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## The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law

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### I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) has long been at the center of employment discrimination law so much so that since the passage of the Civil Rights Act of 1964, the vast majority of employment discrimination claims have been initially processed by that agency.<sup>1</sup> Another indication of how solidly entrenched the EEOC has become is that its existence

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<sup>1</sup> All claims filed pursuant to Title VII of the Civil Rights Act of 1964 must be processed initially by the EEOC, as is also true for claims filed under the Age Discrimination in Employment Act and the Americans With Disabilities Act. *See* 42 U.S.C. § 2000e-5 (1988); 29 U.S.C. § 626(d) (1994) (Age Discrimination in Employment Act); 42 U.S.C. § 12117(a) (1988 & Supp. V 1993) (Americans with Disabilities Act). The only exceptions are for claims filed pursuant to 42 U.S.C. § 1981 (1988 & Supp. V 1993), which applies to race and national origin discrimination, and under the Equal Pay Act, 29 U.S.C. § 206(d) (1988), neither of which requires that claims be processed by the EEOC. Most § 1981 claims filed in federal court include a Title VII allegation, which means that the underlying claim was processed by the EEOC. *See* Theodore Eisenberg & Stewart Schwab, *Comment: The Importance of Section 1981*, 73 CORNELL L. REV. 596, 603 (1988) (noting that 84% of race claims filed in the 3 federal districts in the study's data set between 1980-81 included a Title VII allegation). In addition, Equal Pay Act claims comprise an insignificant amount of discrimination claims. As a result, approximately 85% of employment discrimination cases are initially processed by the EEOC. *See also* John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 735 n.46 (1993).

has gone virtually unquestioned over the last thirty years. This is true even though from its inception the agency has been criticized for being ineffective and has likewise been plagued by a tremendous backlog of discrimination complaints.<sup>2</sup>

This Article will address the question that has gone unasked for too long: why are employment discrimination claims subject to an agency procedure? More specifically, what purpose, or value, does the EEOC serve? After all, in many ways employment discrimination complaints resemble tort actions or wrongful discharge claims, both of which are generally filed directly in court without having to be processed initially by an agency. Given these analogous claims, the question becomes whether there is something about employment discrimination claims that requires they be processed by an agency, or whether private attorneys would be able to offer an enforcement scheme that would deter discrimination and remedy violations as effectively as the agency. To be sure, one of the original purposes of the EEOC was to encourage resolution of discrimination claims through conciliation procedures rather than litigation, and moving exclusively to private enforcement would obscure that goal. Yet, the purpose of resolving claims through conciliation has long since been lost. As will be shown below, strikingly few claims are actually resolved through agency conciliation.<sup>3</sup>

Against this background, I will explore the value of the EEOC to determine whether the agency serves any useful or necessary purpose in the enforcement of our employment discrimination laws. In order to assess the value of the EEOC, I will conduct an empirical analysis of the agency's work and compare that work to the parallel enforcement provided through cases filed by private attorneys. As an evaluative measure of the agency's efficacy, I will suggest that the EEOC ought to provide some value that is different from what

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<sup>2</sup> As far back as 1966, just two years after its creation, the EEOC was derided as a "poor, enfeebled thing." MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966). See Richard K. Berg, *Title VII: A Three-Years' View*, 44 NOTRE DAME LAWYER 311, 315 (1969) ("From the start of its operations . . . [the EEOC] was burdened with a complaint load far in excess of that which had been anticipated and provided for."). More recently, several scholars have questioned the utility of Title VII, the principle law prohibiting employment discrimination, although they have paid little attention to the role the EEOC has played in developing antidiscrimination law. See FARRELL BLOCH, ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT (1994) (questioning impact of antidiscrimination laws on African-Americans and other minorities in the aggregate); RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (advocating elimination of Title VII).

<sup>3</sup> As noted *infra* part II.B., only approximately 15% of the claims filed with the EEOC are settled favorably for plaintiffs through the administrative process, and the vast majority of claims are effectively dismissed by the agency.

could be provided by private attorneys since there are obvious costs to having a public agency process claims.<sup>4</sup>

My analysis will reveal that the EEOC serves two primary functions—it screens a large number of nonmeritorious claims, and it settles and files claims that might otherwise be pursued by the private bar.<sup>5</sup> Additionally, the EEOC tends to concentrate on cases that typically involve lost wages of less than ten thousand dollars, and it is possible that the private bar would be less likely than the agency to bring such small cases because these cases may not be sufficiently lucrative to attract profit-motivated attorneys.<sup>6</sup> If these are the primary functions and virtues of the EEOC, it will be shown that they come with significant costs. For example, the present administrative framework results in the dismissal of hundreds of claims each year because plaintiffs fail to comply fully with the administrative procedures.<sup>7</sup> This problem takes on even greater significance because the cases that are dismissed from federal court tend to be cases having private attorney representation, they are also likely to be, on average, among the strongest of discrimination cases, which may provide a compelling institutional reason to protect them.<sup>8</sup> Without the agency procedure, many of these cases would either be settled favorably for the plaintiffs or be litigated to judgment.

The recent passage of the Civil Rights Act of 1991 has made the EEOC ripe for reassessment because the 1991 Act has implemented several changes to employment discrimination law that should make employment discrimination cases more attractive to private attorneys.<sup>9</sup> In particular, the 1991 Act makes

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<sup>4</sup> In the context of the EEOC, these costs are not only financial but include the time delays the agency adds to the process, and as will be shown, the agency structure imposes substantial costs on many cases and claimants who fail to comply with the agency procedures.

<sup>5</sup> See *infra* part II.B.

<sup>6</sup> See *infra* Tables 4–6. I will generally use the terms low-value and low-damage cases interchangeably. As a conceptual matter, how to describe these cases is made difficult by changes in the law brought by the Civil Rights Act of 1991, which provided plaintiffs for the first time with an ability to seek compensatory and punitive damages for intentional discrimination claims. Prior to the 1991 Act, plaintiffs were limited to equitable relief, which generally meant lost wages, or back pay, and whatever job relief the plaintiff sought. See 42 U.S.C. § 2000e-5(g)(1) (1988 & Supp. V 1993) (setting forth Title VII remedies); *Albamarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discussing Title VII relief).

<sup>7</sup> See *infra* text accompanying notes 36–39.

<sup>8</sup> The argument that these claims are among the strongest assumes only that attorneys are acting rationally in choosing which cases to pursue. For a discussion of how lawyers decide to undertake employment discrimination representation see *infra* part III.A.1.

<sup>9</sup> Although the Civil Rights Act of 1991 was passed in November 1991, it has only recently had an effect in the courts since the Supreme Court held that most of the 1991

limited compensatory and punitive damages, up to \$300,000 depending on the size of the employer, available to the victims of intentional discrimination and also allows plaintiffs the opportunity for a jury trial on claims of intentional discrimination.<sup>10</sup> The damage provisions should make employment discrimination cases more lucrative and therefore more attractive to attorneys, while the jury trial provision will likewise increase the expected value of cases because plaintiffs tend to have a much higher success rate with juries than they do with cases that are tried before judges.<sup>11</sup> At the same time, some of the changes enacted by the 1991 Act have sharply increased the volume of claims that are filed with the agency, which greatly exacerbated the agency's pre-existing problems and has further hindered their enforcement efforts.

This Article will proceed as follows. Part II will discuss the structure of the EEOC and its corresponding administrative procedures. In Part III, this Article turns to an empirical analysis of the nature of the agency's work both in terms of the cases the EEOC processes and those it chooses to settle or litigate. The results and success of the EEOC will then be compared to the enforcement of cases instituted by private attorneys. Part IV of this Article focuses on the likely effects of switching to a market system and compares how different parties—plaintiffs, defendants, and courts—might fare under the two systems. Finally, Part V explores proposals for revising or eliminating the EEOC, and concludes that the agency should either be eliminated or substantially reformed so that it concentrates on cases that private attorneys are unlikely to pursue.

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Act's provisions were not to be applied retroactively. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994). Because there is a lengthy delay in processing claims through the EEOC, claims filed under the new statute are only now beginning to reach the courts.

<sup>10</sup> *See* 42 U.S.C. § 1981a (1988 & Supp. V 1993) (providing for damages with limits of between \$50,000 and \$300,000 depending on the size of the employer). Prior to the passage of the 1991 Act, plaintiffs could not recover damages but were limited to equitable relief. *See supra* text accompanying note 6. The jury trial provision is found at 42 U.S.C. § 1981a(c) (1988 & Supp. V 1993).

<sup>11</sup> Prior to the passage of the 1991 Act, all Title VII claims were tried to a judge, while claims filed under the Age Discrimination in Employment Act, the Equal Pay Act, and § 1981 were tried to a jury. The varying success rates between judge and jury trials are discussed *infra* text accompanying notes 150–54.

## II. THE STRUCTURE OF THE EEOC

### A. *The Procedural Structure*

The history of the EEOC has been well-documented elsewhere<sup>12</sup> and will be discussed only briefly here, primarily as it relates to the creation and operation of its unusual structure. The EEOC was created in 1964 as part of the legislation now commonly known as Title VII.<sup>13</sup> Perhaps the most revealing aspect of the agency's creation is that its original structure was forged out of a political compromise that resulted in significantly limiting the agency's enforcement powers. In order to secure passage of the Civil Rights Act of 1964, it was necessary for Congress to ensure that the EEOC would not be too powerful in relation to the interests of employers. As a result, the EEOC initially was not authorized to file suit in federal court but could only seek to conciliate meritorious claims.<sup>14</sup> 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.<sup>15</sup>

Nevertheless, once the agency's impotence became clear, Title VII was amended to provide the EEOC with the power to sue in federal court on behalf

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<sup>12</sup> For a detailed history of the creation of the EEOC, see ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 40–92 (1993); Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 *BROOK. L. REV.* 62, 62–68 (1964); Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 *INDUS. REL. L.J.* 1 *passim* (1977); Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 *HASTINGS L.J.* 1301, 1314–17 (1990). For a discussion of state and local precursors to Title VII, see Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 *IOWA L. REV.* 1043 *passim* (1967).

<sup>13</sup> See 42 U.S.C. § 2000e-4 (1988) (creating the EEOC).

<sup>14</sup> See BLUMROSEN, *supra* note 12, at 48 (explaining that to overcome the filibuster, proponents of the 1991 Act agreed to limit the powers of the EEOC). At its formation, proponents of the bill sought to create an agency that would resemble the National Labor Relations Board so that the agency's determinations on the merits would be binding subject to limited judicial review and the agency would likewise be permitted to seek judicial enforcement of its orders. *Id.*

<sup>15</sup> At its inception, there was strong evidence that the EEOC's structure was intended, at least in part, to limit its effectiveness. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 129–52 (1990).

of the victims of discrimination, and also to bring claims on its own behalf without the necessity of having a particular plaintiff.<sup>16</sup> This legislative change brought primary enforcement responsibility to the EEOC, even though private attorneys have always played a simultaneous, and generally more important, enforcement role.<sup>17</sup> Indeed, the 1972 Amendments specifically preserved a private right of action for claimants, one that cannot be extinguished by the EEOC without the plaintiff's consent.<sup>18</sup> In subsequent years, the EEOC also assumed responsibility for enforcement of claims under the Age Discrimination in Employment Act (ADEA) and most recently under the Americans With Disabilities Act (ADA).<sup>19</sup>

Accordingly, Title VII, ADEA and ADA claims are all processed through the following administrative scheme, which will be described in some detail in order to reveal both its limited utility and the difficulty a plaintiff may face in negotiating the process. To seek relief on most federal claims of employment discrimination, an individual must initially file a charge of discrimination with the EEOC.<sup>20</sup> There is no filing fee, and to facilitate the process the EEOC uses a standard form that a claimant completes often with the agency's assistance.<sup>21</sup> Importantly, this initial charge, which is typically filed without the assistance of

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<sup>16</sup> See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 1-3, 86 Stat. 103. This latter power is encompassed by what are known as Commission charges, where the Commission issues a charge on its own authority following an investigation. See 42 U.S.C. § 2000e-5(b) (1988). Interestingly, it was the minority view at the time that enforcement of Title VII should be effected through the federal courts rather than through the agency. See H.R. REP. NO. 238, 92d Cong., 1st Sess., at 2167 (1971) (minority views). Employers likewise opposed increasing the powers of the agency, preferring instead to rely on judicial enforcement of the statute. *Id.* at 2175.

<sup>17</sup> Private attorneys typically file 95% of the cases that end up in federal court and they have also been involved in far more of the pivotal employment discrimination cases. See *infra* text accompanying notes 83 and 92.

<sup>18</sup> See 42 U.S.C. § 2000e-5(f)(1) (1988) (describing procedures for filing a court claim); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (discussing prerequisites to filing a claim).

<sup>19</sup> See 29 U.S.C. § 626 (1994) (ADEA); 42 U.S.C. § 12117 (1988 & Supp. V 1993) (ADA).

<sup>20</sup> This is true for all claims other than those filed pursuant to § 1981 and the Equal Pay Act. See *supra* text accompanying note 1. As a definitional matter, I will refer to filings with the agency as charges or claims so as to distinguish them from cases, which I will use to denote lawsuits. It should also be noted that the process for federal employees to file a charge is somewhat different in that they initially file claims with their particular agency. Throughout this Article, I will concentrate on the procedures for non-federal employees.

<sup>21</sup> The form includes boxes to check to describe the applicable kind of discrimination, i.e., race, sex, or age discrimination, and there is room for a brief description of the individual's complaint.

a private attorney, shapes the contours of any subsequent court action, and there has been a substantial amount of litigation over the relevance and proper interpretation of the original charge.<sup>22</sup>

Charges of discrimination must be filed within specific, and relatively short, time deadlines. As a general matter, an individual has 180 days from the date of discrimination to file a charge, though that time is extended to 300 days in states that have their own Fair Employment agencies.<sup>23</sup> Since the majority of states have such agencies, most plaintiffs have 300 days to file a claim, but a peculiar twist to the procedure requires that the state have 60 days to investigate a claim, which means that a plaintiff must generally file a charge within 240 days, or 8 months, of the date of the incident.<sup>24</sup> Eight months is an

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<sup>22</sup> Courts have consistently held that plaintiffs may only pursue those claims that fall within the scope of the original complaint or which are likely to grow out of an investigation of that complaint. *See Jenkins v. Blue Cross Mut. Hosp., Inc.*, 538 F.2d 164 (7th Cir.) (en banc) (allowing claims that are "like or related to" original charge), *cert. denied*, 429 U.S. 986 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (allowing claims that can be "reasonably expected to grow out of EEOC investigation"). As one example of how an individual can be frustrated by the EEOC form, if an African-American woman alleges discrimination based on her race but does not also check the box marked "sex" she will likely be precluded from pursuing a sex discrimination claim even if the investigation points to sex rather than race discrimination, or a combination of the two, as the underlying basis for her treatment. *See, e.g., Leigh v. Bureau of State Lottery*, 876 F.2d 104 (6th Cir. 1989) (dismissing sex discrimination claim because plaintiff had only raised race discrimination claim in EEOC charge). Nor does the EEOC form recognize a combination gender and race claim. *See, e.g., Kimberle Williams Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Although there are procedures to amend a charge of discrimination much like Rule 15 of the Federal Rules of Civil Procedure, there is no procedure to amend a charge of discrimination after a lawsuit is commenced. The problem regarding the scope of the complaint will therefore arise if discovery during the federal litigation produces evidence to establish a claim that was not pled in the original charge.

<sup>23</sup> 42 U.S.C. § 2000e-5(e)(1) (1988 & Supp. V 1993).

<sup>24</sup> *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1980) (work-sharing agreements can render claims filed between 240 and 300 days timely); *Mohasco v. Silver*, 447 U.S. 807 (1980) (charge must be filed 60 days prior to 300th day to ensure state has sufficient time to process charge). The state can, and often does, waive this investigation period, which then stretches the limitations period to 300 days. As a result, not only are these time frames confusing, but they have led to the creation of a rather strange process: the individual files her complaint with the EEOC and checks the box to indicate that she also wants to have the charge filed with the appropriate state agency. That charge, however, is never actually filed. Instead, the agency waives its processing of the charge and the EEOC takes note of that waiver and considers the charge on its own accord. Nevertheless,

unusually short statute of limitations. The original justification for such a short deadline was a desire to ensure that discrimination complaints were promptly resolved.<sup>25</sup> Yet, the reality is that discrimination claims are not resolved any more quickly than other claims. Because the EEOC has an enormous backlog of claims, it takes on average one year to complete an investigation, and many cases remain at the EEOC for two or more years.<sup>26</sup>

These delays plainly conflict with the express purpose of the statute and also mean that, as a practical matter, many charges will receive no agency action. The reason for this is the time restrictions the statute imposes for the EEOC's investigation. According to the statute, the EEOC has 180 days from the filing of the complaint to investigate a claim, though it is not necessary that an investigation be completed within that time period.<sup>27</sup> Instead, after 180 days elapses the plaintiff has a statutory right to request a "Notice of Right to Sue" and the EEOC must issue the Notice.<sup>28</sup> Once a plaintiff obtains her right-to-sue notice, she can file her claim in federal or state court regardless of whether the EEOC has completed its investigation. In short, a right-to-sue notice functions as a plaintiff's jurisdictional ticket into federal or state court. This procedure illustrates the limited utility of the EEOC: although a plaintiff must file a claim with the agency, it is entirely possible that the EEOC will serve no function other than to issue a mandatory right-to-sue notice, which is akin to requiring a driver to apply for a bridge token in advance. Moreover, based on data provided by the EEOC, it appears the agency now serves the sole function of issuing a right-to-sue notice for approximately twenty-five percent of the claims

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by checking the appropriate box the plaintiff has secured an additional 60 days on the statute of limitations clock.

<sup>25</sup> See *Mohasco*, 447 U.S. at 823 (time frames intended to encourage prompt processing of claims).

<sup>26</sup> In its most recent report, the EEOC stated that the average investigation of a claim takes 328 days and that its current backlog would take 18.8 months to clear. See EEOC OFFICE OF PROGRAM OPERATIONS, ANN. REP. 11-12 (1994); see also Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 480-81 (1992) (discussing length of investigation). There might be an additional benefit to the short time frame to the extent the complaint memorializes the alleged discriminatory incident, but too often the charges are so brief that they provide no specific information regarding the nature of the charge other than its broad categorical basis.

<sup>27</sup> 42 U.S.C. § 2000e-5(e)(1) (1988 & Supp V 1993). An investigation is intended to obtain information to determine whether the individual's claim has merit, and may include written questions, collection of documents, and gathering of information from witnesses in the form of affidavits.

<sup>28</sup> See 29 C.F.R. § 1601.28 (1993) (claimant can request a Notice of Right to Sue after 180 days).



that are filed.<sup>29</sup>

If the EEOC does investigate a claim, it will ultimately render a determination on the merits as to whether sufficient evidence exists to conclude that the plaintiff was discriminated against.<sup>30</sup> If the EEOC issues a cause finding, the agency invites the parties to enter into conciliation procedures with an intent to resolve the claim. The defendant, however, is under no obligation to conciliate, and where conciliation is unsuccessful, the EEOC may subsequently elect to file suit on behalf of the individual claimant.<sup>31</sup> If the EEOC files suit, the defendant is entitled to a de novo hearing in federal court.<sup>32</sup> On the other hand, if the EEOC finds that a charge cannot be substantiated, it issues a "no-cause" determination, which is a letter to the plaintiff explaining that the EEOC has determined that there is no reasonable cause to believe that discrimination occurred. At the same time that the agency issues its no-cause finding, the EEOC will also issue a right-to-sue notice informing the individual that she now has ninety days to file a federal court action.<sup>33</sup> A no-cause finding, therefore, has no binding authority and cannot prevent a plaintiff from proceeding de novo in federal court.<sup>34</sup> Instead, the no-cause finding simply determines that the EEOC will not pursue the case.<sup>35</sup>

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<sup>29</sup> See *infra* text accompanying note 46.

<sup>30</sup> In the language of the EEOC, these determinations are called "cause findings" or "no-cause findings."

<sup>31</sup> 42 U.S.C. § 2000e-5(f)(1) (1988). In the past, when conciliation failed, the Commissioners of the EEOC were required to approve litigation, which added further delays to the process and which resulted in many decisions not to pursue litigation in cases after the staff had found reasonable cause. For example, in 1992, the Commission approved suits in 70% of the cases in which suit was recommended by the staff, while in 1994 the percentage declined to 40.4%. See EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 40. The EEOC has recently altered its policy to provide more autonomy to the field offices to commence litigation. See DAILY LAB. REP., Apr. 21, 1995, at A1 (describing EEOC's proposed policy changes).

<sup>32</sup> As will be discussed below, the EEOC renders a cause finding in only approximately 3% of the charges that are filed and successfully conciliates only about one-third of those cases. See *infra* Table 1.

<sup>33</sup> 42 U.S.C. § 2000e-5(f)(1) (1988).

<sup>34</sup> See *Chandler v. Roudebush*, 425 U.S. 840, 844 (1976) ("It is well established that § 706 . . . accords private sector employees the right to de novo consideration of their Title VII claims."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (noting that "[t]he Commission cannot adjudicate claims or impose administrative sanctions"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (reasonable cause finding is not a prerequisite to federal suit).

<sup>35</sup> Rather than issuing a no-cause finding, many EEOC offices inform the plaintiff, or her counsel, of its intent to do so and afford the plaintiff an opportunity to request a right-to-sue notice instead. This has the effect of eliminating any possible prejudice that may arise

As should be evident, these procedures amount to a rather strange and vacuous process—one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the parties. Ironically, despite their apparent vacuity, these administrative procedures have led to a tremendous amount of litigation with issues ranging from the particular time-frames for filing a claim to the scope of the charge, to the weight to be accorded a cause or no-cause determination, to the time a right-to-sue notice has been received.<sup>36</sup> The amount of litigation over these procedures is likely unparalleled in federal administrative law. During 1993 alone, an electronic search identified a total of 107 cases involving motions to dismiss for failure to comply with EEOC procedures.<sup>37</sup> Given that reported cases comprise only a fraction of the cases actually decided by courts in any year,<sup>38</sup> these decisions likely represent only a

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from the EEOC finding, and may also say something about the EEOC's confidence in its own procedures.

<sup>36</sup> Many of these cases have ultimately been resolved by the Supreme Court. *See, e.g.,* *Irwin v. Veterans Admin.*, 498 U.S. 89, 92–93 (1990) (receipt by attorney begins statute of limitations clock); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 125 (1988) (state filing need not be timely to benefit from state deferral requirement); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 (1984) (filing of right-to-sue letter without complaint does not constitute timely filing); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that Title VII filing period is not jurisdictional); *Delaware State College v. Ricks*, 449 U.S. 250, 257–59 (1980) (defining time to file a claim in tenure case); *see also* Jerome M. Culp, *A New Employment Policy for the 1980s: Learning From the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 905 (1985) (noting that between 1979–84, the Supreme Court heard 41 employment discrimination cases, 24 of which involved procedural issues including 5 relating to issues on the statutes of limitations). In the last several years the balance of the Court's employment discrimination docket has begun to shift to evidentiary or substantive matters. *See* *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879, 886 (1995) (after-acquired evidence rule); *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370–71 (1993) (defining the requirements of sexual harassment cases); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (burden of proof).

<sup>37</sup> The search was conducted on WESTLAW for district and appellate court cases involving motions relating to procedural matters. To ensure completeness, two different searches were run, the cases were then compiled by eliminating duplicates and a research assistant checked all the cases to identify the issues involved. Search of WESTLAW, Allfeds library (Feb. 24, 1995 & March 11, 1995).

<sup>38</sup> It has recently been estimated that only about 20% of employment discrimination cases are published, where published was defined as available through an electronic research service. *See* Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1141 (1990) ("Excluding all cases without published opinions

small number of the cases in which procedural issues were litigated, and they do not include the cases that were never filed in court because of procedural defects in the original filing of the charge. Furthermore, of the cases identified, defendants prevailed on approximately seventy percent of their motions to dismiss.<sup>39</sup>

The preceding discussion highlights two important issues. First, the EEOC's procedures appear to be socially wasteful, especially when it is understood that they are not binding on any party. Second, these procedures lead to a large amount of litigation that would be unnecessary in many instances if claims were not initially processed by the agency.<sup>40</sup> Nevertheless, despite these deficiencies, the institutional structure may be worth preserving if there is a net gain from the agency's work, which is the focus of the next section.

### B. *Assessing the Work of the EEOC*

In this section, the function and value of the EEOC will be evaluated through an extensive review of the agency's work. This review will rely primarily on data provided by the EEOC in its annual reports, as well as an independent statistical analysis of some of those data as described in detail below.<sup>41</sup> Identifying the value and function of the EEOC through its specific

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thus eliminates 4 in 5 of all cases filed.”). In their study, Siegelman and Donohue also found that published opinions were not representative of the entire universe of employment discrimination cases; instead, published cases tended to involve higher stakes and to be more complicated than unpublished decisions. *Id.* at 1155–56. These findings make it difficult to extrapolate from the published opinions to determine how much litigation was actually generated over the EEOC procedures.

<sup>39</sup> This figure does not include mixed case results where, for example, the defendant prevailed on some but not all of the claims. There were approximately 14 such cases that have been excluded from the calculations. Defendants also seemed to fare somewhat better on appeal than in district court. For the district court cases, defendants prevailed in 68% of the 76 cases, while they prevailed in 13 of 16 appellate decisions, or in 81.2% of the cases. *See supra* note 37.

<sup>40</sup> Certainly eliminating the agency would not alleviate all of the litigation regarding procedural issues. For example, there would still be litigation over statute of limitations issues, but it seems likely that the volume of litigation would be substantially reduced, particularly if discrimination plaintiffs were afforded a longer statute of limitations than the current 300 day limitation.

<sup>41</sup> Due to the manner in which the EEOC provides information, the data discussed in this section may not always be consistent by years. The EEOC publishes its statistics in three different annual reports, some of which are not issued annually. There is a general annual report, which includes the most comprehensive information relating to the nature of

work will facilitate evaluating whether the agency procedure is necessary to ensure adequate enforcement of the employment discrimination laws.

### 1. *Administrative Processing*

As is well known, the volume of charges filed with the EEOC is substantial and increasing. During fiscal year 1994, the EEOC received 91,189 charges, which represented a 53.4% increase over its 1990 receipts, with much of the increase attributable to the recently enacted ADA.<sup>42</sup> While these charges were typically not resolved during the year they were filed, the EEOC also provides data on its annual charge resolutions. As Table 1 illustrates, during 1994, the EEOC resolved 71,563 charges. The EEOC defines resolution broadly to include termination of charges either by a determination on the merits or an administrative withdrawal of the case initiated by the plaintiff.<sup>43</sup> The two largest classifications of resolutions are no-cause findings, which were issued for 34,451 charges, and administrative resolutions, which account for another 26,012 claims. Administrative resolutions are those resolutions which result in the closing of a case but with no finding issued or relief granted.<sup>44</sup> Administrative resolutions represented 36% of the total charges resolved by the EEOC during 1994.<sup>45</sup> Significantly, the vast majority of these cases were closed when the plaintiff requested a right-to-sue notice from the agency; such requests accounted for 82.5%, or 21,460, of the administrative resolutions.<sup>46</sup>

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the charges that are filed. The most recent report, at the time this Article was written, however is for 1991-92. *See* EEOC ANN. REP. (1991 & 1992). The Programs Branch also issues an annual report, which provides information relating to the processing of charges. The most recent report is for fiscal year 1994. *See* EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 11-12. Finally, the General Counsel's office issues an annual report detailing the agency's litigation activity. The most recent report for this office is fiscal year 1993. *See* EEOC OFFICE OF GEN. COUNSEL, ANN. REP. (1993).

<sup>42</sup> EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 1. The employment provisions of the ADA became effective during July 1992 for many employers, and by 1994 the ADA accounted for 20.7% of all of the charges filed with the EEOC.

<sup>43</sup> *Id.* at 11-12.

<sup>44</sup> *Id.* at 21.

<sup>45</sup> *Id.* at 32.

<sup>46</sup> *Id.* at 12. The bulk of the remaining administrative closures are the result of losing contact with plaintiffs who move without informing the EEOC of a new address or phone number. Importantly, the number of requests for right-to-sue notices represented a sharp increase from the previous year. The 1994 totals were a 26.8% increase from the prior year. *Id.* Because this increase occurred shortly after the changes made by the Civil Rights Act of 1991 became effective, it seems reasonable to assume that the increase is due to those changes.

Determinations	Number	Percent
Cause Findings	1,926	2.69
No-Cause Findings	34,451	48.14
Settlements	9,174	12.81
Administrative	26,012	36.34
Total	71,563	99.98

The remaining claims are those that were resolved favorably to plaintiffs, which total 11,092 or 15.5% of the total resolutions. The largest percentage of these cases, 9,174, were settled without a formal determination on the merits. Notably, this pattern of charge resolution has been consistent over the last few years.<sup>47</sup>

Perhaps the most interesting, and in some ways remarkable, information regarding the work of the EEOC is found in the cause findings issued by the agency. As discussed earlier, a cause finding is a determination on the merits regarding the underlying claim.<sup>48</sup> During 1994, the EEOC issued 36,377 cause determinations following a full investigation, and 94.7% (34,451) resulted in no-cause findings in favor of the defendants.<sup>49</sup> Accordingly, there were only 1,926 determinations of cause, a mere 5.3% of the total determinations.<sup>50</sup> Since 1990 this figure has been consistent with the highest percentage of cause findings occurring in 1990 at 7.2% of the total, while the lowest was in 1992

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<sup>47</sup> See *id.* at 12. Indeed, the percentage of claims resolved favorably for plaintiffs was virtually identical in 1992. See EEOC OFFICE OF PROGRAM OPERATIONS, ANN. REP. 16 (1992). The totals reported by the EEOC include unsuccessful conciliations, though it is unclear why the EEOC defines unsuccessful conciliations as a favorable resolution for the plaintiff, since such a resolution provides the plaintiff with nothing other than a cause finding. Nevertheless, because there are so few cause findings the number of unsuccessful conciliations is relatively small, 1,319 during 1994, and if removed from the 1994 totals would reduce the overall percentage of claims resolved favorably to plaintiffs to 13.7% of resolutions.

<sup>48</sup> See *supra* text accompanying notes 30-31.

<sup>49</sup> EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 12. Even if settlements the EEOC obtains without a formal merits determination were treated as cause findings, the percentage of cause findings would still be only 24.3%.

<sup>50</sup> *Id.* at 12.

with 3.8% of the total.<sup>51</sup>

Equally revealing, an unusually small percentage of the cause findings were favorably resolved—only 31.5% (607) of those findings issued in 1994 met with successful conciliation.<sup>52</sup> This percentage is surprising for at least two reasons. First, the percentage is markedly lower than the general settlement rate for cases that are filed in federal court, which tends to approximate 65%.<sup>53</sup> Second, since so few cases receive a cause determination, one would expect that these cases would be among the very strongest cases and therefore especially amenable to settlement.<sup>54</sup>

The reason the settlement rates have been so low is likely attributable to two policies that were instituted by the EEOC in the 1980s during Chairman Clarence Thomas' tenure. To ensure greater control over the agency's litigation docket, Chairman Thomas required that the full Commission approve all litigation so that a cause finding issued by the staff amounted to little more than a recommendation for litigation.<sup>55</sup> Additionally, the Commission also began to settle cases only for the full amount of relief.<sup>56</sup> Taken together, these policies created clear disincentives for defendants to settle claims prior to the commencement of litigation, which is reflected in the low percentage of

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<sup>51</sup> *Id.* One has to go all the way back to the 1970s to find a significantly higher percentage. See BLUMROSEN, *supra* note 12, at 163–66. The EEOC has recently reported similar results for its processing of ADA claims where it found cause on 822 of approximately 50,000 cases, less than 2% of the charges. See DAILY LAB. REP., July 27, 1995, at A8.

<sup>52</sup> See BLUMROSEN, *supra* note 12, at 12. Again, this percentage has been consistent since 1991—31.4% in 1991, 33.9% in 1992 and 29.9% in 1993.

<sup>53</sup> See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (noting that approximately two-thirds of cases in federal court settle); Joel Seligman, *Commentary: The Merits Do Matter*, 108 HARV. L. REV. 438, 445 (1994) (indicating that approximately 60% of private securities litigation settles). The EEOC's settlement rate is thus about one-half of the general rate.

<sup>54</sup> For an explanation of why these cases should be relatively easy to settle see *infra* part III.A.2. Of course, these cases may not be the strongest of cases. Instead, there is also a class of cases that settle early without a complete investigation that may be the strongest of cases.

<sup>55</sup> See *supra* note 31.

<sup>56</sup> See EEOC COMM'RS' MEMO. OF ENFORCEMENT POL'Y, Sept. 11, 1984, reprinted in STAFF OF HOUSE COMM. ON EDUC. & LAB., 99TH CONG., 2D SESS., REPORT ON THE INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EEOC. This policy was part of the Commission's emphasis on individual cases, and its commitment to providing full relief to all identified victims of discrimination. See Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 965–67 (1993) (explaining policies implemented during the Reagan and Bush Administrations).

successful conciliations.<sup>57</sup>

With respect to the substance of the settlements obtained during the administrative process, the EEOC provides only limited information beyond the average benefits obtained, which in 1994 amounted to \$10,948.<sup>58</sup> In addition to this average, the EEOC also reports the amounts recovered under specific statutes. For disabilities claims the EEOC recovered an average award of \$20,957, while its age discrimination resolutions netted an average of \$15,547.<sup>59</sup>

## 2. EEOC Litigation

The EEOC provides more detailed information regarding its litigation activity, although it provides the data primarily in narrative form. In reviewing the EEOC's litigation activity, there are two different parameters to analyze—the cases the EEOC files, and those it resolves. To obtain a better indication of the EEOC's case resolutions, we created a data set from the information provided in the 1992 and 1988 General Counsel's reports. This data set has allowed us to conduct a statistical analysis of the nature and success of the agency's litigation activity. Based on the EEOC's information, the data set includes variables for the nature of the case, the number of beneficiaries, the resolution of the case, and the amount of money, if any, the EEOC recovered.<sup>60</sup> The statistical information also enabled us to analyze separately cases brought on behalf of individuals and those cases in which the EEOC

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<sup>57</sup> It is not uncommon for defendants to require plaintiffs to commence litigation before they settle cases. A recent study involving medical malpractice claims concluded that "the hospital generally treats the filing of a lawsuit as a hurdle that patients must overcome to receive a settlement." Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777, 795 (1994).

<sup>58</sup> EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 3.

<sup>59</sup> *Id.* at 12. 1994 represented the first year that a significant number of claims were resolved under the ADA.

<sup>60</sup> Specifically, the following variables were coded: (1) kind of claim, e.g., race, gender, etc.; (2) whether or not the case was identified as a class action by the EEOC; (3) the number of beneficiaries; (4) the results of the case; (5) the amounts of money recovered, if any. This information was inputted for both the 1992 and 1988 reports but it subsequently turned out that the 1988 information was too incomplete to provide the basis for a useful statistical analysis. For example, the 1988 report suggests that the EEOC did not lose a single case during the year, and there were many entries that were too incomplete to allow any form of analysis, often times because the monetary amounts or the number of beneficiaries was omitted from the information that the EEOC provided. This is not to suggest that the 1988 report was purposefully misleading in any way, only that given the nature of the reported data it was difficult to complete a statistical analysis for that year.

obtains classwide relief.<sup>61</sup>

Initially, we turn to the cases filed by the EEOC. In Fiscal Year 1992, the EEOC filed 347 substantive lawsuits, which involved a total of 456 allegations of discrimination.<sup>62</sup> Sex discrimination allegations accounted for the largest category of claims, comprising 26.1% (119) of all allegations, followed by age discrimination claims with 21.1% (96) of all allegations, and race discrimination claims accounting for 19.1% (87) of the allegations.<sup>63</sup> As to the nature of the allegations, the largest percentage of claims related to individuals who claimed they had been unlawfully terminated, which accounted for 53.4% of all claims.<sup>64</sup> Only 17.8% of the EEOC cases involved claims for discriminatory hiring.<sup>65</sup> Consistent with the EEOC's history and current litigation trends, a relatively small percentage of the cases were filed as class allegations—47 of the cases which constituted 13.5% of the claims.<sup>66</sup>

The pattern of litigation claims brought by the EEOC has a number of noteworthy features. Substantively, the EEOC's litigation activity is broadly consistent with the general pattern for all employment discrimination cases, including those cases brought by the private bar. John Donohue and Peter Siegelman have documented trends in employment discrimination litigation that largely mirror the EEOC's activity. In particular, they have demonstrated that discharge and individual cases predominate in federal litigation over hiring cases and class actions.<sup>67</sup> Moreover, with one notable exception, the EEOC's

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<sup>61</sup> As detailed *infra* text accompanying notes 78–80, it was not possible to rely on the EEOC's determinations of the scope of the cases since they define as class actions any case in which it seeks classwide relief regardless of whether it obtains such relief.

<sup>62</sup> EEOC OFFICE OF GEN. COUNSEL, ANN. REP. 43 (1992). The EEOC defines substantive suits so as to exclude those cases brought to enforce statutory recordkeeping requirements or subpoenas.

<sup>63</sup> *Id.* The EEOC provides specific numbers only as to allegations as opposed to the number of suits. Reporting the numbers in this fashion could present a skewed picture if, for example, a particular category of claims involves an unusually high number of allegations. However, based on the statistics relating to different statutes, it appears that relying on the number of allegations provides a reasonably accurate measure as 24.2% of the EEOC's cases were filed under the ADEA, which closely approximates the percentage of allegations that included age discrimination claims. It should also be noted that 1992 represented the lowest level of litigation activity for the EEOC since 1990. The differences, however, were not large. For example, in 1993 the EEOC filed 398 substantive suits and the proportion of race, gender, and age cases were roughly the same as in 1992. EEOC OFFICE OF GEN. COUNSEL, *supra* note 41, at 38–39.

<sup>64</sup> EEOC OFFICE OF GEN. COUNSEL, *supra* note 62, at 41.

<sup>65</sup> *Id.* at 43.

<sup>66</sup> *Id.* This figure is based on the EEOC's definition of class claims.

<sup>67</sup> See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment*



litigation is consistent with the percentage of charges that are filed with the agency. For example, during 1992 twenty-one percent of the EEOC's cases involved age discrimination claims while in the two previous years age discrimination complaints accounted for approximately twenty-seven percent of the claims filed with the agency.<sup>68</sup> However, when compared to the percentage of charges filed, the EEOC's litigation docket is unrepresentative when it comes to race discrimination cases. Although race discrimination represents the largest category of charges filed, constituting approximately forty percent of all charges, they result in the fewest lawsuits, only nineteen percent of the cases.<sup>69</sup> This does not necessarily mean that the EEOC is underserving race discrimination claims; instead, it may mean that race claims settle more frequently than other kinds of claims or that more race claims are withdrawn from the agency, either of which might explain the relatively low percentage of suits. Unfortunately, the EEOC does not provide information describing the nature of the cases it settles through conciliation procedures.<sup>70</sup> Finally, the EEOC appears to bring more age discrimination cases, perhaps at a level that is twice as high, than the private bar does.<sup>71</sup>

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*Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-21 (1991). In their study of federal court cases filed between 1978 and 1989, the authors documented that for employment discrimination the largest class of cases involved discharge cases and that class actions were on the decline to the point that in 1989 there were only 51 class action suits filed nationwide.

<sup>68</sup> During 1991, there were 17,449 age discrimination complaints, representing 27.8% of the total charges, and during 1992 there were 19,350 complaints filed, representing 27.5% of the total. See EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26, at 29. During 1992, gender claims accounted for 29.8% of all charges and 26.1% of the case allegations filed.

<sup>69</sup> See EEOC ANN. REP., *supra* note 41, at 28-31. In 1992, race discrimination charges accounted for 43.1% of all charges, while the percentage for 1991 was 43.4%. *Id.*

<sup>70</sup> See *id.*

<sup>71</sup> Between 1972 and 1987, 10.3% of all employment discrimination cases filed in federal court were filed under the ADEA. See Donohue & Siegelman, *supra* note 1, at 715; see also David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1159 (1989) (noting that the EEOC "has been bringing more age discrimination suits than Title VII suits since 1979"). The EEOC's emphasis on age discrimination cases is somewhat unusual in that age discrimination plaintiffs tend to have significantly higher incomes than other discrimination plaintiffs. See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 493 (1995) (documenting that age discrimination plaintiffs had incomes that were nearly twice as high as non-age discrimination plaintiffs). The higher incomes of age discrimination plaintiffs would suggest that they are probably in the best position to vindicate their rights without governmental assistance, and yet they seem to receive the highest attention from the EEOC.

Turning to the EEOC's resolution of cases, during 1992 the EEOC resolved 459 cases that had been filed in federal court.<sup>72</sup> As indicated in Table 2, 378 of these cases were settled while 81 were resolved through some form of litigation. Excluding the three default judgments, these figures produce a settlement rate of 82.9%.

Determinations	Number	Percent
Settlements	378	82.9
Dismissals	30	6.5
Default Judgments	3	0.1
Trials	27	10.4
All Cases	459	99.9

Table 3 indicates that in cases that were tried to judgment, the EEOC prevailed in 27 of the 48 trials for a success rate of 56.3%. The EEOC was most successful in litigating sex discrimination cases where it prevailed in 73% of its trials, while the success rate for age discrimination cases was 56.2% and for race discrimination cases was 53.3%.<sup>73</sup>

Classification	Won	Lost	Percent
Age	9	7	56.2
Race	8	7	53.3
Sex	12	4	75.0
*Cumulative	27	21	56.2

\*N.B. Cumulative total does not equal column total because in one case the EEOC prevailed on claims of age, race, and sex discrimination.

<sup>72</sup> See EEOC OFFICE OF GEN. COUNSEL, *supra* note 62, at 43; see also *supra* text accompanying note 60 (discussing the data that was used).

<sup>73</sup> As discussed *infra* part II.C., these success rates compare favorably with those obtained by private attorneys. See *infra* text accompanying note 86.

Tables 4 and 5 report the amounts recovered by the EEOC in the cases for which the EEOC provided such information. Table 4 presents the amounts for non-class action cases, which are here defined as cases involving ten or fewer beneficiaries,<sup>74</sup> and includes only those cases in which the EEOC identified the number of beneficiaries and also provided the amount recovered in the case.<sup>75</sup> For the cases settled by the EEOC, the median per person recovery was \$8,332, with a mean of \$18,174.<sup>76</sup> Though the variance in awards was high with a standard deviation of \$29,338, 75% of the cases were settled for less than \$20,000.

Classification	Avg. Per Person	Median Award	Number
Age	\$27,130	\$11,181	102
Race	\$14,958	\$ 7,625	78
Sex	\$13,486	\$ 7,000	129
All Cases	\$18,174	\$ 8,332	325

Table 4 also lists the various amounts received for race, gender, and age discrimination claims. While race and gender plaintiffs obtained roughly similar settlements with median awards of \$7,625 and \$7,000 respectively, age discrimination cases garnered approximately 40% higher awards, with a median award of \$11,181.

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<sup>74</sup> For an explanation of this classification see *infra* text accompanying notes 78–80.

<sup>75</sup> There were 22 cases for which the EEOC obtained no monetary relief but for which it was not possible to determine whether the agency had sought any such relief. Accordingly, these cases have not been included in the per person totals. See *supra* text accompanying note 62.

<sup>76</sup> In general, when reviewing data on litigation amounts the median provides a more accurate estimate of results since means can be readily distorted by inordinately large or small recoveries. See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 39 (1990) (“mean jury awards generally are misleadingly high”); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 384 (1991) (noting that in trial outcome data the means are easily distorted where the dispersion is large). Indeed, with the EEOC data from 1992 the age discrimination trial amounts were strongly influenced by a \$407,000 recovery obtained by one plaintiff.

Classification	Avg. Per Person	Median Award	Number
Age	\$92,831	\$51,090	8
Race	\$11,627	\$ 7,775	6
Sex	\$12,487	\$ 9,240	9
All Cases	\$43,656	\$15,000	21

In terms of trial outcomes, Table 5 indicates that individuals represented by the EEOC were successful in 21 individual cases, and the awards in the aggregate were considerably higher in these cases than for settlements—a median award of \$15,000 per person with an average award of \$43,656. It appears, however, that these figures are strongly influenced by age discrimination awards, where limited damages were available at trial.<sup>77</sup> In contrast, race discrimination claims had a median award of only \$7,775 and for sex discrimination claims the median award was \$9,240. Interestingly, those plaintiffs pursuing race discrimination claims to trial obtained no better monetary awards than those who settled their claims prior to trial. In addition, there were three claims for which the EEOC prevailed on the merits but obtained no monetary relief.

Because the settlements for class actions can vary from what would be expected in a non-class action case, those claims were analyzed separately. However, reliance on the EEOC's definition of a class action was not possible since the agency defines class actions broadly to include all cases in which class relief was sought.<sup>78</sup> As indicated by the data, a large number of cases classified by the EEOC as class actions involve only one or two actual beneficiaries,<sup>79</sup> and the EEOC does not indicate in its reports whether it obtained classwide relief in all of these cases. Therefore, to measure the value of classwide

<sup>77</sup> Age discrimination plaintiffs could obtain liquidated damages in the form of twice their backpay award for willful violations of the statute. These damages were not available for other statutory claims.

<sup>78</sup> See EEOC OFFICE OF GEN. COUNSEL, *supra* note 62, at 48 ("In fiscal year 1992, the Office of General Counsel defined 'class case' as a lawsuit that (a) specifically asserts claims on behalf of a 'class of persons,' or (b) challenges a discrete employment practice or policy applicable to a class or classes of employees.").

<sup>79</sup> We identified 27 cases that had only one or two beneficiaries but which the EEOC had defined as a class action. For many years the EEOC has been criticized for failing to bring class action lawsuits. See, e.g., Rose, *supra* note 71, at 1159 ("The Commission brought no testing or other adverse impact suits from 1983 to January 1989, and only one such proposed suit ha[d] been approved in 1988.") (footnote omitted).

recovery, class actions are here defined based on the number of beneficiaries involved in the cases, with cases involving ten or more beneficiaries defined as class actions.<sup>80</sup> As provided in Table 6, per person class action recoveries were considerably lower than non-class action recoveries, with a median recovery of only \$3,158.

Classification <sup>a</sup>	Avg. Per Person	Median Award	Number
Age	\$101,178	\$12,455	14
Race	\$ 5,957	\$ 2,739	9
Sex	\$ 3,230	\$ 2,800	11
All Cases	\$ 48,334	\$ 3,158	33

Here again, the awards for age discrimination suits were significantly affected by a single case, in this instance a settlement that resulted in an award of thirty-five million dollars for thirty-two beneficiaries. Excluding this settlement from the totals results in an average recovery for age discrimination cases of \$24,826 with a median recovery of \$5,243.<sup>81</sup>

This review of the EEOC's data suggests that the agency receives approximately ninety thousand claims a year but only about fifteen percent of those claims obtain relief as a result of the EEOC's actions during the process. It also appears that the EEOC fails to prioritize its cases, although it may de-emphasize race cases, concentrates on individual rather than class action litigation, and litigates very few cases annually.<sup>82</sup> As a result, the primary

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<sup>80</sup> This seems to be a relatively conservative estimate as a case with only 10 members would probably not qualify as a class action. The EEOC, however, is not bound by the procedural rules governing class actions. *See* *General Tel. Co. v. EEOC*, 446 U.S. 318, 319 (1980) (holding that EEOC may seek classwide relief without need for class certification).

<sup>81</sup> The EEOC litigated only one class action during Fiscal Year 1992, so the data in Table 6 includes only settlements. In the litigated case, the EEOC recovered \$494,175 for 39 beneficiaries in a race discrimination case. EEOC OFFICE OF GEN. COUNSEL, *supra* note 62, at 43.

<sup>82</sup> Professors Donohue and Siegelman previously documented that the United States, which included litigation brought by the Justice Department against public employers, is responsible for about 5% of the litigation involving employment discrimination claims. *See* Donohue & Siegelman, *supra* note 67, at 995 (noting that the United States was a plaintiff in only 5.3% of the 7,277 cases filed in 1989).

function of the EEOC appears to be to process a large number of cases that the agency determines have no merit. In order to assess the value of the EEOC, the next question is how the EEOC compares to the private bar in its enforcement and litigation activities.

### C. *The EEOC Compared to the Private Bar*

As noted earlier, the value of the EEOC, at least as the legal representative of victims of discrimination, is largely measured in comparison to the activity of the private bar. Each year private attorneys file between eight thousand and ten thousand employment discrimination cases in federal court and the government plays no role in the vast majority of these cases.<sup>83</sup> Given the existence of parallel private enforcement, one might expect the EEOC to do something either different from or better than the private bar. Otherwise, if private enforcement would produce roughly the same results, and do so without the cumbersome agency procedures, then the agency may be adding no significant value to the enforcement process. Comparing the results obtained through the two enforcement systems produces mixed results—in some ways the EEOC outperforms the private bar and in other ways its performance compares unfavorably to the results obtained by private attorneys.

One area in which the EEOC might be considered to outperform the private bar pertains to its settlement rate for those cases it decides to litigate. As noted earlier, the EEOC settled approximately eighty-three percent of the cases filed in federal court while settlements for the private bar appear to range somewhere between sixty to sixty-five percent of the cases filed in federal court, depending on which study is relied on for comparison purposes.<sup>84</sup> Of

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<sup>83</sup> In 1992, there were a total of 10,771 employment discrimination cases filed. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANN. REP. Table C-2A (1992).

<sup>84</sup> The 65% figure assumes that employment discrimination cases are settled in approximately the same rates as other types of cases. See *supra* note 53. Perhaps the best indicator that discrimination cases are roughly similar to other cases is the information compiled by the Administrative Office of the United States Courts that provides detailed information on the disposition of federal court cases. Here we find that employment discrimination cases reach trial at a slightly higher rate than most other tort cases—8.8% of employment discrimination cases in 1992 compared to 6% of diversity insurance cases—but otherwise are resolved in similar patterns. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 83, at Table C-4. Other studies have reported settlement rates for employment discrimination cases that range from 35% to 80% depending on the category of cases that are studied. See Rutherglen, *supra* note 71, at 513 (finding settlement rate for age discrimination cases ranging from 58% to 47%); Peter Siegelman & John J. Donohue, III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 450 (1995)

course, this conclusion relies on the EEOC's settlement rate for court cases. The settlement rate for charges on which the EEOC issues cause findings is considerably lower, with a successful conciliation rate of approximately thirty-five percent.<sup>85</sup> Additionally, one area in which the EEOC clearly fared better than the private bar is in its success rate at trial.<sup>86</sup>

Although the EEOC has a higher success rate, it obtains less monetary relief for its claimants than the private bar. Here, some caution is necessary because it is difficult to obtain exact comparisons for the EEOC's data. For example, most previous studies involving the amounts recovered by plaintiffs in employment discrimination cases have included cases involving § 1981 claims in which damages were available, and most of the studies do not specifically indicate what percentage of the cases included such claims.<sup>87</sup> Nevertheless, all of the prior studies document that private parties obtain significantly higher results than the EEOC obtains, and focusing on trial outcomes, provides some useful comparisons. Perhaps the most accurate comparison is found in the data compiled by the American Bar Foundation and reviewed by Donohue and Siegelman. This data indicates that between 1972 and 1987, the average recovery in an employment discrimination suit was twenty thousand dollars.<sup>88</sup> Other estimates are consistent with this finding.<sup>89</sup> If

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(reporting settlement rate of 61.3% and 84.6% depending on the time the case was filed); Siegelman & Donohue, *supra* note 38, at 1155 (finding a 68% settlement rate among unpublished employment discrimination cases and a 35% settlement rate for published cases).

<sup>85</sup> See *supra* text accompanying note 32.

<sup>86</sup> See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights & Prisoner Cases*, 77 GEO. L.J. 1567, 1588 (1989) (finding a 22.2% success rate for employment discrimination cases nationwide). Eisenberg found that the United States government had a success rate of 44.1% during the time period he studied. *Id.* at 1600. See also Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC'Y REV. 355, 375 (1986) ("Having a federal agency as party to a case is associated with an 18% higher chance of victory.").

<sup>87</sup> Section 1981 claims, however, generally comprise only a small number of discrimination claims. See Donohue & Siegelman, *supra* note 67, at 997 (noting that only 9 cases filed between 1982 and 1987 raised only a § 1981 claim, while another 147 included a § 1981 claim either alone or in conjunction with another statute).

<sup>88</sup> See Donohue & Siegelman, *supra* note 1, at 760-61. In contrast, based on the information we were able to analyze from the EEOC's 1988 Annual Report the agency's average recovery during 1988 was \$10,620. EEOC ANN. REP. (1988).

<sup>89</sup> Eisenberg reported his findings in percentiles, indicating that the recovery at the 40th percentile was \$14,000 and at the 60th percentile was \$31,000. See Eisenberg, *supra* note 86, at 1580. Reviewing trial outcomes from California state courts, Samuel R. Gross and Kent D. Syverud found that 92% of the employment discrimination verdicts exceeded \$10,000. See Gross & Syverud, *supra* note 76, at 338. Finally, a review of cases from the

one takes these figures as rough estimates, unadjusted for inflation, it appears that the EEOC obtains significantly less monetary relief than do private attorneys, and indeed the differentials are sufficiently high to compensate for a private attorney's fees. In other words, assuming a plaintiff would pay her attorney's fees from the judgment, a plaintiff would still be better off monetarily by retaining a private attorney than by proceeding with the EEOC.<sup>90</sup>

All of this focus on the monetary aspects of the cases may not provide a fair measure of the value of the EEOC if, for example, the EEOC was particularly instrumental in shaping the law through its litigation activity.<sup>91</sup> One way to measure this effect is to look to Supreme Court cases, where the law is shaped most profoundly, to determine whether the EEOC was a party in important and formative cases. Here we find that, outside of cases involving its own procedures, the EEOC has rarely been a party in the Supreme Court in an employment discrimination case. In fact, the EEOC has not been a party in any of the recent major cases pertaining to employment discrimination decided by the Supreme Court.<sup>92</sup>

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Northern District of Illinois indicated that awards in published employment discrimination cases averaged \$47,907, while the average in unpublished cases was \$12,375. See Siegelman & Donohue, *supra* note 38, at 1152.

<sup>90</sup> However, as discussed in more detail below, prevailing plaintiffs are typically entitled to recover their attorneys' fees from the defendants. See 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993). Therefore, the differential to compensate for attorneys' fees is primarily relevant for those individuals who may not know that the defendant would pay the attorneys' fees.

<sup>91</sup> It is conceivable that the EEOC might also be able to extract workplace changes through settlements that private attorneys were unable to obtain, particularly given that a private attorney's financial incentives may lead the attorney to forego certain nonmonetary recovery whereas the EEOC may have no similar incentive. However, no data is readily available to measure this potential difference. Nevertheless, given that so few of the EEOC's cases are truly class actions—which is when structural change is most likely to be produced—it appears unlikely that its settlements are leading to fundamental changes in the workplace in a manner that is significantly different from what the private bar is able to achieve.

<sup>92</sup> See *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995); *Landgraf v. USI Film Prods., Inc.*, 114 S. Ct. 1483 (1994); *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993); *Hazen Paper Co. v. Biggens*, 113 S. Ct. 1701 (1993); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993); *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The EEOC has filed an amicus brief in many of these cases but filing an amicus brief, although valuable, is considerably different than being a party to the case. Along these same lines, Jonathan Leonard has recently observed: "In recent years, a number of record breaking (\$100 million or more) settlements have been



#### D. A Summary of the Comparison

One can surmise from the review of the EEOC's procedures and its activities the following conclusions. First, the EEOC resolves only a small number of cases in favor of plaintiffs. This can be interpreted in at least one of two ways. It may be that the EEOC is accurately assessing the merits of the cases, in which case a tremendous number of meritless charges are filed each year. Assuming this is an accurate explanation, it is doubtful that so many charges would be filed if the system were not costless to plaintiffs or if those individuals sought legal counsel before filing a claim. On the other hand, if the EEOC is dismissing too many meritorious cases, then a different problem arises—one that directly affects the welfare of the plaintiff class. In either case, the agency structure may not be the most suitable means for advancing meritorious cases.

Second, a large number of cases are dismissed in federal court as a result of failing to comply with the administrative procedures.<sup>93</sup> Most of these cases, when filed in federal court, involve private attorneys,<sup>94</sup> and as discussed in Part III of this Article, if one assumes that attorneys are operating accurately as a filter for strong cases, then these cases may have had considerable promise and were likely to be among the strongest of discrimination claims.

Finally, the EEOC concentrates its enforcement efforts on relatively small cases—typically recovering through litigation less than ten thousand dollars per

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reached in cases charging racial and sex discrimination. In many if not all, of these cases, the EEOC had received complaints and performed preliminary investigations. In none of these cases did the EEOC attain the settlements ultimately achieved by private attorneys." Jonathan S. Leonard, *Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers*, REP. FOR U.S. DEP'T OF LAB., GLASS CEILING COMM'N, at 70 (1994). The fact that the EEOC has not been actively involved in the development of the law should not be particularly surprising insofar as during most of this time the EEOC was under the direction of a Republican administration that often expressed hostility towards employment discrimination litigation. For a discussion of the civil rights policies during the Reagan Administration see NORMAN AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* (1988); GRAHAM, *supra* note 15, at 129-52.

<sup>93</sup> See *supra* text accompanying notes 36-39.

<sup>94</sup> One study indicated that 89% of employment-related constitutional tort cases involved counsel. See Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 747 (1988); see also JAMES N. DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 37 (1988) (finding that California wrongful discharge plaintiffs were all represented by attorneys working on a contingency fee).

plaintiff. Given this concentration, the question becomes whether these cases are worth the price of the administrative structure, and whether the EEOC is the only means for resolving such low-value cases. As discussed in more detail below, the changes in the law brought by the Civil Rights Act of 1991 should now encourage private attorneys to bring small but strong cases when they may have previously shunned such cases.<sup>95</sup> Whether that would ultimately be the case, and what effect it may have on the judiciary in terms of deterring discrimination, is addressed below.

### III. CAN WE RELY ON PRIVATE ATTORNEYS TO ENFORCE THE LAW?

Part II of this Article identified the kind of work the EEOC performs and the purposes it serves. This part will explore whether private attorneys might provide an enforcement strategy superior to that which the EEOC currently offers. By engaging in this comparative analysis, I will not try to determine whether an enforcement system predicated on private attorneys would be ideal but only whether it would be superior to the existing process.<sup>96</sup> Making that assessment will require identifying the effects the different structure would have on the three relevant parties: plaintiffs, defendants, and courts, while also differentiating among the various kinds of claims the system would emphasize, for example, between low or high-damage claims, and individual or class actions.<sup>97</sup> In addition to the three parties mentioned above, the effect the system would have on the public is of obvious concern. Yet, the public's interests ought to be represented through the concerns of the three previously named parties since the public's interests are largely reflected in our national policy

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<sup>95</sup> See *infra* part III.A.1.

<sup>96</sup> Cf. NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS & PUBLIC POLICY* 49 (1994) (emphasizing the need to study institutional choice from a comparative perspective); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 *YALE L.J.* 31, 110 (1991) ("A more accurate measure of the desirability of any legal process, . . . is whether the mix of results it produces is better than the mix of results we could get with alternative processes or laws.").

<sup>97</sup> This section will concentrate on individual cases since as already noted class actions do not currently comprise a meaningful portion of the employment discrimination cases that are filed. However, liberating the EEOC from its focus on individual cases would allow it to concentrate on class action litigation, which is certainly a stronger means of working toward true labor market changes than seeking change through individual cases. See Burstein & Monaghan, *supra* note 86, at 367 ("Resolving complaints of discrimination one by one is so costly and inefficient that it is not likely to lead to much change in the labor market."); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *GEO. L.J.* 1619 (1991) (arguing for greater emphasis on class action litigation).

against employment discrimination and in having an efficient enforcement scheme to carry out the law's objective. Accordingly, the public would be concerned if too few victims of discrimination obtained remedies for the wrongs committed against them, if the system led to overdeterrence among employers, or if it excessively burdened the courts. Deciding which of these areas merits the greatest concern, or how best to mediate the various interests, ultimately involves a policy decision that is beyond the scope of this Article. Therefore, this part of the Article will concentrate on elucidating the likely effects of switching to a purely private enforcement scheme.

### A. *The Case for Private Attorneys*

In determining whether private attorneys would assume the work of the EEOC, it is necessary to explore the kinds of cases for which private attorneys are likely to offer representation. From the outset it should be noted that there has been a long-standing concern that attorneys are either unwilling or at a minimum hesitant, to pursue employment discrimination claims.<sup>98</sup> As will be emphasized below, the changes made by the Civil Rights Act of 1991 ought to provide new incentives for attorneys to take more discrimination cases, which will be important to consider when evaluating attorneys' past practices. However, not only has there been a concern with whether attorneys would take cases, but a number of commentators have argued that employment discrimination claims are significantly underreported,<sup>99</sup> and if this is true, it

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<sup>98</sup> This was one of the original purposes behind the creation of a governmental agency and a strong motivation behind the 1972 amendments to the 1964 Act. See S. REP. NO. 415, 92d Cong., 1st Sess., 17 (1971) (describing employment discrimination as "modern day David and Goliath" confrontation); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 951 (1978) (noting that discrimination cases were originally thought to be unattractive to the private bar).

<sup>99</sup> For example, Kristin Bumiller has estimated that about half of the individuals with discrimination claims failed to pursue them. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 26 (1988). Other estimates have been even lower. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 545 (1984) (estimating that 7 in 10 discrimination grievants made no claim for redress). There can be little question that employment discrimination claims are underreported at some level, but the data relied on for the above estimates are all based on the self-reporting of claims with no independent attention given to the potential merits of those claims. Therefore, it is difficult to know what percentage of the unreported claims would have resulted in some relief to the plaintiffs. This analysis also suggests that there is some tension between the fact of underreporting and the paucity of claims that obtain relief, unless we assume that the claims that are not reported are for some reason likely to be

would be important to ensure that moving toward a system that depended entirely on private attorneys would not lead to any greater underreporting.<sup>100</sup>

To identify whether attorneys are likely to pursue employment discrimination claims, one can begin with the standard economic model of litigation. That model, without any refinement, predicts that plaintiffs will bring suit whenever their expected returns from litigation exceed their expected costs.<sup>101</sup> In the employment context, the returns to a plaintiff can be a job or reinstatement to a previously held job, back pay and both punitive and compensatory damages.<sup>102</sup> For all claims filed pursuant to Title VII and under the ADA, those damages cannot exceed \$300,000 and depend on the size of the employer.<sup>103</sup> For age discrimination claims, the plaintiff may recover

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stronger than the reported claims. Within the economic model of litigation, which assumes that individuals engage in some cost-benefit analysis prior to filing a claim, this is extremely unlikely. Additionally, with some exceptions, it does not appear that discrimination claims are reported substantially less than other types of claims, as it appears that most claims are underreported. See Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875, 881 (1991) (reporting that the rate of complaint for employment discrimination was 63% which was lower than other areas but higher than most studies have indicated); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183–86 (1992) (reviewing studies and finding low-claiming rate across-the-board).

<sup>100</sup> This is the focus of *infra* part III.A.3. Importantly, none of the studies documenting the underreporting of claims has concluded that individuals failed to pursue their claims primarily as a result of their inability to hire an attorney.

<sup>101</sup> Extensive literature exists modelling the process by which plaintiffs decide to pursue cases and the effect various fee arrangements have on litigation decisions. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes & Their Resolution*, 27 J. ECON. LIT. 1067 (1989); Earl Johnson Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1981); Janice Madden & Jennifer Wissink, *Achieving Title VII Objective at Minimum Social Costs: Optimal Remedies and Awards*, 37 RUTGERS L. REV. 997 (1985); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991); A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. LEGAL STUD. 151 (1988); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

<sup>102</sup> Until recently, Title VII plaintiffs were entitled only to make-whole relief, which generally included lost wages and job relief. See *supra* note 6.

<sup>103</sup> Under the Civil Rights Act of 1991, the maximum damage awards are as follows: for employers with 14–100 employees, \$50,000; 101–200 employees, \$100,000; 201–500 employees, \$200,000; and more than 500 employees, \$300,000. 42 U.S.C. § 1981(b) (1988)

liquidated damages for willful violations in an amount that is twice the level of backpay,<sup>104</sup> and for claims brought under § 1981 the damages are unlimited.<sup>105</sup> There may also be nonmonetary gains that would motivate individuals to pursue claims even when the monetary returns would not otherwise justify litigation. These gains may include issues such as restoring one's reputation, particularly in cases in which the plaintiff has been fired.<sup>106</sup>

At this point, rather than focusing on the plaintiff's incentives to file claims, the decision-making process employed by attorneys will be focused upon because it is their decision to take cases that is of primary interest as a substitute for the EEOC.<sup>107</sup> Stated in its most basic form, attorneys who are acting rationally ought to pursue those cases that present profitable opportunities. In the employment context, defining profitable opportunities will typically depend on the probability and benefits of prevailing measured against the costs of litigation, including the opportunity costs of taking a particular case. Importantly, although damages are relevant to this calculation, they do not control an attorney's decision in employment discrimination litigation because a prevailing plaintiff routinely recovers her attorney's fees from the losing defendant.<sup>108</sup> Damages may surely be relevant to the extent the attorney is hired on a contingency fee basis and also to the extent that the level of damages is relevant to extracting settlements from defendants.<sup>109</sup> Therefore, assuming that an attorney will fund the litigation and also that she will obtain a percentage of the plaintiff's award, the following equation depicts an attorney's incentive structure based on the above analysis:

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& Supp. V 1993) (setting forth damages for Title VII); 42 U.S.C. § 12117(a) (1988 & Supp. V. 1993) (applying Title VII remedies to ADA).

<sup>104</sup> See 29 U.S.C. § 626(b) (1994) (age discrimination remedies); *Hazen Paper Co. v. Biggens*, 113 S. Ct. 1701 (1993) (discussing available remedies).

<sup>105</sup> 42 U.S.C. § 1981 (1988 & Supp. V. 1993).

<sup>106</sup> Many plaintiffs undoubtedly file claims on which they have little prospect of recovery, and many of these claims are probably filed out of anger or spite. While one might argue about the prevalence of these motives in decisions to file suit, it is perhaps most useful here to note that such claims are likely to be more numerous under the existing institutional structure, which attaches no costs to filing a claim, than under a system involving private attorneys since even where the plaintiff may not be acting rationally, one would expect an attorney to act to further her own financial interests.

<sup>107</sup> Part III.A.3 *infra* will discuss whether there might be some reason that certain plaintiffs who currently file claims would not seek representation from a private attorney.

<sup>108</sup> 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993). In contrast, a defendant can only recover her fees if the plaintiff's case is deemed frivolous. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

<sup>109</sup> This issue is discussed in more detail *infra* part III.A.1.

$$p(wD) + p_1(x) > (1-p)C_p$$

In this equation,  $p$  represents the probability of prevailing, with  $p_1$  representing the probability that damages ( $x$ ) will be assessed in addition to the backpay.<sup>110</sup>  $W$  is the weekly wage and  $D$  represents the duration of unemployment; thus,  $wD$  is the typical backpay calculation for lost wages.<sup>111</sup> Furthermore,  $C_p$  represents the costs of litigation. For an attorney working on a contingency fee, this formula will capture the prevailing incentive structure since the attorney would recover a percentage of the damages.<sup>112</sup>

When an attorney expects to recover her fees from the defendant, however, the equation that best represents the attorney's decision-making process would be the following:

$$p(F) > (1-p)C_p$$

Here,  $p$  represents the probability of prevailing,  $F$  represents the fee, and  $p(F)$  represents the expected fee. With the prospect of representation as the issue of

<sup>110</sup> In many instances, the probabilities for prevailing and for recovering damages may be identical but they need not be. The probability one will receive a punitive damage award can be quite distinct from the probability of prevailing on the underlying claim, especially where the damage award may turn on the desirability of the plaintiff or defendant rather than the particular merits of the case. Additionally, a more refined analysis would look to the probability of settling rather than prevailing since attorneys may take cases that offer a strong probability of settling even where the underlying merits are not so strong. Some of these cases may be what are typically called nuisance suits, where plaintiffs file claims out of the hope of extracting a settlement solely due to the cost of a defense. See Luchian Ayre Bebhuck, *Suing Solely to Extract A Settlement Offer*, 17 J. LEGAL STUD. 437 (1988). In other instances, these may represent either low damage cases or highly risky but high damage cases.

<sup>111</sup> A prevailing plaintiff is generally entitled to backpay. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 220 (1982) (detailing backpay calculations); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 409 (1975) (establishing basis for backpay).

<sup>112</sup> From the available evidence, which is limited, it appears that employment discrimination cases are generally based on a contingency fee—if by contingency we include the ability to recover fees from the defendants. For example, in their review of California state cases, Gross and Syverud found that in 73% of the employment cases the plaintiff was represented on a contingency fee basis. See Gross & Syverud, *supra* note 76, at 374 n.134. Another study found that all of the plaintiffs in the wrongful discharge cases that were studied had attorneys working on a contingency fee basis. See DERTOUZOS ET AL., *supra* note 94, at 37. Though not directly involving employment discrimination cases, other studies have likewise found that individual plaintiffs are typically represented on a contingency fee basis. See HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 88 (1990) (finding 59% of individuals represented on a contingency basis).

interest, the best measure of representation is the expected fee recovery rather than the expected damage recovery.<sup>113</sup> As the equation illustrates, the ability to obtain fees from the defendant suggests that the most attractive case for an attorney may have little to do with damages. An attorney may instead seek out cases with a high probability of success but which are sufficiently complex to require a large number of hours.

What this brief analysis demonstrates is that attorneys have clear incentives to pursue strong employment discrimination cases, that is, at least those cases that have a high probability of prevailing either at trial or through settlement.<sup>114</sup> Moreover, so far there is nothing to suggest that the incentive

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<sup>113</sup> See Donohue & Siegelman, *supra* note 71, at 721 n.16; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 700–01 (1986). The fee is simply the hourly rate multiplied by the hours worked. At one time it was relatively common for attorneys to obtain fee enhancements in employment discrimination litigation from courts as an encouragement for public interest litigation, but the Supreme Court recently held that such enhancements were impermissible under the statute that provides fees to prevailing civil rights plaintiffs. See *City of Burlington v. Dague*, 505 U.S. 557 (1992).

<sup>114</sup> Although there may be room for skepticism regarding the ability of attorneys to select meritorious cases, most studies support the notion that attorneys perform this function reasonably well. For example, a recent study of malpractice cases found that attorneys quite accurately distinguished in their case selection between good and weak cases on the merits. See Farber & White, *supra* note 57, at 780. Reviewing a number of studies, Michael Saks has likewise concluded that there are few false positives among the cases that are actually filed. See Saks, *supra* note 99, at 1196; see also Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 561–62 (1978) (arguing that cases settle so frequently because attorneys are able to assess the value of the case). In contrast, others have questioned the ability of attorneys to distinguish meritorious from nonmeritorious cases. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 513 (1991) (suggesting that securities litigators often engage in opportunistic filings in order to extract settlements that result in large attorney's fees); Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 48 (1994) (arguing that plaintiffs' lawyers serve as poor gatekeepers because of the number of cases disposed of on motions). Alexander's study, however, seems limited in that it was primarily based on a sample of nine cases filed by one law firm. Alexander, *supra*, at 520–22; see also Seligman, *supra* note 53 (critiquing Alexander's study). Regardless of how well attorneys filter out nonmeritorious cases, it is clear that the legal system relies on them to do so for the vast majority of litigation in this country. Thus, the primary question is whether there is something distinct about employment discrimination that requires an agency to do the filtering as opposed to private attorneys.

structure is flawed for discrimination cases.<sup>115</sup> Indeed, one might expect that, all things being equal, many plaintiff's attorneys would prefer to bring employment discrimination claims as a political move toward eliminating discrimination.<sup>116</sup>

However, a number of questions remain to be answered. First, there is a question whether private attorneys can be expected to take low-value claims so as to assume what appears to comprise the bulk of the EEOC's caseload. Second, one must address the question of why attorneys do not take more cases today; why, for example, more attorneys do not remove cases from the administrative process by requesting a right-to-sue notice from the EEOC.<sup>117</sup> Finally, there is a subsidiary question regarding whether claimants would be less likely to seek out an attorney than they would be to file an administrative claim, and if so, what the implications of that greater reluctance might be. These issues will be discussed in turn.

### 1. *Low-Value Cases*

As was shown earlier, a significant portion of the EEOC caseload is concerned with low-damage cases<sup>118</sup> and therefore, any consideration of a private enforcement scheme must take into account whether private attorneys could be expected to assume responsibility for these smaller cases. Alternatively, one might determine that these cases should not be a systemic priority given the limited resources that exist to combat discrimination. If this were the situation, then one would be far less concerned about whether attorneys are likely to take these cases. Therefore, the relative importance of these cases will be addressed at the outset because it directly relates to the importance of attorney representation for low-value cases.

Ordinarily one might think that small damage cases ought not to be an enforcement priority and that discouraging such cases would not produce a particular social loss in a system of constrained resources. As long as litigation costs drive decisions, or expected monetary outcomes determine decisions to litigate, the reality is that many low damage claims simply will not be

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<sup>115</sup> However, the incentives may be insufficient if there are few strong cases. For reasons to be discussed later in this Article, employment discrimination cases have historically fared poorly when tried before a judge. See *infra* text accompanying notes 151-54.

<sup>116</sup> See KRITZER, *supra* note 112, at Table 5-1 (finding that sympathy for a client's predicament was the most important factor to an attorney in deciding to take a case).

<sup>117</sup> See *supra* text accompanying notes 27-29.

<sup>118</sup> See *supra* Tables 4-6.



brought.<sup>119</sup> However, when discrimination forms the underlying basis for the claim, and the system permits individual claims, there is a far greater need to ensure an available judicial forum even for small cases. One reason for this is to guard against the hazard that might arise if employers believed they were effectively free to discriminate as long as the damages remained below a certain level. Surely a policy should not be created that tells employers it is permissible to engage in discriminatory acts as long as the damages do not exceed ten thousand dollars, or worse, a policy that tells employers it is permissible to discriminate against low-wage employees. Here our national policy against discrimination commands that the prohibition of discrimination extends all the way down to even the smallest cases.<sup>120</sup> Moreover, to the extent that low-damage claims are correlated with low-wage jobs, these cases may be concentrated among low-income individuals.<sup>121</sup> Given that members of minority groups and women are also disproportionately found among low-income groups, these cases may disproportionately involve race, gender or national origin claims—precisely the kind of cases that the system should target.<sup>122</sup> Any enforcement system for discrimination claims that systematically

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<sup>119</sup> See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 535 n.7 (1981) (noting that cases of less than \$1,000 are systematically screened out); Polinsky & Rubinfeld, *supra* note 101, at 157-58; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 149 n.47 (1984) (noting that as a society we generally do not want to encourage small claims).

<sup>120</sup> Michael Piore has recently emphasized the distinct importance of discrimination cases by noting, "[I]t is striking that we never talk about selling rights to employment discrimination or sexual harassment." MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* 179 (1995).

<sup>121</sup> This correlation may be less clear than it might otherwise appear because low-damage cases may be the result of either a low-wage job or a short duration of unemployment. Apart from the damage remedies made available by the Civil Rights Act of 1991, the primary component of a discrimination award is for lost wages which is a function of the amount of the wages and the time that one was unemployed. Thus, an individual who quickly obtains new employment at a comparable wage would also tend to pursue a small damage claim.

<sup>122</sup> In his recent work, Martin Carnoy documents the concentration of African-Americans and Latinos in what he characterizes as low-wage and high-wage jobs, relying on recent census data. According to Carnoy, in 1990, 46.4% of black males were employed in traditional low-wage jobs, while only 30.5% of white males held such jobs. The percentage of black males in high-wage jobs was 18%, whereas the percentage for white males was 39.5%. Latinos were found in even greater numbers among low-wage job holders—53.8% of Latino men, and 38.9% of Latina women. For African-American women, 38.9% held low-wage jobs (white females 29.1%) and 20.4% held high-wage jobs. MARTIN CARNOY, *FADED DREAMS: THE POLITICS AND ECONOMICS OF RACE IN AMERICA* 95-

turns away from these causes of action would have to be deemed fatally flawed. Therefore, at some level, low-value claims need to be preserved, and the discussion now turns to the question of whether one can expect private attorneys to pursue low-value cases if the EEOC were no longer available to respond to such claims.

It has already been shown that the existing structure provides sufficient incentives to private attorneys to pursue employment discrimination cases without exclusive attention to the size of the damages at issue. This was, indeed, one of the guiding principles behind the fee-shifting statute that allows prevailing plaintiffs to recover fees from the defendant.<sup>123</sup> Accordingly, the most attractive case for a plaintiffs' attorney may be a very strong but complicated case—one in which there is a high probability of success but that will take a significant amount of time to prepare.<sup>124</sup> Yet, by focusing on fees that are expected after trial one easily loses sight of the reality that so few cases are actually tried.<sup>125</sup> Rather than being determined after trial, the issue of fees will typically arise during settlement negotiations, and whenever fees are determined as an element of the settlement process the case resembles a traditional contingency fee arrangement. The reason for this is that in settling a particular claim a defendant is primarily concerned with the aggregate amount of the agreement and is generally much less concerned with the distribution of the settlement between the plaintiff and attorney.

With the focus on settlement, determining whether attorneys would pursue low-damage claims raises two questions: first, whether small or large damage cases are more amenable to settlement; and second, whether one can expect a

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97 (1994). For additional discussions of the persistent wage differentials see WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, JR., *THE BLACK UNDERCLASS* (1994); Reynolds Farley, *The Common Destiny of Blacks and Whites: Observations About the Social and Economic Status of the Races*, in *RACE IN AMERICA* 197, 206-07 (Herbert Hill & James E. Jones, Jr. eds., 1993).

<sup>123</sup> See Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2050 (1993) (noting that fee shifting increases the attractiveness of cases with low monetary damages); see also Schwab & Eisenberg, *supra* note 94, at 747 (explaining that fee shifting has protected low-damage constitutional torts). Krent also suggests, however, that fee-shifting may make settlement more difficult because it adds another interest into the settlement mix and may place the attorney at odds with her client in certain circumstances. Krent, *supra*, at 2081-82.

<sup>124</sup> This claim may be stated too strongly because it is easy to see that as soon as one alters the strong presumption on the merits, a cautious attorney may want to avoid unduly complicated cases in favor of greater diversification within her case portfolio. See *infra* text accompanying notes 143-45.

<sup>125</sup> In employment discrimination cases, only between 8 and 10% of the cases are actually tried. See *supra* note 84.

fee that is proportionate to the damages that are at stake. At first glance, this latter issue may seem rather obvious if one assumes that fees are a function of the underlying award. But this assumption is only true under an actual contingency fee agreement, and even then an attorney might compensate for the lower award by increasing the percentage of her share for settling small damage claims.<sup>126</sup> In contrast, when an attorney calculates her fees on an hourly basis with the expectation of reimbursement from the defendant either through settlement or after trial, her fee will be dependent on the time she expends on a case rather than on the underlying award. Accordingly, low-damage cases will not necessarily lead to proportionately small fees.<sup>127</sup>

This does not answer the question whether cases involving low or high damages are easier to settle. There is now abundant literature on the relationship between damages and settlement prospects, and to the extent there is any consensus on the issue, it is that a number of factors, including the monetary stakes, are relevant to assessing a case's facility for settlement.<sup>128</sup> For example, in some instances, a large corporation may be prone to settle small cases quickly, although as a repeat player in litigation a large corporation may also decide for strategic reasons to bargain in excess of what the expected value of the judgment would dictate in order to deter future litigants.<sup>129</sup> Small defendants may be more likely to act irrationally at the prospect of being sued

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<sup>126</sup> For example, an attorney might offer an arrangement that provided that she received a one-third percentage for cases in excess of \$50,000 but a 40% share in cases below that amount. This strategy might be feasible, and palatable, if equitable relief, such as a job, was of primary concern to the plaintiff.

<sup>127</sup> One recent study found that on average fees in employment discrimination cases that went to trial averaged more than 50% of the damages obtained by the plaintiff. See Siegelman & Donohue, *supra* note 38, at 1151 Table 3.4 (average damages were \$47,907 with an average fee recovery of \$29,765); see also Rutherglen, *supra* note 71, at 514 (finding that in age discrimination cases fees were on average double the amount of the recovery).

<sup>128</sup> For a thorough discussion of the various arguments as to whether large or small cases are more likely to go to trial see Gross & Syverud, *supra* note 76, at 351-56. Although Judge Posner concludes that higher stakes cases are more likely to be litigated, he also notes that the conditions of the parties and the merits of the cases can significantly increase the risk of litigation. See POSNER, *supra* note 101, at 57.

<sup>129</sup> As the authors of one study recently explained: "In the context of litigation, it is widely believed that repeat players are more likely to reject efficient settlements in any given dispute because of an overriding interest in the development of the governing positive law or in fostering a reputation for stubbornness that could prove valuable in future disputes." George Loewenstein et al., *Self-Serving Assessments of Fairness and Partial Bargaining*, 22 J. LEGAL STUD. 135, 156 (1993). For the classic discussion regarding the role repeat players have in litigation see Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

if for no other reason than they may be unaccustomed to litigation. Their inexperience and the resulting indignation at being sued may lead them to incur litigation expenses that exceed the damages that are at stake in a case. At the same time, small defendants may have fewer litigation resources, which may result in oversettling cases for fear of the potential costs of losing a case.<sup>130</sup>

Nevertheless, it is often thought that increasing the costs of litigation will also increase the prospects for settlement.<sup>131</sup> However, this presumption fails fully to capture the potential influence costs may have on dispute resolution. Instead of a linear relationship between costs and settlement, what has been found is that increasing costs can have any number of effects on the outcome of the case, including the substantial prospect that only a case involving high stakes is likely to proceed to trial given the often high costs of litigation.<sup>132</sup> For this very reason, some have argued that small cases ought to be the easiest kind of case to settle.<sup>133</sup> Yet, this conclusion is likewise too rigid to withstand extended analysis because it depends on two critical assumptions. The first assumption is that a defendant's litigation behavior is driven primarily by its litigation costs, but as has already been shown, this will not always be the case.<sup>134</sup> Second, it assumes that there are fixed costs to trying a case that make certain cases economically inefficient to try. But, if the costs of litigation are proportionate to the monetary stakes at issue, low damage cases should not

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<sup>130</sup> This may be of less concern in Title VII cases since the damages are capped proportionate to the size of the employer. *See supra* note 103. As a result, an employer would at least have some upper-limit by which to measure its ultimate exposure.

<sup>131</sup> *See, e.g.,* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 14 (1992) ("A settlement gap is more likely when litigation costs are high and less likely when they are low.").

<sup>132</sup> *See* POSNER, *supra* note 101, at 557; Linda R. Stanley & Don C. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145, 164 (1990) (concluding that increasing costs of litigation can have varying effects). Others have suggested that greater stakes will lead defendants to litigate cases they are more likely to win, thus skewing data on litigation outcomes. *See* George L. Priest, *Measuring Legal Change*, 3 J. LAW, ECON. & ORG. 193, 207 (1987).

<sup>133</sup> *See, e.g.,* DERTOUZOS ET AL., *supra* note 94, at 40-41 ("[B]ecause going to trial imposes high fixed costs independent of the case size or complexity, both parties will wish to settle small cases out of court."); Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 90 (arguing that low damage cases, with a high probability of liability, ought to be the easiest to settle).

<sup>134</sup> It seems clear that settlement is less likely when nonmonetary issues factor prominently into the litigation. *See* Bundy, *supra* note 131, at 14. Such factors may be disproportionately present in employment discrimination cases given the reputational effects that may attach to a finding of discrimination and the further prospect of additional lawsuits from fellow employees.

enjoy any settlement advantage because they will be proportionately less expensive to try.<sup>135</sup>

Therefore, the above analysis indicates that it is difficult to reach any definitive conclusion regarding the probability of settling cases based solely on their monetary stakes, other than perhaps to suggest that at least some low-damage cases should be easier to resolve given the fixed costs of litigation. Another difficulty in determining whether attorneys will prefer large to small cases is that with the availability of damages it is now difficult to know what kind of case can be properly classified as a low-value case. Prior to the Civil Rights Act of 1991, it was relatively easy to assess the value of a case because the cases typically involved only lost wages.<sup>136</sup> The changes in the law, however, have made it more difficult to focus solely on the lost wages at issue; damages will now depend primarily on the size of the employer and the nature of the defendant's act. Assuming that there is a relation between the quality of the defendant's practice and the punitive damages assessed by a jury, even cases that involve small lost wages but that stem from practices that are worthy of punitive damages should offer profitable opportunities to attorneys.<sup>137</sup> With this in mind, cases that are unlikely to be profitable, and therefore less likely to obtain representation, will be those low lost wages cases that stem from isolated practices that a jury deems unworthy of significant damages. But in a world of limited resources in which not every case can be filed, it seems that those would be precisely the kind of cases that ought to be treated as a low priority. In any event, because attorneys tend to proportion their effort to the amount of fees at stake,<sup>138</sup> to the extent that low-damage cases result in lower fees, attorneys should be able to compensate for the lower fees by adjusting their caseload accordingly, including by increasing the volume of smaller

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<sup>135</sup> See DERTOUZAS ET AL., *supra* note 94, at 38 (noting that "defense fees are higher when stakes are higher"). As Dertouzas notes there are fixed costs to trying a case with the primary question being what those costs are. One recent estimate hypothesized that a case with an average trial time of 9 days cannot be tried to a jury for under \$10,000. See Gross & Syverud, *supra* note 76, at 336-37 & n.53. Many individual employment discrimination cases, however, can be tried in substantially less than nine days.

<sup>136</sup> See *supra* note 6.

<sup>137</sup> To date, there has been very little litigation over the standard a plaintiff must meet to qualify for an award of punitive damages under Title VII.

<sup>138</sup> See KRITZER, *supra* note 112, at 88 (finding a "strong relationship between stakes and [attorney] effort"). Earl Johnson has succinctly explained the basis for the relationship as follows: "In most cases, fee-for-service lawyers have economic motives to overinvest, and contingent-fee lawyers have motives to underinvest." Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 598 (1981).

cases.<sup>139</sup>

At least two other factors suggest that attorneys ought to be willing to accept employment discrimination cases that may involve low damages. First, most claims brought in state and federal court involve relatively modest monetary amounts.<sup>140</sup> Even for attorneys who would prefer larger cases, the opportunity costs to taking low-damage cases may not be high since most of the cases from which an attorney might choose will be low-damage cases. And among low-damage cases one would expect employment discrimination cases to have an edge due to the prospect of receiving fees from defendants in these cases. A second reason attorneys may be willing to accept low-damage claims is that these claims tend to fare better in terms of the proportional amount recovered than larger cases<sup>141</sup> and also have higher success rates than larger claims.<sup>142</sup> In combination, these factors should strongly influence the attractiveness of even low-damage claims.

At a minimum, given the higher success rates, an attorney should seek to have some small value cases in her case portfolio at least as a risk-spreading measure. If one thinks of an attorney as creating an investment portfolio through the selection of cases that she accepts for representation, then she ought to include a variety of cases in her portfolio and, in particular, a sampling of cases that have a high probability of being resolved favorably, which would include low-damage claims.<sup>143</sup> Indeed, Professor John Coffee has

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<sup>139</sup> This suggestion is related to the notion that an attorney's caseload resembles an investment portfolio. See *infra* text accompanying notes 143-45.

<sup>140</sup> Reviewing data primarily from 1978, Herbert Kritzer found: "Most state cases are quite small, involving less than \$5,000 . . . In federal court the cases are larger, as one would expect given the jurisdictional minimums in those courts: the median case involves \$15,000, and 19% of the caseload involves more than \$50,000." KRITZER, *supra* note 112, at 31 (footnote omitted). This finding has been consistent among studies of the value of court cases. See, e.g., David Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 87-89 (1983) (finding that most cases were for modest amounts).

<sup>141</sup> See Saks, *supra* note 99, at 1218 (finding that there tends to be a higher percentage of recovery at the lower-end of the compensation scale). Saks' finding suggests that defendants may quickly find that their litigation costs exceed the value of the case, which would support the theory that low damage cases are the easiest to settle.

<sup>142</sup> KRITZER, *supra* note 112, at 149-50 (finding that contingent fee lawyers had the highest success rate with claims valued below \$50,000).

<sup>143</sup> For a discussion of an attorney's case selection as an investment portfolio see Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal*, 54 LAW & CONTEMP. PROBS. 5, 12 (1991); Coffee, *supra* note 113, at 705; Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm & How Partners Split Profits*, 37 STAN. L. REV. 313, 322-24 (1985); Saks, *supra* note 99, at 1191.

suggested that “multiple small settlements” may provide a risk averse attorney greater economic rewards than significant investment in a single action.<sup>144</sup> Risk neutral attorneys, on the other hand, may prefer to include but not dominate their portfolio with smaller claims.<sup>145</sup>

So far this Article has been focusing exclusively on the monetary value of employment discrimination cases, which may appear to ignore that many, if not most, of these cases seek more than monetary remedies. In addition to monetary relief, employment discrimination plaintiffs ordinarily seek jobs or changes in work conditions. That fact alone, however, does not suggest that a case’s monetary value is divorced from its importance. The reason for this is that nearly all employment discrimination cases seek more than monetary damages—so that those cases involving higher damages will also involve changes to an employer’s practices.<sup>146</sup> Furthermore, there is no reason that the most egregious employer practices, those which any enforcement system ought to target, are likely to be correlated with the lowest value cases. In fact, the contrary seems more likely; the most damaging practices, those that cause the greatest monetary loss, may likewise be the most egregious, especially to the extent the monetary loss is tied to multiple victims.

While it is certainly difficult to draw any definitive conclusion, it appears that private attorneys ought to be willing to pursue cases that involve lower

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<sup>144</sup> John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 231 (1983). Another consideration supporting the likelihood that private attorneys would take the smaller damage claims is that for many attorneys a primary consideration in taking a case is sympathy for the client’s predicament rather than the amount of money at stake. KRITZER, *supra* note 112, at 57 Table 5-1. Indeed, Kritzer found that sympathy for the client’s predicament was the most important factor for an attorney’s determination to take a particular case. *Id.*

<sup>145</sup> Because of their ability to spread risk, we typically expect attorneys, though not necessarily plaintiffs, to be risk neutral. *See* Clermont & Currihan, *supra* note 114, at 565 & n.86 (noting that although we expect clients to be somewhat risk averse we expect attorneys to be risk-neutral). It is also possible that attorneys with a preference for larger cases would demand a higher probability of success for low-damage cases, which the equations developed *supra* part III.A. indicate would increase the expected value of the cases. If attorneys require a higher probability of success on smaller claims, there may be a number of ramifications—the most obvious being that hard cases may go wanting for representation. By hard cases I do not mean weak cases, but rather those cases which may be particularly difficult to prove at trial—cases lacking eyewitnesses or where the evidence may be ambiguous and subject to varying interpretations.

<sup>146</sup> In their review of appellate cases, Paul Burstein and Kathleen Monaghan found that just over half of the cases (51.7%) sought compensation plus changes in work conditions, while another 16.3% of the cases sought changes in work conditions only. Burstein & Monaghan, *supra* note 86, at 377.

damages, though it is also possible that these cases would not receive the same priority in a private enforcement system than they currently do from the EEOC. Eliminating the agency structure outright may lead to some reduction in the number of low-value cases that are brought.

## 2. *Why Don't Attorneys Take More Cases Today?*

One of the remaining questions that needs to be addressed is why it is that attorneys have not been involved in more cases; why, for example, attorneys have not withdrawn more cases from the EEOC, especially since it is currently possible to withdraw almost any case from the agency prior to the completion of an investigation and the issuance of a no-cause finding.<sup>147</sup> Another mystery in the development of employment discrimination law has been the relative paucity of § 1981 claims. This is a puzzle, because although race discrimination claims can be filed under § 1981 without having to proceed through the EEOC, such claims account for a small portion of discrimination suits, despite the fact that race claims are the largest category of claims filed with the EEOC.<sup>148</sup>

There are answers to these questions—some of which have to do with the way the system has developed, while others relate to the deficiencies in the prior system that were at least partly corrected by the Civil Rights Act of 1991. It has already been shown that attorneys are increasingly withdrawing cases from the EEOC by requesting right-to-sue notices,<sup>149</sup> which suggests that as a result of the legislative changes attorneys are progressively moving toward playing a stronger role in case selection and development. One important facet of the legislative changes is the availability of jury trials for claims of intentional discrimination. Prior to the 1991 Act, employment discrimination cases filed pursuant to Title VII were tried before judges and were notoriously difficult to win. Indeed, as discussed below, employment discrimination cases were considerably more difficult to win than other types of tort cases which may have competed for attorneys' time. This comparative difficulty undoubtedly operated as a strong deterrent in attorneys' decisions whether to pursue discrimination claims.

In a recent study, Professor Theodore Eisenberg documented the success rate for employment discrimination cases relying on data compiled by the Administrative Office of the United States Courts for the years 1978 to

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<sup>147</sup> The EEOC currently has a significant backlog of cases. The average investigation time is 328 days, whereas an attorney can request a right-to-sue notice after 180 days. *See supra* note 26.

<sup>148</sup> *See supra* text accompanying note 69.

<sup>149</sup> *See supra* note 46.



1985.<sup>150</sup> With respect to employment discrimination cases, Eisenberg's primary finding was that for those cases that are litigated to judgment, there has been a sharp differential in the success rate on employment discrimination claims for bench trials when compared to other kinds of cases. During the study period, the success rate for employment discrimination plaintiffs nationwide was only twenty-two percent.<sup>151</sup> My own review of more recent data made available by Cornell Law School indicates that this percentage has remained relatively constant into the 1990s.<sup>152</sup> This success rate is considerably lower than the success rate plaintiffs obtain in most tort-type cases, which tend to approximate a success rate broadly speaking of fifty percent. More specifically, a recent study of tort cases that were resolved in 1992 in the nation's seventy-five largest counties found that plaintiffs prevailed in fifty-three percent of all cases that went to verdict.<sup>153</sup>

The most important fact here, however, is that in regards to employment discrimination claims the success rate for jury trials was substantially higher than the rate for bench trials, averaging a success rate of 42.6%.<sup>154</sup> Although this figure is somewhat lower than the more general success rate for plaintiffs of nondiscrimination claims, it is nearly twice as high as the success rate for employment discrimination bench trials. Therefore, prior to the 1991 Act, the

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<sup>150</sup> See Eisenberg, *supra* note 86. As indicated by the title of his article, Professor Eisenberg's study also included other civil rights and prisoner cases.

<sup>151</sup> *Id.* at 1578.

<sup>152</sup> Based on data compiled by the Administrative Office of the United States Courts, and available electronically from Cornell Law School, during 1992 plaintiffs prevailed in 30% of the 533 trials that were completed. For easy access to this database, see Theodore Eisenberg & Kevin M. Clermont, Judicial Statistical Inquiry Form: //teddy.law.cornell.edu: 8090/questata.htm (1995).

<sup>153</sup> See STEVEN K. SMITH ET AL., TORT CASES IN LARGE COUNTIES (report prepared for Bureau of Justice Statistics), Apr. 1995, at 5; see also Eisenberg, *supra* note 86 (finding that employment discrimination cases had lower success rates than other constitutional tort cases). This 50% success rate comports with the theory developed by George Priest and Benjamin Klein that predicts plaintiffs ought to win approximately 50% of the cases that go to trial. See George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). For discussions and criticisms of the Priest-Klein hypothesis see Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990) (finding that success rates vary depending on the kind of case); Siegelman & Donohue, *supra* note 84; Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985) (questioning Priest-Klein hypothesis); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (responding to Wittman's critique).

<sup>154</sup> Smith, *supra* note 153, at 1591. Eisenberg did find significant regional differences for jury trial success, running from a low of 22.6% in New York to a high of 85.7% in the Southwest. Eisenberg, *supra* note 86, at 1591.

absence of jury trials should have substantially deterred attorneys from taking discrimination cases, a deterrent that has now been removed by the adoption of jury trials for all claims based on intentional discrimination.<sup>155</sup> Similarly, as already discussed in some detail, the availability of punitive and compensatory damages should likewise render employment discrimination cases significantly more attractive to attorneys than they previously were.<sup>156</sup>

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<sup>155</sup> The data analyzed by Eisenberg may not fully reflect the expected results of Title VII jury trials because the data includes age discrimination cases for which plaintiffs have always had access to a jury trial, and the limited data available suggests that age discrimination cases fare better than other discrimination claims both in success rates and in the amounts of recovery. See DANIEL P. O'MEARA, *PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION ACT 108-09 (1989)* (suggesting that there is a bias in favor of plaintiffs in age cases); Rutherglen, *supra* note 71, at 502 (discussing the relative success of age discrimination cases); Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 581 (1990) (citing sources demonstrating bias for plaintiffs in age cases). Whether these findings are the result of the availability of jury trials and damages or some factor that is specific to age discrimination claims is difficult to know. One theory suggests that some age discrimination is likely to be economically efficient, at least in those situations where, as is frequently the case, productivity begins to decline at a point in one's career while wages continue to increase in a manner that is inconsistent with the productivity decline. According to this model, individuals are typically underpaid at the beginning of their career while they build up human capital and are overpaid later in their career. See Alan B. Krueger & Lawrence H. Summers, *Efficiency Wages and the Inter-Industry Wage Structure*, 56 *ECONOMETRICA* 259, 276 (1988) ("Firms may be forced to share rents with older workers who have acquired substantial firm specific capital."); Edward P. Lazear, *Agency, Earnings, Profiles, Productivity and Hours Restrictions*, 71 *AMER. ECON. REV.* 606, 615 (1981) ("Senior workers are paid a high wage not because they are productive at that point in time, but rather because paying high wages to older workers induces young workers to perform at the optimal level of effort in hopes of growing old in that firm."). As a result, employers may have an incentive to shirk on the overpayment late in one's career which may lead to opportunistic firings. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause & Employment at Will*, 92 *MICH. L. REV.* 8, 19 (1993) (describing incentives for employers to engage in opportunistic firings of older workers). Given that efficiency concerns are typically not a defense in age discrimination cases, the incentive to engage in opportunistic firings may make age discrimination cases significantly different from claims premised on other bases and thus incomparable in terms of relative success rates. That said, while not a perfect match, the "bulk of actions" analyzed by Eisenberg "consists of Title VII cases." Eisenberg, *supra* note 86, at 1575.

<sup>156</sup> One area where damages ought to prove especially relevant to attracting attorneys is in the area of sexual harassment cases. Prior to the changes in the law, an individual could obtain relief only if she was able to prove that she had been fired or constructively discharged as a result of the harassment. See *Landgraf v. USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992), *aff'd on other grounds*, 114 S. Ct. 1483 (1993); *Swanson v. Elmhurst*

Another problem with the existing system that has led to many claims being pursued without the aid of an attorney is that claimants often proceed directly to the EEOC prior to consulting with an attorney. Given the current structure of the system, this should not be surprising: filing with the EEOC is costless, generally accessible, and unlike going to an attorney, the EEOC will almost always accept a claim.<sup>157</sup> What happens thereafter, however, generally increases the difficulty an individual will have in obtaining representation.

As already noted, the EEOC finds cause in a very small number of cases.<sup>158</sup> Those individuals who proceed directly to the EEOC without an attorney and who receive a cause finding are unlikely to ever seek the services of a private attorney. They will instead likely choose to rely on the EEOC to pursue their interests.<sup>159</sup> After all, most plaintiffs probably consider the EEOC to be their attorney which would undermine the apparent value of a private attorney. It would also be quite difficult for the plaintiff to obtain accurate information regarding the value of an attorney without, of course, seeking the advice of an attorney.<sup>160</sup> Without seeking such advice, all a plaintiff is likely to expect from an attorney is that she would take a sizeable portion of the ultimate award.<sup>161</sup> What this means is that in the current market many of the individuals

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Chrysler Plymouth, 882 F.2d 1235, 1239 (7th Cir. 1989).

<sup>157</sup> There are some instances in which the EEOC will not accept a claim for filing, but they are rare. Typically the agency will accept even claims that are jurisdictionally defective on their face.

<sup>158</sup> See *supra* text accompanying note 50.

<sup>159</sup> This reliance on the EEOC will be particularly true if the EEOC attorney suggests to the plaintiff that a private attorney will offer no additional services, a suggestion that will appear plausible to the plaintiff. Although it is difficult to substantiate this practice other than anecdotally, EEOC investigators clearly have incentives to discourage private attorney involvement. After all, it is almost certainly easier to convince a single plaintiff to accept a settlement than to convince the plaintiff plus a more skeptical and informed attorney, especially when that attorney has a financial interest in the case.

<sup>160</sup> The EEOC, however, does not formally represent the complaining party but instead represents and sues on behalf of the EEOC. As a result, the EEOC is able to settle claims over the objection of the complaining party. To protect her interests, the private party has an absolute right to intervene in the Commission's suit. See *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 878 (1984).

<sup>161</sup> In many cases, this assumption may be correct because a private attorney will not offer much beyond what the EEOC will provide for the plaintiff. Although the EEOC obtains lower settlement amounts than do private attorneys, whether that is because of the nature of the cases or that the EEOC systematically settles for lower amounts is uncertain. The absence of a financial interest in the case, and the fact that the EEOC has no incentive to provide good service in order to obtain additional business, may suggest that the EEOC systematically settles for lower amounts, or at least that the EEOC may not have the same incentives as private attorneys to pursue aggressive settlements. On the other hand, for the

seeking representation will be those for whom the EEOC has issued a no-cause finding, which is obviously the least attractive group of clients.<sup>162</sup>

The sheer volume of claims—and their correspondingly low success rates both administratively and in the courts—creates an additional disincentive for attorneys to offer their representation. With the option of a free investigation available, private attorneys currently have little incentive to initially pursue any but the strongest of claims, in particular those claims that require no investigation. Rather than sifting through the numerous claims to try to find the one that might prove successful, many attorneys prefer to routinely refer cases to the EEOC where the agency will conduct an investigation at the public's expense.

It is too early to tell whether the changes brought by the 1991 Act will provide sufficient incentives to break this cycle. Eliminating the agency, however, would be one way to force attorneys to investigate claims, or in other words, to require attorneys to treat discrimination claims as they do other types of claims, such as tort injuries where the attorneys must differentiate among claims on the merits and conduct some preliminary investigation.<sup>163</sup> The downside that might result from eliminating the agency would be that it may be

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same reasons, the EEOC may be more willing to go to trial than a private attorney where a risky case may obtain significantly higher relief than might have been possible through a settlement, though, of course, some plaintiffs will obtain nothing if the trial is lost.

<sup>162</sup> Attorneys do take cases for which a plaintiff has been issued a no-cause determination, and the EEOC's finding, while often admissible, has no controlling authority over any subsequent litigation. *See McClure v. Mexia Indep. Sch. Dist.*, 750 F.2d 396, 400 (5th Cir. 1985); Note, *Out of Balance: Excluding EEOC Determinations Under Federal Rule of Evidence 403*, 24 LOY. L.A. L. REV. 707 (1991). It would obviously be useful to know the number of cases attorneys take and the success rates on claims on which the EEOC issued a no-cause finding. Regrettably, such data do not currently exist and would be difficult to obtain other than through actual court records. Although, even with court records, the data may be incomplete because the EEOC determination may not be entered into the court record.

<sup>163</sup> Recent changes in the Federal Rules of Civil Procedure concerning discovery ought to facilitate this process. The new mandatory discovery rules provide plaintiffs' attorneys with an opportunity to obtain inexpensive and quick discovery, an opportunity that was not previously available. Moreover, the changes to Rule 11 which now allow an attorney to withdraw a claim or a motion as a way of avoiding sanctions ought to likewise increase the probability that a plaintiff's attorney may take a case that might require further discovery or investigation. In turn, these changes to Rule 11 should decrease the risk of sanctions which will increase the attractiveness of cases, given that civil rights attorneys have long faced a greater risk of sanctions by federal courts than attorneys pursuing other kinds of claims. *See Lawrence C. Marshall et al., The Use & Impact of Rule 11*, 86 NW. U. L. REV. 943, 971 (1992) (documenting that plaintiffs' civil rights attorneys have had a much higher rate of sanctions than plaintiffs' attorneys in personal injury cases).

more difficult for a private attorney to obtain information necessary to evaluate a discrimination claim than it is for the EEOC since the EEOC generally receives voluntary compliance with its information requests from employers. Nevertheless, the attorney will be in the same position as she is with other cases such as torts and the like. The existing structure does not, therefore, provide an accurate guide as to the likely effects of switching to an enforcement scheme that relies on private attorneys or some different combination of private and public enforcement than currently exists.

The lack of development under § 1981 remains to be explained. The failure of private attorneys to develop claims under that statute seems to be largely a function of both the courts' treatment of the statute and perhaps a fair amount of either ignorance or laziness on the part of attorneys, albeit laziness that is fostered by the existing institutional structure. Section 1981 did not become a viable cause of action for employment discrimination claims until 1976 when the Supreme Court held that the statute reached private conduct.<sup>164</sup> At that time, the law treated Title VII claims relatively favorably;<sup>165</sup> it appears that private attorneys did not switch to filing claims exclusively under § 1981 because of either their familiarity with Title VII and its procedures or, perhaps, because of the desire to obtain free discovery by filing charges of discrimination with the EEOC.<sup>166</sup> Ironically, once plaintiffs began in earnest to pursue claims under § 1981 during the 1980s, the Supreme Court significantly restricted the scope of the statute by holding that § 1981 prohibited only discrimination in the formation of new contracts. This holding led to the dismissal of hundreds of claims that had been filed under § 1981.<sup>167</sup> Section 1981, therefore, had a relatively limited lifespan as an important and viable doctrine, which appears to explain its underutilization.<sup>168</sup>

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<sup>164</sup> See *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976).

<sup>165</sup> Paul Burstein and Mark Edwards have demonstrated that plaintiffs in employment discrimination cases fared particularly well at the appellate level through the mid-1970s with a substantial decline thereafter. See Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC'Y REV. 79, 93 (1994).

<sup>166</sup> Many § 1981 claims are filed in conjunction with Title VII claims, which suggests that attorneys sought to avail themselves of the EEOC procedures in the hope of obtaining some discovery or a reasonable cause determination.

<sup>167</sup> See *Patterson v. McClean Credit Union*, 491 U.S. 164, 171 (1989). Quite possibly, attorneys may also have been unduly influenced by the employment discrimination curriculum in law schools which disproportionately focuses on Title VII while providing considerably less attention to § 1981.

<sup>168</sup> The Civil Rights Act of 1991 repudiated the Supreme Court's *Patterson* decision, restoring the statute to its comprehensive scope. See 42 U.S.C. § 1981(b) (1988 & Supp. III 1991).

To suggest that attorneys have failed to explore viable causes of action, or that they send plaintiffs to the EEOC for an investigation that is likely to result in a no-cause determination, may throw into question the underlying premise of this Article, namely that attorneys act rationally in selecting cases. Rationality, however, can only be gauged in the context of the existing system. Under the present system, there exists a costless means of investigation on which, given the alternatives and the volume of claims, it may have been rational for attorneys to rely.<sup>169</sup> Furthermore, when the claims were restricted to backpay, they rarely appeared especially lucrative even when the prospect of obtaining fees from the defendant was factored into the calculus. So it should not be unexpected to discover that attorneys have often been reluctant to pursue discrimination claims. The real issue is whether that reluctance has been a product of the way in which the entire system was structured. As discussed in this section, that certainly seems to be a plausible conclusion, and the recent changes made by the Civil Rights Act of 1991 should likewise affect the existing incentive structure so as to make cases more attractive to private attorneys.

### 3. *Would Individuals Seek Attorney Representation?*

A final question regarding the value of the EEOC concerns whether individuals, particularly those individuals with low-damage claims who are the current beneficiaries of the EEOC, would be less likely to seek attorney representation than they are to file a claim with the EEOC. Individuals might hesitate to pursue an attorney for a number of reasons—fear of the possible costs of an attorney, for example, or a belief that an attorney would not be interested in taking a small claim.<sup>170</sup>

Indeed, it has been argued that higher wage employees are the most likely to pursue a discrimination complaint because the higher value of their claim renders it more economically viable.<sup>171</sup> This argument had greater validity,

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<sup>169</sup> Jon Elster has pioneered much of the relevant work on the importance of context to the study of rational behavior. See JON ELSTER, *SOUR GRAPES* 26–31, 121–33 (1983). For a similar argument see ROBERT NOZICK, *THE NATURE OF RATIONALITY* 41–63 (1993) (discussing the symbolic utility as related to prisoner dilemma games).

<sup>170</sup> As noted earlier, these factors are not unique to employment discrimination cases, but rather they explain why most low-value claims of all kinds are generally not pursued. See *supra* note 119 and accompanying text.

<sup>171</sup> See Donohue & Siegelman, *supra* note 1, at 720. This argument is tied to the notion that a higher wage job will translate into a higher value claim. But since backpay is a function of the wage multiplied by the duration of unemployment, to the extent that a higher wage employee has an easier time finding a comparable replacement job, then that person's

however, when damages were unavailable to plaintiffs, though even then the conclusion that higher wage employees are the most likely to pursue their claims overlooks the importance of the claim's marginal value to the plaintiff. To a low-income plaintiff, a small claim may have substantial value, while that same claim may be of lesser importance to a wealthier claimant. Therefore, it seems that the probability that an individual will pursue a claim cannot turn solely on either the wage that is at issue or the absolute value of the claim. Nonmonetary factors may also create disincentives for some plaintiffs to sue. For example, if filing suit has market disadvantages such as in one's reputation, then the individual for whom reputation appears relevant may refrain from suit more readily than someone who is not concerned with such reputational effects.<sup>172</sup> So it is one thing to say that all things being equal, one would expect an individual to pursue a larger rather than a smaller claim, but it is another thing to say that all things are equal.

But here the question is whether an individual might be reluctant to seek out a private attorney in order to vindicate her claim of discrimination, whereas she might otherwise file a claim with the EEOC. To address this issue, one can begin with the knowledge that individuals already rely on private attorneys to handle the vast majority of all kinds of claims. It is not clear that individuals would be any less likely to seek representation on a discrimination claim than they might on a tort claim, though presumably it is more important for the government to be involved in remedying discrimination than to aid in the resolution of torts. Moreover, as earlier demonstrated, an individual who obtains private representation is likely to obtain a higher monetary award than she might receive if the EEOC pursues her claim,<sup>173</sup> which should provide a sufficient incentive for a plaintiff to prefer private counsel to the EEOC.

This does not mean that there would not be fewer claims filed if the agency were no longer available to all plaintiffs. To be sure, one of the premises of this Article is that there should be fewer claims filed given the number of nonmeritorious claims that the current system appears to encourage. The more difficult question is whether the claimants who might be discouraged from filing would be the ones that should be discouraged—those whose claims have no real likelihood of success but which are filed solely because there is a relatively costless means of initiating a claim. Assuming individuals engage in

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claim may not be any larger than an individual with a lower wage job but a higher period of unemployment or underemployment.

<sup>172</sup> It also seems plausible that reputation is more relevant at higher income jobs where there might be better information flow among employers given that the employer will have a greater incentive to search out detrimental information due to the greater monetary risk at issue with the job.

<sup>173</sup> See *supra* text accompanying notes 87–90.

some cost-benefit analysis, one would expect those claims to comprise the bulk of claims that would not be brought through a system that relied on private representation. As discussed earlier, increasing the costs of filing decreases the expected value of the claim, which should deter those claims that are currently filed because the system is costless.<sup>174</sup> Moreover, many individuals with nonmeritorious claims will likely not be able to find an attorney willing to take the case.

Certainly some meritorious claims may also be discouraged, but the net effect will be that those claims that are filed will have a higher probability of success, assuming they are able to obtain attorney representation. Therefore, by encouraging claimants to seek out private representation, the system should deliver fewer aggregate claims while providing relief to a much higher percentage of those claims, which simply returns us to one of the original questions, namely what is the underlying purpose of the system. If the system is intended to provide redress for meritorious claims of discrimination, one should be encouraging those individuals to seek out representation because individuals who obtain counsel will, on average, fare better in the system.<sup>175</sup>

It might also be argued that requiring an individual to file directly in federal court would discourage some individuals from filing because the federal court might be considered more public or intimidating than the EEOC. Whatever advantages individuals may feel with the EEOC, however, are likely to be more perceived than real. Indeed, the reality is that courts provide a safer haven for victims of discrimination than the EEOC due to their stronger remedial powers. For most individuals, the disincentive to file employment claims stems from a fear of retaliation, at least for those who are not job applicants.<sup>176</sup> Even for job applicants, the fear of obtaining a reputation as a troublemaker can operate as a strong disincentive to filing a claim. As far as mitigating this concern, the EEOC is no less public than a federal court because in both instances, the employer will be promptly notified of the claim and it is

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<sup>174</sup> See *supra* text accompanying notes 101–02.

<sup>175</sup> This conclusion follows from the earlier analysis of the monetary remedies obtained for plaintiffs which demonstrated that awards obtained by private counsel tend to be significantly higher than the awards obtained by the EEOC. Again, it is worth noting that one cannot be certain whether this is a result of differences in the kinds of cases that are taken or whether it is a function of the way the EEOC operates. For a discussion of the general value of lawyers in the litigation process see Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 313 (1991).

<sup>176</sup> See *Cross v. State of Alabama Dept. of Mental Health & Mental Retardation*, 49 F.3d 1490, 1494–99 (11th Cir. 1995); *Hutchison v. Amateur Elec. Supply*, 42 F.3d 1037, 1042 (7th Cir. 1994); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1140 (5th Cir. 1991).



at that point that the immediate and feared possibility of retaliation arises.<sup>177</sup>

Where the difference arises between the two bodies is in the diverse remedial powers of the EEOC and federal court. On the one hand, if the EEOC suspects retaliatory actions on the part of the employer, it can seek a protective order from the court, but it has no contempt or sanctioning power of its own.<sup>178</sup> Even if the EEOC draws an "adverse inference" in its investigation, or even if it were to enter a finding of discrimination based on retaliatory acts, those findings would ultimately be subject to de novo review in the federal court.<sup>179</sup> The EEOC's powers undoubtedly provide some incentive for employers not to retaliate against employees, but far less than when the case is in the federal court where a court can enter adverse findings from retaliatory acts that are not subject to de novo review by an appellate court.<sup>180</sup> From this perspective, the federal court ought to provide a more accessible forum for the filing of claims, and those individuals with meritorious claims ought to be willing to pursue them even if the EEOC were disbanded.

### B. *The Deterrence Value of the EEOC*

Throughout this Article, the focus has been primarily on how successful or unique the EEOC is in remedying violations of discrimination. Another value the EEOC may add to the enforcement process is deterring workplace discrimination through its presence, if not its processing of claims or litigation activity. Employers may, for example, temper their discriminatory tastes or employ greater safeguards against discrimination in order to avoid having an EEOC charge filed against them. Of course, this kind of value is difficult to measure. Ideally one might want to measure whether discrimination had decreased after the EEOC was established, but since the life of the EEOC is coextensive with the birth of Title VII it is not possible accurately to isolate the influence of the agency.<sup>181</sup>

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<sup>177</sup> The EEOC is required to inform the employer of the charge within 10 days after the charge is filed. *See* 42 U.S.C. § 2000e-5(b) (1988) (providing that the Commission shall serve the charge on the employer within 10 days of its filing).

<sup>178</sup> *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("The Commission cannot adjudicate claims or impose administrative sanctions.").

<sup>179</sup> *Cf. Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir. 1994) (a finding of reprisal is for the trier of fact).

<sup>180</sup> The district court's findings would be subject to a clearly erroneous standard of review. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985).

<sup>181</sup> A number of studies have sought to measure the influence of Title VII on the economic progress of protected groups, primarily African-Americans. *See BLOCH, supra* note 2 (suggesting that Title VII has not made significant changes in the status of African-Americans); *Burstein & Edwards, supra* note 165, at 102 (concluding that "a strong

However, there are a number of reasons to believe that the agency qua agency adds no significant deterrent value, or at least no particular value that an enforcement scheme which relied primarily on private attorneys would not offer. First, given that the EEOC provides such limited, and occasional, relief, a rational employer ought not to be substantially deterred by its presence. Deterrence, after all, is primarily a function of the probability of detection of wrongdoing measured against the penalties imposed. For cases processed by the EEOC, the probability of detection, as determined by the likelihood of a cause finding, is exceptionally low, and the costs of detection are likewise relatively low—especially when compensatory and punitive damages were unavailable to plaintiffs.<sup>182</sup> Even when one focuses on the probability of providing compensation on claims, rather than the likelihood of a cause finding, the probability remains small. Only about fifteen to twenty-five percent of the charges filed will result in some form of compensation to the plaintiff as a result of the EEOC's role in the process.<sup>183</sup>

Additionally, the EEOC's procedural structure can function as a barrier to meritorious cases coming to judgment, which may undermine the agency's deterrence value. For example, if the chances of a meritorious lawsuit reaching judgment decrease because of the EEOC procedures, in that a certain number of cases will be dismissed for failure to comply with the administrative procedures, then the agency's deterrence value should be reduced because the probability of detection, in fact, decreases as a result of the EEOC procedures.<sup>184</sup>

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argument can be made that the courts were essential to whatever gains blacks made" in the 1970s); John J. Donohue, III & James Heckman, *Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603 (1991) (discussing effect of the legal changes). None of these studies, however, has sought to isolate the influence of the EEOC as a factor in altering the employment conditions of protected groups.

<sup>182</sup> Here by costs, I mean the amount paid to the claimant, which Tables 4-5 *supra* indicate is between \$7,000-\$15,000.

<sup>183</sup> See *supra* text accompanying notes 46-47. The 25% figure is arrived at by excluding those cases that are withdrawn from the EEOC by private attorneys. Because the focus here is on the role of the agency, the figures relied on in the text do not include those claims that are currently resolved by private attorneys in federal court. With or without the agency, these cases would still be resolved by private attorneys. Although there is some possibility that these cases may not have been filed without the benefit of the EEOC investigation, it is unlikely the investigation played a significant role for a sizable group of cases, or that an attorney would not have been able to conduct a similar investigation to achieve the same result.

<sup>184</sup> It is doubtless true that these cases would still require the expenditure of costs on litigation, but as long as those costs do not exceed the expected value of a judgment then the

The large volume of nonmeritorious filings the current system encourages also may limit its deterrence value. An enforcement strategy that relies on many false accusals, as does the present system, can lead either to overdeterrence among employers, or alternatively may decrease a firm's incentives to comply with the law because the likelihood of a charge being filed may be unrelated to the firm's compliance with the law.<sup>185</sup> In other words, a high volume of nonmeritorious cases may lead an employer to conclude that it will be sued regardless of what it does, which in turn may decrease compliance incentives. A more accurate enforcement strategy—where there are fewer charges but those charges have a higher probability of leading to litigation—would operate as a stronger deterrent. Importantly, such a strategy is more likely to arise under a private market than through the present system, assuming that there is currently a connection between the large volume of nonmeritorious suits and the relatively costless procedure for filing claims the EEOC currently offers.

A private enforcement system may also increase deterrence in other ways as well. For example, the EEOC does not recover its attorneys' fees from successful litigation,<sup>186</sup> which may provide an additional disincentive for defendants to comply with the law because it decreases the potential penalties that attach to violations. To the extent that the probability of settlement is tied to the value of the case, allowing for private attorneys ought to encourage more settlements both because they can recover their fees and they tend to receive higher settlements.<sup>187</sup>

In moving away from the public agency structure, there may be a concern with the probable increase in costs to defendants. It is possible that defendants' costs would increase either because they will be required to pay out more compensation to plaintiffs or because they will incur higher costs of litigation, assuming it is more costly to defend against a court suit than an administrative charge. Yet, it is also difficult to know whether litigation costs would increase for defendants. Whether the aggregate litigation costs would be higher ultimately depends on the cost of litigation compared to the cost of proceeding

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deterrence would be limited—even more so given that the litigation costs would be incurred in any event for those cases that are filed in federal court.

<sup>185</sup> See Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J. LAW, ECON. & ORG. 279, 289 (1986) (uncertainty of punishment can increase incentives to overcomply); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J. LAW, ECON. & ORG. 99, 100 (1989) (false accusals or convictions may decrease incentives to obey the law).

<sup>186</sup> 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993) (prohibiting the Commission from obtaining attorneys' fees).

<sup>187</sup> See *supra* text accompanying notes 87–90.

administratively, as well as the relative volume of claims the two systems produce. As detailed in the next section, by moving away from an agency structure, one would expect significantly fewer lawsuits to be filed compared to the number of claims that are currently filed with the agency. Any increase in costs may therefore be mitigated by a reduction in the volume of charges that are filed.

While increased litigation costs may raise social welfare concerns, requiring employers to pay out more compensation to plaintiffs seems less problematic. As long as the increase in compensation does not arise from the need for employers to settle nuisance litigation, employers should be no worse off than they ought to be given that their higher costs would be due to a higher percentage of the victims of discrimination receiving compensation. By itself, paying more compensation should not result in any social harm since all that would be occurring would be the imposition of greater sanctions as a way to conform the defendants' behavior to the established norm. Indeed, one would presume that defendants would eventually adjust their levels of discrimination to the increased costs of that discrimination, which ought to serve as an additional deterrent.<sup>188</sup>

Where a clear deterrence loss might be felt due to a switch to private enforcement would be if the EEOC functioned as an independent enforcement agency choosing which companies to investigate regardless of whether a particular charge of discrimination had been filed. Indeed, the EEOC has the power to investigate discrimination without the necessity of having a particular charge from an individual,<sup>189</sup> but this power is rarely if ever invoked by the Commission.<sup>190</sup> As a result, the EEOC is almost entirely dependent on charges for its enforcement activity, and moving to a private enforcement scheme should not result in any deterrence loss from the EEOC's independent investigative authority.

In short, there is no reason to believe a private system would provide any less deterrence than the agency structure as currently constituted. On the contrary, it appears that a private system may provide a superior form of

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<sup>188</sup> See Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL. J. ECON. 213 (1983) (discussing the effect of a contingent fee); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation & Accident Prevention*, 20 J. LEGAL STUD. 381 (1991) (arguing that the increased incentive to sue under contingent fee arrangement induces greater care by injurers).

<sup>189</sup> The EEOC is empowered to investigate discrimination on its own accord and to file charges on behalf of the Commission. See 42 U.S.C. § 2000e-5(b) (1988).

<sup>190</sup> In its annual reports, the EEOC provides no indication of having pursued claims without the benefit of a charge having been filed. See, e.g., EEOC OFFICE OF PROGRAM OPERATIONS, *supra* note 26.

deterrence by focusing on fewer but more meritorious charges and by increasing the cost of penalties through the provision of attorney's fees and higher settlements.

### C. *The Effect on the Judiciary*

One objection to moving to a private enforcement scheme for individual cases of discrimination is likely to concern the burden such a system might have on the judiciary—a judiciary that is already viewed as substantially overburdened.<sup>191</sup> Simply mentioning the prospect of eliminating the agency is likely to produce horrific images of 80,000 to 100,000 new federal lawsuits being filed each year. It is, however, extremely unlikely that all of the charges that are currently filed would be transformed into lawsuits. After all, a main premise of this Article has been that the present system encourages the filing of nonmeritorious charges and that those charges have substantially limited the effectiveness of the entire system.

Accordingly, moving toward an enforcement scheme that relies on private attorneys would reduce the number of such claims insofar as the current system provides a free opportunity for aggrieved individuals to file charges. Filing a charge with the EEOC is largely, though not entirely, costless.<sup>192</sup> In contrast, without the EEOC, a plaintiff would have to either find an attorney willing to take her case, which will involve search costs and the likely prospect that at least some attorneys would decline representation, or decide to file a complaint *pro se*.<sup>193</sup> Under either scenario, filing a suit would be considerably more difficult for the plaintiff than going to the local EEOC office to fill out a charge of discrimination. Therefore, the current number of charges do not provide an accurate measure of the number of lawsuits one could expect if claims were no longer filed initially with the agency.

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<sup>191</sup> See, e.g., RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) (documenting the workload of the federal courts); Kenneth W. Starr, *The Supreme Court and the Federal Judicial System*, 42 CASE W. RES. L. REV. 1209 (1992) (discussing federal judiciary's workload).

<sup>192</sup> There is the cost of time to file the charge, which may include time waiting at the EEOC office. However, almost by definition, most individuals filing charges have time on their hands since their claims will either involve an allegation of failure to hire or unlawful termination. See *supra* text accompanying notes 64–65 (documenting that 70% of cases involved hiring and discharge cases).

<sup>193</sup> Outside of prisoner cases, *pro se* litigation appears to comprise a rather trivial amount of the federal court docket. See Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1131 (1987) (documenting the extent of nonprisoner *pro se* litigants and concluding that the cases present no significant burden on the courts).

This is not to suggest that there would be no increase in federal court filings. On the contrary, assuming attorneys respond to the changes by taking cases currently resolved by the EEOC, there would almost certainly be a significant increase in filings. How large an increase is difficult to predict, although one may use some of the current figures to provide a reasonable though somewhat imprecise estimate. As earlier noted, the EEOC resolves through its administrative system approximately twelve thousand cases a year with determinations that are favorable to the plaintiff.<sup>194</sup> If one assumes the cases resolved by the EEOC represent the universe of meritorious claims that are not currently resolved by the private bar, then one would expect that same number of claims, about twelve thousand, to be favorably resolved on behalf of plaintiffs in any particular year through attorney representation.

It is unlikely, however, that all of these cases would result in actual lawsuits. Some meritorious cases would not be brought. Moreover, as indicated earlier, many charges are currently settled very quickly by the EEOC without any formal investigation, and there is no particular reason private attorneys would not be able to obtain the same result prior to filing a complaint, through, for example, the issuance of a demand letter.<sup>195</sup> There is also a continuing increase in the use of arbitration for employment discrimination claims along with a growing judicial acceptance of alternative dispute resolution, both of which should limit somewhat the number of federal lawsuits handled by private attorneys.<sup>196</sup>

Yet, there will also be many cases brought that are not resolved favorably to plaintiffs. If one assumes that there would be approximately ten thousand new cases filed by private attorneys that would ultimately result in relief for plaintiffs, which takes into account that some cases will be settled and others will not be brought, then one must also determine how many additional cases

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<sup>194</sup> See *supra* Table 1. The private bar resolves another 8,000 to 10,000 cases a year, some of which were processed by the EEOC, but those cases will be largely unaffected by moving toward a private enforcement scheme.

<sup>195</sup> Most attorneys precede a lawsuit with a demand letter to the defendant, which provides a ready means for presuit settlements. Demand letters may, in fact, send a stronger signal to the employer than a charge filed with the EEOC. Because of the importance attorney representation has to a case, this stronger signal may also lead to a higher number of settlements.

<sup>196</sup> See WILLIAM B. GOULD, IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 262 (1993) (predicting further increases in arbitration); Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521 (1994) (discussing recent changes in the law); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor & Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993) (documenting the rise in arbitration).

are likely to be filed, that will not be resolved favorably for plaintiffs. For this determination, one can rely on the percentage of cases that are currently settled in favor of plaintiffs of those filed in federal court, which was earlier shown to be approximately sixty-five percent, or two-thirds of the cases.<sup>197</sup> Using the 10,000 figure as the base, one would then expect another 5,000 or so cases to be filed that are ultimately dismissed or lost at trial, which would bring the increase in filings to approximately 15,000 new federal cases.

This is by no means a trivial number of cases, and would add approximately 6.5% to the federal civil workload.<sup>198</sup> Although that may be a substantial increase, that by itself should not justify preserving the current system. In fact, it is possible that the workload of the federal courts will not increase substantially because a direct result of eliminating the agency structure would be a decrease in the litigation that currently occupies much of the courts' time involving the administrative procedures.<sup>199</sup> Given that litigation over the administrative procedures accounts for a significant amount of the work of the federal courts on employment discrimination claims, eliminating or modifying the agency would result in a tradeoff between the nature of the work the court conducts on substantive issues involving newly-filed cases and the procedural issues that are currently litigated. How these issues would weigh out—whether there would be a net increase in the courts' workload—is purely speculative, but it is safe to assume that whatever increase there might be would be substantially less than the volume of filings might otherwise indicate. Moreover, nearly twenty percent of employment discrimination cases require no court activity,<sup>200</sup> and over half of the remaining cases are resolved prior to the pretrial conference, which would suggest that the actual increase in the work of the courts will likewise not correspond to the increased number of filings.<sup>201</sup>

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<sup>197</sup> See *supra* note 84.

<sup>198</sup> In 1992, there were 230,509 civil suits filed in federal court. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 83, at Table C-2A. Fifteen thousand new cases would represent a 6.5% increase in the total filings.

<sup>199</sup> See *supra* notes 36–37 and accompanying text.

<sup>200</sup> According to the data provided by the Administrative Office of the U.S. Courts, 1,476 of the 7,758, or 19%, of the employment discrimination cases that were terminated in federal court during 1992 required no court action. ADMINISTRATIVE OFFICE OF THE U. S. COURTS, *supra* note 83, at Table C-4. In contrast, for bankruptcy cases only 14.8% of the claims were resolved without court action. *Id.* These figures are roughly consistent with the broad patterns of civil cases, many of which require little to no discovery. See Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 758 (1995) (noting that many of the cases filed in federal court conclude with token or no discovery).

<sup>201</sup> Of the total, 4,150 or 53.5% were resolved prior to the pretrial conference. *Id.*

Even assuming a significant increase in the workload of the courts, that should not settle the question of the merits of the existing system. It instead returns us to one of the questions we began with, namely why discrimination claims are treated differently from other kinds of disputes that are filed in federal court. Assuming an increase of fifteen thousand or so federal cases, there would still be fewer employment discrimination claims in federal court than there are personal injury cases.<sup>202</sup> If discrimination claims have been treated differently because they are more important and more deserving of governmental attention than other kinds of claims, as our national policies against discrimination suggest, then an increase in the judicial workload by itself should not prevent structural changes which will result in providing more, and more effective, relief to the victims of discrimination while reducing systemic inefficiencies that currently define the existing agency structure. On the other hand, if discrimination claims have been subjected to an agency procedure because they are too plentiful and trivial to engage the courts, then the increase in the federal workload may appear too substantial and undesirable. Yet, it seems more likely that it is the importance of the claims that has justified their differential treatment and that importance should counsel in favor of providing a proper forum for discrimination claims.

#### IV. PROPOSALS FOR REFORM

In this section, I will explore various proposals for reforming the enforcement scheme for employment discrimination claims. To this point, I have largely concentrated on addressing two stark alternatives—the current structure measured against eliminating the agency and thereby relying on private attorneys to enforce individual claims of discrimination.<sup>203</sup> But other alternatives might be more desirable in trying to fashion a superior enforcement regime, and I will now discuss several possible alternatives, as well as the elimination of the agency.

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<sup>202</sup> Adding 15,000 cases would bring the total of employment discrimination cases to approximately 26,000. In contrast, in 1992, there were 34,480 personal injury cases filed in federal court. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 83, at Table C-2A.

<sup>203</sup> I am here qualifying the enforcement scheme because it is certainly conceivable that an agency could provide greater enforcement of class action cases than a private system might, given the costs and risks of prosecuting such actions. That said, it was earlier demonstrated that the vast majority of the EEOC's work involves individual claims of discrimination therefore displacing the agency in its current form would not alter the prosecution of class action cases. See *supra* text accompanying note 66.



### A. *Eliminating the Agency*

The previous analysis has demonstrated that the EEOC currently serves two, or perhaps three, functions. As its primary function, the agency processes thousands of claims, determining that the vast majority of them are without merit. In addition, the EEOC provides a forum for low-value claims that might not otherwise exist insofar as the monetary value of these claims might be too low to justify either a plaintiff's effort in securing counsel or an attorney's effort in pursuing the case given that the expected fees may not justify the opportunity costs or time necessary to prosecute the case properly.<sup>204</sup>

It could also be argued that the EEOC serves an additional function by providing a forum for individuals to file claims with a corresponding hope that the government will act to remedy the claimed violation. This function could be classified as a process value, one that may enhance the system's legitimacy by providing a message of governmental concern with eradicating discrimination. Yet, assuming the EEOC serves this function, it is far from clear that it is desirable even from a process perspective because there is plainly a deceptive aspect to the entire process. Presumably, the hope that is invested in filing a claim stems from the possibility that some relief might be provided, whether that relief be in the form of money or other institutional change. But as the data indicate, very few of the individuals who rely on the EEOC will obtain any remedy at all. Almost certainly, if plaintiffs knew that the agency found cause in only five percent of the findings it renders, while another ten percent of the claims resulted in favorable settlements, they would likely feel much less sanguine about the value of the process and whatever potential value the system offered would be lost. Indeed, the message the current system sends is that the government believes most discrimination claims are without merit, which is a far cry from a message of governmental concern or a commitment to eradicating discrimination.

The process value of the EEOC is further limited given that plaintiffs who obtain attorney representation have what appears to be a sixty to sixty-five percent chance of obtaining some relief.<sup>205</sup> The empirical data presented in this Article suggests that individuals who are able to obtain counsel will have a far greater likelihood of obtaining relief and that relief is also likely to be approximately twice as high as that which might be obtained by the EEOC. This may, of course, be due to the kind of claims that are filed, or left, with the agency. But if that is true, it suggests that the claims for which individuals are unable to obtain representation are, in fact, without merit or less meritorious

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<sup>204</sup> *But see supra* part III.A.2, where it was shown that the expected fees may exceed the expected damages in a case.

<sup>205</sup> *See supra* text accompanying notes 83-84.

than those which are currently removed from the system by private attorneys. Otherwise there would be no clear explanation for the differential success rate on the claims that are left with the agency. Surely one must question the need for the EEOC to provide a forum for the inexpensive filing of nonmeritorious complaints.<sup>206</sup> Similarly, if it is not the nature of the cases that explains the differential success rate, then the problem would seem to lie with the manner in which the agency is handling cases—either dismissing more cases than the evidence would warrant or systematically settling cases for less than private attorneys are able to obtain. Either of these explanations obviously counsels against maintaining the agency system.

The one distinct function the EEOC appears to serve with respect to claim adjudication is providing a market for low-value claims.<sup>207</sup> The entire structure, however, may not be necessary to fulfill that limited function, and it may also be the case that if the EEOC were disbanded private attorneys, state agencies or public interest groups would fill the role currently satisfied by the agency. Therefore, if the alternative is between the agency as currently structured and eliminating the agency so as to rely on private attorneys, it appears that the latter system would provide a superior enforcement scheme, especially when one factors into the balance the many cases that are currently dismissed for failure to comply with the administrative procedures. As a result, it seems clear that, in the aggregate, the plaintiff class would fare better without the agency structure, and there does not appear to be any clear loss to defendants other than the possibility of paying out greater compensation to the

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<sup>206</sup> As currently structured, the EEOC is a rather expensive and elaborate means for providing a complaint process, assuming the purpose is to provide some notion of process to those who are disgruntled. If process without any meaningful probability of relief is the intent of the system, then it would seem more desirable to have a system where there is no pretense to investigation following the filing of a complaint. Of course, absent the prospect of an investigation, there would be little value to the process. But what I am suggesting here is that there is little real value to the current process and a sham procedure would at least have the advantage of substantial cost savings.

<sup>207</sup> The EEOC also serves important policy functions such as developing guidelines governing certain areas of the law. *See, e.g.*, 29 C.F.R. § 1604.11(a) (1995) (establishing guidelines for defining sexual harassment). If the agency were abolished, this function could presumably be preserved by either transferring the power to draft guidelines to either the Department of Labor or the Department of Justice, both of which have some responsibility for enforcement of employment discrimination laws. One significant advantage as a policymaking body the EEOC can have over the Department of Justice is that, unlike the EEOC, the Department of Justice is one of the largest employers subject to employment discrimination claims and its role as a defendant in such suits can often conflict with what might be in the best interests of plaintiffs. Thus, it is also possible that it would be desirable to preserve the EEOC as a policymaking body in some form.

victims of discrimination.

### B. *Should the EEOC Be Optional?*

Another possible reform would be to make the filing of a claim with the EEOC optional. This would have the advantage of leaving the decision whether to avail oneself of the agency to claimants and attorneys, allowing them to determine and pursue what is in their own best interests.<sup>208</sup> Those individuals who were able to obtain counsel and for whom an agency investigation would be of little value could decide to file directly in court, bypassing the agency entirely. To complete this reform, it might also be possible to change the legislation so that filing a claim with the agency would be binding on the parties subject to appellate review in order to avoid wasteful de novo court hearings.<sup>209</sup> This would have the advantages of remedying the nonbinding quality of the current structure and of shifting responsibility to the party for making the choice—and accepting the consequences—of proceeding through the agency or directly in federal court.<sup>210</sup>

Moving to a system in which filing with the EEOC would be optional produces some procedural difficulties, particularly in trying to create a reasonable transition period, as well as in finding ways to provide adequate information to claimants regarding their available options. Without such information, given how entrenched the current procedures appear to be, many claimants might unwittingly proceed through the EEOC without knowing their options, or even knowing that the system had been changed. This problem could be remedied if the EEOC provided clear and accurate information to the claimants prior to the commencement of the filing, and it might also be possible to provide a grace period during which claimants could remove their claims from the EEOC so as to take their case to federal court within a designated

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<sup>208</sup> This is effectively the procedure that currently exists for race discrimination claims since individuals have a choice to file under either Title VII or § 1981, and under the latter statute the claim is not filed with the EEOC. Additionally, filing a charge prior to commencing a federal suit is optional for Equal Pay Act claims. *See supra* note 1.

<sup>209</sup> The Fair Housing Act provides for a similar procedure where either party can opt to proceed in federal court following a cause determination by the agency responsible for enforcing the act. *See* 42 U.S.C. § 3612(a) (1988) (providing right to elect to proceed administratively or in federal court). The final order of the Secretary of Housing & Urban Development is thereafter reviewable by the United States Court of Appeals. 42 U.S.C. § 3612(j) (1988).

<sup>210</sup> It might also be possible, as Professor Craver has suggested in his comments on this Article, to require plaintiffs who lose in federal court after having received a no-cause finding from the agency to pay the defendant's attorneys' fees for the court litigation.

period of time.<sup>211</sup>

There may also be a concern that those individuals who opt to proceed through the EEOC would ultimately receive a form of second-class justice, with those individuals likely being concentrated disproportionately among low-damage claimants. That perception may be muted somewhat, however, when one realizes that for many individuals the current system is, in fact, optional since it is currently possible to withdraw claims from the EEOC prior to the completion of investigations, and race claimants have the option to proceed by filing a § 1981 cause of action. Under the present system, those who already have attorneys or the wherewithal to withdraw their claim from the EEOC have a distinct advantage; rendering the entire process optional would simply institutionalize that advantage and eliminate the needless but potentially costly practice of filing a claim in order to receive a right-to-sue notice.

The disadvantage to the optional procedure is that it provides only limited reform. There would likely be no decrease in the volume of nonmeritorious filings with the EEOC and the agency would likely continue to provide poor service to those who opted for that route. While moving to an optional system may provide a socially salutary ability to blame those who choose the EEOC, it would seem better if one were able to achieve more wholesale reform as a way to reduce the volume of claims and increase attention on those claims most warranting relief. An optional proceeding would get us only part way to the desired goal.

### *C. The EEOC as a Legal Services Corporation*

Another possibility would be to transform the agency entirely by having the EEOC focus on claims the market is not likely to serve. Given that the primary value the EEOC currently provides is a forum for low-damage cases, and assuming those are the cases for which the agency is necessary, there are several possible means to retain this feature of the current system without requiring the maintenance of the entire agency structure. One problem in constructing an agency to resolve low-damage cases is creating a monetary jurisdictional baseline for the agency. Because damages are available for proof of intentional discrimination, it would be difficult to arrive at the equivalent of a small claims forum for employment discrimination claims, unless the claimant

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<sup>211</sup> It might, of course, also be possible to keep the existing nonbinding procedures while simply making those procedures optional as well. At that point, however, one must wonder what the value would be in having a nonbinding and optional procedure, particularly where such a system would likely impose excessive costs on defendants who would have a very difficult time assessing their likely litigation expenses.

was willing to waive a right to obtain damages beyond a specified level.<sup>212</sup>

Instead of concentrating on the level of damages, it may be more desirable to create an agency structure for low-income claimants—particularly since there is likely to be some relation between low-damage claims and low-income individuals.<sup>213</sup> In fact, it might be possible to have Legal Services offices assume this work of the EEOC for eligible low-income claimants using the eligibility criteria already in place for Legal Services.<sup>214</sup> If this procedure were adopted, instead of filing a claim with the EEOC a claimant would seek assistance from the Legal Services Corporation. To be sure, the Legal Services offices are overburdened and adding to their workload may be either undesirable or infeasible under any circumstances. But if the focus is on the responsiveness of the system to low-income plaintiffs, the questions are whether Legal Services attorneys are any more burdened than the EEOC, or whether Legal Services attorneys would provide any less service to low-income plaintiffs. Although there may be an increased burden on the Legal Services Corporation, low-income plaintiffs would likely fare just as well with Legal Services as with the EEOC. Moreover, if the law were changed to permit Legal Services attorneys to recover their attorneys' fees from Title VII litigation, the alternative may appear more promising than the EEOC.<sup>215</sup> Allowing Legal Services offices to handle discrimination suits may, however, seriously interfere with their ability to provide adequate service for their other clients.

Therefore, rather than shifting the work to Legal Services offices, it might be preferable to scale down the EEOC to the point that it concentrates on cases where it can be of particular value. Along these lines, the EEOC might serve as an agency solely for low-income plaintiffs, becoming in effect a Legal Services agency for discrimination complaints. If it is only the class of low-income plaintiffs who benefits from the agency system, then perhaps we may want to

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<sup>212</sup> A level of \$50,000, which corresponds to the lowest damage cap provided under Title VII, might be one feasible level, though this may open the agency to a great many claims and also force the agency to involve itself only with small employers. It seems ironic, if not foolhardy, to have the government agency concentrate its enforcement efforts only on small employers.

<sup>213</sup> See *supra* note 122.

<sup>214</sup> This would presumably require a change in the Legal Services Corporation's statutory authorization, which currently prohibits the Corporation from providing assistance on any fee-generating case. See 42 U.S.C. § 2996f(b)(1) (1988).

<sup>215</sup> To alleviate some of the burden, some portion of the EEOC's budget might be transferred to the Legal Services Corporation. Of course, this may not be a feasible political option given that for years there have been attempts to eliminate the Legal Services Corporation and it is currently experiencing a significant cut in its own budget.

retain the system only for that class of plaintiffs.<sup>216</sup>

Of course, it is not necessary to limit the EEOC solely to low-income claimants. In addition to serving low-income plaintiffs, the EEOC might continue to pursue certain policy functions such as issuing regulations or filing amicus briefs, and it might also be retained for the purpose of administering new causes of action. In terms of current legislation, the EEOC might continue to process all claims filed under the ADA for a specified period of time. The ADA is a distinctly different statute from other antidiscrimination statutes—in particular, the statute's breadth raises many questions regarding how a disability is defined and it will require a substantial amount of time before some of the definitional and jurisdictional issues are resolved.<sup>217</sup> There are also many new questions surrounding an employer's obligations under the statute since, unlike other acts, the ADA provides employers with a cost defense as to what constitutes a reasonable accommodation.<sup>218</sup> In these areas, the EEOC might perform a valuable function in helping to shape the law and resolve the many ambiguities that accompany any new legislation.

Somewhat ironically, the EEOC cannot now fulfill this function for ADA claims because the agency is overwhelmed with tens of thousands of other claims arising from different statutes. Allowing the EEOC to focus on particular claims, or the claims of low-income individuals, would enable it to concentrate on areas where its expertise or resources could be put to their most valuable uses.<sup>219</sup> Keeping ADA claims at the EEOC would also alleviate some of the burden on the federal courts that would result if a private enforcement scheme was substituted for the current agency structure insofar as the ADA represents the fastest growing portion of the EEOC's current docket.<sup>220</sup>

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<sup>216</sup> As noted throughout this Article, it is difficult to make the strong assumption that low-damage cases are correlated with low-income plaintiffs.

<sup>217</sup> For example, the ADA covers "qualified individual[s] with a disability" which the Act defines as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1988 & Supp. V 1993). The Act also includes provisions for reasonable accommodation and undue hardship, terms that because of their statutory definition do not have clear legislative parallels in other employment discrimination statutes. *See* 42 U.S.C. § 12111(9) & (10) (1988 & Supp. V 1993).

<sup>218</sup> 42 U.S.C. § 12112(b)(5)(A) (1988 & Supp. V 1993) (providing employer with a defense when a reasonable accommodation would amount to an undue burden on the employer).

<sup>219</sup> If the EEOC were retained for new statutes, it could also have a definite time period, perhaps processing claims for eight years from the statute's effective date.

<sup>220</sup> *See supra* note 42.

#### D. Increasing the Powers of the EEOC?

One final proposal might be to try to strengthen the EEOC by providing it with greater adjudicatory powers including the power to impose sanctions and assess punitive damages. These new powers might also be combined with legislation making the EEOC's findings binding subject to deferential appellate review as some commentators have recently suggested.<sup>221</sup> These proposals, however, ignore the actual operation of the EEOC, which issues cause findings in so few cases and resolves comparatively few cases in favor of plaintiffs that allowing the EEOC to have the final word on claims of discrimination—without a substantial restructuring of the agency—would be tantamount to providing employers a license to discriminate. Indeed, given the low number of cause findings, making the EEOC procedures mandatory and binding would almost certainly reduce the number of settlements that are currently obtained, since employers would no longer fear federal court enforcement of any kind and could rest on the knowledge of the low probability that any particular claimant would obtain relief through the EEOC. The interests of plaintiffs along with the history of the EEOC surely counsel against increasing the agency's responsibility without fundamentally restructuring the agency in order to provide a true enforcement mandate. This latter issue would require, at a minimum, that the EEOC's budget be substantially increased and that the increased budget go primarily toward an increase in investigators or attorneys to handle cases.<sup>222</sup> Absent this restructuring, strengthening the powers of the agency or moving toward a system that is binding on the parties seems to offer little hope of a better enforcement system.<sup>223</sup>

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<sup>221</sup> This was the original procedure that was sought by the early proponents of Title VII. See *supra* note 14. The idea was revived recently by David Strauss where he also suggested that individuals should not be able to bring claims in federal court but instead have recourse only to the administrative process. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1655 (1991). The thrust of Strauss's argument is that the employment discrimination laws should concentrate on class action cases in order to alter substantially the labor market condition of those groups designed to benefit from the laws. *Id.* While class action litigation may bring greater overall benefits, it is difficult to imagine an adjudicatory system that would not allow meaningful access to the courts for the individual victims of discrimination.

<sup>222</sup> An increase in funding seems highly unlikely given the way Congress has typically treated the agency. During the last 15 years, Congress has met the agency's budget request on only two occasions. See Nancy Montwieler et al., *EEOC: Substantial Increase in EEOC Budget is Unlikely to Survive GOP Congress*, DAILY LAB. REP., Feb. 7, 1995, at B2.

<sup>223</sup> Given that one of the central concerns of the proposal to eliminate the agency is to protect cases that are currently dismissed for failure to comply with the administrative

## V. CONCLUSION

What this analysis suggests is that it is time to fundamentally rethink the necessity and proper role of the EEOC. Whatever the EEOC's original mission, and whatever the original hope, today the agency is clearly a failure, serving in some instances as little more than an administrative obstacle to resolution of claims on the merits. The EEOC resolves too few claims favorably for employees; it handles cases that would otherwise be pursued by private attorneys, and its cumbersome procedures result in a large number of potentially meritorious cases being dismissed for failure to comply with those procedures. The failures of the EEOC are particularly glaring in that they involve an issue of great national importance—the elimination and remediation of unlawful discrimination. To some, it may appear that the proposals discussed here place too much faith in the ability of attorneys to act rationally with full information so as to optimally enforce our employment discrimination laws. But it is no more faith than we place in the rest of our litigation system and it is a faith that seems better placed with private attorneys than with the EEOC, which has demonstrated time and again its inability to warrant any such trust or faith.

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process, it might be possible to change these procedures as a less drastic alternative to eliminating the agency. The procedures that currently result in litigation, however, are a critical feature of the administrative process and would not lend themselves to modification without seriously limiting the purpose of the entire system. For example, many of the current dismissals stem from a failure to file a claim within the statutory time limits, and expanding the time limits might alleviate some of the dismissals. Yet, increasing the time limits would also undermine the prompt resolution of claims and would increase the processing time of cases. If plaintiffs had 2 years to file a claim rather than the existing 300 day time limit, then it may take even longer—on average 4 years—before the cases ever reached federal court. Rather than modifying the procedures, it seems it would be preferable to treat employment discrimination claims like other tort claims relying on attorneys to investigate and file the claims promptly instead of modifying a seriously broken system.