1995

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The EEOC: Pattern and Practice Imperfect

Maurice E. R. Munroe†

“IT is time for a congressional review of the strategy being used to enforce employment discrimination laws,” concluded a comprehensive report to Congress nearly a quarter century after the passage of the landmark Civil Rights Act of 1964.1 Because race discrimination in employment remains pervasive despite three decades of government effort, the strategies and methods employed in the past must be redefined. The Equal Employment Opportunity Commission (EEOC), the federal agency primarily responsible for combatting employment discrimination, has been hampered in its efforts by being constrained to focus on processing individual charges of discrimination. This Article argues that Congress should relieve the EEOC of its duty to process individual charges so that the agency can concentrate on combatting broader unlawful practices.

While Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, race, or national origin,2 this Article focuses on race-based discrimination, which is the most socially divisive kind of discrimination in 1995 as it was three decades ago. Opinion polls of white Americans show that the majority believes that employment opportunities for black Americans are either equal to or better than those for white Americans and that disparities in employment are due to a lack of effort or motivation on the part of black Americans rather than pervasive practices of discrimination.3 This Article, however, identifies the common unlawful practices that account

† Professor of Law, Thomas M. Cooley Law School; Barrister-at-Law (Middle Temple). LL.B., 1976, University of Birmingham, England; Barrister-at-Law (Middle Temple) 1977; LL.M., 1980, University of London (London School of Economics); LL.M., 1992, University of Michigan.

This Article is based on a thesis which I submitted as part of the University of Michigan’s LL.M. program. My supervisor was Professor Theodore St. Antoine. I have benefitted immensely from his wisdom and generosity. I would also like to thank Professors Jim Jones and Stewart Schwab for their valuable comments on draft chapters.

I have been impressed by the professionalism and dedication of the EEOC employees with whom I have dealt. I wish to thank them for their courtesy, efficiency and helpfulness. I wish in particular to thank Mr. William Schukar, District Director of the EEOC Detroit District Office. Finally I wish to thank the following research assistants who have helped me on this or a related project: Lorna Ceraso, Larry Cohen, William Fleener, Elizabeth Harvey, James Marchant, Susan Murphy, Kirsten Quanbeck, Cheryl Ronk, Nicolas P. Scutari, and Andrew Shostack.

The conclusions and any errors and omissions in this Article are mine alone.


3. See infra text accompanying note 99.
for much of the socioeconomic disadvantage of black Americans. If American society wants to eliminate racial disparities in employment, it must attack these practices aggressively.

Both private litigation and government enforcement can be used to attack employers who discriminate. This Article focuses on the EEOC, however, because only the EEOC has the potential to attack employment practices in the systematic way that is necessary to eradicate them. Private lawsuits by individual plaintiffs, like individual charges filed with the EEOC, tend to focus on isolated incidents of discrimination. Discrimination occurs, however, not in isolation but in systematic practices. While sometimes these practices are addressed by class action lawsuits, individuals do not usually have the information or resources to identify these practices and litigate against them. The EEOC, however, has both the resources and the responsibility to monitor employment practices and bring the strongest possible cases attacking discriminatory practices. The best way to attack discriminatory practices is to investigate and prosecute firms based on the use of statistical evidence. The EEOC not only has access to this type of data but also possesses the necessary investigatory powers and legal expertise.

There have been many proposals for "reforming" the EEOC. In general, however, these proposals suggest ways to handle individuals' complaints of discrimination more cheaply and efficiently. They range from permitting employers to insist on compulsory arbitration, to giving the EEOC powers of adjudication like those of the National Labor Relations Board (NLRB), to creating a special system of tribunals to resolve individual disputes of discrimination. Many of these reforms appear to assume either that resolving individuals' complaints is the most effective way to fight employment discrimination, or that implementing a more efficient way to resolve such individual complaints is more important than implementing a more effective method of combating race discrimination. This Article rejects both of these assumptions. Finding an effective way to address unlawful practices of race discrimination is the most urgent problem in the field of employment discrimination law. The EEOC's failure to fulfill its mission frustrates congressional will and is a constant source of social tension. Because under this proposal individual victims of discrimination retain their right to sue, there is no reason to require the EEOC to process individual charges. The EEOC can

4. See infra Part II.
5. See infra Part III.
do more to reduce discrimination by spending its resources on attacking practices than by spending the same funds on resolving individual complaints, and analysis of the results of the EEOC’s charge processing indicates that the system is ineffective even for justly resolving individual complaints.

This Article will begin, in Part I, by defining the phrase “unlawful employment discrimination” as it is applied in various contexts. Part II identifies the common unlawful practices that are responsible for most of the harm caused by race discrimination in employment and that must, therefore, be targeted by the EEOC. Part III analyzes the inherent inability of charge processing to address the problem of unlawful employment practices. Part IV analyzes the performance data of the EEOC over the course of three time periods and shows that, whatever strategies it has used, the EEOC has been ineffective both in combatting practices of discrimination and in processing individual charges. Part V proposes a legislative solution that will make the EEOC more effective in targeting practices by eliminating its obligation to process charges.

I. THE MEANING OF UNLAWFUL PRACTICE

Under the proposal advanced by this Article, the EEOC’s success in eliminating race discrimination turns upon the legal definition of what constitutes an unlawful practice of race discrimination. The legal meaning of discrimination is quite technical and dependent upon the factual context of each case. While the two defined categories of discrimination, “disparate treatment discrimination” and “disparate impact discrimination,” impose distinct evidentiary standards upon the parties, both share the common purpose of achieving “equality of employment opportunities and [removing] barriers that have operated . . . to favor . . . white employees over other employees.”9 The main difference in the judicial definition of the two kinds of race discrimination is that disparate treatment analysis focuses on the way employers make decisions affecting their employees, while disparate impact focuses on the

9. Griggs v. Duke Power Co, 401 U.S. 424, 430-31 (1971); Title VII was passed to assist certain groups (inter alia blacks and women) who were suffering widespread employment disadvantage, based in part on their inability to meet employers’ institutional standards and requirements. Both disparate treatment and disparate impact aim to remove unnecessary barriers to equality of opportunity for these groups. See also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Stevens, J., dissenting) (“[O]ur national goal [is the] elimination of barriers that define economic opportunity not by aptitude and ability but by race, color . . . and other traits that are easily identified but utterly irrelevant to one’s qualification for a particular job.”) (Stevens, J., dissenting); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1972) (“Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”).

results of such decisions. Both prohibitions, however, can be used to address the same underlying problem of improper employer conduct which injures a group of African Americans or other ethnic minority.

A. "Disparate Impact" and "Disparate Treatment" Discrimination Compared

Disparate treatment discrimination expresses the more traditional meaning of discrimination and was recognized first by the courts. Section 703(a) of Title VII makes it illegal for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual [with respect to employment] because of such individual's race . . . ." Disparate treatment racial discrimination, therefore, involves making a distinction based on race. The essence of discrimination concerns the conscious or unconscious state of mind of the discriminator. "[T]he plaintiff is required to prove that the defendant had a discriminatory intent or motive" on which he acted. There is disparate treatment discrimination where an "employer . . . treats some people less favorably than others because of their race . . . ."

10. See Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) (1988 & Supp. V 1993). The differences between the two standards are set out by the Supreme Court as follows:

Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, [or] color . . . Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.


11. Id. Title VII also protects against discrimination because of "color, religion, sex [and] national origin." Title VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Section 703(a)(2) makes it illegal for an employer to "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." Title VII, § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1988).

12. The dictionary defines "discriminate" as "make a clear distinction; distinguish; differentiate." AMERICAN HERITAGE DICTIONARY 404 (2d ed. 1985). One may question the appropriateness of the term "discrimination" in the present context. As one commentator has explained, "'discrimination'. . . means the ability . . . to use one's reason in an analytically rigorous way." Mary E. Becker, Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment, 79 GEO. L.J. 1659, 1664 (1991). "Much [racial] discrimination is not, however, rational . . . . It is not reason . . . that explain[s] why jurors impose the death penalty most often on African American defendants whose victims were white." Id. Interestingly, the dictionary's second definition is: "to act on the basis of prejudice." AMERICAN HERITAGE DICTIONARY 404 (2d ed. 1983); see Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989) (citing 110 CONG. REC. 7213 (1964)).


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The issue is not whether the treatment was undeserved, but whether it is applied differently to employees of different races. If a black employee is dismissed for theft pursuant to a workplace rule, but a white employee is merely suspended for the same offense, the black employee has been discriminated against. Indeed, there is disparate treatment discrimination where an employer merely treats people differently because of their race.

Therefore segregated jobs and segregated facilities are unlawful. The Supreme Court has defined disparate treatment discrimination to include stereotyping, stating: "In forbidding employers to discriminate . . . Congress intended to strike at the entire spectrum of disparate treatment . . . resulting from . . . stereotypes." Thus employers may believe that they are acting without racial prejudice yet, if their judgments are in fact based on


19. See David B. Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899 (1993). Oppenheimer explains, Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that outcomes are random, fortuitous and uninfluenced by the decision maker’s beliefs, desires and biases. Rather racist acts often appear to be the product of unconscious bias and stereotyping. Racist behavior, including employment discrimination, can . . . be ascribed to the failure of decision-makers to reflect upon, and cleanse their decisions of, the unconscious bias underlying their decisions.

stereotypes, they are engaging in unlawful employment discrimination.

The second kind of discrimination, disparate impact discrimination, focuses on the result of, rather than the motivation for, an employment practice. While disparate treatment requires the plaintiff to prove that the employer had an unlawful state of mind, disparate impact focuses instead on the adverse consequences of an employer's behavior. This concept of discrimination is located in Sections 703(a)(2) and 703(k)(1)(A) of Title VII. 703(k)(1)(A) provides: "disparate impact is established . . . only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the . . . practice is job related for the position in question and consistent with business necessity . . . ." While an employer charged with disparate treatment may defend an employment decision by proving a non-discriminatory motive, such a defense does not defeat a charge of disparate impact discrimination. Instead, the defendant in a disparate impact case must refute a prima facie case based upon statistical evidence of black disadvantage with proof that the employment practice in question is reasonably related to job performance.

21. Griggs v. Duke Power Co., 401 U.S. 424 (1971), is the first Supreme Court case to apply disparate impact analysis. The Court reasoned that to achieve employment equality, Title VII could not be limited to overt or clearly intentional practices. The Court stated that:

"Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act prescribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."


25. Griggs, 401 U.S. at 424, 429-32. The court also stated that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Id. at 430.
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The disparate impact concept provides a framework for the EEOC to use statistical evidence of socioeconomic disadvantage of black workers to attack a multitude of objective and subjective practices. Examples of practices that the disparate impact concept may make unlawful include: the practice of recruiting by word-of-mouth, the practice of giving preference to relatives of current employees, the use of subjective hiring and promotion systems, the practice of hiring externally for higher level jobs and of not promoting from within, the requirement of a high school diploma, the requirement of a college degree, and the use of formal tests.

When challenging an employer's conduct under the disparate impact theory, the plaintiff must identify the particular practice that she claims causes disparate impact. She must then prove that this practice has substantial disparate impact on her racial group. No uniform standard exists, however,

26. An objective practice is a standard for allocating benefits which does not require the exercise of discretion to determine if it has been met. Standardized tests, years of experience, and educational attainments are often referred to as "objective criteria," while subjective practices include vague requirements for hiring or promotion that allow individual managers too much discretion, permitting conscious or unconscious discrimination to occur. See SCHLEI & GROSSMAN, supra note 15, at chs. 4, 5.


28. See Wards Cove, 490 U.S. at 657.


30. See Wards Cove, 490 U.S. 642; see also Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), amended, 784 F.2d 1407 (9th Cir. 1986) (discussing lateral hiring).


for determining whether a disparity is sufficiently substantial to satisfy the plaintiff's case. The courts have proceeded on a case-by-case basis.36

Once the plaintiff proves that the defendant has a practice which causes substantial disparate impact, the plaintiff will win unless the defendant proves that the practice is "justified."37 The justification phase of a disparate impact case "contains two components: first, a consideration of the justifications the employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact."38 The standard for the first component is whether "the challenged practice is job related for the position in question and consistent with business necessity."39 Under the second component of the justification phase, if the defendant can persuade the judge that the practice is justified, the plaintiff may still succeed if she can show that there is a "suitable alternative . . . practice which also serves the employer's goals but is less discriminatory" and "the employer refuses to adopt such alternative employment practice."40 To determine whether this practice is suitable, the courts must consider its cost.41

401 U.S. at 426; SCHLEI & GROSSMAN, supra note 15, at 91, 163 & Supp. 496.


The "suitability" of the proposed alternative practice is determined on a case-by-case basis. "[T]he [Civil Rights Act of 1991] does not establish the criteria by which a proposed alternative qualifies as . . . legally sufficient." Less Discriminatory Alternatives, supra note 24, at 1623. In addition, "[t]he courts, [and] Congress . . . have provided scant guidance as to when a proposed [less discriminatory alternative] is sufficiently less discriminatory to warrant imposition on an employer." Id. at 1624; see Mannion, supra note 38.

41. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985), cert.
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B. A Definition of a "Practice" of Discrimination

In this Article, the phrase "unlawful practice of discrimination" will be used to refer to all of the disparate impact category of cases and most of the disparate treatment cases as well. Race discrimination, both disparate treatment and disparate impact discrimination, is discrimination based on a group characteristic. Congress has recognized that unlawful discrimination will generally affect more than one individual. For instance, to prove disparate impact, the plaintiff must show relative disadvantage to her group. Also, an employer who treats one person differently because she is black—disparate treatment discrimination—will often treat all other black workers that way. A racially prejudiced decision maker is by definition biased against all those with that racial characteristic. As the Supreme Court recognized in General Telephone Co. of the Southwest v. Falcon, "we cannot disagree with the proposition . . . that racial discrimination is by definition class discrimination." Thus it is misleading to view disparate treatment as discrimination against an individual, and disparate impact as discrimination against a group.

Employers may "practice" discrimination against a racial group through a formal or informal policy or procedure, or by the persistent actions of a prejudiced decision maker who controls access to a workplace benefit. Thus, depending on the circumstances, a practice may constitute disparate treatment or disparate impact discrimination or both. Furthermore, although a practice of discrimination is often called systemic discrimination, it need not be "system-wide." A practice is "more than an isolated, sporadic incident."
but it may be limited to a particular department, or even particular pay grades within that department. A practice of discrimination is:

an unlawful employment practice or set of practices which exists in a particular component or all components of a respondent's business and which has an adverse impact upon members of a class or classes. [Practices of] discrimination [are] patterns of discrimination as contrasted with individual acts of discrimination which may occur because of the specific interaction of individual persons.

A practice of discrimination may be attacked either through a private class action, or through an action brought by the EEOC. A judicial determination that a practice is unlawful is a greater deterrent against future discrimination than a determination that an isolated incident is unlawful. In the former case, the court will award prospective relief benefitting the group, which may take the form of a prohibitive or a mandatory injunction requiring the employer to take specific steps to reform the illegal practice and the court will also

said that to prove the employer engaged in pattern or practice discrimination the government had to "establish . . . that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." Id. at 336. See Price Waterhouse v. Hopkins, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977). Commentators sometimes speak as if pattern or practice discrimination refers only to system-wide discrimination. See, e.g., Sullivan, supra note 15, at 1114. However, the term "pattern or practice" is more flexible than this and covers any discrimination which is more than an isolated or infrequent occurrence. The government in the Teamsters case had to prove that the employer practiced discrimination on a company-wide basis because it alleged that the employer's pattern or practice of discrimination was "system-wide." Teamsters, 431 U.S. at 332, 337.

I intend the term "practice" of discrimination to include "pattern or practice" discrimination. However, on a strict statutory construction, "pattern or practice" discrimination refers only to disparate treatment discrimination. See Title VII, § 707, 42 U.S.C. § 2000e-6 (1988). Whereas "practice" of discrimination refers to both disparate treatment and disparate impact discrimination.

Teamsters v. United States, 431 U.S. at 336 n.16 (quoting Sen. Humphrey, 110 CONG. REC. 14,270 (1964)).

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 877-78 (1984). However, as the area of the employer's operation which is being challenged narrows, it will become increasingly difficult to find sufficient evidence to prove a practice. Statistical evidence becomes less reliable as the sample size contracts. Teamsters, 431 U.S. at 389 n.20; Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 n.3 (10th Cir. 1987); SCHELI & GROSSMAN, supra note 15, at 1375 & Supp. 508. Also, the actual number of discriminatory actions will decline. A discriminatory action affecting only one person is not a practice.


For the requirements of Title VII class actions, see FED. R. CIV. P. 23; see also SCHELI & GROSSMAN, supra note 15, at ch. 34.

Where a public employer is the discriminator, the Attorney General will bring the suit. The EEOC is not bound by the requirements of Rule 23 of the Federal Rules of Civil Procedure. See General Tel. Co. v. Falcon, 457 U.S. 147 (1982); General Tel. Co. v. EEOC, 446 U.S. 318 (1980). The Attorney General is similarly not bound by Rule 23 requirements. See SCHELI & GROSSMAN, supra note 15, at 1177.

"[C]lass actions . . . provide the incentives for increased compliance with the law, through the prevention of unjust enrichment or cost internalization . . . ." ONTARIO LAW COMMISSION, REPORT ON CLASS ACTIONS, 146 (1982) [hereinafter CLASS ACTIONS].

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award monetary benefits to the numerous group members.\(^{56}\)

The EEOC does not always have to rely on statistical evidence to prove disparate treatment as it necessarily does to prove disparate impact. In a disparate treatment case, if the EEOC proves that the employer applies a formal rule that is facially discriminatory, it proves a practice of discrimination without the need for further evidence, statistical or otherwise. Because facially discriminatory notices or rules are now rare, however, the EEOC will usually have to prove a practice of disparate treatment discrimination by inference, using statistical evidence.\(^{57}\) A statistical disparity showing an under-representation of minorities in a segment of a work force compared to the relevant labor pool may allow a fact-finder to infer employer discrimination,\(^{58}\) so long as the statistical comparison eliminates the most common innocent explanations for the disparity, including "lack of qualification" and "chance."\(^{59}\) Other evidence the EEOC may use to bolster its statistics includes: (1) evidence of prejudiced utterances by the decision-maker(s);\(^{60}\) and (2) individual instances of disparate treatment.

The essence of disparate impact discrimination is the fact of substantial racial disadvantage, which the EEOC will rarely be able to prove without statistical evidence. Where the EEOC challenges a hiring practice as disparate impact discrimination, it will seek to show that the practice causes substantial racial disadvantage by comparing "the racial composition of [the jobs at issue] and the racial composition of the qualified . . . population in the relevant labor market"\(^{61}\) or "the racial composition of otherwise-qualified applicants for at issue jobs."\(^{62}\) In this latter case, the EEOC proves the practice causes substantial disadvantage by showing that, because of the practice, "the

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56. In determining the individual entitlements of those persons claiming to be injured by the practice, the employer bears the burden of proving that they were not injured. \textit{Price Waterhouse}, 490 U.S. at 233; \textit{Teamsters}, 431 U.S. at 359-61; Franks v. Bowman Auto. Transp. Co. Inc., 424 U.S. 747, 772 (1976); \textit{SCHLEI & GROSSMAN}, supra note 15, at 1323.


59. \textit{Segar}, 738 F.2d at 1274. "[T]hese statistics . . . show[ing] a disparity of treatment [must] eliminate the most common nondiscriminatory explanations of the disparity and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination." \textit{Id.}; \textit{see also} Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308-09 (1977); \textit{Teamsters}, 431 U.S. at 340-42; Sullivan, \textit{supra} note 15, at 1113.


62. \textit{Id.}
percentage of selected applicants who are non-white, is . . . significantly less than the percentage of qualified applicants who are non-white.\textsuperscript{63} The EEOC will also use non-statistical evidence to bolster statistical evidence of disparity.\textsuperscript{64}

While the elements of proof of a case alleging a practice of disparate treatment are different from those of a case alleging disparate impact, the similarities between the two kinds of cases are significant. In the disparate treatment case, the EEOC shows statistical evidence of black disadvantage for the purpose of raising an inference of improper intent or motive on the part of the employer. In a disparate impact case, the EEOC's statistical evidence of black disadvantage directly establishes an element of disparate impact discrimination.\textsuperscript{65} In both kinds of cases, the plaintiff alleges that the employer's conduct has had an adverse effect on the plaintiff's racial group.\textsuperscript{66} In both, the plaintiff uses statistics to prove the allegation. The key to combatting any practice of discrimination then is statistical evidence, and because Title VII gives the EEOC access to this evidence, the EEOC holds the key.

In essence, an unlawful practice of race discrimination is employer conduct prohibited by Title VII that injures a number of African American workers, rather than a single individual. An employment practice may be prohibited under the disparate treatment theory, the disparate impact theory, or both. Since discrimination usually occurs as a practice, affecting more than one member of a protected group, we are more likely to eliminate discrimination by attacking unlawful practices than by attacking unlawful conduct harming an individual. Furthermore, legal action against a practice on behalf of all its victims will more effectively deter employers from discriminating than legal action brought by only one of the victims. As Part III discusses, individual victims of practices do not usually take action against them. The most effective strategy for reducing race discrimination in employment is therefore for the EEOC to attack unlawful practices on behalf of the victims.

II. THE HARM CAUSED BY UNLAWFUL EMPLOYMENT PRACTICES

"[T]he 1963 March on Washington . . . was for jobs and freedom . . . . We won the freedoms but we still do not have the jobs. There are today half a million more black people unemployed than at the time of the March on Washington."\textsuperscript{67}

Race discrimination in employment usually occurs in the form of a practice.

\textsuperscript{63} Id. at 653.
\textsuperscript{64} For instance, the presence of an excessively subjective system will help bolster otherwise inconclusive statistical evidence of disparity. SCHLEI & GROSSMAN, supra note 15, at Supp. 59.
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Indeed, certain very common business practices cause substantial disadvantage to African Americans, and these practices persist even though they are usually unlawful. Because these unlawful practices are pervasive and extremely harmful, combating them may be the most effective way to fight race discrimination in employment.

A. Common Practices of Discrimination

1. Word-of-Mouth Recruitment

One of the most common methods used by employers for creating job candidate pools is “word-of-mouth recruiting.” While this method is most frequently used for lower-level jobs, it is also common for upper-level jobs. Employers justify recruiting by word-of-mouth because it is less expensive than formal advertising and recruiting, and because they believe it ensures that their employees will “mesh.” The problem for employees, however, is that word-of-mouth recruiting perpetuates the existing racial stratification in the work force because it operates in the context of segregated networks. Segregated networks are largely the result of residential segregation, and residential segregation is common. One commentator has explained that “blacks and whites live as two separate societies . . . lacking ties to whites.” Blacks tend to be isolated from the networks in which connections to

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69. See Braddock & McPartland, supra note 68, at 8; see also SCHLEI & GROSSMAN, supra note 15, at 571 (reporting Census Bureau survey covering 6,000,000 wage and salary earners); GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION, 15 (1991) [hereinafter EZORSKY] (“[S]udies . . . indicate that communicating job information to family, friends, neighbors and acquaintances by word-of-mouth is probably the most widely used recruitment method.”)(citation omitted).


71. Upper-level jobs are those requiring at least some college education. Employers are not inclined to expend substantial resources in recruiting for these kind of positions. See Braddock & McPartland, supra note 68, at 7.


desirable employment—where whites predominate—are forged."\textsuperscript{74} White people are disproportionately represented in upper-level jobs and in the more desirable lower-level jobs. Therefore, researchers have found that black high school graduates who use segregated networks end up in poorer-paying, more segregated work, while those who have access to desegregated networks get the better-paying, less segregated jobs.\textsuperscript{75} Even judges have recognized that where the work force is predominantly white, word-of-mouth recruiting leads to the exclusion of black workers.\textsuperscript{76} The Eighth Circuit, for example, stated that “[r]eliance on . . . word-of-mouth recruitment, especially in a segregated work force, easily may result in discriminatory personnel decisions.”\textsuperscript{77} Segregated recruiting networks have been linked to some of the most severe disparities between black and white employees.\textsuperscript{78}

Word-of-mouth recruiting may be unlawful under either the disparate treatment theory or the disparate impact theory,\textsuperscript{79} depending upon whether the plaintiff can show that the employer intentionally adopted this policy in order to exclude black applicants. In \textit{Bailey v. Great Lakes Canning Inc.},\textsuperscript{80} for example, the plaintiff proved that the employer used word-of-mouth recruitment to discriminate intentionally against black applicants by showing (in addition to black underrepresentation) that the employer’s records identified applicants by race,\textsuperscript{81} that the employer disregarded its own hiring standards,\textsuperscript{82} and that the employer preferred less-qualified white applicants to

\textsuperscript{74} EZORSKY, supra note 69, at 15; see also Galster, supra note 72, at 1431.

\textsuperscript{75} EZORSKY, supra note 69, at 12; Galster, supra note 72, at 1421.

\textsuperscript{76} See Braddock & McPartland, supra note 68, at 12; see also NAACP v. Town of Harrison, 940 F.2d 792, 805 (3d Cir. 1991) (prohibiting word-of-mouth recruitment practices which benefitted only local residents); Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (word-of-mouth recruitment practices coupled with nepotism may discriminate against minorities); EEOC v. Metal Serv. Co., 892 F.2d 341, 350 (3d Cir. 1990) (“[A] word-of-mouth . . . hiring process, in conjunction with an all white work force, is itself strong circumstantial evidence of discrimination.”).

\textsuperscript{77} Lams v. General Waterworks Corp., 766 F.2d 386, 392 (8th Cir. 1985); see also Braddock & McPartland, supra note 68, at 10-12 (“Advertising job vacancies . . . by word of mouth undoubtedly operated to the benefit of white applicants and to reduce the number of potential black applicants by excluding blacks from access to . . . [job] information.”). For example, in NAACP v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982),reh'g denied, 698 F.2d 1238 (11th Cir. 1983), the court stated that “[s]ince all punch and kick press operators . . . were white, in all probability the word-of-mouth recruits . . . would also be white.” Id. at 1236.

\textsuperscript{78} Braddock & McPartland, supra note 68, at 27-28; see Galster, supra note 72, at 1448-49. Word-of-mouth recruiting is especially harmful to those seeking lower-level employment. Braddock & McPartland, supra note 68, at 12.


\textsuperscript{80} Bailey v. Great Lakes Canning, Inc., 908 F.2d 38 (6th Cir. 1990); see also Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985) (showing that employer concentrated black employees in labor-intensive, nonsupervisory positions); Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984) (finding that the few black employees were assigned to janitorial positions); SCHLEI & GROSSMAN, supra note 15, at Supp. 240.

\textsuperscript{81} Id. at 40.

\textsuperscript{82} Id.
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better qualified black applicants.83

As discussed in Part I, under the disparate impact theory the defendant bears the burden of refuting the plaintiff’s prima facie case showing a causal relationship between the employment practice and substantial black under-representation.84 The plaintiff wins unless the defendant can justify the employment practice based on “business necessity.”85 Even if the court finds that the practice derives from “business necessity,” the plaintiff can win if she proves that the defendant has refused to adopt an alternative selection device with less adverse impact. Courts, recognizing the exclusionary effect of word-of-mouth recruiting and the availability of other cheap methods of recruitment,86 usually rule in plaintiffs’ favor once they have proven substantial disparate impact.87

For these reasons, where an employer’s work force contains a substantially higher proportion of white employees than the relevant labor pool, the employer’s practice of word-of-mouth recruiting will usually be unlawful. Despite judicial recognition of the damage caused by word-of-mouth recruiting, it remains a common practice that continues to cause substantial disadvantage to African Americans, and must be more effectively attacked.

2. Stereotyping

Subjective hiring and promotion systems control access to jobs in both white-collar and blue-collar employment.88 A subjective system for allocating jobs is characterized by one or more of the following characteristics:

83. Id.

84. “Black under-representation” consists of a substantial disparity between the racial composition of the employer’s work force or applicant pool and the relevant labor market. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Markey v. Tenneco Oil Co., 635 F.2d 497 (5th Cir. 1981), aff’d, 707 F.2d 172 (5th Cir. 1983); SCHLEI & GROSSMAN, supra note 15, at Supp. 240.


86. Other cheap methods include the public employment service and community agencies. See Smith v. Western Elec. Co., 770 F.2d 520 (5th Cir. 1984); Braddock & McPartland, supra note 68, at 24.

87. This would seem equally true of the related practice of nepotism. “Courts generally agree that whatever the benefits of nepotism and word of mouth hiring, those benefits are outweighed by the goal of providing everyone with equal opportunities for employment.” Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990); see George v. Farmers Elec. Co-op., Inc., 715 F.2d 175 (5th Cir. 1983); United States v. Int’l Union of Elevator Constr., 538 F.2d 1012, 1016 (3d Cir. 1976); SCHLEI & GROSSMAN, supra note 15, at 573 & Supp. 241.

(a) the employer does not widely advertise the job, but instead invites a select few to apply;\textsuperscript{89}
(b) the employer makes no thorough analysis of the appropriate criteria (e.g., job skills) on which to select a candidate for the job;\textsuperscript{90}
(c) the employer provides no precise, fixed criteria which the evaluator is required to consider with respect to every candidate,\textsuperscript{91} or provides criteria which are largely intuitive, such as "ability" and "potential for growth;"\textsuperscript{92}
(d) the employer does not require review of the decision either by the

\textsuperscript{89} See, e.g., Payne v. Travonel Lab. Inc., 673 F.2d 798 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
\textsuperscript{91} See Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1045 (7th Cir. 1991) ("[W]e note that with respect to a promotion system such as this one—where . . . [defendant] concedes that there were no written criteria for the foremen to follow—the use of hindsight to construct 'qualifications' for a position must be viewed with some suspicion." (citing Crawford v. Western Elec. Co., 745 F.2d 1373, 1385 (11th Cir.), cert. denied, 419 U.S. 1033 (1974); James v. Stockham Valves and Fittings Co., 940 F.2d 1036, 1045 (7th Cir. 1991), cert. denied, 113 S. Ct. 207 (1992); Scales v. J.C. Bradford & Co., 925 F.2d 901 (6th Cir. 1991); Rendon v. AT&T Technologies, 883 F.2d 388, 391 (5th Cir. 1991); Cox v. American Cast Iron Pipe Co., 925 F.2d 901 (6th Cir. 1991); Rendon v. AT&T Technologies, 883 F.2d 388, 391 (5th Cir. 1991); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir.), cert. denied, 457 U.S. 883 (1986); Hill v. Seaboard Coast Line R. Co., 767 F.2d 771 (11th Cir. 1985), aff'd, 885 F.2d 804 (11th Cir. 1989); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); Crawford v. Western Elec. Co., 745 F.2d 1373 (11th Cir.), reh'g denied, 751 F.2d 394 (11th Cir. 1984); Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir.), reh'g denied, 718 F.2d 1115 (11th Cir. 1983); Boykin v. Georgia-Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984); Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir.), reh'g denied, 712 F.2d 1416 (5th Cir. 1983); Robbins v. White-Wilson Med. Clinic, 660 F.2d 1384 (5th Cir. 1981), vacated, 456 U.S. 989 (1982), reh'g denied, 465 F.2d 564 (5th Cir. 1982); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979) (gender); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).}
Shaping the Organizational Context for Black American Inclusion, Travenol Lab., Inc., v. Marsh, a preference if he has one for one race of workers over another. A ready mechanism for racial discrimination this type of worker assessment and noted that subjective evaluations involving white supervisors provide others.

habits performance, [no] written worker evaluations [and no] regular checks done on [all] employee[s’] work done by the plant manager. Sugar Smith v. Herron, guidance on how to determine whether one candidate’s record is superior to another’s. Promoting employee to pick “the best man for the job” positions, particularly low-level positions, because they can find enough suitable candidates by relying “pleasant personality,” and “ability to fit in.”

and “dependable” and may rely on other equally vague criteria such as “appearance,” “alertness,”

employers also use additional subjective criteria, such as “desire for the promotion,” “aptitude,” and “common sense,” thus reducing the significance of an employee’s objective job performance record. In addition, the candidate’s record of job performance may itself be subjective. For example, the candidate’s record may be based on performance ratings by his supervisors who used factors that are no more concrete or objective than those used in the hiring process.

The unstructured, discretionary nature of subjective systems allows racial stereotyping to control job allocation. This is a problem for African Americans because, as courts have recognized, “racial stereotypes are deeply embedded in . . . our society.” Opinion polls show that the majority of white Americans believe that African Americans are both lazier and less intelligent than

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94. Braddock & McPartland found that about 20% of employers stated that for lower-level jobs, the interview was “most important” in determining which applicant should get the job. Braddock & McPartland, supra note 68, at 36. Twenty percent (20%) of employers seeking to fill mid-level employment and 25% of employers seeking to fill upper-level employment said the interview was most important. Id. Braddock & McPartland found that particularly for lower-level jobs, employers frequently rely on impressions gained from the personal interview, and/or previous employer recommendations but little else. Id. at 18. “[I]nterviews are especially important in the selection process for lower level jobs, . . . .” Id. at 19. Employers commonly stress such intellectual and attitudinal traits as “quick learner” and “dependable” and may rely on other equally vague criteria such as “appearance,” “alertness,”


96. Stockham Valves and Fittings Co., 559 F.2d at 317-18. The employer may simply instruct the promoting employee to pick “the best man for the job” or “the most qualified” with no additional guidance on how to determine whether one candidate’s record is superior to another’s. Id. at 318; see Smith v. Herron, 770 F.2d 520 (5th Cir. 1985); Seaboard Coast Line R. Co., 767 F.2d 771; Savannah Sugar Refining Corp., 495 F.2d 437.

97. For instance, in Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985), all evaluations were done by the plant manager. Id. at 871. The court found that “there were no guidelines for evaluating performance, [no] written worker evaluations [and no] regular checks done on [all] employee[s’] work habits . . . . management [therefore had] more familiarity with the performance of some workers than others.” Id. The Court further observed, “This circuit has frequently noted the problems associated with this type of worker assessment and noted that subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination. . . . This is because the supervisor is left free to indulge a preference if he has one for one race of workers over another.” Miles, 750 F.2d at 871; see Emanuel v. Marsh, 897 F.2d 1435 (8th Cir. 1990); Rendon, 883 F.2d 388; Crawford, 745 F.2d 1373; Payne v. Travonol Lab., Inc., 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038 (1982).

white Americans.99 Persuasive evidence indicates that in hiring and promoting
decisions, employers routinely discount the abilities and achievements of black
individuals.100 A 1990 study by the Urban Institute concluded, "Chicago's
employers [do] not hesitate to generalize about race or ethnic differences in the
quality of the labor force . . . [They] consistently relate race to inferior
education, lack of job skills, and unreliable job performance."101 This study
confirmed that racial stereotyping by employers is widespread. When two
equally matched test applicants, one black and one white, applied for entry
level jobs, twenty percent of the employers discriminated against the black
applicant by allowing only the white applicant to make a formal application,
giving only the white applicant an interview, or offering only the white

99. In a 1981 survey, 60% of whites felt that the inferior economic position of blacks was due to
lack of "motivation or effort" on their part. NATIONAL RESEARCH COUNCIL, A COMMON DESTINY:
BLACKS AND AMERICANS IN SOCIETY 151 (1989) [hereinafter A COMMON DESTINY]. A recent national
poll found that a majority of whites continue to characterize blacks as lazier and less intelligent than
whites. MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED;
DISCRIMINATION IN HIRING, URBAN INSTITUTE REPORT 2 (1991) [hereinafter TURNER] (citations
omitted). Without hesitation, most whites would attribute black social and economic disadvantage to
black "lack of effort." COMMON DESTINY, supra at 151 (citing Howard Schuman, Free Will and
Determinism in Beliefs About Race, in MAJORITY AND MINORITY: THE DYNAMICS OF RACIAL AND
ETHNIC RELATIONS, (Norman Yetman & C. Hoyt Steele, eds. 1971) and J. R. KLUEGEL & E. R.
SMITH, BELIEFS ABOUT EQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE
(1986)). The intellectual abilities of blacks are undervalued even in the sports arena. See Derrick Z.
Jackson, Stereotypes Carry the Ball on New Year's Day, BOSTON GLOBE, Jan. 7, 1990, at A22 ("On
New Year's Day, 1990, you could watch the Rose Bowl, Orange Bowl and Sugar Bowl college football
games, and see African American men examined like horses. 'He's a real horse,' said ABC's Frank
Gifford. . . . Watch the games again. Not once during any of the three games was a white athlete
referred to with an animal term. See white men described with brains and valor.").

100. In hiring decisions, an employer may downgrade a black person's references and recommenda-
tions if these are written by blacks. Braddock & McPartland, supra note 68, at 19.

101. TURNER, supra note 99, at 2. One may attribute the practice of employer stereotyping to
perceptions, based on black social, educational, and employment disadvantage, and employer ignorance

Economists often refer to stereotyping as statistical discrimination. Employers rely on observable
characteristics which they believe are correlated with productivity. RONALD G. EHRENBERG & ROBERT
S. SMITH, MODERN LABOR ECONOMICS 26 (3d ed. 1988); Braddock & McPartland, supra note 68, at
15. Employers may use a group characteristic such as race, when they are unable or unwilling either
to screen for individual characteristics or rely exclusively on individual characteristics. An employer's
belief that the group characteristic reliably predicts individual productivity may or may not be accurate.
Where an employer uses an observable characteristic which is correlated with productivity, she engages
in true stereotyping. Where she uses one that is not, this is false stereotyping. An employer using a true
 stereotype may prefer a less productive white to a more productive black. The true stereotype is only
correct on average. Discrimination occurs in economic theory when an employer treats a black employee
less favorably because of her race than she treats a less productive white employee. Consequently
economists refer even to true stereotyping as "statistical discrimination." For further discussion of the
economic theory of statistical or stereotype discrimination, see J.G. MacIntosh, Employment
Economics of Racial Discrimination: A Survey, 12 J. ECON. LIT. 849, 855 (1974); HAMMERMEH &
REES, supra note 19, at 356. Stewart Schwab, Is Statistical Discrimination Efficient?, 76 AM. ECON.
REV. 228 (1986).

The term "racial nepotism" applies to situations where an employer prefers whites because she feels
a personal affinity with them. This personal affinity may cause the employer to exaggerate the
productive characteristics of a white applicant. There is thus some overlap between this concept and
racial stereotyping. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF
applicant a job.\textsuperscript{102}

Empirical studies consistently document the pervasiveness of employer stereotyping. A path-breaking study by Jomills Braddock and James McPartland found that in hiring for lower-level jobs employers often attach importance to certain basic skills\textsuperscript{103} as well as intellectual\textsuperscript{104} and attitudinal traits.\textsuperscript{105} The authors noted that, for lower-level jobs, white workers were disproportionately represented in jobs stressing the following characteristics: (1) skills: advanced reading, basic or advanced arithmetic; (2) intellectual traits: quick learner, good judgment; and (3) attitudinal traits: being a good team member, and fostering good client relations.\textsuperscript{106} With respect to these skills and intellectual traits, the authors determined that individual differences in educational attainment and academic test score performance could not account

\textsuperscript{102} Turner, supra note 99, at 31-32. Fifteen percent of the employers offered the white, but not the black, a job. \textit{Id.} at 32. The study was conducted in Chicago and Washington. \textit{Id.} The authors believe that the results are not an overestimate of the incidence of discrimination in hiring, because (1) the jobs were advertised in “major metropolitan newspapers,” and an employer is less likely to discriminate in respect of positions filled publicly; and because (2) the black and white testers were college students, and the black was indistinguishable from the white in terms of style of clothing, demeanor, oral self-expression, and general presentation. \textit{Id.} In other words, there was nothing in the way the black presented himself to indicate that he was “different” from or less suitable than the white. Other studies support the conclusion that racial disparate treatment discrimination in hiring is widespread. \textit{See} Heather K. Gerken, \textit{Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions}, 91 \textit{Mich. L. Rev.} 1824 (1993); David A. Strauss, \textit{The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards}, 79 Geo. L. J. 1619 (1991); Jerome M. Culp, Jr. & Bruce H. Dunson, \textit{Brothers of a Different Color: A Preliminary Look at Employer Treatment of White and Black Youth}, in \textit{Black Youth Employment Crisis} 233 (Richard B. Freeman & Harry J. Holzer eds., 1986); Jerry M. Newman, \textit{Discrimination in Recruitment: An Empirical Analysis}, 32 \textit{Indus. & Lab. Rel. Rev.} 115 (1978).

\textsuperscript{103} Braddock & McPartland, supra note 68, at 37. For example, for lower-level jobs, 13\% of employers considered advanced reading a very important qualification, 44\% felt the same about the ability to do basic arithmetic, 8\% about the ability to do advanced arithmetic. \textit{Id.} For upper-level jobs the proportions of employers considering these skills as very important was higher. \textit{Id.}

\textsuperscript{104} \textit{Id.} For lower level positions, 47\% of employers felt that being a quick learner was very important. (9\% of employers felt that intellectual trait was the most important qualification for the job.) \textit{Id.} 50\% felt that good judgment was a very important qualification. \textit{Id.}

\textsuperscript{105} \textit{Id.} With respect to attitudinal traits for lower-level employment, being a “good team member” was considered very important by 68\% of employers; having “the proper attitude” was considered very important by 82\% of employers; being “dependable” was considered very important by 96\% of employers; and the ability to foster good client relations was considered very important by 32\% of employers. \textit{Id.}

For lower-level employment, 21\% of employers considered “dependability” the most important qualification, while 12\% of employers considered “proper attitude” the most important qualification. \textit{Id.}

There is overlap between some of these traits (e.g. “good team member,” “the proper attitude,” and “dependable”) and these traits can be expressed in a variety of different ways. For instance, in \textit{Northlake} the interviewing board judged applicants according to “emotional stability” and “friendliness”. United States v. City of Northlake, 942 F.2d 1164, 1166 (7th Cir. 1991). “Friendliness” is clearly related to “good team member” and “emotional stability” is related to “dependable.” In \textit{Green v. USX Corp.}, 843 F.2d 1511 (3d Cir. 1988), interviewers were instructed to make selections based on inter alia: “ability to take directions” and “ability to meet work schedules.” \textit{Id.} at 1517. Both of these relate to “good team member,” and “ability to meet work schedules” relates to “dependability.”

\textsuperscript{106} Braddock & McPartland, supra note 68, at 14. Because of the unanimity among employers \textit{vis-a-vis} “dependability” and “good attitude,” the authors were unable to test for racial disparity in jobs emphasizing these traits. \textit{Id.} at 15.
for the overrepresentation of white applicants.\textsuperscript{107} They concluded that white people are frequently preferred to equally qualified African Americans in jobs that emphasize skill or intellectual traits “and that statistical discrimination is often a significant problem for blacks who have not completed a college degree.”\textsuperscript{108} Because racial stereotypes extend beyond academic criteria, it is likely that negative stereotyping of African Americans extends to qualities such as “dependability,” “proper attitude,” and “ability to foster good client relations.”\textsuperscript{109} Employers also frequently rely on stereotypes when hiring for upper-level jobs.\textsuperscript{110} Indeed, their reliance on stereotypes increases as the job’s importance, measured by career opportunity and earning potential, increases.\textsuperscript{111}

Stereotyping is also a common occurrence in the promotion process. Jobs may be filled through a “public” process or through a purely “private” internal process. An employer filling a job publicly circulates a notice inviting applications. An employer filling a job privately invites particular employees to apply, or simply offers the job to one employee.\textsuperscript{112} A private system is commonly used by private employers.\textsuperscript{113} Employers using a private system are less likely to promote black employees.\textsuperscript{114} Stereotyping is likely to account for this disparity.\textsuperscript{115}

It is important to note that stereotyping also occurs in a public system. Substantial evidence shows that white managers undervalue black achievements

\textsuperscript{107} Id. at 16. With respect to certain traits, the authors found an overrepresentation of whites, in some upper-level jobs after accounting for individual differences. Id.

\textsuperscript{108} Id. at 17. Note that the finding is that blacks were underrepresented in the more desirable lower-level jobs as compared to the less desirable lower-level jobs even after accounting for inter alia education. These findings are evidence that there is more disparate treatment discrimination in the more desirable jobs, not that there is no disparate treatment discrimination in the less desirable jobs.

\textsuperscript{109} See Turner, supra note 99, at 33. “Of the eight job categories with ‘above-average’ levels of discrimination six are in clerical or [client] sales and service positions.” Id.

\textsuperscript{110} Id. “In general, minorities are more likely to encounter discrimination in entry level clerical jobs, and jobs involving client sales and service than in blue collar positions.” Id.; see Pettigrew & Martin, supra note 98, at 64. These authors report that well-educated employees and managers frequently accept and act on negative racial stereotypes. Given the law’s tolerance for “subjective or discretionary decision-making” at this level, discrimination is much more likely to go unchecked.

\textsuperscript{111} See Turner, supra note 99, at 33. “Discrimination against blacks appears to be highest in the types of jobs offering the highest wages and future income potential.” Id.; see also Hammermesh & Rees, supra note 19, at 348 (“[A] common form of discrimination . . . [is] excluding members of minority groups from the better-paid jobs.”).

\textsuperscript{112} Braddock & McPartland, supra note 68, at 20.

\textsuperscript{113} Id. at 20-21. In fact, they use it 35% of the time, whereas public employers use a private system 10% of the time. See, e.g., Paul v. F.W. Woolworth Co., 809 F. Supp. 1155, 1160 (D. Del. 1992) (“The personnel supervisor . . . confirmed that jobs had not been posted during her twenty years tenure with the personnel department.”).

\textsuperscript{114} Braddock & McPartland found that “[t]he probability that a minority worker will fill the job is significantly greater for jobs for which employers post or circulate a written vacancy notice,” and concluded that blacks are significantly deprived of employment opportunities by the practice of private internal promotion. Braddock & McPartland, supra note 68, at 21.

\textsuperscript{115} Another reason is that jobs may be organized in a career path, and to advance, an employee must hold a job within that path. Because of stereotyping in hiring decisions, fewer blacks hold these career path jobs. See id.
in the workplace, even when employers have first-hand knowledge of black candidates' job performance.\textsuperscript{116} The black candidate may suffer stereotyping by the person who originally evaluated his performance, the person who makes the decision to promote, or both. The widespread use of subjective systems permits the pervasive use of racial stereotypes in allocating job benefits, leading to the conclusion that subjective systems cause substantial employment disadvantage to black workers.\textsuperscript{117}

Discrimination based on stereotyping may currently be attacked under either the disparate treatment or the disparate impact framework. An employer who stereotypes an individual because she is African American and refuses to hire or promote her, or places her in an undesirable job,\textsuperscript{118} unlawfully discriminates against that individual.\textsuperscript{119} While subjectivity in the allocation of jobs is not unlawful per se,\textsuperscript{120} and does not on its own even raise an "inference of discriminatory conduct,"\textsuperscript{121} courts have recognized that such systems permit the practice of stereotyping.\textsuperscript{122} Where an employer routinely

\textsuperscript{116} Pettigrew & Martin, \textit{supra} note 98, at 60-61. A related problem concerns the assigning of work that is a precondition for promotion. In Crawford v. Western Electric Co., 614 F.2d 1300 (5th Cir.), \textit{reh'g denied}, 620 F.2d 300 (5th Cir. 1980), an installer had to satisfactorily perform work in a higher index in order to be promoted to that higher index. \textit{Id.} at 1309-11. There was no fair method established for assigning this work, and there was statistical evidence to show that whites were given higher index work more often than blacks of equal rank. \textit{Id.} at 1309-13. The black plaintiffs also showed through statistics that their promotions to a higher index took much longer than comparable whites. \textit{Id.} at 1313; see Rendon v. AT&T Technologies, 883 F.2d 388 (5th Cir. 1989); Smith v. Western Electric Co., 770 F.2d 520 (5th Cir. 1985); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), \textit{cert. denied}, 434 U.S. 1034 (1978). These cases also show how subjective assignment and subjective assessment of the assigned work reinforce each other in creating black employment disadvantage.


\textsuperscript{118} A job may be undesirable because it is low paying, has less status, or carries diminished prospects for advancement. SCHLEI & GROSSMAN, \textit{supra} note 15, at 571, 582.

\textsuperscript{119} See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); SCHLEI & GROSSMAN, \textit{supra} note 15, at 583.

\textsuperscript{120} See SCHLEI & GROSSMAN, \textit{supra} note 15, at Supp. 55; Smith v. Western Electric Co., 770 F.2d 520 (5th Cir. 1985); Hung Ping Wang v. Hoffman 694 F.2d 1146 (9th Cir. 1982); see also Gay v. Waiters and Dairy Luncheon's Union, 694 F.2d 531, 554 (9th Cir. 1982) ("the use of subjective employment criteria is not per se unlawful").


relied on racial stereotypes in a subjective system,\(^{123}\) the subjective system itself becomes part of the practice of discrimination. To invalidate a subjective system under the disparate treatment theory, therefore, the plaintiff must show that race is the most likely explanation for a sequence of decisions in which white workers have been preferred over black workers.\(^{124}\) To invalidate a subjective system under disparate impact theory, the Supreme Court has held that a plaintiff must show that the hiring or promotion system caused substantial disparate impact.\(^{125}\) Unless the employer justifies the subjective system based on business necessity, the plaintiff wins.\(^{126}\) In lower-level employment at least, an employer will find it difficult to justify a system with

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\(^{123}\) Note that such a system may involve the use of earlier subjective merit assessments which are then used as part of the system for determining whether the employee is entitled to the job in question.

\(^{124}\) Cases challenging subjective systems under the disparate treatment theory include: Mozee v. American Commercial Marine Service, 940 F.2d 1036 (7th Cir. 1991), cert. denied, 113 S. Ct. 207 (1992); IMPACT v. Firestone, 893 F.2d 1189 (11th Cir.), cert. denied, 498 U.S. 847 (1990); Rendon v. AT&T, 883 F.2d 388 (5th Cir. 1989); Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988), vacated, 490 U.S. 1103 (1989), cert. denied, 498 U.S. 814 (1990); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir.), cert. denied, 479 U.S. 883 (1986); Smith v. Western Elec. Co., 770 F.2d 520 (5th Cir. 1985); Hill v. Seaboard Coast Line R. Co., 767 F.2d 771 (11th Cir. 1985), aff'd, 885 F.2d 804 (11th Cir. 1989); Lams v. General Waterworks Co., 766 F.2d 386 (8th Cir. 1985); Miles v. MNC Corp., 750 F.2d 867 (11th Cir. 1985); Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984); Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir.), reh'g denied, 718 F.2d 1115 (11th Cir. 1983); Boykins v. Georgia Pacific Co., 706 F.2d 1384 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984); Carpenter v. Stephen Austin State Univ., 706 F.2d 608 (5th Cir.), reh'g denied, 712 F.2d 1416 (5th Cir. 1983); Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); Gay v. Waiters and Dairy Lunchmen's Union, 694 F.2d 531 (9th Cir. 1982); NAACP v. Evergreen, 693 F.2d 1367 (11th Cir. 1982), reh'g denied, 698 F.2d 1238 (11th Cir. 1983); Wylene Watson v. Nat'l Linen Serv., 686 F.2d 877 (11th Cir. 1982); Payne v. Travellion Lab., 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); Robbins v. White-Wilson Medical Clinic, 660 F.2d 1064 (5th Cir. 1981), vacated, 456 U.S. 969, reh'g denied, 695 F.2d 564 (5th Cir. 1982); Lyn v. Regents of Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982); Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980), reh'g denied, 620 F.2d 300 (5th Cir. 1980); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1981); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).

\(^{125}\) Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 989-90 (1988). The Court was firstly concerned that if only objective criteria were reachable under the disparate impact theory, employers could immunize themselves from "impact" suits by incorporating objective criteria into a selection process which included subjective criteria. Id. The Court also felt that the disparate treatment theory may not be adequate to police a system of subjective decision-making where the evaluators held subconscious stereotypes and prejudices. Id. at 991-92; SCHELE & GROSSMAN, supra note 15, at 490; see Emanuel v. Marsh, 897 F.2d 1435 (8th Cir. 1990); IMPACT v. Firestone, 893 F.2d 1189 (11th Cir.), cert. denied, 498 U.S. 847 (1990); Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988), vacated, 490 U.S. 1103 (1989), cert. denied, 498 U.S. 814 (1990); Smith v. Western Elec. Co., 770 F.2d 520 (5th Cir. 1985); Hill v. Seaboard Coast Line R. Co., 767 F.2d 771 (11th Cir. 1985), aff'd, 885 F.2d 804 (11th Cir. 1989); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Crawford v. Western Elec. Co., 745 F.2d 1373 (11th Cir.), reh'g denied, 751 F.2d 394 (11th Cir. 1984); Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1385-86 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

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insufficient safeguards against racial stereotyping by an evaluator. Statistical evidence of racial disadvantage is critical under both theories of discrimination, combined with proof of a subjective system of evaluation, which increases the significance of racial disparities.127

Using private methods of promotion may not be unlawful per se, but where African Americans are significantly underrepresented in the jobs at issue, courts are likely to find employers using such a practice liable for employment discrimination.128 Again, this practice may be attacked under either the disparate impact or disparate treatment theories.129 Either way, the plaintiff must establish that the practice caused significant underrepresentation. The substantial disadvantage to African Americans caused by stereotyping can best be remedied through an attack on the practice of using subjective systems.

3. Educational Requirements

Employers generally establish a minimum level of education for a particular job because they believe that persons with more education are more productive. Establishing a minimum level of education is therefore a cheap way to

127. SCHLEI & GROSSMAN, supra note 15, at Supp. 59. "Where a subjective system creates no adverse effect on the subject class, such subjectivity is insufficient by itself to sustain the plaintiff's case. At the same time the existence of a subjective evaluation system lacking appropriate safeguards generates a greater risk of liability in cases where the statistical disparity is a matter of dispute." Id.; see Gay v. Waiters and Dairy Lunchmen's Union, 694 F.2d 531, 554 (9th Cir. 1982) ("Subjective decision-making strengthens an inference of discrimination from general statistical data.") (disparate treatment); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1387 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979) ("the significance of statistical disparities between the races is magnified when appraised in light of the fact that the defendant's decision[s] ... are ... almost exclusively ... subjective determination[s] made by white supervisors.") (disparate impact). The plaintiff may find it easier to attack a subjective decision-making process under the disparate impact theory than under the disparate treatment theory because the employer's motivations are not at issue. However, the remedies for disparate treatment are more generous than those for disparate impact. If the plaintiff succeeds in proving disparate treatment she may recover compensatory damages (in addition to backpay) and if she can prove that the employer acted maliciously or recklessly, she may also recover punitive damages. These damages are not recoverable for a disparate impact violation. See 42 U.S.C. §§ 1981 and 1981a(a)(1),(b) (1988 & Supp. V 1993).


129. See supra text accompanying notes 124-126.
eliminate less productive candidates.\textsuperscript{130} This practice causes substantial black employment disadvantage because a smaller proportion of black applicants than white applicants have high school or college diplomas.\textsuperscript{131}

An employer who imposes an educational requirement for the purpose of excluding black applicants commits disparate treatment discrimination.\textsuperscript{132} However, because such a purpose may be difficult to prove, the lawfulness of an educational requirement will usually be determined by reference to the disparate impact theory of discrimination. The plaintiff will usually be able to show that an educational requirement has a disparate impact on black applicants because of black educational disadvantage. The unlawfulness of an educational requirement, therefore, will depend on whether it is justifiable, i.e., whether it is a sufficiently good predictor of job performance.\textsuperscript{133} Traditionally, courts have been extremely reluctant to permit the use of educational requirements to restrict entry into unskilled employment.\textsuperscript{134} They have, however, been more willing to rely on employer judgment to hold that educational requirements are justified for skilled and professional-level employment.\textsuperscript{135}

Because educational requirements, which disadvantage black job applicants, are common in unskilled employment contexts,\textsuperscript{136} we may conclude that unlawful educational requirements cause African Americans substantial disadvantage. In addition, “[t]he adverse effect of irrelevant higher education requirements increases when . . . as in 1990 . . . college graduates—in over supply—[are] being hired as clerks, bookkeepers and so forth."\textsuperscript{137} Thus when an economic downturn makes lower-level jobs scarce black job-seekers suffer disproportionately.

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\textsuperscript{130} Braddock & McPartland, \textit{supra} note 68, at 12.
\textsuperscript{131} Id. at 13. Of black males and females over the age of 25, 71.1\% obtained a high school diploma or higher graduate degree. \textit{Claudette E. Bennett}, U.S. \textsc{Dep't of Commerce}, \textit{The Black Population in the United States} 10 (1993). In contrast, 82.1\% of whites in corresponding age and gender groups held these qualifications. \textit{Id}.
\textsuperscript{132} See, e.g., Lams v. General Waterworks Corp., 766 F.2d 386 (8th Cir. 1985).
\textsuperscript{135} Aguilea v. Cook County Police & Corrections Merit Bd., 760 F.2d 844 (7th Cir.), \textit{cert. denied}, 474 U.S. 907 (1985); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983); Rice v. City of St. Louis, 607 F.2d 791 (8th Cir. 1979); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); \textit{Schlei & Grossman}, \textit{supra} note 15, at 166 & Supp. 51.
\textsuperscript{136} In Braddock and McPartland’s study, 22\% of employers reported that they frequently use education level in selecting employees for lower-level jobs. Braddock & McPartland, \textit{supra} note 68, at 35, \textit{Table A2}.
\textsuperscript{137} \textit{Ezorsky}, \textit{supra} note 69, at 22.
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B. Assessing the Harm Caused by these Common Practices

Whether measured by earnings, employment, or occupation, black employment disadvantage is substantial.\(^{138}\) In 1991, the average annual earnings\(^{139}\) of a black male were only 61% of a white male’s earnings.\(^{140}\) The black unemployment rate is approximately double the white rate,\(^{141}\) and African Americans are overrepresented in the lower paying occupations, overrepresented in the lower categories of many occupations, and work in sectors of the economy that are particularly sensitive to cyclical downturns and slow to respond to upturns.\(^{142}\)

While the main causes of black employment

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138. For purposes of this discussion the following definitions will prove useful:
Employed: includes those holding part-time jobs.

Unemployed: refers to those without jobs who are actively seeking work.

Labor force: consists of the employed and the unemployed. Full-time students, retirees, homemakers and persons who have stopped looking for work, are not in the labor force.

Employment rate: is the ratio of those employed to those in the labor force.

Unemployment rate: is the ratio of those unemployed to those in the labor force.

Labor force participation rate: is the ratio of those in the labor force to the total adult population.

Ehrenberg & Smith, supra note 101, at 17.

139. Average annual earnings are a more accurate indicator of labor market position than hourly wages, because unlike hourly wages, they reflect the incidence of both part-time work and unemployment among the respective racial groups. Earnings exclude unearned income such as dividends, interest and government transfer payments. Id., supra note 101, at 22. Earnings are therefore much more accurate indicators of labor market or employment status than is income.

140. Bennett, supra note 131, at 142. In 1991, the average earned income for a black male was $12,962, whereas a white male earned $21,395. Id. The black female earned an average income of $8,814, the white female, $10,722. Id. This disparity persists even when we factor in education. Young blacks with twelve or fewer years education have earnings and occupations below those of equivalently educated whites. A Common Destiny, supra note 99, at 320. In 1992, black males twenty-five years and older who held a high school degree could expect mean annual earnings of $18,422, while similar whites earned $25,724. U.S. Dep’t of Commerce, Money Income of Households, Families, and Persons in the United States: 1992 at 119, 123 (1993). However, a greater earnings gap existed between those holding bachelor’s degrees or above. Black employees with bachelor’s degrees earned $34,940, while similarly credentialed white employees earned $48,899. Id.

141. U.S. Dep’t of Labor, Employment in Perspective: Minority Workers 2 (1993) [hereinafter Employment in Perspective]. Specifically, the black rate was 12.6% compared to the white rate of 5.8%. Id. Education does not significantly effect the unemployment disparity. For example, while 11% of the blacks holding college degrees were unemployed only 5.3% of the whites were. U.S. Dep’t of Labor, Employment and Earnings 15 (Nov. 1993) [hereinafter Employment and Earnings]. As to duration of unemployment, an unemployed black male’s median duration of unemployment for the third quarter of 1993 was 9.8 weeks, whereas a white male’s was 8.3 weeks. Employment in Perspective 2 (1993). Unemployment rate is understated because it only accounts for those currently in the labor force. A discouraged job seeker who stops looking for work, drops out of the labor force, and ceases to be counted as unemployed. Reynolds Farley, Blacks and Whites: Narrowing the Gap 38 (1984).


In 1992, the proportion of White males in the managerial and professional specialty occupations was twice that of Black males (27 percent compared to 14 percent) . . . . On the other hand, Black males were twice as likely as White males to work in service occupations (19 compared to 9 percent), and more than one and one-half times as likely to be operators, fabricators, and
disadvantage may be segregation and concentrated poverty, employment discrimination also contributes significantly to black employment disadvantage.

Economists have attempted to measure the amount of black employment disadvantage caused by employment discrimination. While these studies are useful in exploring some of the effects of employment discrimination, they significantly underrepresent the harm caused by unlawful practices. Economic studies have focused on the extent to which "current labor market discrimination" causes the racial disparity in earnings. Economists define "current labor market race discrimination" as occurring when persons of the same gender, and of equal training, education, and productivity are valued differently because of

within white collar categories, blacks are concentrated in government jobs, especially those serving a black clientele, and in the lower and less well-paid categories of white collar employment. Pettigrew & Martin, supra note 98, at 45; Ezorsky, supra note 69, at 27. A recent magazine article noted that African Americans are significantly underrepresented in management sales positions even in the music industry. Ed Christian & Don Jeffrey, Is Music Industry Hiring Too Few Women, Minorities?, BILLBOARD, Mar. 26, 1994.

"Equal opportunity (defined as receiving outcomes based solely on an individual's productive characteristics) will lead to equal outcomes only in the absence of racial segregation." Jeffries & McGahen, supra note 142, at 267 (citation omitted); see Massey & Denton, supra note 73, at 162.

As compared to white Americans, a higher percentage of black Americans are poor and a higher percentage of poor blacks live in poor communities. Poor blacks face a density of poverty three or four times higher than that of poor whites." A COMMON DESTINY, supra note 99, at 285; see William J. Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy 121 (1987); Galster, supra note 72. Other related factors frequently cited as contributing to black employment disadvantage include:


ii) The shift of employment from manufacturing to service, which is impacting more harshly on occupationally disadvantaged blacks than whites. See A COMMON DESTINY, supra note 99, at 301-11; Wilson, supra, at 40-41 (1987).

iii) Educational disadvantage, especially of black youth; Turner, supra note 99, at 3.


v) The increase in single parent families among black teenagers. Women who have a child while in their teens are much more likely to finish their schooling prematurely, have large families, and encounter subsequent difficulties finding jobs. See Daniel H. Saks, The Goals of the Civil Rights Movement and the Evolution of the Economy, 37 Rutgers L. Rev. 765, 778 (1984-85).

145. I recognize the symbiotic relationship between employment discrimination and segregation and poverty. Segregation and poverty help cause racial stereotyping and the employment disadvantage which results from word-of-mouth recruiting and unjustifiable educational qualifications. Braddock & McPartland, supra note 68, at 9-12. See generally Pettigrew & Martin, supra note 98, at 695. "Continued segregation supports the exclusionary barrier of social networks in finding job opportunities, ... produces racial bias of information used in selection ... [and provides the basis for] the practice of statistical discrimination." Braddock & McPartland, supra note 68, at 27-28; see Ezorsky, supra note 69, at 16, 26-7; A COMMON DESTINY, supra note 99, at 322. I isolate employment discrimination as a cause of employment disadvantage, however, because this cause can be directly addressed by the EEOC.
their race. These studies try to determine how much of the disparity in earnings is accounted for by productivity and demographic characteristics. Whatever disparity cannot be accounted for by these factors may be attributable to "current labor market discrimination." Studies estimate that between 12% and 50% of the difference in average earnings may be attributable to "current labor market discrimination."

These economic studies have numerous limitations. One problem is with the definition of "current labor market discrimination," which does not cover many instances of unlawful disparate treatment. For instance, employers wishing to exclude black workers from blue collar employment may impose a college degree requirement. So long as these employers apply the requirement scrupulously to applicants of all races, no wage differential unrelated to "productive" characteristics appears. Neither does the concept of "current labor market discrimination" account for disparities caused by many instances of unlawful disparate impact, such as unjustifiable educational, or experience requirements. In addition, the concept treats productivity characteristics as given. It ignores the fact that productivity characteristics may be determined by earlier unlawful employment discrimination. For instance, an employee may not possess a skill because of employer discrimination in assigning jobs or providing training. This employee's failure to gain promotion because of his lack of skill is not counted as "current labor market discrimination."

146. See EHRENBERG & SMITH, supra note 101, at 443; A COMMON DESTINY, supra note 99, at 146. Racial discrimination causes two equally qualified individuals to have different earnings because of their race. Saks, supra note 144, at 770. "The notion of discrimination involves the concept that personal characteristics of the worker, unrelated to productivity are . . . valued on the market." Kenneth Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS (Ashenfelter & Rees eds., 1973).

147. These characteristics are: education, training, experience, turnover rate, health and marital status, and region of residence. EHRENBERG & SMITH, supra note 101, at 445.

148. This disparity may be attributable to discrimination because it remains after most quantifiable relevant market characteristics are accounted for. Id. at 446.

149. Id.; see, e.g., Mary Corcoran & Greg J. Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes, 14 J. HUM. RESOURCES 3, 18 (1979) (finding that 47% of the wage gap between black males and white males was "unexplained"). Farley, on the other hand, found that if black men "matched white men in labor force characteristics and hours worked but were paid at their own rate of return, black men would have earned 88% as much as white men in 1979." FARLEY, supra note 141, at 75.

150. They do not necessarily account for all productivity characteristics. Certain characteristics relevant to productivity, such as work habits, are immeasurable. If unmeasured characteristics raise black productivity, the estimate understates discrimination. If these characteristics lower black productivity, discrimination is overstated. See EHRENBERG & SMITH, supra note 101, at 537; FARLEY, supra note 141, at 76. For example, unions in the U.S. narrow the black-white adjusted wage gap. HAMMERMESH & REES, supra note 19, at 377. Union workers are better paid than non-union workers, and blacks are more likely to join unions than whites. If we do not account for trade union membership, our estimate will understate discrimination.


152. In James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978), the court criticized a study attributing a firm's black/white wage differential to productivity differences rather than discrimination. Specifically, the court stated that the study:

is based on the assumption that productivity factors, not discrimination, may explain the wage differences.
Another problem is that these studies include only persons in the labor market. African Americans of working age may have dropped out of the labor market because of discrimination.

It may be impossible to quantify precisely the contribution of discrimination to employment disadvantage. However, the evidence supports the conclusion that the contribution is significant. We have seen that the three practices discussed above cause substantial employment disadvantage. Indeed, they may account for most of the harm caused by employment discrimination. The practices of word-of-mouth recruiting and stereotyping deprive black workers of the opportunity to compete for more desirable jobs, and push them into the lower paying, lower status jobs.\textsuperscript{153} The practice of imposing unjustifiable educational requirements has the same effect. Not only do these practices cause occupational and earnings disadvantage, they also contribute to the high black unemployment rate.\textsuperscript{154} Furthermore, excluding African Americans from better paid jobs also pushes the wages of black workers below their reservation wage. This results in a lower black labor force participation rate.\textsuperscript{155} These practices indirectly contribute to black employment disadvantage by helping to maintain poverty and segregation.\textsuperscript{156}

Attacking these practices, therefore, is the most effective way to reduce the harm of employment discrimination. Absent such an aggressive legal

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differences between . . . [the firm's] black and white employees. The productivity factors . . . employed were years of schooling, achievement, seniority, skill level, outside craft experience, outside operative experience, absenteeism, and merit ratings. The rub comes with how these factors were defined. . . . \textsuperscript{[T]}he critical factors of "skill level" and "merit rating" were defined in such a way as to incorporate discrimination. Skill level was derived from an employee's job class. . . . The systematic exclusion of blacks from promotion and training opportunities for such jobs . . . will automatically produce no black employees with "skill level". \textsuperscript{[The study] used the merit ratings of Stockham supervisors, who are overwhelmingly white. . . . If there is racial bias in the subjective evaluations of white supervisors, then that bias will be injected into . . . [the] earnings analysis.}

Further, . . . [the study] included education as one of . . . [the] productivity factors, even though education is not a job requirement at . . . [the firm]. . . . \textsuperscript{[A]}djusting for education in a regression analysis of earnings where education is not related to job performance and where one race is more educationally disadvantaged than another masks racial difference in earnings that may be explainable on the basis of discrimination.

\textit{id.} at 332.
\textsuperscript{153} \textit{See} Braddock & McPartland, \textit{supra} note 68, at 24.
\textsuperscript{154} The relatively few jobs open to blacks tend to be within the "secondary sector" of the labor market. They are characterized by poor wages, poor working conditions and their temporary or cyclical nature. \textit{See} Ehrenberg & Smith, \textit{supra} note 101 at 537; Ray Marshall, \textit{The Economics of Racial Discrimination: A Survey}, 12 J. Econ. Lit. 849 (1974); see also Galster, \textit{supra} note 72, at 1448-49 ("Both overt hiring discrimination and seemingly benign hiring techniques . . . contribute to the lower earnings, limited employment and occupational/industrial segregation of minorities.").
\textsuperscript{155} Hammermesh & Rees, \textit{supra} note 19, at 348.
\textsuperscript{156} "Not only does discrimination lead to segregation, but segregation by restricting economic opportunities for blacks, produces interracial economic disparities that incite further discrimination . . . . " Massey & Denton, \textit{supra} note 73, at 109. The lower labor force participation rate caused by discrimination discourages blacks from acquiring human capital. Hammermesh & Rees, \textit{supra} note 19, at 348. "[W]hat makes statistical discrimination troubling, is the aggregate effect . . . on the minority population--the fact that it discourages investment in human capital . . . and subordinates [minorities] . . . as a group." Strauss, \textit{supra} note 102, at 1648.

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attack, employers have few commercial incentives to change their practices. These practices are cheap and often produce enough suitable employees to meet employer needs. Furthermore, employers incur few if any costs by ignoring suitable black candidates.\textsuperscript{157} If we hope to banish these practices from the workplace, we must increase the cost to employers of their use.\textsuperscript{158}

III. THE EEOC'S IMPERFECT PATTERN: WHY INDIVIDUAL CHARGES DO NOT TARGET UNLAWFUL PRACTICES

Although the most effective way to reduce race discrimination in employment is to target unlawful practices, the EEOC was originally designed to pursue individual charges. When the agency tries to target practices using individual charges, it not only fails to reach such practices, but its more narrow charge-processing function also suffers. As this Part will help to demonstrate, the duties of processing individual charges and attacking unlawful practices are fundamentally incompatible.

The EEOC is the public's standard-bearer in the battle against race discrimination in employment, and it already has the mission of attacking unlawful practices. The best way to target practices is to investigate firms based on work force statistics showing black disadvantage at these firms, and the EEOC already possesses this vital information. The agency regularly receives and analyzes the most up-to-date firm information documenting black disadvantage, and it has the power to investigate those firms that it suspects of committing unlawful practices. It is therefore better placed than a private individual or organization to uncover and litigate unlawful practices.

A. The Mission and Charge-Processing Function of the EEOC

As the federal agency chiefly responsible for enforcing Title VII,\textsuperscript{159} the EEOC has the statutory mandate to attack practices of discrimination.\textsuperscript{160} The filing of an employment discrimination charge with the EEOC begins the Title

\textsuperscript{157} Braddock & McPartland, \textit{supra} note 68, at 28.

\textsuperscript{158} "Forcing [an employer] to take into account, or 'internalize,' the costs that its . . . [practices] impose . . . can influence the conduct of the [employer] through the market mechanism, so as to minimize harm to society." \textit{CLASS ACTIONS, supra} note 54, at 141.


\textsuperscript{160} Title VII § 706(b), 42 U.S.C. § 2000e-3(b) (1988); Title VII § 707(e), U.S.C. § 2000 e-6(c) (1988).
VII enforcement process. A charge may be filed by a person claiming to be aggrieved ("aggrieved person") or by an EEOC commissioner.\textsuperscript{161} A commissioner's charge may be filed on behalf of an "aggrieved person,"\textsuperscript{166} or the EEOC. A commissioner's charge filed on behalf of the EEOC will usually commence a "systemic investigation," i.e., an investigation to determine whether an employer is committing an unlawful practice.\textsuperscript{163} The EEOC must investigate all charges. In connection with an investigation, the EEOC is entitled to view and copy documents relevant to the investigation and to interview witnesses.\textsuperscript{164} If it finds no reasonable cause to believe that a charge is true, it must dismiss the charge.\textsuperscript{165} If the EEOC finds reasonable cause to believe that a charge is true, it must try to eliminate the unlawful practice by conciliation.\textsuperscript{166} Where the charging party is an "aggrieved person," the EEOC is not required by statute to seek a remedy for her. However, it will usually do so because one of the purposes of EEOC charge processing is to provide federal assistance to "aggrieved persons."

If the EEOC is unable to secure an acceptable conciliation agreement, it may, at its discretion, sue the employer.\textsuperscript{167} If the EEOC proves that the employer wrongfully discriminated, the court may award the same remedies as it would to a successful private plaintiff. The court may enjoin the respondent from discriminating, or "order such affirmative action as may be appropriate, . . . or any . . . equitable relief as the court deems appropriate."\textsuperscript{168} An

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\textsuperscript{161} Title VII, § 706(b), 42 U.S.C. § 2000e-5(b) (1988 and Supp. V 1993). Title VII contains detailed provisions concerning the time of filing, and the relationship between the EEOC and state or local fair employment agencies. In outline, these provisions provide that the charging party, whether "aggrieved person" or commissioner, must file her charge with the EEOC within 180 days of the alleged discrimination. Title VII § 706(c), 42 U.S.C. § 2000e-5(c) (1988 & Supp. V 1993). Where the discrimination occurs in a state with state laws outlawing it, and an agency to enforce them, the charging party has 300 days from the date of the discrimination to file the charge with the EEOC (or 30 days from the time the state agency has terminated its proceedings). \textit{Id.} It is a precondition to EEOC action that the state agency is given the opportunity to remedy the discrimination. Where the charging party is "an aggrieved person," the agency is given up to 60 days exclusive jurisdiction before the EEOC may act. If the charging party is a commissioner, the EEOC cannot act on the charge unless it allows the agency a reasonable time to remedy the alleged practice. The state agency can insist on at least 60 days for this purpose. Title VII § 706(c)-(d), 42 U.S.C. § 2000e-5(c)-(d) (1988 & Supp. V 1993).

\textsuperscript{162} 29 C.F.R. §§ 1601.6-.7, 1608.11 (1991).

\textsuperscript{163} See infra text accompanying note 262.

\textsuperscript{164} Title VII § 709(e), 42 U.S.C. § 2000e-8(a) (1988). The EEOC also has the power to apply for an order granting "temporary or preliminary relief pending final disposition of [the] charge" where it believes that "prompt judicial action is necessary." Title VII § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2) (1988).

\textsuperscript{165} Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1988). The "aggrieved person" and employer must be notified of the dismissal. \textit{Id.} The EEOC must make its determination on reasonable cause as promptly as possible. \textit{Id.}

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.} If the employer is a state governmental body, only the U.S. Attorney General may sue. \textit{Id.}

\textsuperscript{168} Title VII § 706(g), 42 U.S.C.. § 2000e-5(g) (1988 & Supp. V 1993). In addition to processing charges and bringing suit, the EEOC is empowered to issue procedural regulations. Title VII § 713, 42 U.S.C. § 2000e-12 (1988). The EEOC has not only issued regulations concerning its administrative process, but also regulations "interpreting" Title VII. The EEOC is also empowered to impose such record keeping and reporting requirements on employers covered by Title VII "as are appropriate for
"aggrieved person" also has a right to sue. When an individual brings such a suit, the judge in her discretion may allow the EEOC to intervene.

Prior to 1972, the EEOC had no power to remedy employment discrimination by legal action, but the Attorney General was empowered to bring an action against an employer or group of employers whom he had reasonable cause to believe was engaged in a "pattern or practice" of employment discrimination. The Attorney General was not required to follow any administrative procedures prior to suit because Congress originally devised pattern or practice suits to allow swift federal prosecution of particularly harmful practices. In 1972, when Congress gave the EEOC the power to bring pattern or practice suits, it made exhaustion of the EEOC's charge processing system (i.e. charge filing, investigation, reasonable cause determination, and attempted conciliation) a precondition to a pattern or practice suit brought by the EEOC. To this day, therefore, the EEOC must exhaust its charge-processing system prior to suit, whether its suit is based on an "aggrieved person" charge or a commissioner's charge alleging an unlawful practice.

In 1964, when Congress created the EEOC without the power to sue, Congress recognized the existence of discriminatory practices and gave the EEOC a role in attacking them. Under Title VII as originally enacted, "a member of the Commission" could file a charge alleging an unlawful
practice. Members of the Senate voted down a proposed amendment to deprive a commissioner of this power, recognizing that it was necessary to combat discrimination even when individual victims did not take the initiative. The original Title VII also required employers to keep such reports and records as the Commission prescribed. Senator Case explained the importance of record-keeping: "[whether an employer discriminates] will usually be best evidenced by his pattern of conduct on similar occasions." Furthermore, while the original Title VII gave only the Attorney General the power to bring legal action to stop 'patterns or practices' of discrimination, the EEOC was empowered to advise the Attorney General in this area. Congress clearly recognized in 1964 the existence of unlawful practices and gave the EEOC a role in fighting them. Its members, however, believed that focusing on individual incidents of discrimination was the best way to address the problem. Indeed, Congress intended the EEOC's main role to be dispute resolution between individuals and their employers, and it modelled...
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the EEOC on earlier Fair Employment Agencies (FEAs) with this role.183

An FEA which offered a clear precedent for this approach was President Roosevelt's Fair Employment Commission, established in 1941 and authorized to "receive and investigate complaints of discrimination . . . and take appropriate steps to redress grievances which it [found] to be valid."184 It had no power to issue legally enforceable orders.185 Similarly, the New York State FEA, established in 1945186 and modelled on Roosevelt's commission,187 was also complaint-driven and focused upon reaching individual conciliation agreements.188

Although the EEOC now has the power to sue, its administrative procedure continues to resemble that of these early FEAs.189 It is complaint-driven. A formal charge starts its investigatory process and it must investigate all charges.190 It also focuses primarily upon conciliation, has no power to impose sanctions, and may only sue when conciliation has failed. Furthermore, it is not required to sue, even when conciliation has failed.191 Therefore, even

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183. Bamberger & Lewin, supra note 182, at 531; see MICHAEL J. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 56 (1966) ("In the years after World War II, some thought that employment discrimination would yield to persuasion and education without compulsion.").


185. SOVERN, supra note 183, at 13; Bamberger & Lewin, supra note 182, at 526 n.6. By Executive Order 9346, President Roosevelt abolished the original committee and created a new one, with an expanded area of operation but with the same lack of enforcement powers. SOVERN, supra note 183, at 12-13.

186. SOVERN, supra note 183, at 21; Bamberger & Lewin, supra note 182, at 527.

187. SOVERN, supra note 183, at 22. The procedures also resembled those of the National Labor Relations Board ("NLRB").

188. Although the New York FEA was empowered to issue judicially enforceable "cease and desist" orders when it found discrimination, it was originally required to conciliate prior to the hearing at which the order could be imposed. SOVERN, supra note 183, at 24. Conciliation is now optional. See id.; N.Y. EXEC. LAW § 297(3) (McKinney 1982). The procedural sequence under the original New York legislation was: (1) complaint; (2) investigation; (3) reasonable cause determination; (4) conciliation; and (5) formal hearing. SOVERN, supra note 183, at 22-25.

189. SOVERN, supra note 183, at 9. See generally Bamberger & Lewin, supra note 182.

190. The EEOC is not, however, dependent on a formal complaint by an "aggrieved person". Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1988). A charge may be filed by a commissioner. Id.

today the EEOC is still basically designed to address discrimination by focusing on individual wrongs and using dispute resolution techniques.\footnote{Silver, supra note 182, at 507; Bamberger & Lewin, supra note 182, at 531; Cornelius J. Peck, The Equal Employment Opportunity Commission: Developments in the Administrative Process, 51 Wash. L. Rev. 831, 851 (1976).}


As early as 1972, however, commentators and legislators recognized that employment discrimination must be viewed not in terms of individual wrongs but “in terms of ‘systems’ and ‘effects.’"\footnote{H. R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971), reprinted in 1972 LEGISLATIVE HISTORY, supra note 191, at 68.} They recognized that attacking unlawful practices is the best way to combat employment discrimination.\footnote{See Eleanor Holmes Norton, Overhauling the EEOC, 28 Lab. L.J. 683, 690 (1977) ("Only by an effective attack on entire systems that discriminate can we have any significant impact on discrimination."); Herbert Hill, The Equal Employment Opportunity Commission: Twenty Years Later, 11 J. INTERGROUP REL. 45, 63-64 (1988) [hereinafter Twenty Years Later]; Oversight Hearing, supra note 42, at 202-21 (letter from various House members to Chairman Thomas, EEOC). A system of enforcement should place “a priority on systemic litigation recognizing that such cases are an excellent way to maximize limited resources.” CITIZENS' COMM’N ON CIVIL RIGHTS, ONE NATION, INDIVISIBLE 202 (1989) [hereinafter ONE NATION]. Agreement that attacking practices is the best way to fight discrimination is general, but by no means unanimous. Clarence Thomas, Chair of the EEOC from 1982 to 1989, did not agree “that ‘pattern or practice’ cases ... constitute the ... most important deterrent to the continuance of discriminatory employment practices.” Oversight Hearing, supra note 42, at 20. He believed that legal action on behalf of individual victims was the most effective deterrent to discrimination. Id.} An FEA that seeks to combat practices of discrimination by investigating and resolving the specific complaints of individuals will be ineffective.\footnote{"[C]ommissions can achieve far greater results by emphasizing pattern-centered compliance activities than by concentrating on the adjustment of individual complaints." PAUL H. NORGREN & SAMUEL E. HILL, TOWARD FAIR EMPLOYMENT 251 (1964). “Individual enforcement can at best produce an erratic series of changes in the behavior of individual employers.” LAWRENCE LUSTGARTEN, LEGAL CONTROL OF RACIAL DISCRIMINATION 241 (1980). “[R]esolving 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.” Paul Burstein & Kathleen Monaghan, Equal Employment Opportunity and the Mobilization of Law, 20 L. & Soc. Rev. 344, 367 (1986).} An FEA may seek to discover unlawful practices in two ways. It may expand its investigation of an “aggrieved person” charge to cover class-wide injury or it may initiate an investigation into a firm to determine, for example, the legal significance of statistical evidence of black disadvantage at that firm. Professor Michael Sovern, for example, argued that a system based on “aggrieved person” charges could be effective if the FEA made “the most of a complaint”:\footnote{SOVERN, supra note 183, at 35. “Indeed, on a number of occasions discriminatory practices have been eliminated even though the complaint actually made was found to be baseless.” Id.} “Instead of sticking close to the specifications of a complaint, an active commission will take the opportunity to conduct a full review of the accused’s employment practices.”\footnote{Id.}

By 1972, Congress also understood the importance of attacking unlawful
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practices. It made clear that this was one of the chief functions of the EEOC, and it gave the agency responsibility for coordinating the government’s attack on these practices. However, Congress continued to regard the investigation and resolution of “aggrieved person” charges by the EEOC as a priority. Congress envisioned that the EEOC would attack practices while investigating these charges. “[Individual acts of discrimination are] frequently symptomatic of a pattern or practice of [discrimination]. . . .”200 “[The EEOC’s new enforcement power should be used for] the elimination of patterns and practices of discrimination wherever [an] investigation of a charge discloses the existence of such employment situations.”201 At least one member of Congress believed that attacking practices of discrimination through investigations of “aggrieved person” charges would be ineffective, but the majority did not share those misgivings.

Congress’s strategy of using complaints to attack practices suffered, however, from a major limiting flaw: victims of unlawful practices do not usually complain. Even a victim who believes that she has been discriminated against may not complain for a variety of reasons. She may be ignorant of the statutory protection, or how to invoke it.202 She may find the remedy insufficient, the prospect of success slight, the advent of success long-delayed, or the enforcement procedures complex and intimidating.203 She may fear


199. The House committee reported that the EEOC’s expertise and “access to the most current statistical [data] . . . regarding employment patterns” meant that the agency was ideally suited to combatting employment discrimination. H.R. REP. NO. 238, 92d cong., 1st sess. 14 (1971), reprinted in 1972 LEGISLATIVE HISTORY, supra note 171, at 74 (report of House Committee on Education and Labor). The House committee took the view that combating practices of discrimination should be “an integral and coordinated part of the [Commission’s] overall enforcement effort.” See id.; S. REP. NO. 415, 92d cong., 1st sess. 1 (1971), reprinted in 1972 LEGISLATIVE HISTORY, supra note 191, at 410. Save with regard to state employers, the 1972 Act transferred the Attorney General’s “pattern or practice” jurisdiction to the EEOC. Title VII, § 707(c)-(e), 42 U.S.C. § 2000e-6(c)-(e) (1988).


202. 118 CONG. REC. 4081 (1972), reprinted in 1972 LEGISLATIVE HISTORY, supra note 191, at 1586. Senator Hruska said: “§ 706 is a complaint-oriented procedure and is not geared to the handling and the management of pattern and practice cases which are in the nature of class actions . . . [The Commission is] going to be circumscribed . . . [and is] to be hemmed in by a complaint-oriented procedure which is contained in section 706.” Id.


204. STANDING ADVISORY COMM’N ON HUMAN RIGHTS, RELIGIOUS AND POL. DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN N. IRELAND REPORT ON FAIR EMPLOYMENT, 1987, CMND 145, § 11.59 [hereinafter FAIR EMPLOYMENT]. In general, poorer people are reluctant to become entangled
employer retaliation,205 or she may simply wish to forget her pain and get on with her life.206

Victims, moreover, are often unaware that they have been discriminated against. This is because disparate treatment discrimination tends to be covert,207 while disparate impact discrimination often appears innocuous208 and is only discernable with technical expertise or access to detailed statistical records.209 For instance, stereotyping is now a chief cause of disparate treatment discrimination210 and it is more likely to occur in the hiring process than in the decision to dismiss because the employer has less information about the worker at the hiring stage.211 Because discrimination in hiring is now less blatant than it was thirty years ago, it is more difficult to perceive than discrimination in dismissal, where the black victim can compare herself to white co-workers.212 Consequently, the percentage of discrimination cases and charges alleging hiring discrimination has declined while the percentage of those alleging discriminatory discharge has increased. The author of one critical study concluded that “once the egregious forms of exclusion have been eliminated, there is far less potential for black improvement under a law that is enforced by complaints by alleged victims of discrimination.”213 In the words of one commentator analyzing Title VII’s regulatory regime, “Title VII, originally envisioned as a tool for opening employment opportunities for African Americans . . . is now overwhelmingly used to protect the existing positions of incumbent employees.”214 A complaint-based system not only fails to open up sufficient new employment opportunities for African

206. “For countless reasons, including the internalization of inferiority, victims are unlikely to [complain]. . . .” Becker, supra note 12, at 1680; Ronald Turner, A Look at Title VII’s Regulatory Regime, 16 W. New Eng. L. Rev. 219, 237 (1994) [hereinafter Regulatory Regime].
210. See generally supra Part II. See also Jerry L. Mashaw, Implementing Quotas, 79 Geo. L.J. 1769, 1771 (1991) (“I believe . . . unconscious racism is not just widespread, but ubiquitous. I suspect that it infects a huge proportion of marginal hiring decisions . . . .”).
211. “[I]nformation about employees is ordinarily easier to acquire than information about applicants, and it is lack of information that makes statistical discrimination rational.” Strauss, supra note 102, at 1677.
214. Regulatory Regime, supra note 206, at 236. In 1966 there were twice as many charges of hiring discrimination as of firing discrimination. By 1985 there were six times as many charges of firing discrimination as of hiring discrimination. Donohue & Siegelman, supra note 212, at 1015.
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Americans, but also fails to produce cases against those employers that discriminate most seriously. This is because complaints tend to cover those sectors where minorities have already made some inroads, not those from which they are systematically excluded. Because of the use of social networks to find employment, black job-seekers tend to apply to employers who already employ other black workers. Also, to avoid discrimination, African Americans will tend to apply where they think they have a chance of being hired and relatively well-treated. Thus the figures for discriminatory claims and charges may invert reality. As commentators have observed, because "[v]ictims of discriminatory patterns rarely file complaints about such discrimination, and few of the complaints which individuals file involve institutional structures of discrimination," the logical conclusion is that "[t]he complaint pattern in employment cases . . . is inversely related to the . . . incidence of discrimination."

Even before Title VII was passed, some experts in the field of discrimination law had recognized that charges select targets and issues at random, based on the initiative of individual victims, and thus do not reliably identify practices of discrimination. A more effective way for an FEA to combat unlawful discrimination may increase, even as (overall) discrimination decreases. Id. at 1011-14 (referring to this as the "integration effect"). People tend to measure themselves by persons closest to them. Identical employer conduct suffered by a black worker may hurt that individual more in an integrated environment, where his white peers are unaffected, than in a segregated environment, where ex hypothesi his black peers are equally affected. Id. at 1012. Alarm has been raised over the disproportionate increase in discrimination filings in federal court. Cheryl B. Bryson & Anurag Gulati, The Courts and Legislature Begin to Adopt ADR Methods to Deal with Growing Numbers of Employment Discrimination Claims, 13 N. ILL. U. L. REV. 221 (1993); Donohue & Siegelman, supra note 212. Yet a study of the litigation rate (litigation as a percentage of disputes) in eight areas (tort, consumer, debt, discrimination, property, government, post-divorce, and landlord-tenant) found that the area of discrimination had the second lowest litigation rate. (The consumer area had the lowest.) David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 87 (1983). (I am grateful to Professor Stewart Schwab for this reference.) "The evidence suggests, however, that there may be too few [Title VII cases]. People are much less likely to see a lawyer or litigate an employment discrimination claim than any other legal claim." Becker, supra note 12, at 1679.


215. LEON H. MAYHEW, LAW AND EQUAL OPPORTUNITY 159 (1968); see LUSTGARTEN, supra note 195, at 241.
216. See supra text accompanying notes 73-78.
217. Herbert Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations, 14 BUFF. L. REV. 22, 51; Appleby & Ellis, supra note 209, at 274.
218. Donohue and Siegelman note another way in which litigation data invert reality. "[T]he volume of federal employment litigation has grown spectacularly . . . ." Donohue & Siegelman, supra note 212, at 983-84. Between 1970 and 1989 federal employment discrimination filings rose by 2,166%. All other federal civil filings rose by 125%. Id. at 985. However, during this period, discrimination in the workplace may have been declining. Id. at 1001. But with the increasing integration of the workplace, an individual's ability to perceive discrimination increased, as did the psychic hurt of discrimination. Thus, complaints of discrimination may increase, even as (overall) discrimination decreases. Id. at 1011-14 (referring to this as the "integration effect"). People tend to measure themselves by persons closest to them. Identical employer conduct suffered by a black worker may hurt that individual more in an integrated environment, where his white peers are unaffected, than in a segregated environment, where ex hypothesi his black peers are equally affected. Id. at 1012. Alarm has been raised over the disproportionate increase in discrimination filings in federal court. Cheryl B. Bryson & Anurag Gulati, The Courts and Legislature Begin to Adopt ADR Methods to Deal with Growing Numbers of Employment Discrimination Claims, 13 N. ILL. U. L. REV. 221 (1993); Donohue & Siegelman, supra note 212. Yet a study of the litigation rate (litigation as a percentage of disputes) in eight areas (tort, consumer, debt, discrimination, property, government, post-divorce, and landlord-tenant) found that the area of discrimination had the second lowest litigation rate. (The consumer area had the lowest.) David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 87 (1983). (I am grateful to Professor Stewart Schwab for this reference.) "The evidence suggests, however, that there may be too few [Title VII cases]. People are much less likely to see a lawyer or litigate an employment discrimination claim than any other legal claim." Becker, supra note 12, at 1679.
221. See Bamberger & Lewin, supra note 182, at 531. "[I]t is apparent that no more than token progress [is] possible under a complaint-centered approach." NORGREN & HILL, supra note 195, at 231.

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practices is to target companies for investigation based on work force data. Thus, the EEOC, designed to attack discrimination by using “aggrieved person” charges, cannot eliminate discrimination effectively in this way.

IV. THE EEOC'S IMPERFECT PRACTICES: WHY EEOC STRATEGIES HAVE FAILED

A. Analysis of the EEOC's Performance

An analysis of EEOC performance data from 1972 to 1989 indicates that, whether the agency targeted unlawful practices using “aggrieved person” charges or work force statistics, it failed to make significant headway against unlawful practices because of its ongoing duty to process charges. Furthermore, the EEOC was unable to fulfill its charge processing obligations properly, even when it emphasized charge processing at the expense of attacking unlawful practices.

The era analyzed here spans almost eighteen years. It begins in 1972 when Congress first gave the EEOC the power to sue employers for employment discrimination. It includes the tenure of the two most effective chairs in EEOC history: Eleanor Holmes Norton and Clarence Thomas. It also covers a time in which the EEOC sought to attack employment discrimination aggressively, using litigation-oriented strategies. Even with effective leadership and aggressive strategies, the EEOC's performance in reducing discrimination was disappointing. By studying this era we can see that the root cause of the EEOC's problems has not been leadership or policy, but function and design.

I divide this era into three periods using EEOC fiscal years (FY). The first period is from FY 1973 to FY 1977. The 1973 fiscal year was the first full fiscal year after President Nixon signed the Equal Employment Opportunity


223. Fiss, supra note 203, at 269.

224. See id. at 251; NORGEN & HILL, supra note 195, at 268. By 1964 numerous FEAs had this self-starting power. See SOVERN, supra note 183, at 32-33.
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Act on March 24, 1972. This act gave the EEOC the power to sue when it was unable to conciliate a charge which it had reason to believe was true. In the first period, the EEOC tried to target practices using “aggrieved person” charges. The second period is from FY 1978 to FY 1982. The 1978 fiscal year is the first full fiscal year after Eleanor Holmes Norton became the chair of the EEOC on June 7, 1977. In the second period, the EEOC made attacking practices a priority, and targeted practices using statistical evidence rather than “aggrieved person” charges. The EEOC also adopted a claims adjustment or settlement-oriented model of charge processing. The third period is from FY 1983 to FY 1989. This period spans the full fiscal years of Clarence Thomas’ chairmanship of the agency. Under Chairman Thomas, the EEOC placed less emphasis on attacking unlawful practices and adopted a law enforcement or litigation-oriented model of charge processing.


During the first period, the EEOC devised an enforcement strategy based on congressional intent. Between 1973 and 1977, the EEOC sought to attack practices of discrimination through investigations of “aggrieved person” charges. The EEOC routinely expanded charges and investigations to determine whether the employer charged was guilty of an unlawful practice. The EEOC did not usually use any reliable criteria to determine whether the expansion of a particular charge was warranted. In 1973, the EEOC created a National Program Division (NPD) to attack practices of discrimination. The new National Program Division targeted employers for investigation based on the number of charges pending against them and whether...

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226. Between 1973 and 1977, the EEOC filed suit in 1,158 cases. See EEOC 8TH ANN. REP. (1973) [hereinafter 8TH ANN. REP.]; EEOC 9TH ANN. REP. (1974) [hereinafter 9TH ANN. REP.]; EEOC 10TH ANN. REP. at 8 (1975) [hereinafter 10TH ANN. REP.]; EEOC 11TH ANN. REP. at 9 (1976) [hereinafter 11TH ANN. REP.]; EEOC 12TH & 13TH ANN. REPS. (1977-1978) [hereinafter 12TH & 13TH ANN. REPS.]. These figures do not include EEOC subpoena enforcement actions. Almost all of these cases were the product of “aggrieved person” charges, yet almost all involved class issues. The EEOC’s policy was to focus mainly on those charges where it found “class issues” present. See John Ross, A HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1965—1984 at 124 n.83 (unpublished manuscript, on file with author) [hereinafter Ross] (noting that, of the 200 or more suits filed by the EEOC as of May 1974, no more than three involved only one charging party) (citation omitted).
227. In the past “[t]he EEOC’s two basic objectives [were] - to resolve individual charges of employment discrimination and to eliminate systemic discrimination . . . . The agency tried to accomplish both objectives at once by combining its investigation of individual charges with its class action activities, most often by expanding individual charges to encompass group concerns without reference to any criteria to assure the effectiveness of the individual charge as a class vehicle.” Ross, supra note 226, at 120.
228. Id. at 91.
229. The NPD’s purpose was to focus on “systemic nationwide discrimination and the investigation of commissioner’s charges.” Id. at 96.
they had a history of statutory violations. These attempts at attacking practices of discrimination through "aggrieved person" charges were unsuccessful because this basis for targeting employers was unreliable. By 1978, the EEOC recognized that while occasionally it is desirable to expand a charge investigation into 'like and related' matters and conduct a full scale investigation of the respondent's operations, routine expansion is an ineffective way to combat unlawful practices.

Using "aggrieved person" charges to attack unlawful practices not only hampered the EEOC's efforts to combat unlawful practices; it also adversely affected charge processing itself. To understand why, we must imagine an FEA devoted exclusively to processing "aggrieved person" charges, whose goal is law enforcement rather than claims adjustment. An FEA with a law enforcement goal will try to ensure that violators are punished and victims recompensed to the full extent required by the law. An FEA with a claims adjustment goal, however, will work toward settlement by compromise, whether or not the victim and violator receive their just desserts.

Ideally, an FEA with a law enforcement goal will seek to secure full statutory relief for victims through litigation or settlement. It will recognize that settlement is often necessary because it will have insufficient resources to litigate every reasonable cause finding. It will, however, avoid settlements which amount to an abdication of "its principal law enforcement responsibility

230. See 1964 LEGISLATIVE HISTORY, supra note 173; 1972 LEGISLATIVE HISTORY, supra note 191. The NPD took over the investigation of commissioner charges issued against Sears, General Electric, General Motors, Ford and the International Brotherhood of Electrical Workers. Ross, supra note 226, at 113. One of the NPD's notable successes involved the investigation of a large portion of the steel industry. Id. at 127. The court-approved settlement provided for 30 million dollars to be paid to about 40,000 minority and women employees. Id. For the Department of Justice's role in this settlement, see David L. Rose, Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement, 42 VAND. L. REV. 1121, 1145 (1989). In total, however, the EEOC's pattern or practice activity based on Commissioner's charges, Title VII § 707, 42 U.S.C. § 2000e-6 (1988), was not very distinguished. By June 30, 1975, the EEOC had only filed two § 707 lawsuits. By September 1976, the EEOC had filed only three § 707 lawsuits. Acts of 1964 & 1972, supra note 203, at 83; GAO REPORT 1976, supra note 222, at 43.

231. GAO REPORT 1976, supra note 222, at 45-46 (stating that the use of statistics to target the employer would be more appropriate). Regarding the NPD, see generally Acts of 1964 & 1972, supra note 203, at 85.

232. Norton, supra note 194, at 687. In February of 1979 the EEOC, while abandoning routine expansion of charges, devised a plan called the Early Identification Litigation Program (ELI) to identify charges where an expansive investigation was warranted. SCHLEI & GROSSMAN, supra note 15, at 953. See also GAO REPORT 1981, supra note 51, at 10; Ross, supra note 226, at 197. Charges were selected for the ELI program based on an issues' list or a respondents' list. SCHLEI & GROSSMAN, supra note 15, at 954; Lehr, supra note 222, at 252-53. The issues' list included allegations of disparate impact policies; the respondent's list was based chiefly on work force data. SCHLEI & GROSSMAN, supra note 15, at 954. The EEOC did not usually seek to settle ELI charges until the investigation was complete. Id. at 946. The EEOC would generally litigate where it found reasonable cause and was unable to conciliate the charge. Id. at 946.

233. "Combining its investigations of individual charges with its systemic activities ... has not been particularly effective but actually has been a significant factor hampering the achievement of both goals." GAO REPORT 1976, supra note 222, at 45.

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... The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated.235 This FEA will conduct thorough, litigation-oriented investigations because an employer will agree to pay full relief in settlement only if convinced that she will lose at trial.236 The FEA's reasonable cause determination, following such a thorough investigation, should convince the employer that she will lose.237 Therefore, in pursuit of its goal of full relief, the FEA will not seek early settlements (i.e., settlements prior to the determination of reasonable cause). Finally, this FEA will litigate a high proportion of the charges that are likely to succeed at trial and that it cannot settle for full compensation because over time the strong likelihood of successful FEA litigation will encourage employers to settle on terms favorable to employees.238

The law enforcement model of charge processing is undermined when an FEA with the dual function of processing charges and combatting unlawful practices routinely expands investigations into "aggrieved person" charges to uncover broader practices of discrimination. Investigations seeking unlawful practices are more exploratory, expansive, and complex than those to determine the merits of an "aggrieved person" charge.239 By filing a charge, the "aggrieved person" initiates the investigation and defines the allegations or dispute.240 The investigation seeks to elicit the facts of a dispute between two parties.

The scope of an investigation seeking unlawful practices is not defined by a private dispute; it is determined endogenously rather than exogenously.241 The aim of the investigation is to ascertain whether African Americans are underrepresented in a firm, and if they are, to determine why. Among other things, this entails procuring and analyzing extensive employment and economic data. Therefore, investigations seeking unlawful practices are more time-consuming and resource-intensive than those seeking merely to resolve...

235. Oversight Hearing, supra note 42, at 18.
236. Id. at 42 (joint statement of William Robinson, Director, Lawyers Committee for Civil Rights Under Law and Richard T. Seymour, Director, Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law); id. at 62 (statement of Nancy Kreiter, Research Director, Women Employed Institute); Lynn C. Burbridge, Changes in Employment Enforcement: What Enforcement Statistics Tell Us, REV. OF BLACK POL. ECON., Summer 1986, at 71, 76; Peck, supra note 192, at 853.
237. See generally Oversight Hearing, supra note 42, at 8 (statement of Fred W. Alvarez, Commissioner of the EEOC).
238. Id. at 9-10; GAO REPORT 1976, supra note 222, at 29; see also Leach, supra note 222, at 689.
240. While the FEA may, during the course of its investigation, deviate to some extent from the initial allegation, the charge is the starting point, and evaluating the substance of the charge is a main goal. Cf. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1283 (1976).
241. Id. at 1302.
“aggrieved person” charges.\textsuperscript{242} Thus, routinely expanding investigations of “aggrieved person” charges to attack unlawful practices will cause substantial delays in processing charges. As charges age, evidence disappears. This reduces the prospect of a proper agency investigation and reasonable cause finding, and of successful litigation. In addition, as charges age, the victim’s backpay claim increases, reducing the employer’s incentive to settle. For these reasons, routinely expanding investigation of individual charges diminishes the victim’s prospects of relief through litigation or settlement.\textsuperscript{243}

Not surprisingly, when the EEOC routinely expanded “aggrieved person” charges to investigate practices, its charge inventory ballooned, creating the infamous “backlog.”\textsuperscript{244} In June 1966, the EEOC’s charge backlog was 6,133 charges;\textsuperscript{245} by April 1977, it was 130,000.\textsuperscript{246} The backlog grew until 1978.\textsuperscript{247} By some estimates, the practice of routinely expanding charges increased the length of EEOC investigations by a factor of ten,\textsuperscript{248} thus contributing significantly to the growth of the backlog.\textsuperscript{249} Between 1973 and 1977, the proportion of suits filed by the EEOC compared to unsuccessful conciliations was 4%.\textsuperscript{250} The backlog contributed to this low litigation rate.\textsuperscript{251} The serious delay in processing charges caused evidence to be lost,

\textsuperscript{242} Ross, supranote 226, at 120; see GAO REPORT 1976, supra note 222, at 46-47.
\textsuperscript{243} See Norton, supranote 194, at 687.
\textsuperscript{244} A backlog may be described as the political term for an aging inventory of charges being investigated or pending investigation. See Thomas, supranote 234, at 32. The EEOC will always have an inventory in the sense of charges being currently processed. This inventory becomes a “backlog” when the number of charges in the system, and thus the processing time per charge, becomes “unacceptably” large.
\textsuperscript{245} Acts of 1964 & 1972, supranote 203, at 68. The EEOC started with a backlog of charges. It had anticipated no more than 2,000 charges during its first year of operation. Its budget and staff were tailored to this forecast. It received 8,854 charges. See Julius L. Chambers & Barry Goldstein, Title VII: The Continuing Challenge of Establishing Fair Employment Practices, 49 LAW & CONTEMP. PROBS. 235, 255 (1985); Belton, supranote 207, at 921; see also Ross, supranote 226, at 18.
\textsuperscript{247} Information supplied by Women Employed Institute (on file with author).
\textsuperscript{248} Twenty Years Later, supranote 194, at 46; Ross, supranote 226, at 113.
\textsuperscript{249} GAO REPORT 1976, supranote 222, at 45-46 ("[W]e believe [this practice] . . . contributed to the growth in EEOC’s backlog of individual charges because of the additional time required in expanding investigations beyond the specific issues alleged in the individual charge."); see also Ross, supranote 226, at 20; Lehr, supranote 222, at 243-44. The EEOC also had an analogous practice of encouraging charging parties to expand their charges beyond their personal grievance. Id. at 243. Analysts have cited a number of other reasons for this growth in the backlog including cumbersome and inefficient investigative and administrative procedures. Ross, supranote 226, at 18-20. For instance the commissioners made all reasonable cause decisions based on elaborately drafted reports. Id. at 18. Also because of the EEOC’s inefficient intake process, about 10% of its inventory consisted of meritless charges. Lehr, supranote 222, at 243.
\textsuperscript{250} See infra note 279. From 1973 to 1975, the EEOC successfully litigated only 1% of those charges which the EEOC had tried but failed to conciliate. GAO REPORT 1976, supranote 222, at 14. These figures show that litigation was unlikely to follow a reasonable cause determination by the EEOC.
\textsuperscript{251} Other reasons for the low rate of litigation were:
1) many of the EEOC’s reasonable cause findings concerned narrow allegations, while its policy

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making it more difficult for the EEOC to prove the charge allegation in court. Consequently, the EEOC refused to litigate many charges which it had reason to believe were legitimate. The backlog also contributed to the EEOC's poor settlement record. The delay in processing charges not only led to the loss of evidence, but also to huge back-pay claims which employers were loathe to pay.

Thus, by the time Eleanor Holmes Norton became Chairwoman of the EEOC, the agency was already floundering under its dual burden of processing individual charges efficiently and using these individual complaints to attack practices. One commentator characterized the EEOC's performance during the first period as follows:

[A]dministration of the law was not based upon any given rationale or systematic inquiry into work force discrimination. Instead, [the EEOC] yielded to the individual complaint process whereby the [EEOC's] enforcement efforts were determined by individual allegations and how the allegations were crafted in terms of complexity. The [EEOC] was a tree caught up in an avalanche: rootless, out of control, directed by outside forces.


By 1978, the EEOC clearly needed a new approach to fighting discrimination. Attacking practices based on work force statistics appeared to offer an effective strategy. To be successful, this strategy requires an FEA to invest substantial resources. It must employ specialized equipment and personnel to process extensive employment and economic data, as well as carefully plan and monitor large scale investigations. If an FEA with a duty to process charges were to decide that attacking unlawful practices is the best way to combat discrimination, it would allocate the maximum possible resources to this strategy. Therefore, it would limit its investigations of charges to the narrow confines of the charge itself and "use resolution techniques which do

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was to litigate allegations of unlawful practices;
2) the standard used by the EEOC for determining reasonable cause was the conciliation standard, while the standard used for determining whether to file suit, where conciliation failed, was the higher litigation standard. Ross, supra note 226, at 128.

Therefore the EEOC rejected as unworthy of litigation many of the charges regarding which it found reasonable cause. In 1975 about 80% of the charges referred to EEOC litigation centers were rejected. GAO REPORT 1976, supra note 222, at 30. By 1976, these centers were only approving 14% of these cases for suit. Ross, supra note 226, at 123.

252. Ross, supra note 226, at 124.
253. See infra notes 280-81, and accompanying text.
254. See Norton, supra note 194, at 686.
255. Leach, supra note 222, at 664.
256. EEOC FY 1978 to FY 1982.
not require exhausting the entire [administrative] process. This includes the adoption of an early settlement strategy. If the FEA had no duty to litigate where it found reasonable cause, the FEA would adopt the strategy of litigating only those charges that involved a practice of discrimination. This FEA, then, would adopt a claims adjustment model of charge processing. In other words, the decision by the FEA to focus on unlawful practices would profoundly alter the way it processed charges.

During the second period, under Chairwoman Norton, the EEOC made unlawful practices "its priority for the immediate future." It established an Office of Systemic Programs (OSP) at EEOC headquarters and a "systemic unit" in each district office. The function of the OSP and these district office units was to find unlawful practices. Under this program, the EEOC targeted employers based on EEOC work force data and commenced investigations by a § 707 commissioner's charge. Along with this program, the EEOC introduced the Rapid Charge Processing System (RCP). The EEOC introduced RCP to free resources for its systemic program. Under RCP the EEOC narrowed charges and investigations to cover injury to the victim only and encouraged settlement at the earliest opportunity. By

258. Norton, supra note 194, at 685.
259. Settlement is the "only technique which can secure a remedy for a significant number of complainants in a timely fashion." Id.; see also Leach, supra note 222, at 662; Alfred W. Blumrosen, Toward Effective Administration of New Regulatory Statutes - Part II, 29 ADMIN. L. REV. 209, at 218 (1977) ("[F]or reasons of economy . . . it makes sense to seek a settlement on the spot.").
260. 12TH & 13TH ANN. REPS., supra note 226, at 21. On July 27, 1977, the EEOC notified Congress that it was undertaking "the most massive overhaul of the agency structure and its processes since the establishment of the Commission in 1965." Oversight Hearing, supra note 42, at 6 (statement by Eleanor Holmes Norton); see also Ross, supra note 226, at 104.
261. Ross, supra note 226, at 120.
262. The district office units were to target employers with between 500—2,500 employees. The OSP itself would focus on employers with above 2,500 employees. The OSP was responsible for: (1) developing criteria which the district office units would use to select targets for investigation; (2) developing procedures by which the district office units would institute and process charges of unlawful practices, and 3) providing district office units with expertise and technical assistance. GAO REPORT 1981, supra note 51, at 9; 12TH & 13TH ANN. REPS., supra note 226. Norton, supra note 194, at 208.
263. GAO REPORT 1981, supra note 51; Ross, supra note 226, at 129.
264. Lehr, supra note 222, at 255; Leach, supra note 222, at 670.
265. The EEOC also introduced the Backlog Charge Processing system (BCP). The EEOC designed BCP to reduce the backlog. Pursuant to the BCP program, the EEOC separated "backlogged" charges from new charges, and processed backlogged charges separately. 12TH & 13TH ANN. REPS., supra note 226, at 12. For the purposes of BCP, backlogged charges were defined as those charges received before 1979, that were open and to be processed by EEOC not the state fair employment agency. See SCHLEI & GROSSMAN, supra note 15, at 938 n.53.
266. 12TH & 13TH ANN. REPS., supra note 226, at 21. RCP was also introduced to provide a swift processing system and avoid the creation of a backlog. "[I]f the [charge processing] system is to function, it must use resolution techniques which do not require exhausting the entire process. Swamping of the process harms complainants and respondents alike and threatens the very existence of charge processing as a system." Norton, supra note 194, at 685.
268. 12TH & 13TH ANN. REPS., supra note 226, at 16, 19, 21. "The rapid charge processing system emphasized quick settlement . . . [and] the practice of individual complaints triggering a wall-to-wall investigation of a company was ended." Leroy D. Clark, The Law and Economics of Racial
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the end of the second period, the systemic program was only starting to have an impact, because throughout the period the EEOC had been preoccupied with reducing the backlog and avoiding a new one. Consequently, it devoted insufficient resources to its systemic program. Therefore, despite the introduction of RCP, processing charges consumed most of the EEOC's resources.

In addition, despite RCP's success in reducing the backlog, commenta-
tors strongly criticized it for its negative effect on charge processing. Earlier we saw that an FEA which uses charge processing to enforce the law will try to secure full compensation for victims. To be effective, this FEA must

Discrimination in Employment by David Strauss, 79 GEO. L.J. 1695, 1709 (1991). Where the charge did not obviously constitute a practice, the RCP procedure involved the following steps:

(i) Intake involving an extensive interview to determine the basis of the charge and the issues involved and whether the EEOC had jurisdiction.

(ii) A limited investigation by the fact-finding unit which entailed interviewing witnesses, the charging party and sending an interrogatory to the employer.

(iii) A fact-finding conference between the employer and charging party so that the investigator could determine the facts and each party could better understand the other's position. The EEOC expected that the fact-finding conference would either produce a settlement, or sufficient evidence for a decision on reasonable cause.

See 12TH & 13TH ANN. REPS., supra note 226, at 18; GAO REPORT 1981, supra note 51, at 12; SCHLEI & GROSSMAN, supra note 15; Norton, supra note 194, at 686. RCP and BCP were presaged by earlier EEOC attempts to limit the depth and the scope of investigations. For instance, in 1975, the EEOC manual was altered to require investigators to limit the scope of their investigations. Ross, supra note 226, at 113. Also in August 1976 the EEOC in an effort to reduce the backlog introduced the notorious "30 day turn around process." Under this process—which only applied to pre-1974 charges—investigators were to carry out narrow investigations, to make determinations based on investigations which were "minimally sufficient" and to discourage victims from insisting on full relief. This procedure was discontinued because of opposition from charging parties and their representatives. Acts of 1964 & 1972, supra note 203, at 85-87; GAO REPORT 1988, supra note 1, at 14.

269. R. Gaul Silberman, The EEOC is Meeting the Challenge: A Response to David Rose, 42 VAND. L. REV. 1641, 1642 (1989) [hereinafter Meeting The Challenge]; Rose, supra note 230, at 1151. The EEOC commenced 132 § 707 charges between 1978 and 1982, an average of 26 per year. Twenty Years Later, supra note 194, at 50. The number of § 707 charges commenced each year during the second period was:

1978: 3
1979: 42
1980: 62
1981: 25
1982: 0

From 1978 to 1983 the EEOC filed six lawsuits based on § 707 commissioner charges. SCHLEI & GROSSMAN, supra note 15, at 953 n.169; Rose, supra note 230, at 1151. This was scarcely an improvement on the first period during which the EEOC filed three § 707 based lawsuits. The EEOC's attack on unlawful practices also includes EEOC "class" suits based on "aggrieved person" charges. Regarding these "class" suits, the EEOC's record during the second period was relatively strong. See infra note 306.

270. Rose, supra note 230, at 1150; Twenty Years Later, supra note 194, at 52; Ross, supra note 226, at 194.

271. Rose, supra note 230, at 1151; Twenty Years Later, supra note 194, at 50. For instance, the EEOC did not make available to the district office units sufficient technical services to enable them to effectively analyze the huge volume of work force data. SCHLEI & GROSSMAN, supra note 15, at 953. Other EEOC actions also retarded the program's development—e.g., the procedure for obtaining a commissioner's charge to start a systemic investigation was "cumbersome." id.

272. In 1977 the EEOC backlog was 130,000 charges. By 1981 this had been reduced to 20,238 charges. ROSS, supra note 226, at 114; Data from Women Employed Institute (on file with author).

conduct thorough, litigation-oriented investigations to determine which charges are likely to succeed at trial and then litigate a high proportion of those strong charges which it cannot settle. 274

In practice this FEA will make a finding of reasonable cause only where it believes that success is likely if it litigates the charge. The FEA will avoid early settlements (i.e. settlements entered into before the reasonable cause determination). Where the FEA offers to settle before the strength of the victim’s case has been fully revealed, the employer has little incentive to pay anything approaching full relief. Under RCP, however, the EEOC had a policy of limiting resources devoted to investigating charges, 275 only litigating the relatively small number of charges involving unlawful practices, 276 and settling early. 277 By adopting RCP, the EEOC thus pursued a claims adjustment goal in contrast to a law enforcement goal, with predictably poor results.

During the second period, therefore, the EEOC’s litigation performance was disappointing. Its litigation average was low, 278 as was its litigation rate (i.e. the percentage of unsuccessful conciliations in which suits were eventually filed). 279 Its conciliation rate (the percentage of attempted conciliations which

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274. See supra Part III.

275. The EEOC did not thoroughly investigate many of the charges regarding which it found reasonable cause. Therefore, these charges were not suitable for litigation. Thomas, supra note 234, at 32.

276. Id. at 33. Most charges dealt solely with harm to a single victim. The systemic program and the ELI program produced charges of unlawful practices. See supra note 232. However, during fiscal year 1980, the EEOC commenced sixty-two § 707 charges and planned to have a total ELI program case load of 723 cases. GAO REPORT 1981, supra note 51, at 10. In 1980 alone, the EEOC received 57,327 charges to process.

277. Burbridge, supra note 236, at 78. Many of the better cases were settled before the EEOC made its reasonable cause determination. The strongest cases therefore were not available for litigation. Thomas, supra note 234, at 32.

278. Litigation average for a period is the average annual number of suits filed by the EEOC during that period.

LITIGATION AVERAGE:

First Period: 232 suits per year
Second Period: 245 suits per year
Third Period: 346 suits per year

These figures do not include EEOC subpoena enforcement actions. From FY 1980 onwards, these figures include ADEA and EPA enforcement. 8TH ANN. REP., supra note 226; 9TH ANN. REP., supra note 226; 10TH ANN. REP., supra note 226; 11TH ANN. REP., supra note 226; 12TH & 13TH ANN. REPS., supra note 226; EEOC 14TH ANN. REP., (1979) [hereinafter 14TH ANN. REP.]; EEOC litigation statistics FY 1980-1989 (on file with author); Women Employed Institute Statistics (on file with author).

279. Litigation rate:

First Period: From 1973 to 1975 the litigation rate was 4%. In 1977 it was 5%. Figures for 1976 are unavailable.
Second Period: 15%
Third Period: 23%

Litigation rate is important from the charge processing perspective because it shows the frequency with which the EEOC litigated those charges regarding which it found reasonable cause. The third period’s rate was an increase on the second period’s rate of over 50%. However the rate for the second period was an increase of 200% on the rate between 1973 to 1975. Indeed there were more unsuccessful conciliations between 1973 to 1975 than for the whole of the second period. From FY 1981 onwards, these figures include ADEA and EPA enforcement. 8TH ANN. REP., supra note 226; 9TH ANN. REP., supra note 226; 10TH ANN. REP., supra note 226; 11TH ANN. REP., supra note 226; 12TH & 13TH ANN. REPS., supra note 226; 14TH ANN. REP., supra note 278; GAO REPORT 1976, supra note 222,
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were successful) was also low.\textsuperscript{280} In contrast, during the second period the EEOC had the best settlement record, i.e., predetermination settlements and conciliation agreements, of any period.\textsuperscript{281} Under RCP, many victims received little or no direct benefit from the EEOC's efforts on their behalf.\textsuperscript{282} Those with justifiable claims often settled early for much less than full compensation.\textsuperscript{283} Those who did not settle early often received nothing. When conciliating, the EEOC would propose remedies "designed in accordance with relevant court-established principles of relief."\textsuperscript{284} However, the EEOC's conciliation attempts usually failed. To make matters worse, the emphasis on settlement led the EEOC to encourage settlement of frivolous charges rather than dismiss them for "no cause."\textsuperscript{285} Many civil rights advocates regarded

\begin{itemize}
\item\textsuperscript{280} "[T]he infrequency with which enforcement actions were brought to back up our own reasonable cause determinations caused many who dealt with EEOC to disregard our process and take us less than seriously." \textit{Oversight Hearing, supra} note 42, at 10 (Statement of Commissioner Fred W. Alvarez).
\item\textsuperscript{281} The EEOC during the second period had the highest total number of settlements, the highest average number of settlements and the highest proportion of settlements to charge resolutions. This last measure is useful because it eliminates productivity differences between the three periods.
\item\textsuperscript{282} Thomas, \textit{supra} note 234, at 31; Burbridge, \textit{supra} note 236, at 42.
\item\textsuperscript{283} During the second period, the EEOC would only insist on substantial relief in ELI cases. \textit{Schlei & Grossman, supra} note 15, at 945-46. Otherwise, the EEOC would approve a settlement that was not unlawful. \textit{Id.} at 945.
\item\textsuperscript{284} Burbridge, \textit{supra} note 236, at 965. Note that prior to the reasonable cause determination, the EEOC may try to settle; after the determination the EEOC must try to conciliate. Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1988).
\item\textsuperscript{285} Thomas, \textit{supra} note 234, at 31; see \textit{GAO REPORT 1981, supra} note 51, at 62; Lehr, \textit{supra} note 222, at 31. Ironically, persons whose complaints would have been exposed as baseless by a full
\end{itemize}

\begin{center}
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\textbf{Conciliation Rate:} \\
\textit{Second Period (1979-1982):} 20\% \\
\textit{Third Period:} 22\%
\end{tabular}
\end{center}

For the second period, I have omitted the 1978 rate which at 64% was uncharacteristically high and therefore may have been caused by some extraordinary procedural or reporting phenomenon. From FY 1981 onwards, these figures include ADEA and EPA enforcement. 12TH & 13TH ANN. REPS., \textit{supra} note 226; 14TH ANN. REP., \textit{supra} note 278; EEOC Enforcement Statistics FY 1980-FY 1989 (on file with author).

\begin{center}
\begin{tabular}{l}
\textbf{Total Number of Settlements:} \\
\textit{First Period:} 25,474 \\
\textit{Second Period:} 78,086 \\
\textit{Third Period:} 75,335
\end{tabular}
\end{center}

\begin{center}
\begin{tabular}{l}
\textbf{Average Annual Number of Settlements:} \\
\textit{First Period:} 5,095 \\
\textit{Second Period:} 15,617 \\
\textit{Third Period:} 10,762
\end{tabular}
\end{center}

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\begin{tabular}{l}
\textbf{Settlements as a Proportion of Charge Resolutions:} \\
\textit{First Period:} Between 1973 and 1975 and for 1977 settlements were 11\% of charge resolutions. Figures for 1976 are not available. \\
\textit{Second Period:} 27\% \\
\textit{Third Period:} 17\%
\end{tabular}
\end{center}

From FY 1981 onwards, these figures include ADEA and EPA enforcement. Sources for these figures are: 8TH ANN. REP., \textit{supra} note 226; 9TH ANN. REP., \textit{supra} note 226; 10TH ANN. REP., \textit{supra} note 226; 11TH ANN. REP., \textit{supra} note 226; 12TH & 13TH ANN. REP., \textit{supra} note 226; 14TH ANN. REP., \textit{supra} note 278; EEOC Enforcement Statistics FY 1980-FY 1989 (on file with author); GAO REPORT 1976, \textit{supra} note 222, at 12.
RCP (which led to meritorious claimants being undercompensated and non-meritorious claimants being compensated) as a fundamental breach of trust between the EEOC and victims of discrimination.286

RCP was introduced as part of the EEOC's reorganization aimed at improving its effectiveness in fighting unlawful practices. Although it was designed to increase the resources devoted to fighting unlawful practices, it subverted the law enforcement goal of charge processing. This would have been an acceptable price to pay if the reorganization had significantly improved the EEOC's record of combatting unlawful practices. Unfortunately, however, the reorganization did not achieve this intended result.

3. The Third Period: 1983-1989287

In 1982, Clarence Thomas was appointed EEOC chairman. He soon began to dismantle RCP in favor of the law enforcement model of charge processing. In 1983, the EEOC adopted a resolution modifying its charge processing288 in favor of more complete investigations. The EEOC did not eliminate rapid processing, but abandoned the "existing assumption (developed in 1979) that charges . . . will be processed" by that method, in favor of "case-by-case decisions on appropriate methods for resolving . . . charges."289 This change in processing meant that "a larger number of charges . . . [would] be fully investigated."290 It de-emphasized "speedy settlements" in favor of "potential litigation and conciliation agreements."291 The EEOC’s goal was “better
quality litigation vehicles for the commission's litigation program" and "greater enforcement through conciliation agreements." In 1984, the EEOC adopted a new enforcement policy reflecting this new philosophy. It provided that the EEOC would "pursue through litigation each case in which merit has been found and conciliation has failed." The purpose of the policy was to "promote more compliance with the law and more conciliation because of the credible and predictable threat of an enforcement action should a reasonable cause determination be made." Finally, in 1985, the EEOC issued a policy statement to announce that in conciliation and in litigation it would seek "prompt, comprehensive and complete relief for all individuals directly affected by violations of the statute." A law enforcement model of charge process-

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292. EEOC 20TH ANN. REP. (1985) [hereinafter 20TH ANN. REP.]; 19TH ANN. REP., supra note 288. The shift towards more full investigations was intended to make EEOC determinations as accurate as possible and make the charges better litigation vehicles. Id. at 4; Oversight Hearing, supra note 42, at 9 (statement of Commissioner Fred W. Alvarez, EEOC). Pursuant to these goals, the EEOC increased the involvement of its trial attorneys in all stages of the compliance process. 19TH ANN. REP., supra note 288, at 4; Oversight Hearing, supra note 42, at 15 (memorandum from Chairman Thomas and others to General Counsel Johnny Butler and others regarding Statement of Enforcement Policy).

293. 19TH ANN. REP., supra note 288, at 4.

294. 20TH ANN. REP., supra note 292, at 3; Oversight Hearing, supra note 42, at 11-14.


296. "We intend to litigate to enforce our findings no matter how small the case is. This is a profound departure from the pick and choose approach of our predecessors." Thomas, supra note 234, at 33.

One finding of discrimination is no more 'worthy' of litigation than any other finding of discrimination. Accordingly, the Commission believes that an enforcement philosophy or operational system which attempts to determine which among several meritorious findings is 'worthy' of governmental resources is inconsistent with our statutory obligations.

Oversight Hearing, supra note 42, at 15 (Statement of Enforcement Policy).

A decision that all charges likely to succeed at trial are equally worthy of litigation appears to emphasize restitution at the expense of deterrence (i.e., the elimination of discrimination) at least if the following assumptions are correct:

(i) the agency cannot litigate all charges likely to succeed at trial; and

(ii) the successful litigation of certain charges will have a greater deterrent effect than the successful litigation of other charges.

To increase its ability to litigate charges which the employer refused to conciliate, the EEOC streamlined the process by which it approved a case for litigation. Instead of district offices and the Office of General Counsel having to approve a case before the commissioners considered it, all charges which the EEOC could not conciliate were sent to the Commission for their consideration. SCHLEI & GROSSMAN, supra note 15, at 1147, & Supp. 433.


298. Policy statement on remedies and relief for individual cases of unlawful discrimination. 20TH ANN. REP., supra note 292, at 3; Oversight Hearing, supra note 42, at 16. "[T]he bottom line is that we intend to obtain the maximum relief available under the statute to make the charging party whole and to eradicate the discriminatory conduct." Oversight Hearing, supra note 42 at 16. "[C]onciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated." Id. at 18. Clarence Thomas, then chairman of the EEOC, criticized his predecessors for choosing "to concentrate on prospective relief in the form of numerical goals and time tables rather than full relief for the party filing the charge." Thomas, supra note 234, at 33.

This policy of full relief required:
ing was now firmly in place.

As a result of its new enforcement policy, the EEOC during the third period filed the highest average number of suits per year, and had the highest litigation rate. The EEOC’s conciliation rate also increased. However, the results for charge processing were not uniformly good. The new policy’s aim was to secure full compensation for victims through conciliation or litigation. The EEOC’s resources were stretched thin by its commitment to full investigations, and its refusal to settle early. Consequently, a backlog soon developed. Because a backlog diminishes a victim’s prospects for full

(a) that each identified victim of discrimination be unconditionally offered placement in the position she would have occupied but for the discrimination; and
(b) that each identified victim of discrimination be made whole for any loss of earnings she suffered as a result of the discrimination.

Oversight Hearing, supra note 42, at 16.

299. See generally supra note 278. The EEOC litigation policy was not introduced until 1984. Between 1983 and 1985, the EEOC filed an average of 215 cases per year. This was a decline from 1980 and 1981 levels during which the EEOC filed 326 and 368 cases respectively. However from 1986 to 1989 the EEOC filed an average of 445 cases per year. EEOC Litigation Statistics, FY 1980–1989 (on file with author). Note that these figures do not include subpoena enforcement actions, but do include ADEA and EPA enforcement.

Some have criticized Chairman Thomas for the low level of litigation during the early part of the third period. We may note however that in Chairwoman Norton’s first two years (1978 and 1979), the EEOC brought 176 and 192 suits, respectively. This may be compared with 1976 in which the EEOC brought 484 suits. See 11TH ANN REP., supra note 226; 12TH & 13TH ANN. REPS., supra note 226; 14TH ANN. REP., supra note 278. Both Chairman Thomas and Chairwoman Norton were concerned with urgent and substantial reorganizations during their first few years in office. This probably accounts for the low level of litigation in the early years. Chairman Thomas recounts the administrative difficulties he faced on becoming EEOC chairman: “[O]ur agency was an administrative and managerial disaster... We had an automated payroll system and a manual personnel system which meant that we often paid dead people and former employees.” Thomas, supra note 234, at 29.

300. The EEOC’s litigation rate for the third period increased by more than 50% compared to its rate for the second period and by almost 400% compared to its rate for the first period. Actually the increase caused by the new policy may be steeper than this. In 1983, the EEOC’s litigation rate was a pitiful 6%. From 1986 to 1989 the rate averaged 34%, an increase of more than 100% compared to the rate for the second period and an increase of almost 600% compared to the rate for the first period. See generally supra note 279.

301. This improvement may be ascribed both to the increased litigation rate and the increased rate of no cause findings, which meant that some of the weaker cases (in terms of forensic evidence) were dismissed by the EEOC before conciliation.

302. The backlog started to develop in 1984, and by 1987 it was almost three times as large as it had been in 1981. The average processing period also significantly increased. The Vice Chairman of the EEOC has acknowledged that this increase in the backlog “was a direct result of the EEOC’s 1984 enforcement policy that mandated complete investigations for all charges.” Meeting the Challenge, supra note 269, at 1644; ONE NATION, supra note 194, at 202; GAO REPORT 1988, supra note 1, at 16.

<table>
<thead>
<tr>
<th>Year</th>
<th>Backlog</th>
<th>Time to process (months)</th>
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<tbody>
<tr>
<td>1980</td>
<td>37,675</td>
<td>3.6-5</td>
</tr>
<tr>
<td>1981</td>
<td>20,238</td>
<td>5-8</td>
</tr>
<tr>
<td>1982</td>
<td>33,417</td>
<td>5.4-9.4</td>
</tr>
<tr>
<td>1983</td>
<td>31,538</td>
<td>4.3-7.2</td>
</tr>
<tr>
<td>1984</td>
<td>39,893</td>
<td>5.9-6.8</td>
</tr>
<tr>
<td>1985</td>
<td>46,773</td>
<td>6.4-6.9</td>
</tr>
<tr>
<td>1986</td>
<td>50,767</td>
<td>8.3</td>
</tr>
<tr>
<td>1987</td>
<td>61,686</td>
<td>9.3</td>
</tr>
</tbody>
</table>

After 1987 the backlog declined somewhat. In 1988 it was 53,056, and in 1989 it was 46,071.
relief, the aim of the new policy was being subverted by its key elements. The effect of the new policy on the EEOC's fight against unlawful practices was uniformly negative. The new policy required substantial extra resources, and thus diverted resources away from attacking unlawful practices. Consequently, during the third period, the EEOC initiated fewer investigations under its systemic program than it had in the second period, and its record of litigating unlawful practices or "class" suits deteriorated.

Sources for these figures are: Women Employed Institute statistics (on file with author); EEOC, OFF. OF PROGRAM OPERATIONS, 1989 ANNUAL REPORT. One likely explanation for the backlog's decline after 1987 is that the EEOC began to reject charges by finding "no reasonable cause" without a proper investigation. This was not the intended result of the new enforcement policy, but does show the political power of the "backlog." GAO REPORT 1988, supra note 1, at 3; ONE NATION, supra note 194, at 202.

303. Blumrosen, supra note 259, at 221; Meeting the Challenge, supra note 269, at 1644.

304. Congress appears to have made little or no provision for the increased cost of charge processing during the third period.

i) In constant dollars, the relationship of subsequent appropriations to the 1982 appropriation was as follows:
   - 1983: .05% increase.
   - 1984: 1% increase.
   - 1985: 4% increase.
   - 1986: 5% decrease.

ii) In constant dollars, no annual appropriation in the third period exceeded the EEOC's annual appropriation for 1981.

iii) In constant dollars, the average annual appropriation for the third period ($148,000,000 approx.) was about the same as the average annual appropriation for the second period ($147,000,000 approx.)

Sources for these figures are: EEOC budgetary allocation (1972-1989) (on file with author); Burbridge, supra note 236, at 40-41.

305. Under its systemic program, the EEOC commenced systemic investigations with § 707 charges.

TOTAL NUMBER OF § 707 CHARGES:
Second Period: 132 charges.
Third Period: 79 charges.

AVERAGE NUMBER OF § 707 CHARGES:
Second Period: 26 charges per year.
Third Period: 11 charges per year.

In 1990 the EEOC initiated 29 § 707 charges (nine of them relating to a single case). If we included these charges in the figures for the third period this would bring the total to 108, and the average to 14. The EEOC's performance over the third period would still be worse than its performance during the second period.

Sources for these figures are: Meeting the Challenge, supra note 269, at 1643; Twenty Years Later, supra note 194, at 50; see also EEOC, Systemic Report, Administrative Case Activity, Year End Comparison, Oct. 1, 1990 (unpublished, on file with author).

306. "Class" suits include those based on systemic program charges (§ 707 charges) and those based on "aggrieved person" charges (§ 706 charges).

AVERAGE ANNUAL NUMBER OF "CLASS" SUITS FILED BY EEOC:
Second Period (from 1979-1982): 152
Third Period: 120

"CLASS" SUITS FILED AS A PERCENTAGE OF TOTAL SUITS FILED:
Second Period (from 1979-1982): 55%
Third Period: 35%

BEST YEAR FOR THE NUMBER OF "CLASS" SUITS FILED BY EEOC:
Second Period (from 1979-1982): 1980 - 218 "class" suits
Third Period: 1985 - 155 class suits

Figures for "class" suits filed in 1978 are not available. From FY 1980 onwards figures include ADEA and EPA enforcement. The source for these figures is: Suits Filed by Office of General Counsel (on file with author).
By increasing the resources it devoted to charge processing, the EEOC diminished its ability to combat unlawful practices.

To summarize, after 1978, the EEOC separated its functions of charge processing and attacking unlawful practices. During the second period, it focused upon attacking unlawful practices. In the third period, it emphasized charge processing and adopted the law enforcement model. During both periods, however, the EEOC's campaign to eliminate unlawful practices was abortive because the agency consumed the vast bulk of its resources in meeting its obligation to process "aggrieved person" charges.

B. How Charge Processing Hurts Victims and Impedes the EEOC

As the performance data analysis of the EEOC's three periods shows, it has proven impossible for the EEOC both to process "aggrieved person" charges and to combat practices of discrimination effectively. Where the EEOC attacks practices through "aggrieved person" charges, it undermines both functions. Where it pursues each function separately, its efforts in both areas suffer unacceptably from the competition for resources.

Whatever approach the EEOC takes to charge processing, moreover, it is under continuous pressure to divert resources away from its efforts to combat unlawful practices and toward charge processing. This pressure comes from parties who have filed charges and their advocates who complain about recurring backlogs and the fact that, in general, the charging process does not satisfy the complaining parties' interests. Because Congress will not increase the EEOC's funding to meet these demands, the EEOC is constantly faced with the choice of resisting these pressures or succumbing to them by taking resources away from its efforts to combat unlawful practices. The

307. See Oversight Hearing, supra note 42, at 60 (statement of Nancy Kreiter, Research Director, Women Employed Institute). In constant dollars the annual average appropriation for the second and third periods were about the same. See supra note 304. If the EEOC's level of funding in constant dollars does not substantially increase, the evidence shows that the EEOC cannot both effectively process charges and effectively combat practices of discrimination.

308. Meeting the Challenge, supra note 269, at 1642 ("The duality of the [EEOC's] mission to vindicate the rights of individuals and to cure broad-based societal discrimination [has] proved most confounding."); FAIR EMPLOYMENT, supra note 204, at 138.

309. Backlogs may be caused by changes in the EEOC's charge processing system, or simply unexpected rises in the volume of charges. For example:

CHARGES RECEIVED BY EEOC IN SELECTED YEARS:

1977: 57,562 charges.
1979: 35,279 charges.
1980: 59,328 charges.
1985: 72,002 charges.

The sources for these figures are: Belton, supra note 207, at 921; Ross, supra note 226, at 18; Chambers & Goldstein, supra note 245, at 255; 12TH & 13TH ANN. REP., supra note 226; 14TH ANN. REP., supra note 278; EEOC Enforcement Statistics, FY 1980—1984 (on file with author).

310. See supra notes 269-271 and accompanying text.

311. GAO REPORT 1976, supra note 222, at 48; see FAIR EMPLOYMENT, supra note 204, at 138 ¶11.29.
agency is sensitive to this pressure from its wards and constituents, and it will usually succumb because there is little countervailing pressure on the EEOC to maintain its efforts to combat unlawful practices. Unlike the congressional mandate to process "aggrieved person" charges, which is outside the EEOC's control, performance goals for the EEOC's campaign against unlawful practices are developed internally and can therefore be easily altered in the face of changing conditions. In addition, beneficiaries of the EEOC's campaign against unlawful practices do not have the same stake in the enforcement process as charging parties have. Because these beneficiaries neither initiate investigations into unlawful practices nor participate actively in them, they are unlikely to oppose reductions by the EEOC in its efforts to combat unlawful practices.

Not only is there currently little pressure on the EEOC to increase its efforts to attack unlawful practices, there is instead significant pressure on the EEOC to reduce these efforts. This pressure comes from employers who regard aggressive action against unlawful practices as disruptive to business. Thus the EEOC's resources are continually being redirected from attacking unlawful practices back to processing "aggrieved person" charges.

While charge processing substantially burdens the EEOC, it does not correspondingly benefit individual victims. Consequently, even the interests of individual victims in financial and emotional security provide no compelling argument for requiring the EEOC to process charges. To begin, charge processing does not assist victims who do not file charges. The filing of a charge should not be regarded as a useful sorting mechanism, justifiably excluding from benefits those persons who do not complain. Discrimination is difficult to detect and the less privileged in our society are reluctant to complain. Those who either do not know that they have been discriminated against or who, because of factors associated with low socio-economic status, decline to complain, are perhaps the most in need of EEOC assistance but the least likely to receive it through charge processing. Those who take advantage of EEOC charge processing may have the least need of it because they know that their rights have been infringed and have the financial and psychological resources to seek redress on their own. These are also the individuals best able to prevail in individual private suits against their employers. In short, attacking

312. For instance, civil rights advocates strongly criticized the backlog because of its negative impact on charging parties' rights, and then strongly criticized RCP, which reduced the backlog, because it failed to secure substantial compensation for victims. See, e.g., Burbridge, supra note 236, at 42; EEOC's Performance in Handling Caseload Criticized by Witnesses at House Hearing, BNA EMPLOYMENT POLICY & LAW DAILY, July 29, 1993 at 1. Criticisms by these advocates helped to persuade the EEOC to introduce RCP in the first place and then helped to push the EEOC to abandon it.

313. Blumrosen, supra note 259, at 211.

314. Persons who file charges tend to be the more skilled and better paid workers. Donohue & Siegelman, supra note 212.
unlawful practices is more likely than charge processing to help those persons who cannot help themselves.

If the charge processing system worked as designed, at least those victims who did file charges would derive significant benefits from doing so.315 The victim would receive the benefit of an investigation by an expert who has power to compel disclosure of information necessary to win in the case or obtain a favorable settlement.316 The victim would receive the benefit of a reasonable cause determination, thus improving her position in settlement negotiations and increasing her chances of successfully litigating if no settlement were reached. In settlement negotiations, the victim would also benefit from the assistance of an experienced negotiator.317

Unfortunately, many victims who file charges fail to receive the expected benefits. To begin with, most charges are not settled. Even in the second period, under Chairwoman Norton, when settlement was a priority, settlements were only 27% of all charge resolutions. Also the settlements that occurred frequently undercompensated the victim. These disappointing results occurred because the EEOC has never had the resources to litigate more than a small fraction of its reasonable cause findings. Thus it cannot, through litigation, provide victims with full compensation, nor secure for them a substantial settlement through the realistic threat of litigation.318

Furthermore, at moments throughout its history, for institutional reasons, the EEOC systematically dismissed the charges of actual victims, denying them the benefits of a proper investigation, reasonable cause determination and conciliation efforts. Such systematic denial of benefits occurred most commonly during the first and third periods, when the “backlog” was substantial. During these periods, victims frequently received findings of “no cause” because, with the passage of time, evidence favorable to their cases was lost.319 In other misguided efforts to reduce its backlog, the EEOC frequently dismissed charges

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315. There may also be societal advantages to charge processing. Where an individual’s right to sue is conditioned on the EEOC first having the opportunity to process the charge, this encourages resolution without resort to litigation. This may, from a certain perspective, be viewed as efficient. Also, it promotes cooperation and diminishes antagonism. The desirability of these two goals may depend on the extent to which we endorse the “human rights” approach to eliminating discrimination. The human rights approach to employment discrimination relies on appeals to conscience and voluntary compliance, rather than legal compulsion. See, e.g., Timothy L. Jenkins, Study of Federal Effort to End Job Bias: A History, a Status Report, and a Prognosis, 14 How. L.J. 249, 270 (1968).

316. Lustgarten, supra note 195, at 190.

317. I do not discuss the possibility of the EEOC suing on behalf of the victim because this does not happen very often. See supra note 279.

318. For instance, during the 2nd period, the EEOC’s conciliation success rate was 20% of attempts. The EEOC’s litigation rate was 15% of failures. Victims who refused early settlement were therefore unlikely to have their rights vindicated by charge processing. Those who accepted early settlement got less than substantial compensation.

319. This loss of evidence, plus a finding of no cause by the EEOC will be a substantial barrier to settlement or successful litigation. Persons who would not have litigated even in the absence of a requirement that they first file a charge may still have been better served by arbitration rather than charge processing.
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without conducting a proper investigation.320

During its third period, under Chairman Thomas, the EEOC also systematically denied benefits to victims as a consequence of its decision to raise the reasonable cause determination standard. In making its reasonable cause determination, the EEOC may focus on whether the charge has sufficient merit to warrant conciliation 21 (conciliation standard) or on whether the charge has sufficient merit to warrant litigation (litigation standard). The reasonable cause standard in the latter situation is higher because litigation is costly and the EEOC will wish to litigate only the strongest cases. 22 If the EEOC adopts the litigation standard and sets it too high, it will in consequence dismiss a large number of charges by actual victims. 323 During the first period, the EEOC used the conciliation standard for making a reasonable cause determination. 324 The EEOC had a different, higher standard for determining if it should litigate a charge where conciliation failed. 325

Since [the conciliation] standard required less evidence than that necessary to go to litigation, few cases in which reasonable cause was found were taken to court. This meant that the Commission did not secure leverage in settlement from the prospect of litigation and that there was a double standard - one for conciliation and one for litigation. 326

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320. Between January and March 1987, the GAO reviewed six EEOC district offices and found "The district offices did not fully investigate an estimated 41 to 82 percent of the charges they closed as no cause determinations . . . ." GAO REPORT 1988, supra note 1, at 21.

321. [The EEOC's] primary priority during the last decade has often been to close the maximum number of cases in as timely a manner as possible. This is done most efficiently if claims are found to have no reasonable basis after little or no investigation" Becker, supra note 12, at 1684.

322. "In performance evaluations, directors of the [EEOC's] field offices review the investigators' work largely for the speed with which they move cases along, not for the rigor of the examination." Peter T. Kilborn, Backlog of Cases is Overwhelming Jobs-Bias Agency, N.Y. TIMES, Nov. 26, 1994, § 1, at 1.

323. "[There is] a perception by investigative staff that EEOC was more interested in reducing the large inventory of charges than in performing full investigations." GAO REPORT 1988, supra note 1, at 3.

324. "It is more important to do a fast investigation than to do a thorough investigation." Regulatory Regime, supra note 206, at 269.

325. Under either the conciliation standard or the litigation standard, there is the possibility of the EEOC erroneously determining that the charge is without merit. The higher the standard, the greater the possibility. Given the pervasiveness of discrimination, and the difficulty of forensic proof, the likelihood of an erroneous determination is too great where the standard is closely tied to establishing liability at trial.

326. This litigation standard was met only if there was "a preponderance of evidence - enough evidence to sustain a formal court case." GAO REPORT 1976, supra note 222, at 31; Ross, supra note 226, at 100, 123, 128; Lehr, supra note 222, at 243.
In 1977, the EEOC raised the standard for a finding of reasonable cause by linking it to the decision whether to litigate. In 1984 the EEOC again raised the standard. The rate of no cause determinations increased greatly each time the EEOC raised its standard of reasonable cause. During the third period, then, in defining reasonable cause by whether charge allegations were likely to succeed in court rather than by whether they were probably legitimate and using the reasonable cause standard to select only the strongest cases, the EEOC systematically deprived actual victims of administrative benefits. These victims were deprived of the benefit of the reasonable cause determination, and also of the benefit of the EEOC’s conciliation efforts. Also, during the third period, these victims received little or no settlement assistance from the EEOC, because of its policy against early settlements.

Even more seriously, by systematically dismissing victims’ charges, the EEOC robbed countless victims of their ability to secure a remedy at law. An

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327. It adopted the following resolution: “The reasonable cause decision will constitute a determination that the claim has sufficient merit to warrant litigation if the matter is not thereafter conciliated by the Commission or the charging party.” SCHLEI & GROSSMAN, supra note 15, at 949 (citation omitted). Whether a charge warranted litigation depended on whether it was deemed “worthy of litigation by the standards of the Regional Attorney in a district office which is responsible for litigating such cases.” Id. If the EEOC found that a charge had merit, but was unable to conciliate it, a further decision still had to be made as to whether the EEOC would sue. Id. at 950, 1147.

While linking the reasonable cause determination to litigation rather than conciliation may (perhaps) promote administrative efficiency, it is not justified by legislative history. During the passage of the 1972 Act, Senator Williams stated: the reasonable cause determination decides “whether a complaint has a minimum of substance” to justify further EEOC action such as conciliation. 118 CONG. REC. 934 (1972), reprinted in 1972 LEGISLATIVE HISTORY, supra note 191, at 813 (memorandum of Sen. Williams); Senator Case stated: “[The reasonable cause determination decides] the question of whether there is reasonable cause to believe [the charge] is true and therefore to warrant conciliation efforts.” 118 CONG. REC. 7256 (1972), reprinted in 1972 LEGISLATIVE HISTORY, supra note 191, at 3297.

328. Pursuant to its new enforcement policy the EEOC declared that the reasonable cause determination was: “a determination that it is more likely than not that the charging party . . . [was] discriminated against . . . .” “[This is] assessed based upon the evidence that establishes, under the appropriate legal theory, a prima facie case, and if the respondent has provided a viable defence, whether there is evidence of pretext.” EEOC COMPL. MAN., supra note 222, at 1062; SCHLEI & GROSSMAN, supra note 15, at Supp. 374.

329. “NO CAUSE” DETERMINATIONS AS A PERCENTAGE OF CHARGE RESOLUTIONS:

First Period: From 1973 to 1975 “no cause” determinations were 16% of charge resolutions. For 1977 “no cause” determinations were 36% of charge resolutions. Figures for 1976 are not available.

Second Period: 31%

Third Period: 51%

THE FREQUENCY OF “NO CAUSE” DETERMINATIONS TO “CAUSE” DETERMINATIONS:

First Period: The EEOC found “no cause” approximately as often as “cause.”

Second Period: The EEOC found “no cause” approximately 8 times as often as “cause.”

Third Period: The EEOC found “no cause” approximately 17 times as often as “cause.”

From FY 1981 onwards these figures include ADEA and EPA enforcement. Sources for these figures are: 8TH ANN. REP., supra note 226; 9TH ANN. REP., supra note 226; 10TH ANN. REP., supra note 226; 11TH ANN. REP., supra note 226; 12TH & 13TH ANN. REPS., supra note 226; 14TH ANN. REP., supra note 278; EEOC Enforcement Statistics, FY 1980—1989 (on file with author); GAO REPORT 1976, supra note 222, at 12.

330. Burbridge, supra note 236, at 79. The deprivation of administrative benefits did not occur much during the second period, because the reasonable cause standard was either lower or less rigorously adhered to and because the EEOC sought early settlements.
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EEOC finding of no cause not only discourages employers from settling or agreeing to arbitration; it also discourages the victim from litigating. Furthermore, a no cause finding makes it more difficult for the victim to get an attorney if she decides to litigate\textsuperscript{331} and it may put her at a disadvantage at trial because it may be admissible on the issue of discrimination.\textsuperscript{332} As a General Accounting Office report to Congress on the EEOC concluded, "[t]he various approaches the EEOC has tried over the years have not been successful in balancing the timely resolution of a large volume of charges with the performance of high-quality investigations."\textsuperscript{333} Indeed, it is fair to conclude that an effective system of charge processing is not feasible.

V. A PROPOSAL FOR REFORM

In order to enable the EEOC to attack unlawful discriminatory employment practices effectively, Congress must create a new statutory framework for the EEOC.\textsuperscript{334} To begin, the EEOC’s primary duty of eliminating employment discrimination would not change,\textsuperscript{335} but the agency would no longer be required to investigate individual complaints. Instead, the EEOC would use its investigatory powers primarily to determine whether an employer is engaging in an unlawful practice. Using, inter alia, the statistical information it already receives from employers through statutorily required reports,\textsuperscript{336} the agency would target employers who have disproportionately few black employees, or disproportionately few black employees at higher levels, as such disparities may indicate discriminatory hiring or promotion practices. To enable the EEOC to litigate the strongest cases against the worst practices, Congress should increase the EEOC’s power to investigate, freeing the agency to find out more details about a firm’s minority employment\textsuperscript{337} and to determine whether a firm is abiding by the terms of a prior settlement or court-ordered remedy.

Because the remedy required to rectify an employment practice may be more extensive and disruptive to the employer than the remedy for an individual instance of discrimination, employers’ interests must be protected in

\textsuperscript{331} See Clark, \textit{supra} note 268, at 1698.
\textsuperscript{332} SCHLEI & GROSSMAN, \textit{supra} note 15, at 977 & Supp. 379. It may be argued that the victim has not been deprived of a legal remedy because having failed the litigation standard she is likely to have lost at trial. However, given the bureaucratic interest in picking only the strongest cases, a competent attorney may still have won cases which failed the litigation standard. Also, the negative effects on victims’ legal rights of raising the reasonable cause standard are compounded where in addition the EEOC curtails its investigations. Few charges will meet the litigation standard after a cursory investigation. For evidence that the EEOC curtailed investigations to reduce the backlog, see, e.g., GAO REPORT 1988, \textit{supra} note 1, at 3; Thomas, \textit{supra} note 234, at 38-39.
\textsuperscript{333} GAO REPORT 1988, \textit{supra} note 1, at 41.
\textsuperscript{334} For a fuller discussion of such a statutory framework, see generally Maurice E.R. Munroe, Change the System!, chs. 11 and 13 (unpublished LL.M. thesis, University of Michigan, on file with author) [hereinafter Change the System].
\textsuperscript{337} See generally \textit{Acts of 1964 & 1972}, \textit{supra} note 203; Fiss, \textit{supra} note 203, at 269 (1971).
the adjudication process and in the formulation of a remedy by the procedural safeguards of a civil trial. The EEOC would have the power and the duty to file civil claims against employers who engage in allegedly discriminatory practices. If the federal district court determined that the EEOC successfully proved that one or several employment practices were unlawful, it could devise a remedy that required sweeping changes in the employer's personnel policies and procedures as well as significant compensation to employees disadvantaged by those policies. Judicial adjudication is preferable to a cumbersome process of agency adjudication and subsequent judicial review because judicial ratification of the EEOC's efforts to combat employment discrimination may be more politically palatable than an internal agency adjudication.338 The EEOC would, in the interests of fairness,339 be required to provide the employer with timely and full notice of the extent of its investigations. While initial investigations would be fairly general, notice would warn employers of the need to retain documents which may be relevant to the investigation.340 In keeping with general Due Process concerns, a showing at trial that the employer was prejudiced by the EEOC's failure to provide the required notice would give the trial court discretion to limit or bar the EEOC's claim.341

While the EEOC would be required to give notice before beginning an investigation, it would no longer be required to file a written charge or defer to a state FEA. Congress, recognizing that the EEOC has more expertise than any state FEA in combatting unlawful practices, would grant the EEOC freedom to determine when to investigate and how to proceed. Congress would also give the EEOC the power to compel an employer under investigation to disclose any evidence that the agency believed would assist it in eliminating employment discrimination.342 Perhaps most importantly, the EEOC would no longer be obliged to attempt conciliation, nor to make a reasonable cause determination prior to filing suit. Because of its limited resources, the EEOC would have sufficient incentive to settle, and the issue of settlement would arise naturally during the course of the close contact between the agency and the employer under investigation. The EEOC's incentives to bring the strongest possible cases given its limited resources would provide any necessary restraint against frivolous suits, and the lifting of conciliation and reasonable cause requirements would eliminate

341. See EEOC v. Burlington N. Inc., 644 F.2d 717 (8th Cir. 1981) (holding that late notice was not fatal to an EEOC case unless it was willful, in bad faith, or caused substantial prejudice).
342. Such powers are neither unconstitutional nor unprecedented. See Oklahoma Press v. Walling, 327 U.S. 186, 208-09 (1946); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 123, 144 (1976).
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unnecessary administrative obstacles to fulfillment of the agency's mission. 343

This proposal to relieve the EEOC of its duty to process charges would not leave victims without meaningful protection. Individuals would retain the right to sue employers privately for discrimination under Title VII in state or federal court. 344 The EEOC will never have sufficient resources to enable it to combat all practices of discrimination on its own, 345 and private suits would continue to play a role in attacking such unlawful practices. In any event, individuals would retain the right to seek compensation for both the financial and emotional loss of being unfairly treated because of their race. 346

Furthermore, implementation of this proposal would not necessarily deprive an individual of EEOC assistance. The EEOC need not be prevented from handling some complaints; it simply should not be required to handle all complaints. The EEOC is the only federal agency with the cumbersome duty of investigating every charge it receives. 347 It should instead be allowed to set its own agenda. 348 Individuals have the right to sue privately and in most states they enjoy the protection of state fair employment laws and the benefit of state administrative procedures. 349 Additionally, an alleged victim may have recourse to arbitration. 350


344. But see Strauss' proposal for reform which does advocate the abolition of the private right to sue. Strauss, supra note 102, at 1655; see also Yellow Freight System v. Donelly, 494 U.S. 820 (1990) (recognizing the right to enforce Title VII in state court).

345. "[B]ureaucratic enforcement . . . [has] a strong bias toward underenforcement." Mashaw, supra note 210, at 1774. The possibility that the Federal Government itself may subvert the EEOC enforcement process is also a strong argument for retaining the private right to sue. Becker, supra note 12, at 1685; Clark, supra note 268, at 1707; NORMAN AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 108-30 (1988).

346. Becker, supra note 12, at 1679. See also St. Antoine, who describes the psychologically, physically, and economically devastating effect on the worker of losing a job. Theodore St. Antoine, At-Will Employment and the Handsome American, 33 LAW QUADRANGLE NOTES 26, 31 (Fall 1988).

347. As David Rose testified before Congress, "the EEOC is the only federal agency I know of which attempts to investigate every charge." Subcommittee on Select Education and Civil Rights of the House Committee on Education and Labor, 103rd Cong., 2nd Sess. (1994) (testimony of David L. Rose).

348. Complaints may sometimes indicate an unlawful practice. Further, certain kinds of discrimination—e.g., harassment—may not be easily identifiable from statistics and the EEOC may decide to make the investigation of certain "individualized" types of discrimination a priority.

349. See BNA LABOR RELATIONS REPORTER, FAIR EMPLOYMENT PRACTICES MANUAL 8A, 8B. Of course, like EEOC administrative procedures, these state administrative procedures may not always be beneficial.

350. If we are going to relieve the EEOC of its duty to process charges, we may wish to consider ways of assisting individuals in vindicating their statutory rights. Firstly, we can increase alleged victims' incentives to litigate. The 1991 Civil Rights Act was helpful in this regard, providing compensatory and punitive damages in a Title VII disparate treatment action, and permitting the award of experts' fees in a Title VII action. 42 U.S.C. § 1981(a)(1); Title VII § 707, 42 U.S.C. § 2000e-6 (1988). See generally John M. Husband & Jude Biggs, The Civil Rights Act of 1991: Expanding
Part II described the serious damage inflicted on African Americans by employment discrimination. This proposal aims to increase the public resources invested in attacking these practices. Combating practices of discrimination will not only help past and present victims, but also prevent future discrimination. The data conclusively show that the EEOC cannot effectively address both individual complaints and unlawful practices. Where the EEOC is required to process charges, its conduct will be reactive, its aim random. An administrative system needed to investigate every charge is necessarily unwieldy. Such a system is necessarily an inefficient way to combat employment discrimination. It responds only to formal complaints, while many instances of discrimination are never reported, and many reports of discrimination are unfounded. Even the claims with substance do not reveal the most serious form of discrimination, the unlawful practices. As Gilbert Casayas, the current EEOC Chairman said recently,

Remedies in Employment Discrimination Cases, 21 COLO. LAW. 881 (1992); David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, in THE CIVIL RIGHTS ACT OF 1991 at 1, 62 (1992); Michael W. Roskiewicz, Comment, Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination, 43 WASH. U.J. URB. & CONTEMP. L. 391 (1993). Increasing the availability of attorney's fees or the private class action, will also be effective. Rose, supra note 230, at 1174. Secondly, we can provide alleged victims with cheap alternatives to litigation such as mediation or arbitration procedures. This approach would be particularly helpful in states with weak or non-existent fair employment laws. Lehr, supra note 222, at 260 (1983); see also Regulatory Regime, supra note 206, at 272.

351. Remedies for practices of discrimination emphasize changing future behaviors by instituting systems to compel the change and police future behaviors. B.A. Hepple, Judging Equal Rights, 1983 CURRENT LEGAL PROBS. 71, 77 (1983); McCrudden, supra note 257, at 227-28; Schlei & Grossman, supra note 15, at 1416. Indeed Chairman Thomas criticized his predecessors for choosing to "concentrate on prospective relief in the form of numerical goals and time tables rather than full relief for the party filing the charge." Thomas, supra note 234, at 33.

352. See HOME AFF. COMM., FIRST REP. ON COMM’N FOR RACIAL EQUALITY, SESS. 1981-82, Vol. II, 4,5 ¶4.4 at 10; Appleby & Ellis, supra note 209, at 238.

353. For example at the EEOC's Detroit district office, there are three units and 26 employees devoted to charge processing and one systemic unit with four employees. Correspondence with William Schukar, District Director (on file with author). This problem was recognized by the British government when it passed the Race Relations Act 1976 (RRA 1976). RRA 1976 is Britain's second piece of legislation outlawing race discrimination in employment. It replaced the 1968 Race Relations Act (RRA 1968). In determining the structure of enforcement of the RRA 1976, the British government drew on the U.S. experience with Title VII and their own with the RRA 1968. The government considered and rejected the "Agency processing model" (this is my terminology). See HOME OFFICE, EQUALITY FOR WOMEN (1974), CMND 5724. Under this model, the agency would be required to investigate and consolidate all complaints. Id. at 7 ¶ 28. The British government rejected this model because to require the "enforcement body" to "investigate all individual complaints would create a vast, costly and wasteful administrative burden." Id. The obligation to process all complaints: "would cause unacceptable delay in the handling of cases and involve the creation of a very large administrative staff to process the complaints . . . . Above all, the enforcement agency would be distracted by an ever increasing backlog of individual complaints from playing its crucial general role in changing discriminatory practices . . . ." Id.

The British government chose instead to allow individuals to sue and to create an agency, the Commission for Racial Equality (CRE) with "strategic functions," whose main task is: "to identify and deal with discriminatory practices by industries, firms or institutions." The CRE is an agency whose enforcement activities are not dependent on individual complaints and which is not required to enforce individual complaints. Id. at 7 ¶ 29, 110 ¶ 24. On the powers and procedures of the CRE, see Prestige Case, supra note 339; see also Change the System, supra note 334, app. II & III at 22-86.
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We're just processing cases . . . [w]e've got this enormous caseload, but in terms of being proactive, being more strategic and fulfilling the mission of eradicating employment discrimination . . . we really haven't been . . . a player. 354

In the long run, only a strategy attacking unlawful practices can be relied on to reduce discrimination.

The decisive issue is not whether charge processing provides benefits to discrimination victims (it sometimes does), nor whether charge processing is administratively workable (it is not). The real issue is this: Which is more effective to combat discrimination, an EEOC with the tasks of both charge processing and attacking unlawful practices, or an EEOC with equal resources whose sole task is attacking unlawful practices? The answer is plain. To maximize the EEOC’s ability to combat discrimination, we must relieve it of the obligation to process charges without reducing its resources.355 Only then will the EEOC be “an effective instrument for the elimination of . . . discrimination.”356

355. The resources formerly used to process individual charges must continue to be available for combating practices of discrimination. If these funds are lost to the EEOC we gain little by relieving it of its duty to process charges.