

**FEDERAL EMPLOYMENT LAW:  
CURRENT PROBLEMS AND A CALL FOR REFORM**

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The career of Justice Sandra Day O'Connor has been a testament to the great strides of women's advancement in the workplace in contemporary America. She advanced in a profession dominated by men to become a member of the nation's highest court. As Associate Justice she proved to be a tireless champion of equal employment opportunities for women.<sup>1</sup> On her recent retirement from the Supreme Court<sup>2</sup> it is appropriate to reaffirm the importance of women's rights to equal opportunity and to acknowledge the progress that has been made to advance these important rights through the passage of federal statutes. It is also appropriate to assess the degree of success that these statutes have achieved, and to acknowledge the many obstacles that still confront women in the American workplace.

In this spirit we need to appreciate how women's equality in the workforce faces serious challenges. There is still a high level of gender discrimination in the contemporary workplace,<sup>3</sup> and anti-discrimination statutes designed to ensure equal treatment for women and men are not living up to their full potential.<sup>4</sup> As a result, there is a serious tension in the federal response to workplace inequality. This is so because the goal of securing equality of opportunity on the basis of gender has rightly been deemed by the federal government to be of considerable importance, and the project of securing greater equality has received significant legislative attention in the form of laws requiring equal treatment, laws enforceable in the federal courts.<sup>5</sup> However, conditions exist at the federal level that make it difficult for many meritorious cases of gender discrimination to be

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<sup>1</sup> See Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615 (1998); and Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. 159, 161 (1986) (arguing that Justice O'Connor has traditionally been more sympathetic to women's perspectives in gender-related issues, including in the area of employment rights, than her male colleagues).

<sup>2</sup> See *Retirement Letter*, WASH. POST, July 2, 2005, at A08.

<sup>3</sup> Reed Abelson, *Anti-Bias Agency Is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, Section 3 at 1. See also Schafran, *supra* note 1, at 615.

<sup>4</sup> See Schafran, *supra* note 1, at 617-32 (discussing Title VII).

<sup>5</sup> See *id.* (discussing Title VII).

won in court.<sup>6</sup> As such, a serious tension exists in the way the federal government addresses continuing workplace inequality.

The difficulty of effectuating in court the right to equal opportunity for women arises for at least four reasons. First, currently there is little active litigation support for claimants from the EEOC.<sup>7</sup> The agency has the authority to bring lawsuits in federal court on behalf of private claimants. The EEOC, however, initiates so few cases that many meritorious claims have to be brought by private parties.<sup>8</sup> Second, the governing federal statutes establish a relatively low cap on the amount of damages that are recoverable for gender discrimination<sup>9</sup>; the result is that plaintiffs often have a very difficult time securing counsel on a contingency fee basis should the EEOC not pursue a case. In addition, the standards for certifying class action suits have become increasingly restrictive in a number of federal circuits. This further weakens the ability of women, including many with meritorious cases, to pursue claims in court by making it more difficult for claimants to secure adequate representation.<sup>10</sup> Third, plaintiffs in a significant number of gender discrimination cases face the obstacle of defendants seeking summary judgment. In the federal system summary judgment has become a procedural device that is fairly aggressively used in gender discrimination cases.<sup>11</sup> Evidence is mounting that a

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<sup>6</sup> See *id.* at 620.

<sup>7</sup> The EEOC is the federal agency tasked with assisting in the enforcement of federal anti-discrimination statutes. For a history of the EEOC, see The Equal Employment Opportunity Commission History, <http://www.eeoc.gov/abouteeoc/history/index.html> (last visited Mar. 28, 2006).

<sup>8</sup> See discussion *infra* section III, subsection i, pp. 21-28.

<sup>9</sup> Anne Noel Occhialino & Daniel Vail, *The 40<sup>th</sup> Anniversary of Title VII of the Civil Rights Act of 1964: Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L. J. 671, 687 (2005).

<sup>10</sup> See discussion, *infra* section III, subsection ii, pp. 28-34.

<sup>11</sup> See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72 (1999) (for an argument that there is an “attack on harassment law” being waged by the courts throughout the use of summary judgment). See also M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 329 (1999) (noting that a “substantial majority” of hostile workforce claims are disposed of by summary judgment). However, it may seem that some decisions at the federal level have placed a chilling effect on the use of summary judgment in employment discrimination lawsuits. Compare the case of *Gallagher v. Delaney*, 139 F.3d 338, 342-47 (2d Cir. 1998), wherein Judge Weinstein argued that summary judgment should be used with extreme caution in gender employment discrimination cases. Despite this ruling, a number of subsequent cases have held that summary judgment is not to be eliminated from the arena of employment litigation. For example, in the case of *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998), a second circuit panel held that after the *Gallagher* case summary judgment is “still fully appropriate” in gender discrimination lawsuits. Indeed, as Richard T. Seymour argues, “there is still substantial proper room for taking numerous cases away from juries.” Richard T. Seymour, *Developments in*

significant percentage of cases that present factual questions worthy of trial do not move forward as a result of federal trial judges failing to appropriately apply summary judgment standards in gender discrimination lawsuits.<sup>12</sup> As experienced litigators know well, this fact creates an incentive for women either not to pursue a case at all or to accept a small settlement at the beginning stages of a suit before risking a potentially devastating summary dismissal. Moreover, evidence indicates that class action lawsuits are especially prone to dismissal by summary judgment.<sup>13</sup> Hence, because motions for summary judgment are so aggressively used in gender discrimination cases, the degree to which class action cases can be an effective tool in advancing an aggregation of relatively small claims is further reduced.<sup>14</sup> This fact is especially problematic in light of the low caps on damages that often make individual cases of discrimination difficult to pursue. Fourth, the process of proceeding toward a trial can be painful for a plaintiff, especially in sexual harassment cases, as aspects of the plaintiff's life can be dragged out during the pre-trial discovery process, with the threat of further disclosure taking place at trial.<sup>15</sup> Although judges have discretion to help protect plaintiffs from unfair and unnecessary personal intrusion in gender discrimination lawsuits, they

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*Summary Judgment: Making the Most of Reeves v. Sanderson Plumbing*, p. 28, National Employment Lawyers' Association Twelfth Annual Convention, June 27-30, 2001, available at [http://www.lieffcabraser.com/pdf/seymour\\_art\\_13\\_nela.pdf](http://www.lieffcabraser.com/pdf/seymour_art_13_nela.pdf). See also Elizabeth Schneider, *Gender and Summary Judgment: Some Preliminary Thoughts*, p. 3 (unpublished paper, on file with author).

<sup>12</sup> See Beiner, *supra* note 11, at 72. See also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993). See also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1069 (2003).

<sup>13</sup> Allan Kanner and Tibor Nagy note "the tendency to terminate cases on dispositive motions applies with additional force to class actions, which many state and federal courts view with disfavor." Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 694 (2005).

<sup>14</sup> See discussion *infra* section III, subsection iii, pp. 34-41.

<sup>15</sup> Embarrassing evidence concerning a plaintiff's prior sexual activity can be disclosed either through the discovery process or during trial. Rule 26 of the Federal Rules of Civil Procedure controls the admissibility of prior sexual activity in terms of discovery, and Rule 412 of the Federal Rules of Evidence controls admissibility of evidence at trial. See FED. R. CIV. P. 26 and FED. R. EVID. 412. For a helpful discussion of this topic, see Richard Bell, *Shielding Parties to Title VII Actions for Sexual Harassment from the Discovery of their Sexual History—Should Rule 412 of the Federal Rules of Evidence be Applicable to Discovery?* 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1998). See generally, Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs Sex Lives are being Laid Bare in Harassment Cases—Defense Lawyers Use Tactic to Counteract Litigants as Suits Get More Costly: What Evidence is Relevant?* WALL ST. J., Sept. 19, 1994, at A1 (noting the lengths to which defense attorneys will go to defend against discrimination claims).

often do not use this authority as aggressively as they should.<sup>16</sup> Hence, many plaintiffs, even with meritorious cases, elect not to proceed through trial.<sup>17</sup>

As a result of these factors, the current ability to advance women's rights in the workforce through federal statutes is rather weak, both in terms of the rights afforded private plaintiffs and in terms of the effect that individual cases have on the structural relations of women in the workplace. Having a large number of cases being dropped or not being brought at all, or having cases settle at a disadvantage to the claimants, injures the rights of individual women and dissipates the deterrent effects of anti-discrimination statutes.<sup>18</sup> As such, a genuine problem exists concerning the stability and institutional efficacy of legal protections for gender rights. While gender rights have been deemed so important as to require federal legal protections justiciable in federal court, those legal protections are being undermined by the hurdles women must surmount to successfully bring such cases in court. There is then a serious tension in federal law between its noble aspirations and its failure to achieve its full potential.

This tension is the focus of this article. In the first section I affirm the continuing importance of federal laws to promote gender equality and survey the gains in statutory protections for equal employment rights at the federal level. The second section documents that sexual discrimination in the workplace continues to be a serious problem in contemporary America. The third section reviews how the means of enforcing gender rights are tilted against the full vindication of women's equality in the workplace, with the result being that many meritorious cases are not brought at all or are settled from a bargaining position that undermines the legitimate merit of a plaintiff's case. These conditions in turn make it possible for employers to escape penalties for engaging in structural practices of discrimination, therefore encouraging discrimination, which then disadvantages the rights of all women and creates a real problem for the stability and institutional efficacy of advancing gender equality through federal statutes. The fourth section develops a response to this problem. Efforts should and can be

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<sup>16</sup> See Jennifer E. Smith, Note, *Fine Tuning the Wrong Balance: Why the New Rule 412 Does Not Go Far Enough to End Harassment in Sexual Harassment Litigation*, 10 WIS. WOMEN'S L. J. 63, 80-87, 92-99 (1995) (providing examples of judicial laxity in enforcing Rule 412).

<sup>17</sup> See Lewis Gainor, *The Missouri Human Rights Act is the Law of Choice for Sexual Harassment Victims' Privacy*, 60 J. MO. B. 20, (2004), available at <http://newsite.mobar.org/76714f25-2fa7-4901-90c2-2c10aad69a18.aspx> (last accessed Nov. 10, 2005) (describing how the laws of evidence impact settlement rates). For a more detailed discussion of this point, see *infra* section III, subsection iv, pp. 41-45.

<sup>18</sup> See *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989). Indeed, the Supreme Court has noted how individual claimants can be characterized as "private attorneys general" in the sense that their specific cases also have a public dimension.

made to empower the EEOC and to raise the low caps on damages in federal employment law cases. Additionally, there is a need to change class action certification rules surrounding litigation of claims of gender discrimination in the workforce. In addition, progress should and can be made in encouraging a more restricted use of summary dismissal by means of summary judgment in gender equality cases. Progress can also be made by modifying the way federal trial judges use their authority over the discovery process and the admission of evidence by encouraging a more sensitive use of the power to control disclosure of information pertaining to a plaintiff's private life.

The first objective, changing the background conditions and governing laws dealing with workforce inequality by emboldening the EEOC, increasing the damage caps for employment discrimination cases, and loosening the rules around class action certification in all federal circuits, can be achieved by grounding the discussion in terms of the political position of women in contemporary politics, focusing on their role as an electoral swing group. The second aspect, changing the often biased outcomes of summary judgment decisions and the regulation of pre-trial discovery and the admission of evidence, is perhaps more subtle. Reform measures that might be undertaken to change the governing standards surrounding the granting of summary judgment, or to change the rules of evidence, appear to be impracticable.<sup>19</sup> In light of these factors, I argue that the goal should be to address the issue of judicial virtue: the goal should be to enhance the virtues of federal district judges in terms of fortifying their will and capacity to use discovery control mechanisms appropriately and to deploy summary judgment in a way that is both faithful to the governing standards, and sensitive to women's perspectives, so that more truly meritorious cases survive summary dismissal and fewer unwarranted intrusions of privacy take place during the pre-trial discovery process, or at trial. This will entail formulating an understanding of judicial virtue that emphasizes a kind of judicial intelligence, a type of perceptiveness defined by the broadening of perspectives and the ability to engage arguments from a wide variety of points of view. It will also entail developing a program for inculcating such an understanding of judicial virtue. This project of improving judicial virtue may itself appear to be impracticable—or perhaps even utopian—but it need not be. I argue that a concrete set of proposals for improving judicial behavior exists that demonstrates the real possibility of improving the performance of federal district judges in these important areas. I then argue that the same political pressures that can enable a reformulation of the cap on damages and the enhancement of the EEOC can mobilize attention to the issue of improving trial-

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<sup>19</sup> See Miller, *supra* note 12, at 996. I develop this point in greater detail *infra* at pp. 58-60.

level judicial virtue, and that additional political pressures have the power to move Congress to initiate programs to improve federal judicial education.

I end the work with a general conclusion arguing that the ability to make the legal environment more of a level playing field in gender discrimination lawsuits indicates that we can have greater confidence in the institutional effectiveness of protecting gender rights by a strong system of federal laws. The measures I address can serve over time to improve the position of women in the workplace by moving both the position of individual plaintiffs and the structural practices of employers in a more positive direction. This result then would mean that we can have greater confidence in federal laws that, by helping to promote the advancement of women, help to generate a more just society for every individual. As a consequence of these measures, we can help to sustain a culture in which all aspects of the modern workforce can have among their ranks an equal number of female participants, and where the very best of these women can continue to advance, in the trail blazed by Justice Sandra Day O'Connor, to the highest levels of American public life.

### I. Gender Equality and Federal Law

Gender rights in the workplace are vitally important. Slow but significant progress has been made in realizing these rights by adopting legislation at the federal level.<sup>20</sup> In this section, I first discuss the importance of gender equality in the workforce and then survey the laws that have been put in place at the national level to secure these important rights.

Laws that protect the equal employment rights of women in the workplace are important expressions of who we are as a people. Perhaps the most important aspect of laws protecting women's equality of opportunity is their connection to what has been termed our "organic law": the Declaration of Independence.<sup>21</sup> Affirming the equality of the sexes affirms the continued importance of the Declaration in our public life. The Declaration sets forth a radical expression of human rights and equality.<sup>22</sup> The Declaration announces the self-evidence of each

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<sup>20</sup> See Schafran, *supra* note 1, at 617-32.

<sup>21</sup> See for example MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 11-13 (Princeton University Press) (1999) arguing for an approach to constitutional interpretation that accords a special place to the Declaration of Independence.

<sup>22</sup> *Id.* at 11. See also, GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 25 (Vintage 1993) (1992) (arguing that the Declaration was a radical expression of human equality); SAMUEL ELLIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 223 (Penguin Books 1994) (1965) (arguing that the Declaration's claim of equal rights was "more revolutionary

human being's status as a person of equal moral worth.<sup>23</sup> In this regard we do well to remember the famous statement of Abraham Lincoln that the Constitution is a "silver frame" to protect the "apple of gold" of freedom, dignity, and equality affirmed in the Declaration.<sup>24</sup> The Constitution achieves its full moral vindication when it is seen as a structuring device that exists for the concrete political realization of human freedom and moral equality.<sup>25</sup>

Moreover, a strong call for women's rights and equality is not an anomaly of modern times—it is not a mere fad that has risen and fallen with the shifting tides of public opinion. In fact, calls for women's rights started early in the life of the republic and have expanded rather consistently throughout the life of the nation.<sup>26</sup> From the call for women's equality in Seneca Falls to the continual demands in congress for an equal rights amendment starting from at least the late 1800s, the call for greater equality for women is a deep-seated aspect of American political development.<sup>27</sup>

Also, the nation is made stronger by gender equality, and perhaps most especially by gender equality in the workplace. The country is knitted together into a coherent cloth of moral principle grounded on equality of opportunity. The articulation of shared moral principles leads to a strong nation of stakeholders, where the whole of society feels invested in the progress of the country. And gender equality in the workforce makes the country stronger in a more concrete sense; by realizing the labor potential of all Americans fully and equally, we are in a better position to meet the future challenges to our own economic vitality.<sup>28</sup> In a global economy where the United States faces competition from countries

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than anything written by Robespierre, Marx, or Lenin, more explosive than the atom, a continual challenge to ourselves, as well as an inspiration to the oppressed of all the world").

<sup>23</sup>Mark Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 11 (2000).

<sup>24</sup>Abraham Lincoln, *Fragment on the Constitution and the Union*, in Roy Basler, ed. *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 513 (2<sup>nd</sup> ed. 2001).

<sup>25</sup>See generally, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281 (1991).

<sup>26</sup>*Id.*

<sup>27</sup>In this context it is important to remember that the Equal Rights Amendment, so much debated in the 1970's, and so often seen as a product of modern feminism, was championed on the national level by the National Women's Party as early as 1923. For instructive histories of the ERA see MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 57-58 (Indiana University Press 1988); see Medina, *supra* note 11, at 320; and Ginette Castro, *AMERICAN FEMINISM: A CONTEMPORARY HISTORY* 28-31 (Elizabeth Loverde-Bagwell, trans., New York Univ. Press 1990).

<sup>28</sup>Senator Humphrey in discussing the Civil Rights Act of 1964 explicitly mentioned how greater equality of opportunity would improve the economic strength of the country. 110 *CONG. REC.* 13, 088 (1964) (statement of Sen. Humphrey). This reasoning would seem to remain true today.

with populations three to four times our number—and where the populations are increasingly well-educated—it can be argued that we simply need all the good domestic labor power we can muster.<sup>29</sup> Lastly, our country is made stronger by a firm commitment to gender equality in the workforce because of the important message this commitment has sent and can continue to send to the wider world. For example, our country faced communism in the twentieth century,<sup>30</sup> a system that was inconsistent with full human freedom.<sup>31</sup> Many countries, especially in the third world, did not fully appreciate or recognize that inconsistency at the time.<sup>32</sup> And so, the forces of international communism attempted to seduce other nations to its cause in part by the attractiveness of its call for greater gender equality.<sup>33</sup> In this environment the United States eventually had to respond to this call with its own articulation of rights to equal treatment, including greater equality for women.<sup>34</sup> A new international obstacle confronts us today: the rise of extreme understandings of Islam based on the ideology of international jihad.<sup>35</sup> Once again our country can be made stronger by showing the women of the world that equality of opportunity is a valuable ideal for the United States—so much so that we take great care to realize it in our own laws. By advancing women's rights at home we are better able to show how extreme forms of Islam do not affirm this value and so ultimately are inadequate forms of thought. This can help us win the battle for hearts and minds in the larger war against Islamic extremism. So once again, greater equality of opportunity is both right on principle and makes us stronger as a people.

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<sup>29</sup> As a recent report of the Global Alliance for Diversifying the Scientific and Engineering Workforce notes, “for the US to remain competitive in a global technological society, it must take serious steps to create a diverse and multicultural labor force.” Suzanne G. Brainard, *Globally Diversifying the Workforce in Science and Engineering*, [http://www.globalalliancesmet.org/about\\_concept.htm](http://www.globalalliancesmet.org/about_concept.htm) (last visited April 17, 2006).

<sup>30</sup> *The End of the Modern Era*, N.Y. TIMES, Mar. 1, 1992, at 15.

<sup>31</sup> *Id.*

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

<sup>33</sup> See KATE WEINGAND, *RED FEMINISM: AMERICAN COMMUNISM AND THE MAKING OF WOMEN'S LIBERATION* 35 (Johns Hopkins Univ. Press 2002) (describing the world-wide communist development of calls for an end to the subordination of women).

<sup>34</sup> The development of equality in America as a response to the threat of communism is strongest in terms of race. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (Princeton Univ. Press 2002). But see HELEN LAVILLE, *The Importance of Being (in) Earnest: The Irony of State-Private Network in the Early Cold War*, in *FREEDOM'S CRUSADERS: STATE-PRIVATE NETWORKS IN AMERICA'S COLD WAR* (Helen Laville & Hugh Wilford eds., Frank Cass, 2005) (arguing that the connection is also present in terms of gender).

<sup>35</sup> For a discussion of global Jihad, see generally inter alia, FAWAZ A. GERGES, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* (Cambridge Univ. Press 2005).



Over the last forty years there has been slow but steady progress in realizing through concrete political measures these ideals of full equality of opportunity in the workplace.<sup>36</sup> These changes have been slow in developing, and there are some real problems with the measures that have been adopted.<sup>37</sup> Nevertheless, the adoption of a variety of measures advancing gender equality demonstrates that there has been a considerable change for the better in America in the last four decades. A range of important laws affecting women's participation in the workplace have been adopted, including the Equal Pay Act of 1963 and the Family and Medical Leave Act of 1993.<sup>38</sup> I shall focus on the landmark civil rights acts of 1964 and 1991 and the changes in statutory and case law surrounding these acts, providing a brief survey of the development of federal employment law as it has emerged from these two important federal statutes.<sup>39</sup>

In 1964 the historic Civil Rights Act (CRA) was passed by the Congress and signed into law by President Lyndon Johnson.<sup>40</sup> This measure made employment discrimination on the grounds of race or gender illegal in America.<sup>41</sup> The act also created the Equal Employment Opportunity Commission to assist in effectuating the goal of eliminating discriminatory practices in the workplace.<sup>42</sup> However, at first the EEOC did not have the power to initiate litigation.<sup>43</sup> Moreover, protecting employees from gender discrimination at first was not

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<sup>36</sup> See Schafran, *supra* note 1, at 617-32.

<sup>37</sup> *Id.*; and see Abelson, *supra* note 3, at 1.

<sup>38</sup> The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (2005) (codified at 29 U.S.C. § 206 (d) (2005)); The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (2005) (codified at 29 U.S.C. § 2601-2654 (2005)). (The Equal Pay Act mandates that women and men doing comparable work must receive comparable pay; the Family and Medical Leave Act allows women and men to take time off work, without pay, to care for a newborn or to care for a sick or aging family member.)

<sup>39</sup> I can here provide only a brief sketch of some of the most salient features of the law of gender equality in the workplace.

<sup>40</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered portions of 28 and 42 U.S.C.).

<sup>41</sup> 42 U.S.C. § 2000e-2 (a) (1) of the CRA reads as follows: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." Civil Rights Equal Employment Opportunities Act, 42 U.S.C. § 2000e-2 (a) (1) (2006).

<sup>42</sup> For an interesting assessment of the EEOC from a political scientist, see American Political Development Colloquium, Robert Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement* (2005), at

<http://www.americanpoliticaldevelopment.org/townsquare/colloquia.html>.

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

deemed by the EEOC to be within its ambit.<sup>44</sup> Nevertheless on the basis of this law, private parties could seek relief in court after first filing with the EEOC, and they could receive in a trial before the court (no provision was made for trial by jury), remedies for back pay, front pay, reinstatement, and even injunctions against future discriminatory practices.<sup>45</sup> In the late 1960's the EEOC for the first time became seriously concerned with women's issues, issuing reports, for example, asserting that sex-segregated employment ads violated the Civil Rights Act, and holding that gender was not an inherent aspect of the job description of being a flight attendant.<sup>46</sup> However, it was not until 1972 that the CRA began to be seen as a real vehicle for achieving greater workplace equality for women and men.<sup>47</sup> The Act was amended in that year by adding Title IX, which mandated equal treatment in educational institutions receiving federal funds.<sup>48</sup> Additionally, the EEOC for the first time became authorized to file suits in federal court.<sup>49</sup>

From 1972 to 1991 the biggest advances for women developed through federal case law interpreting the 1964 Civil Rights Act.<sup>50</sup> In the late 1970's federal courts authorized the practice of the EEOC's filing lawsuits arguing for the existence of gender discrimination on the basis of statistical data of a "disparate impact" on women of policies undertaken by employers.<sup>51</sup> Moreover, in 1986, in the case of Meritor Savings Bank v. Vinson, the Supreme Court affirmed that employment discrimination law should be widened to include the concept of sexual harassment.<sup>52</sup> Meritor held that sexual harassment is a violation of Title VII if either a quid pro quo exists where the employer trades retention or advancement for sexual favors, or if a hostile work environment is created by the

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<sup>44</sup> See MacKinnon, *supra* note 25, at 1281 (attention to the rights of women was an important cause in the formation of the National Organization of Women). For a history of NOW and its relationship to the EEOC, see Milestones in the History of the U.S. Equal Employment Opportunity Commission, available at <http://www.eeoc.gov/abouteeoc/35th/milestones/index.html> (last visited Apr. 11, 2006).

<sup>45</sup> Occhialino, *supra* note 9, at 679-705.

<sup>46</sup> For a good overview history of the EEOC, see Feminist Majority Foundation, *Feminist Chronicles*, at <http://www.feminist.org/research/chronicles/fc1953.html> (last visited April 17, 2006). Other activity on the part of the federal government to advance the rights of women can be seen in Executive Order No. 11,375, 3 C.F.R. 684 (1966-70), reprinted in 42 U.S.C. § 2000e (1982), banning discrimination on the basis of sex in federal contracts.

<sup>47</sup> MacKinnon, *supra* note 25, at 1281.

<sup>48</sup> Occhialino, *supra* note 9, at 672.

<sup>49</sup> The Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e (1972); see also Occhialino, *supra* note 9, at 677.

<sup>50</sup> One of the exceptions to this claim is the adoption by Congress in 1978 of an amendment to section 701 of the 1964 CRA, known as the Pregnancy Discrimination Act, which prohibits employers from unfairly penalizing employees who become pregnant.

<sup>51</sup> Occhialino, *supra* note, 9 at 677 (documenting the advance of disparate impact claims).

<sup>52</sup> Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

employer and the environment causes serious psychological harm and thus substantial injury to the work capacity of one or more employees.<sup>53</sup> The Court in Meritor also held that to some extent employers could be held strictly liable for actions by their employees constituting sexual harassment.

One of the next major advances in federal protections for gender equality in the workplace came with the passage of the 1991 Civil Rights Act.<sup>54</sup> This Act created, among other things, a right to trial by jury in all cases alleging gender discrimination under the 1964 Civil Rights Act, and a right in all cases of intentional employment discrimination to damages in addition to strict monetary compensation for lost wages and promotion pay, including compensatory damages for such things as emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life, as well as punitive damages for intentional discrimination with malice or reckless disregard for an employee's civil rights.<sup>55</sup> The Act did establish caps on compensatory and punitive damages, as well as limitations on the degree to which suits claiming employment discrimination on the basis of statistical evidence of disparate impact of various policies and procedures could be successful.<sup>56</sup> Nevertheless, the Act represented a significant step forward for equal opportunities for women in the workplace because it created an additional avenue for women to address their grievances in court and to receive compensation for discrimination.

Subsequent case law expanded the protections for women in the workforce. For example, in 1993 the Supreme Court broadened the protections against sexual harassment. In the case of Harris v. Forklift Systems,<sup>57</sup> the Supreme Court expanded the holding in Meritor Savings Banks v. Vinson.<sup>58</sup> The Forklift case held that there need not be serious psychological harm or trauma to the employee in order for a hostile work environment case to be actionable. Rather, all that is necessary to establish a violation of Title VII is the existence of a serious and pervasive hostile and abusive work environment, without respect to whether such an environment causes serious psychological injury. Moreover, in Forklift the Court announced that the appropriate test for determining whether a workplace is sufficiently hostile to generate a violation of Title VII is to look at

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<sup>53</sup> *Id.*

<sup>54</sup> Civil Rights Act of 1991, 42 U.S.C. §1981(a) (1991). See Geraldine Szott Moohr, *Arbitration Goals of Employment Discrimination Law*, 56 WASH & LEE L. REV. 395, 425 (1999) (describing Congress as having been the firm champion of gender rights by creating important changes favoring the use of the courts to uphold gender equality).

<sup>55</sup> See 42 U.S.C. §1981.

<sup>56</sup> See 42 U.S.C. §1981.

<sup>57</sup> *Harris v. Forklift Sys.*, 510 U.S. 17, 22-23 (1993).

<sup>58</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

the totality of the circumstances. The factors to be considered in determining the totality of the circumstances surrounding a hostile work environment claim include the severity and persistence of the alleged activity, and the degree of welcomeness of any sexual comments or activities directed at the complainant. These factors are to be determined, in part, by reference to the reasonable person standard. For example, the welcomeness of persistent sexual references in the workplace is to be determined by judging if the acts or comments of the defendant were both objectively and subjectively unwelcome or upsetting, that is, by asking whether a “reasonable person” would have been offended by the actions of the employer or the employer’s subordinates, and whether the employee was, in fact, offended.<sup>59</sup>

In 1998, in the cases of Faragher v. City of Boca Raton<sup>60</sup> and Burlington Industries v. Ellerth,<sup>61</sup> the Courts further expanded the protections against sexual harassment by widening the scope of strict liability for employers for sexual harassment committed by subordinates. Earlier decisions had held that there was strict liability for employers for the actions of their subordinates only in quid pro quo cases of harassment and not for hostile workplace claims.<sup>62</sup> Ellerth and Faragher held that strict liability is appropriate for sexual harassment in all cases when there is “tangible employment action” of a sexually intimidating nature, as long as the employer did not take reasonable efforts to prohibit the sexually offensive actions.<sup>63</sup>

Lastly, class action suits for violation of rights guaranteed under Title VII have been available since the liberalization of class actions in the reforms of

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<sup>59</sup> See Harris at 21-22; see also Smith, *supra* note 16, at 93-94 (1995)

<sup>60</sup> Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

<sup>61</sup> Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

<sup>62</sup> See Faragher at 784-86, and Burlington at 751-54 for descriptions of the earlier case law.

<sup>63</sup> For a helpful discussion of these issues see Philip Lyon and Bruce Phillips, *Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth: Sexual Harassment under Title VII Reaches Adolescence* 29 U. MEM. L. REV. 601 (1999). Moreover, in 2002 in the case of *Min Jin v. Metropolitan Life*, 310 F. 3d 84, 93 (2d Cir. 2002), the Second Circuit expanded the range of offenses for which an employer could be held strictly liable, holding that a tangible employment action that was intimidating need not have resulted in any actual adversity in pay, promotion or assignments, as long as the intimidating actions were motivated by sex. *Id.* at 91-93. In *Min Jin* the court rejected the employer's argument that there was no tangible employment action because the harassing behavior consisting of a threat to fire the plaintiff on the basis of gender was not carried out. *Id.* The court held that the fact that the plaintiff submitted to the sexual abuse of her supervisor to avoid the threatened termination was sufficient to state a tangible employment action, creating potential liability for the employer. *Id.*

the Federal Rules of Civil Procedure of 1966.<sup>64</sup> In 2004, the largest class action Title VII case ever was certified in federal court.<sup>65</sup> In June 2004, Judge Martin Jenkins, of the Northern District of California, certified a class action suit against Wal-Mart for sexual discrimination.<sup>66</sup> The class includes over 1.6 million current and former employees of Wal-Mart, and is a hallmark in Title VII class action litigation.<sup>67</sup>

Let us summarize what we have discussed concerning the current state of federal employment discrimination law as it has developed since the 1960's. Individuals can now have a claim under federal law if there are discriminatory employment practices on the basis of gender. There is some limited ability to bring disparate impact cases.<sup>68</sup> One can also bring an actionable claim for sexual harassment on the basis of behavior requesting a sexual quid pro quo or behavior creating a hostile work environment. A jury trial is available in all gender discrimination lawsuits, with remedies available to make the plaintiff whole, such as back and front pay, along with a range of statutorily specified monetary damages and employers are subject to strict liability for a wide range of actions. Lastly, large class action suits are available in federal court, at least to a certain extent. In all, then, in the last forty years we have seen the establishment of a fairly impressive set of federal legal protections from gender-motivated employment discrimination.

## II. These Laws Remain Important in Light of Continued Discrimination

These laws and legal developments have by no means outlived their usefulness. There remains, in fact, a serious problem with gender discrimination in the workplace—a fact that makes ensuring that these laws are fully effective vitally important. I shall discuss several indicators of the extent of gender discrimination in the American workplace.

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<sup>64</sup> The 1966 changes to class action certification, found in Rule 23 of the Federal Rules of Civil Procedure, allow classes to be certified without notifying and obtaining the permission of all members, on condition that reasonable efforts at notifying potential class members have been undertaken.

<sup>65</sup> Abelson, *supra* note 3.

<sup>66</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

<sup>67</sup> See Brad Seligman, lead counsel in the Dukes case, for a discussion of the implications of that case. Brad Seligman, "From Duke Power to Wal-Mart: Title VII Class Actions Then and Now" in CIVIL RIGHTS AND ATTORNEYS FEES ANNUAL HANDBOOK 20 (2004), available at <http://www.impactfund.org/pages/articles/TitleVIIhistoryarticlefinal2.doc> (last accessed April 20, 2005).

<sup>68</sup> For an especially helpful discussion of the current law surrounding disparate impact cases, see Robert Belton, *Title VII at 40: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005).

First, the EEOC, the federal agency charged in part with reviewing the extent of employment discrimination, still receives a very large number of complaints each year.<sup>69</sup> Under Title VII, a dispute can only be filed in court if the claimant first registers the complaint with the EEOC<sup>70</sup> (a process which I discuss at greater length in the next section). The EEOC therefore plays an important role in providing information that can help researchers gauge the extent of employment discrimination. During the last ten years the EEOC has received over 20,000 cases of workplace gender discrimination each year.<sup>71</sup> The EEOC is not able to research each case as extensively as it would like, but on the basis of the limited reviews of the claims undertaken by dedicated professionals in the Commission, on average the EEOC finds that about half of the cases show some degree of “cause” for concluding that gender discrimination has indeed taken place.<sup>72</sup> As such, the EEOC reports that approximately 10,000 allegations of gender discrimination show some basis in fact.<sup>73</sup> This fact gives us strong indication that the problem of gender discrimination is a significant one.<sup>74</sup> Despite major efforts to improve the position of women in the workplace, the reported incidence of gender discrimination remains high.

In addition to case filing statistics, the extent of discrimination can be inferred from the number of class action cases<sup>75</sup> that have been successfully litigated on behalf of the claimants over many years.<sup>76</sup> Over the last ten years the success rate at trial for private class action cases has been increasing, and when the EEOC files comparable cases (called pattern and practices cases) it has been

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<sup>69</sup> Abelson, *supra* note 3.

<sup>70</sup> Abelson, *supra* note 3.

<sup>71</sup> EEOC, Charge Statistics FY 1992 through FY 2004, available at <http://www.eeoc.gov/stats> (last visited Apr. 18, 2006). These number are important, for as Anne Noel Occhialino and Daniel Vail argue, “the sheer number of [filings with the EEOC] provides evidence that employment discrimination remains a stubborn and intractable problem”, Occhialino, *supra* note 9, at 704.

<sup>72</sup> Lieberman, *supra* note 42, at 15.

<sup>73</sup> *Id.*; and EEOC, Charge Statistics FY 1992 through FY 2004, available at <http://www.eeoc.gov/stats> (last visited Apr. 18, 2006).

<sup>74</sup> Moreover, employment discrimination cases in general represent “an increasing fraction of the federal civil docket, now reigning as the largest single category of cases.” Kevin M. Clermont and Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court* 1 J. EMPIRICAL LEGAL STUDIES 429, 429 (2004). This fact alone can be seen as some further evidence of the extent of discrimination, given that win rates in such cases are not de minimis. *See* Schwab at 445 (discussing plaintiff win rate in employment discrimination cases in federal court).

<sup>75</sup> FED. R. CIV. P. 23.

<sup>76</sup> *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816 (2000) (arguing that class action cases historically have been the most important means of successfully combating systemic gender discrimination in the workplace).

collecting a record amount of damages.<sup>77</sup> This further indicates the real existence of gender discrimination in the American workplace.

Another basis for inferring the widespread incidence of gender discrimination is by reference to so-called employment audits, a practice where equally qualified men and women apply for jobs and the outcomes are compared.<sup>78</sup> Recent data shows that women in these circumstances are at least 10% less likely to be hired than men, which again gives additional reason for suspecting the persistence of employment discrimination based on gender.<sup>79</sup>

Lastly, another indicator of the degree of sexual discrimination can be gleaned from surveys of women in the workplace. In many fields, women still express the view that workplace discrimination is a substantial problem. A few samples of the evidence established from these surveys include that 46 percent of critical care nurses reported having been harassed<sup>80</sup> and 44 percent of women in a recent extensive survey of federal employees indicated having suffered sexual harassment at work.<sup>81</sup> In 2002 a report by the ABA's Commission on Women found that between 50 to 66 percent of female attorneys have experienced sexual

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<sup>77</sup> EEOC. Litigation Statistics, available at <http://www.eeoc.gov/stats/litigation.html> (last accessed July 1, 2005); see also *EEOC Issues Comprehensive Report*, 2 OMEGA HR NEWS (Omega HR Solutions, Inc., Marietta, Ga.), Fall 2005, at 1, available at <http://www.omegahr.com/newsletters/Fall%202002.pdf> (last visited Jul. 6, 2006) (when the EEOC brings suit for workplace bias, its win rate in the last decade has been 60.24%; the win rate for all sexual harassment cases that have gone to trial has hovered around 55% for the past few years; and in cases where physical harassment has been alleged, the win rate over the last decade increases to 59%); see also Ann Juliano and Stewart Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 567 (2001) (these numbers serve to indicate the pervasiveness of employment discrimination).

<sup>78</sup> Rachel Dunifon, *Race and Gender in Labor Market*, in Report of the Joint Project on Poverty Research. Vol. III, No. 1 (Winter 1999), available at <http://www.jcpr.org/99winter/article2.html> (last visited Apr. 18, 2006).

<sup>79</sup> *Id.*; see also *New Census Data Reveal Women's Share of Executive Positions Decreased*, Peopleclick Research Institute, (Feb. 23, 2004), available at <http://www.peopleclick.com/news/asp/22304.asp> (last accessed Apr. 18, 2006).

<sup>80</sup> Emily Kaye, C.G. Donald, and S. Merker, *Sexual Harassment of Critical Care Nurses: A Costly Workplace Issue*, 6 AMERICAN JOURNAL OF CRITICAL CARE 409 (1994), available at <http://ajcc.aacnjournals.org/cgi/content/abstract/3/6/409> (last visited Apr. 18, 2006).

<sup>81</sup> U.S. MERIT SYSTEM PROTECTION BOARD, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges*, p. vii (1995), available at <http://www.mspb.gov/studies/sexhar.pdf> (last visited Apr. 18, 2006).

harassment in their workplace, and almost three-quarters believe that sexual harassment is a problem in their firm or practice.<sup>82</sup>

In all, then, there appears to be strong grounds for concluding that gender discrimination is still a serious problem in the modern workplace.

### III. The Difficult Position of Plaintiffs in Federal Employment Discrimination Cases

Women in the workforce still face significant discrimination. Therefore, the federal laws designed to protect gender equality are of great importance. However, despite the gains in legal protections that we have noted, the legal environment for women who have suffered discrimination is tilted against the plaintiff. Many women with meritorious claims face an uphill challenge to establish their legal claims. This is the case for at least four reasons, which I shall discuss in detail in this section: the Equal Employment Opportunity Commission is not as effective as it should be in assisting women with meritorious disputes; claimants with strong claims often have great difficulty securing private counsel; there are problems relating to federal summary judgment practice in gender discrimination lawsuits; and there are problems relating to the pre-trial discovery process and the admission of evidence in gender cases, especially in hostile work environment claims. I explore each of these problems in turn.

#### i) Problems with the EEOC

The EEOC is charged with assisting individuals to achieve the ends of the 1964 Civil Rights Act as well the purposes of subsequent civil rights legislation.<sup>83</sup> Originally, the EEOC was designed to monitor the incidence of discrimination and to initiate and supervise voluntary settlement agreements between employers and employees.<sup>84</sup> In 1972, it was extended the right to bring litigation in federal courts in certain cases.<sup>85</sup> In all, the modern EEOC exists in large part to facilitate just settlements, to bring cases on behalf of private claimants so that fewer private plaintiffs have to pay for their own suits, which can be very expensive, and to

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<sup>82</sup> Jay Marhoefer, *The Quality of Mercy is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Professions*, 78 CHI. KENT L. REV. 817, 832 (2003).

<sup>83</sup> Occhialino, *supra* note 9, at 672

<sup>84</sup> Occhialino, *supra* note 9, at 672-74.

<sup>85</sup> See <http://www.usdoj.gov/crt/emp/faq.html> (last visited Apr. 18, 2006) (under the controlling statutes, the Justice Department brings suits against state and local governments for employment discrimination).



create an extensive litigation department capable of bringing large suits on a consistent basis covering many individual claims of discrimination.<sup>86</sup>

The EEOC is not realizing its full potential. The EEOC has attempted to enhance the support it provides individual claimants by establishing settlement support and mediation programs, however, these programs have been weakened in the last decade.<sup>87</sup> Moreover, the EEOC does not provide direct support through litigation for most women who complain of genuine cases of gender discrimination, and the degree to which it has undertaken large multiple-party cases has been reduced substantially in the last five years.<sup>88</sup> These developments have a cumulative effect on women's rights. They mean that a great number of non-frivolous cases of gender discrimination are put in a difficult position. They are placed in a weaker position because the erosion of the settlement program means more cases are exposed to the threat of extensive and protracted legal defense by defendants, possibly including a trial.<sup>89</sup> Also, the known failure of the EEOC to litigate many individual suits has the effect of further placing women on their own against defendants who can generally marshal considerable litigation resources.<sup>90</sup> Also, the lack of will by the EEOC to bring large multi-party cases often hurts the individuals involved in these cases, as well as significantly weakens the bargaining position of other individual plaintiffs, since businesses in this environment can view the disposal of individual cases as distinct problems to be addressed without any fear of eventual wide-scale litigation by the EEOC,

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<sup>86</sup> The EEOC also issues non-binding advisory opinions on contested legal issues and sets out non-binding guidelines for various business practices. These have been useful to many employers and employees. Medina, *supra* note 11, at 322. Moreover, the EEOC has also become active in bringing amicus curiae briefs before the Supreme Court in cases that deal with racial and gender discrimination. See Occhialino, *supra* note 9, at 707.

<sup>87</sup> Occhialino, *supra* note 9, at 675-80.

<sup>88</sup> See Amos N. Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 178 (Spring 2005) (arguing that Bush has "de-prioritized the Civil Rights Division of the Justice Department, discouraging the kind of aggressive legal advocacy encouraged under President Clinton").

<sup>89</sup> See Matthew A. Swendiman, *The EEOC Mediation Program: Panacea or Panicked Reaction?* 16 OHIO ST. J. ON DISP. RESOL 391, 404 (2001) (arguing that "mediation has allowed more individuals to have their employment discrimination charges resolved with few negative consequences"); See Clermont, *supra* note 74, at 440-41 (noting that the lower the settlement rate, the greater the likelihood of trial). See also Occhialino, *supra* note 9, at 706 (describing how this puts plaintiffs in a difficult position at least because of the high costs of litigation). See also Clermont, *supra* note 74, at 445 (describing the costs for many individual plaintiffs as often "prohibitively expensive" and the relatively low win rate at trial); see *infra* section III, subsection iv, pp. 41-45 (the psychological difficulties facing plaintiffs of taking a case to trial); see *infra* pp. 30-34 (the high costs of trial).

<sup>90</sup> Occhialino, *supra* note 9, at 679.

which can enable employers to treat individual cases in a less compromising manner.<sup>91</sup>

There are, then, three major obstacles facing the EEOC. First, there is currently much less political support for the mediation and settlement program of the EEOC than has been the case in the past. Second, the commission is flooded with cases and has too few resources to bring many individual cases to federal court. Lastly, the EEOC currently has a serious tension between its high-visibility chairperson and the individuals responsible for actually filing and pursuing litigation, with the latter not as willing to use the agency for aggressive litigation as the former, especially in large scale “pattern and practices” lawsuits involving multiple cases of employment discrimination.<sup>92</sup> I shall briefly address these reasons in more detail.

First, the EEOC has run a well-received mediation and settlement program for several decades. The settlement/mediation program has dealt fairly with some 20,000 cases (not all gender cases), through a process that has been supported by most employees and employers.<sup>93</sup> Indeed, in 1999 the Clinton-appointed EEOC chairwoman, Ida Castro, proclaimed the mediation program as “one of our shining stars.”<sup>94</sup> However, in the early period of the current Bush administration Congress refused to authorize more money for the EEOC, which led directly to the mediation program being substantially curtailed.<sup>95</sup>

Second, the Commission has been flooded with individual claims of discrimination for a long period of time. Since 1964, the caseload has grown exponentially, partially as a result of the expansion of the protections afforded to workers under the extensions of the 1964 act since its first enactment. For example, between 1992 and 1998, as the protections against harassment expanded, the EEOC received over 15,000 sexual harassment complaints. Moreover, the number of sexual harassment filings per year increased 62% in just

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<sup>91</sup> See Moohr, *supra* note 54, at 400, 422, 425 (describing the relationship between individual litigation and the overall strength of the laws protecting workplace equality).

<sup>92</sup> Occhialino, *supra* note 9, at 671.

<sup>93</sup> *Anti-Bias Agency is Short of Will and Cash*, N.Y. TIMES, July 1, 2001, at 1, available at <http://www.racematters.org/eoclackswill&cash.htm> (last visited April 17, 2006). See also Michael Z. Green, *Proposing a New Paradigm for EEOC after Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK L. REV. 305 (2001), and Occhialino, *supra* note 9, at 689-90.

<sup>94</sup> Abelson, *supra* note 3.

<sup>95</sup> Abelson, *supra* note 3. See also Green, *supra* note 93.

one year, from 1991 to 1992.<sup>96</sup> On top of this, the agency's responsibilities have substantially increased as a result of the 1990 Americans with Disabilities Act.<sup>97</sup> In all, in the last fifteen years the EEOC has received over 80,000 cases per year,<sup>98</sup> including over 20,000 cases of gender discrimination,<sup>99</sup> and the Commission faces backlogs in excess of 25,000 cases.<sup>100</sup> All of this has taken place with relatively little increase in real-dollar funding for the Commission.<sup>101</sup>

As a result of this heavy case burden, there are very few EEOC cases that are thoroughly investigated, and much less brought to trial. This has been the case independently of the level of political support for the agency.<sup>102</sup> For example, at the height of the Clinton administration in 1997, the EEOC brought only 439 lawsuits in all and only 166 gender discrimination suits.<sup>103</sup> In light of case pressures, the EEOC can only conduct a rather cursory review of a sizable percentage of its cases, and when it does review more extensively, its review is usually not at all as thorough as the agency would like, especially when dealing with what are deemed low-profile cases.<sup>104</sup> In all, there is little active support from the agency in most individual cases of employment discrimination.<sup>105</sup>

Third, the EEOC has a divided administrative structure that under current political conditions has led to a decrease in its use of multi-party pattern and

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<sup>96</sup> See Nancy Wyatt, *Information on Sexual Harassment: Chronology*, available at <http://www.de2.psu.edu/harassment/generalinfo/> (last visited April 17, 2006).

<sup>97</sup> For a discussion of the impact of the ADA on the EEOC, see Micheal Selmi, *Why are Employment Cases so Hard to Win?*, 61 LA. L. REV. 555 (1996).

<sup>98</sup> See EEOC Statistics, available at <http://www.eeoc.gov/stats> (last visited Apr. 17, 2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> McGinley, *supra* note 12 (noting the problems facing the EEOC arising from fiscal restraint); see Occhialino, *supra* note 9, at 703. See also, Marhoefer, *supra* note 82, at 846-47 (These budgetary restraints have often taken the form of hiring freezes).

<sup>102</sup> Lieberman, *supra* note 42; see also *Paralysis for EEOC Feared*, NAT'L L. J., Aug. 24, 1998.

<sup>103</sup> See EEOC Statistics, available at <http://www.eeoc.gov/stats> (last visited April 17, 2006).

<sup>104</sup> Marhoefer, *supra* note 82, at 847. See also Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 289 (1996).

<sup>105</sup> See Moohr, *supra* note 54, at 425. Here it is important to note that the EEOC and the federal courts both acknowledge the great strains placed on the Commission. For example, when the EEOC grants a right to sue letter, which technically indicates a lack of a high level of probable cause to suspect discrimination, the EEOC letter carries no weight at all in a subsequent private lawsuit. The EEOC and the courts both acknowledge that lack of action by the commission does not necessarily imply a lack of wrongdoing by an employer. See also McGinley, *supra* note 12.

practices litigation.<sup>106</sup> The commissioner of the EEOC is appointed directly by the president.<sup>107</sup> The chief commissioner of the EEOC is usually the formal spokesperson and champion for the agency, and visibility tends to center around this individual.<sup>108</sup> Presidents therefore usually appoint commissioners who are in favor of aggressively enforcing civil rights laws.<sup>109</sup> However, the chief litigation counsel of the EEOC is also appointed by the president—and some commentators say that this person is the real leader of the agency.<sup>110</sup> Under the EEOC's governing structure, the general counsel is a separate litigation officer in charge of deciding whether to file suit in federal court.<sup>111</sup> The commissioner and the litigation chief are equal in rank, so the litigation chief is not accountable to the chairperson. In addition, there has been a great deal of decentralization at the agency, with more of the authority to initiate litigation being transferred to lower levels of the administration.<sup>112</sup> As a result of this administrative structure, the actual decision to initiate litigation is not vested in the commissioner, who is a fairly high profile official in Washington. Instead, the decision to litigate is entrusted to officials with much less political visibility. Hence, presidents have the ability to appear strongly committed to enforcing Title VII laws by appointing strong commissioners, while moving the agency, in a way that generates much less visibility, in a direction of less aggressive enforcement of anti-discrimination laws through the appointment of litigation officials who are less prone to pursue extensive litigation.

This appears to be what has been happening in the Bush administration.<sup>113</sup> The chairperson of the EEOC has often been a person dedicated to the extensive use of litigation;<sup>114</sup> however, over the last six years the litigation chief and the regional chiefs have often been at odds with the chairperson over how aggressively to pursue litigation, especially in respect to large multi-party lawsuits.<sup>115</sup> Many of the litigation officers are currently opposed to extensive

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<sup>106</sup> Abelson, *supra*, note 3 (describing how “political sensitivity over quotas” has driven the EEOC, with its divided structure, to a point where it “has often failed to attack the most systemic cases of discrimination”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *CARDOZO L. REV.* 273, 285 (1983).

<sup>112</sup> Abelson, *supra*, note 3.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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

participation in large-scale pattern and practice lawsuits.<sup>116</sup> Hence, the discord between the commissioner and the chief litigator has created what one commentator has called a “hidden state of war” between levels of the EEOC—with the presidentially selected chair, and national spokesperson, often warring against the presidentially selected litigation chief, who has much less visibility, but a great deal of influence in the actual operations of the Commission.<sup>117</sup> As a result of this hidden war, there have been fewer pattern and practices cases undertaken, with the result being that most cases that are brought to court are individual cases of discrimination.<sup>118</sup> As a case in point, the large class action suit against Wal-Mart that has recently been certified is being pursued privately without the backing of the EEOC.<sup>119</sup> That’s true even though, as Professor Charles Silver’s research gives us reason to suspect, as part of the class certification process the merits of the Wal-Mart class action case<sup>120</sup> were likely reviewed extensively by the trial judge and found not to be baseless.<sup>121</sup> As an additional indicator of the lack of will on the part of the administration to bring extensive litigation, the Justice Department—quite in contrast to earlier administrations, both Republican and Democrat—has filed only one pattern and

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<sup>116</sup> *Id.* See also Civilrights.org, Civil Rights 101: Employment Discrimination, available at [http://www.civilrights.org/research\\_center/civilrights101/employment.html](http://www.civilrights.org/research_center/civilrights101/employment.html) (last visited Apr. 17, 2006).

<sup>117</sup> Abelson, *supra* note 3 (quoting John Rowe, thirty year veteran of the EEOC and district office director in Chicago, who notes that there has been “quiet warfare between general counsel and chair”).

<sup>118</sup> See Moohr, *supra* note 54, at 425 (noting that individual claims dominate as a result of declines in large cases); and Abelson, *supra* note 3 (arguing that they have been very careful to avoid many pattern and practices cases). See also Judith Appelbaum & Virginia Davis, *Justice Department Policies Undermine Women’s Rights*, available at <http://www.watchingjustice.org/reports/article.php?docId=220> (last visited Apr. 17, 2006). (It is noted by Judith Appelbaum and Virginia Davis, both of the National Women’s Law Center, that “the Civil Rights Division has brought significantly fewer employment discrimination cases than in previous administrations, and a much lower proportion of those that have been brought are “pattern or practice” cases – high-impact cases that challenge discriminatory policies affecting large numbers of people.”)

<sup>119</sup> See *Dukes*, 222 F.R.D. at 137. For an insightful analysis of this case article by the lead attorney for the plaintiff in the suit, see Seligman, *supra* note 67.

<sup>120</sup> *Id.*

<sup>121</sup> Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1395 (2003) (arguing that judges increasingly “refuse to certify [class action cases] until they are persuaded that plaintiff’s allegations have merit”). For an additional discussion of the review of the merits in pretrial issues in class action cases, see JoEllen Lind, “*Procedural Swift*”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 761-62 (2004). This practice is in technical violation of the holding in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which proscribes a review of the merits as an aspect of class certification.

practices case against state or local governments.<sup>122</sup> A parallel provision of Title VII pertains to state and local governments' practices of employment discrimination and requires any litigation in this area to be undertaken by the Justice Department.<sup>123</sup> However, the Bush administration's Justice Department has been notably uninterested in pursuing such litigation.<sup>124</sup>

Thus three big problems face the EEOC: the program does not have sufficient resources to support fully its mediation and settlement program; it has faced a growing increase in cases without a corresponding increase in resources; and there is not a firm will in the commission to litigate broad multi-party lawsuits.<sup>125</sup>

The effect of this is that many claimants have to proceed on their own—seeking counsel in private cases in an environment without much of a corresponding threat to employers being supplied by the EEOC. And this is true of many meritorious cases, since the large caseloads and political orientation of the highest echelons of the litigation department mean that many meritorious cases have to be pursued without effective support from the EEOC.

#### ii) The Difficulty of Securing Private Counsel

If the EEOC does not bring a suit then the private plaintiff must bring suit on his or her own behalf. This, however, can be extremely difficult. I shall discuss the problems that private plaintiffs, even those with meritorious cases, can face in bringing suits in federal court as a result of the difficulty of retaining adequate counsel. I begin by addressing the problem of high attorneys' fees in most discrimination cases,<sup>126</sup> and how this can deter many women from seeking relief in court through a pay-for-service arrangement. I then discuss the importance of

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<sup>122</sup> Under the administrations of G.H.W. Bush and Bill Clinton, on average two to four such cases were filed per year. See *Watching Justice Civil Rights*, available at <http://www.watchingjustice.org/issues/subIssueCompilation.php?docId=53> (last visited Apr. 17, 2006).

<sup>123</sup> Doug Heron, *No More Enforcers? Justice has Lost Enthusiasm for Employment Discrimination Cases*, LEGAL TIMES, May 19, 2003.

<sup>124</sup> See Citizens' Commission for Civil Rights: Report on Employment, available at <http://www.ccr.org/justice/issue.cfm?id=11> (last visited Apr. 17, 2006). See also Heron, *supra* note 123.

<sup>125</sup> Abelson, *supra* note 3.

<sup>126</sup> David Sherwyn, J. Bruce Tracey, and Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 81 (1991) (David Sherwyn, J. Bruce Tracey, and Zev J. Eigen point out, in the area of employment law, if a case goes to trial, attorney's fees will "almost always be in excess of \$50,000 and could exceed \$500,000.").

contingency fee arrangements and class action certification as ways of dealing with the problem of high legal fees deterring many claimants from seeking vindication of their legal rights, and how current federal laws works to undermine the ability of claimants to secure either contingency fee or class action representation. I end the section with a brief discussion of an even more fundamental change that may be taking place, one that would make plaintiffs and plaintiffs' attorneys liable for the attorneys' fees of the defendant if their (non-frivolous) case does not prevail at trial, which could make the problem of securing counsel even worse.

By provision of section 706(k) of the Civil Rights Act of 1964, prevailing parties are able to receive, at the discretion of the trial court, reasonable attorneys' fees.<sup>127</sup> In addition, the 1991 Civil Rights Act awards attorneys' fees in cases seeking monetary damages, and section 113 enhances this, to some extent, by expanding the amount that can be given in attorneys' fees to cover the use of scientific and expert witnesses.<sup>128</sup> These measures were put in place to alleviate the problem of securing legal counsel on a fee-for-service basis.<sup>129</sup> Moreover, the thought has been that if a civil rights claim has merit sufficient to receive a favorable judgment at trial, the plaintiff should not have to bear the burden of upholding his or her rights because, by upholding laws against discrimination in their individual cases, plaintiffs serve also to vindicate the overarching policy objectives expressed by federal law.<sup>130</sup> Following this logic, for a long period the provision of attorneys' fees has been construed to mean that only if the prevailing party is the plaintiff can the prevailing party receive compensation for legal expenses.<sup>131</sup>

However, relying on the ability of a prevailing plaintiff to be awarded attorneys' fees, as a way to address the problem of claimants with meritorious cases being unable to afford to sue, is highly problematic. Again, the awards are made only if the plaintiff wins.<sup>132</sup> This creates disincentives to pursue litigation

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<sup>127</sup> Civil Rights Act of 1964, Pub. L. 88-352 (codified as amended at 41 U.S.C. § 1971 (2001)).

<sup>128</sup> See Civil Rights Act of 1991, Pub. L. 102-166 (codified as amended at 41 U.S.C. § 1991(1991)).

<sup>129</sup> *Id.*

<sup>130</sup> David A. Root, *Attorneys Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule and the English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 588 (2005) (Root points out, a successful employment law plaintiff upholds "a higher public purpose" and thus the American system has held that such litigants "should not have to shoulder the cost of advancing American public policy").

<sup>131</sup> See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). See also *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427 (1973).

<sup>132</sup> *Id.*

from the perspective of both the claimants and the attorneys. From the claimant's perspective, attorneys' fee arrangements are extremely risky because a claimant puts money up front to the lawyers, and has wasted costs if he or she loses.<sup>133</sup> In this regard, it is important to note that litigation is expensive, in part, because of the new introduction of jury trials, which are generally more expensive than bench trials.<sup>134</sup> Litigation is also expensive for reasons concerning the availability of discovery during the pre-trial process, which we shall explore in greater detail in the next section.<sup>135</sup>

Moreover, litigation costs remain substantially high irrespective of whether a plaintiff will or will not gain substantial amounts in damages for lost wages in a victorious case. As a result, low-to-middle income employees are placed at a real disadvantage.<sup>136</sup> From the point of view of the attorneys, the question is one of opportunity cost.<sup>137</sup> First, the question is what counsel could have done for the same amount of compensation (that is, compensation based simply on one's hourly rate) in a different kind of a lawsuit, or by engaging in other forms of legal work. In different cases, especially ones with clients who are typically wealthier than most ordinary employees, such as medium to large businesses, the same amount of work will generate much more revenue, as the attorney can set his or her own hourly rate. This is important since, in civil rights cases, the rate for attorney compensation is set by the judge and is generally somewhat lower than what counsel could otherwise receive.<sup>138</sup>

For these reasons, employees in gender discrimination cases— and especially mid- to low-level workers—often seek to bring cases on a contingency

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<sup>133</sup> *Northcross*, 412 U.S. at 422.

<sup>134</sup> Michael Mankes, *Combating Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. LAW. J. 67, 85 (1994) (describing the expenses of jury trials).

<sup>135</sup> Moohr, *supra* note 54, at 445 (describing the expenses of employment law litigation).

<sup>136</sup> *Id.*; Vail, *supra* note 9, at 706 (describing the costs for many individual plaintiffs as often "prohibitively expensive"). See also McGinley, *supra* note 12, at 1452-54 ("The vast majority of claims brought before the EEOC are not resolved by the agency, and the vast majority of potential plaintiffs cannot afford to bring suit in federal court.").

<sup>137</sup> Moohr, *supra* note 54, at 445.

<sup>138</sup> McGinley, *supra* note 12, at 1454 (noting that court-issued attorneys' fees in employment litigation "do not compensate the plaintiff adequately"). It is important to keep in mind that the attorney compensation rate is to be set by the judge in reference to compensation that lawyers in the area would typically receive in similar cases. It is important to note that "the rates charged corporate clients [...] are not appropriate for most cases since the work is not similar." See *Approaching the Bench: Determining Attorney's Fees*, 2 FOIA UPDATE (1981), available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_II\\_3/page4.htm](http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page4.htm) (last visited July 6, 2006). The opportunity cost from the attorney's perspective is significant in taking civil rights cases.



fee basis or as class action cases. As to the first, the Civil Rights Act of 1991 enables parties to secure monetary damages in cases of deliberate discrimination. But there are very low caps on the extent of the monetary damages that are recoverable.<sup>139</sup> These low caps make it very hard to find private counsel on a contingency fee basis if the EEOC does not take one's case.<sup>140</sup> In section 102 of the Civil Rights Act of 1991, the caps on monetary damages are specified.<sup>141</sup> They are capped on a sliding scale depending on the number of employees, and are sensitive to who the plaintiff is, and other special features.<sup>142</sup> If a defendant has 15-100 employees in 20 or more calendar weeks in the current or preceding calendar, the caps on damages are \$50,000; if 101-200, \$100,000; if 201-500, 200,000; if more than 500, \$300,000.<sup>143</sup> These are totals for all compensatory and punitive damages. These caps are per claimant, not per claim.<sup>144</sup> The person can receive this as a total amount; it is not calculated per discrete claim or discrete instance of discrimination.<sup>145</sup> In the case of Smith v. Chicago School Reform Board of Trustees it was held that any attempt to separate cases must be closely monitored by judges so that plaintiffs do not simply disaggregate the claims of discrimination that constitute a same transaction and file separate suits.<sup>146</sup> Judges are to review this closely and are to dismiss cases, by the tool of issue preclusion, if they suspect this kind of multiple pleading.<sup>147</sup> Lastly, federal, state, and local governments, even if guilty of discrimination with malice, cannot be ordered to pay punitive damages.<sup>148</sup> As a result of these factors, gender discrimination cases taken on a contingency fee basis are not especially profitable from the lawyer's perspective.<sup>149</sup>

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<sup>139</sup> See Pub. L. 102-166, U.S.C. §102 (1991).

<sup>140</sup> See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Law: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1422 (2004) (arguing that "while passage of the Civil Rights Act of 1991, making available punitive and compensatory damages, likely made it easier to secure a competent lawyer on a contingent fee basis, it remains true that plaintiffs who did not earn a lot or cannot show clear monetary losses may not be able to secure legal representation").

<sup>141</sup> See Pub L. 102-166, U.S.C. §102 (1991).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Jeffrey Needle, chair of the Employment Rights Section of the Association of Trial Lawyers of America, has written and lectured extensively on this topic. See Jeffrey Needle *Punitive Damages for Civil Rights: Convincing the Judge and Jury*, available at <http://www.jneedlel.home.mindspring.com/Swinton3.htm> (last visited Nov. 10, 2005).

<sup>146</sup> *Smith v. Chicago School Reform Bd. of Trustees*, 165 F. 3d 1142, 1149-50 (7<sup>th</sup> Cir. 1999).

<sup>147</sup> *Id.* at 1150-51.

<sup>148</sup> *Id.* at 1149-50.

<sup>149</sup> Moreover, at a more basic level, in any contingency fee arrangement, more exploratory cases are often not taken because of the risk assumed by the lawyers. See Moohr, *supra* note 54, at 445. This analysis does not address the issue of whether attorney's fees should be treated as taxable

As to class actions, although in general these kinds of suits tend to make cases more economically feasible, the rules for class action certification in employment cases are becoming much more restrictive than has been the case in the past.<sup>150</sup> Currently, in the Fifth and Eleventh Circuits, awarding damages in employment discrimination suits requires a “particularized inquiry” into each case.<sup>151</sup> These rulings are in opposition to earlier practices that grew out of the liberalization of class action suits in the federal system as a result of the 1966 changes to the Rules of Civil Procedure.<sup>152</sup> These recent changes make it very difficult to pursue large class action suits that aggregate an extended number of claims.<sup>153</sup> Moreover, there is, by federal law, a prohibition against legal aid agencies filing class action lawsuits, if the agency receives federal funding.<sup>154</sup> As a result of these and other factors, the number of class action cases involving claims of employment discrimination has plummeted since the 1970s, with a 90% reduction in class action suits taking place since the early 1970s.<sup>155</sup>

Lastly, in regard to the ability to secure counsel in employment discrimination lawsuits, an especially detrimental ruling has recently been issued. As previously mentioned, attorneys’ fees have generally only been awarded to plaintiffs if they prevail, not to defendants if they prevail. In the case of Christiansburg Garment Co. v. EEOC, the Supreme Court held that only if a plaintiff’s case was wholly frivolous, unreasonable, or without foundation, would attorneys’ fees be awarded to a defendant.<sup>156</sup> However, this has recently changed in some federal circuits. In the case of Quintana v. Jenne, the Eleventh Circuit has held that a defendant can be awarded attorneys’ fees from a plaintiff, even if there

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income for the plaintiff. In some federal circuits it is the case that attorney’s fees, paid, as by definition, to the plaintiff’s attorney, are treated as taxable income for the plaintiff herself. This can lead to a case where, due to the tax burden, successful plaintiffs owe more in taxes than they collect in judgment. See Kenneth R. Pyle, *To Tax or Not to Tax: Should Contingent Attorneys’ Fees be Included in the Successful Litigant’s Gross Income*, 30 DEL. J. CORP. L. 285 (2005).

<sup>150</sup> See *Allison v. Citgo Petroleum Corp.*, 151 F. 3d 402 (5<sup>th</sup> Cir. 1998).

<sup>151</sup> See *id.*; see also *Murray v. Auslander*, 244 F.3d 807 (11<sup>th</sup> Cir. 2001).

<sup>152</sup> For a detailed review of the older rules of class certification see Brad Seligman, lead counsel for the recent Wal-Mart class action case, in “Lessons in Class Certification” in TRIAL, Oct. 2001 Volume 37, Issue 10, available at <http://www.atla.org/Publications/trial/0110/t0110oct.aspx> (last visited Apr. 20, 2005). See also Seligman, *supra* note 67.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Andrew C. Allen, *Employment Class Actions in the Private Sector*, available at <http://www.whatleydrake.com/CM/NewsandInfo/EMPLOYMENT%20CLASS%20ACTIONS%20IN%20THE%20PRIVATE%20SECTOR.pdf> (last visited Apr. 20, 2005). See also Hart, *supra* note 76, at 820.

<sup>156</sup> *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

are aspects of the plaintiff's case that are plausible, sensible, and non-frivolous.<sup>157</sup> More specifically, if a plaintiff succeeds on one claim, but also asserts a frivolous claim unrelated to the successful claim, the defendant may recover attorneys' fees incurred in responding to the frivolous claim. The First and Seventh Circuit Courts are also allowing this practice.<sup>158</sup> This is a minority position in the federal courts at the present time, but it may have a significant chilling effect in those circuits in which this is the controlling law.<sup>159</sup> Moreover, the very changeableness of the law of attorneys' compensation that these cases speak to, and the uncertainty that they give rise to, can produce a chilling effect on the general willingness of firms nationwide to develop their practices in the area of civil rights law.

In summary, meritorious cases can be and are being turned away by attorneys, with many claimants with strong cases finding it hard to bring suits in court.<sup>160</sup> This set of circumstances then leaves many meritorious cases unaddressed by the federal legal system.<sup>161</sup>

### iii) The Looming Fear of an Unfavorable Regime of Summary Judgment

If a complainant has been able to secure counsel, either by the EEOC's litigating the case or by retaining private counsel, many obstacles still confront the case. One of the most ominous<sup>162</sup> is the threat of summary dismissal before trial. Judges, under the Federal Rules of Civil Procedure, can enter a final judgment on a case before trial if they determine that the case is not "trial worthy."<sup>163</sup> Evidence exists that federal judges are using this power fairly extensively in cases involving gender discrimination by dismissing plaintiffs' cases before trial, and that they are doing so in a way that dismisses a fair number of cases that should have received a full day in court.<sup>164</sup> This development, which

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<sup>157</sup> *Quintana v. Jenne*, 414 F. 3d 1306, 1312 (11<sup>th</sup> Cir. 2005).

<sup>158</sup> *Id.* at 1312.

<sup>159</sup> *Id.* at 1310-11.

<sup>160</sup> Susan FitzGibbon, *Reflection on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYER POLICY J. 221, 245 (1997).

<sup>161</sup> *See id.* at 245 (1997). *See also* Theodore St. Antoine, *Mandatory Arbitration of Employee Discrimination Cases: Unmitigated Evil or Blessing in Disguise*, 15 T.M. COOLEY L. REV. 1, 7 (1998) (noting that "good" plaintiff attorneys take only 1 in 100 cases).

<sup>162</sup> Willy Rice calls summary judgment "dangerous...drastic and harsh." Willy E. Rice, *Questionable Summary Judgments, Appearance of Judicial Bias, and Insurance Defense in Texas Declaratory Judgment Trials: A Proposal and Arguments for Revising Texas Rules of Civil Procedure 166A(A), 166A(B), and 166A(I)*, 36 ST. MARY'S L. J. 535, 548, 558 (2005).

<sup>163</sup> For a detailed discussion of summary judgment, see EDWARD J. BRUNET ET AL., *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* (2d ed. 2000).

<sup>164</sup> *See* Beiner, *supra* note 11, at 19, and McGinley, *supra* note 12, at 203.

I discuss below, has important implications for the rights of women in the workplace. It creates a disincentive for many women to seek to vindicate a meritorious claim in the first place; it creates further disincentives for counsel to accept cases, and if counsel does accept a case, it puts pressure to secure an early, and usually relatively low, settlement. And lastly, it subjects women's cases, which have traveled far in the process, to a devastating pretrial dismissal. This last point, of course, is especially important for cases in which the arduous process of securing counsel or of certifying a class action has been successful.

I shall first discuss how summary judgment has become a prominent aspect of federal litigation, both across the board, and in gender discrimination lawsuits. I shall then briefly survey what standards govern the summary judgment determination, and explore reasons for concluding that summary judgment is being used to dismiss gender discrimination suits that should survive the level of review that the governing standards establish.

Federal judges are dealing with a considerable number of summary judgment motions in federal litigation.<sup>165</sup> The data that has been collected on summary judgment in the federal courts indicate a significant increase in the degree to which judges are involved in issuing summary judgment. The data indicates a substantial increase over the last two decades in the number of motions being filed.<sup>166</sup> A recent study by the RAND organization indicated a 90% increase in summary judgment motions filed from 1980 to 1999.<sup>167</sup>

It is important to note that summary judgment is very much used in gender-related cases.<sup>168</sup> For example, very few hostile workplace cases go to

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<sup>165</sup> Actual data on the number of summary judgment motions made is hard to acquire for a number of reasons. As Professors Sinclair and Hanes point out, federal statistics do not record the number of summary judgment motions made or even the number granted. Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633 (1995).

<sup>166</sup> Miller, *supra* note 12, at 1048. See also Paul Mollica, *Federal Summary judgment at High Tide*, 84 MARQ. L. REV. 141 (Fall 2000). See also Hanes, *supra* note 169, at 1634 (1995). This is due to an important extent to the cases of Celotex, Liberty Lobby, and Matsushita—the so-called summary judgment trilogy—of 1986. See also Miller, *supra* note 12, at 1049-50.

<sup>167</sup> Lloyd Dixon & Brian Gill, *Research Brief: Changes in the Standards for Admitting Expert Evidence*, RAND Institute for Civil Justice (2001), available at [http://www.rand.org/pubs/research\\_briefs/RB9037/index1.html](http://www.rand.org/pubs/research_briefs/RB9037/index1.html) (last visited Apr. 20, 2005).

<sup>168</sup> In reference to all civil rights cases, evidence indicates that 60% of such cases are dismissed on summary judgment. National Workrights Institute, *Employment Arbitration: What Does the Data Show?*, available at [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html) (last visited Apr. 20, 2006).

trial.<sup>169</sup> This is not due entirely to these cases settling before trial. Evidence indicates that a great percentage is disposed of by summary judgment.<sup>170</sup> As Elizabeth Schneider points out in her work on gender and summary judgment, summary judgment has expanded into the area of workforce discrimination.<sup>171</sup>

What standards govern the issuance of a summary judgment? According to governing federal law, the trial judge is to review the case as a whole<sup>172</sup> and to see if there is a “genuine dispute” as to a “material fact.”<sup>173</sup> A genuine dispute is a dispute where reasonable people could disagree about the outcome.<sup>174</sup> If there can be such disagreement, the judge is not to enter summary judgment. However, a genuine dispute is present if, in Justice Scalia’s characteristically turgid words, there is “more than a metaphysical” reason to suspect the existence of a reasonable dispute.<sup>175</sup> In other words, the judge is to survey the case and weigh the claims to see if a robustly disputable claim is present in the case. As such, conclusory or speculative affidavits asserting the existence of a dispute are insufficient to defeat summary judgment.<sup>176</sup> Nevertheless, in deciding a motion, the judge is not supposed to weigh the evidence to the extent that she or he decides on the superior validity of contending reasonably entertainable differences concerning factual allegations<sup>177</sup>; rather, the judge is only to enter summary judgment when “a reasonable jury could reach only one conclusion.”<sup>178</sup> Also, in the situation where the judge is fully weighing all the merits—the situation of a full bench trial—the judge has access to live testimony and a full record. However, in the summary judgment circumstance, the judge is to credit all the reasonable claims that are present in the case of the party opposed to summary judgment, and all the reasonable inferences that support that side. The judge must do so with a relatively small summary of the record. Weighing of this nature has been held not to require the use of live testimony and cross examination, and

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<sup>169</sup> Medina, *supra* note 11, at 329.

<sup>170</sup> *Id.*

<sup>171</sup> Elizabeth Schneider, *Gender and Summary Judgment: Some Preliminary Thoughts* 3 (2003) (unpublished paper, on file with author). *See also*, Schwab, *supra* note 75, at 568 (noting that “recent years have seen a significantly higher fraction of [sexual harassment] cases occurring at the summary judgment stage”).

<sup>172</sup> Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).

<sup>173</sup> *See* Brunet, *supra* note 163, at 97-122.

<sup>174</sup> *Id.*

<sup>175</sup> Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

<sup>176</sup> *See* Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49, 56 (2d Cir. 1995).

<sup>177</sup> *See* DAVID BARRONS ET AL., *THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE* 12 (Federal Judicial Center Monograph 1991).

<sup>178</sup> Brunet, *supra* note 163, at 35.

indeed very few summary judgment motions involve the use of live testimony.<sup>179</sup> Despite these features, under federal law, the judge in deciding a motion for summary judgment is to play a fairly extensive role in determining whether, all things considered, the case is in fact worthy of a trial.<sup>180</sup>

It is important to note that in integrating the case and then viewing it *in toto* and weighing the claims in this limited sense, the judge is to be governed by a broad standard that requires him or her to see issues from a wide variety of points of view. Why this is so can be seen for at least two reasons.

First, as we have seen, the judge is to see the evidence in the light most reasonably favorable to the non-moving side, that is, to the side that is defending against having its case dismissed by summary dismissal.<sup>181</sup> The judge, therefore, is called upon to assume a broad frame of reference, looking to the extremes of what is reasonable. No doubt the judge's own initial estimation of what is reasonable will be relevant in determining what is maximally reasonably favorable to one side, but the judge cannot simply remain content with his or her own initial estimations of reasonableness—he or she must endeavor to broaden this sense to the greatest extent reasonably possible.

Second, as we have seen, case law indicates that in determining whether a reasonably contestable dispute exists, a judge is to ask if a reasonable jury would see such a dispute.<sup>182</sup> The standard, by referencing a reasonable jury, requires, as Heidi Li Feldman points out, that the trial judge be sensitive to community

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<sup>179</sup> See Barrons, *supra* note 177, at 13.

<sup>180</sup> The work on federal summary judgment practice and the role of the judge in properly deciding on a motion has become vast. See, e.g., Melissa Nelken *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53 (1988), and James Walsh, Christopher Newkirk, and Eric Brown, "Summary Judgment and Judicial Gatekeeping" in *The Judicial Gatekeeping Project Book: The Judge's Role as Gatekeeper: Responsibilities and Powers*. ed. Charles Nesson, available at <http://cyber.law.harvard.edu/daubert/book.htm> (last visited Nov. 10, 2005). The extent of review, as well as the number of cases of summary judgment, is also related to the so-called trilogy of cases established in 1986. For an especially detailed discussion, see Miller, *supra* note 12, at 982.

<sup>181</sup> Fed. R. Civ. P. 56, See, e.g., *Vathekan v. Prince George's County*, 154 F.3d 173, 175 (4th Cir. 1998) (where court holds "we must view the facts in the light most favorable to the nonmoving side" and most draw all justifiable conclusion to the advantage of the nonmovant).

<sup>182</sup> As the majority opinion writes in the case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), "[The] judge must ask himself ... whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented". See also, *Skinner v. Square D Co.*, 491 N.W. 2d 648, 652 (Mich. Ct. App. 1992) (A Michigan Court of Appeals case which used standards equivalent to the federal rules, where Judge Kelly notes in his dissent that in deciding whether to grant a judgment, the standard is not what the judge himself would do, but it is to be "decided by a jury").

understandings of what is reasonable.<sup>183</sup> The reasonable jury standard therefore is best seen, she notes, as a “blend concept,” it requires combining judicial sapience, that is the judge’s initial sense of reasonability, and the breadth of reasonable views found in a community.<sup>184</sup>

In all, the standard governing summary judgment is vague,<sup>185</sup> but it can at least be said that it requires trial judges to think in a very broad manner. The standard can best be seen as a demand for the judge to stretch his or her own way of seeing in search of all reasonable viewpoints in a very broad sense.

There is growing evidence that demonstrates that judges do not apply this way of approaching cases as successfully as they should in cases involving gender, and thus, that many trial-worthy cases face the risk of being summarily dismissed before trial.<sup>186</sup> Empirical evidence exists that judges are especially prone to error in fully appreciating issues from a perspective that is sensitive to how a reasonable jury could construe evidence of women’s experiences.<sup>187</sup> Indeed, the Race and Gender Bias Task Forces of three different federal circuit courts have found that many attorneys believe that gender-sensitive cases are inadequately dealt with at the summary judgment level. Gender task forces from the Second Circuit, the District of Columbia Circuit, and the Eighth Circuit found that fifty-three percent of plaintiffs’ attorneys reported that summary judgment was granted too easily in many gender-sensitive cases, and twenty-nine percent of plaintiffs’ attorneys reported that judges often, or many times, said cases were “frivolous, unimportant, or undeserving of the federal court’s time” when this judgment was sharply rejected by seasoned plaintiffs’ attorneys.<sup>188</sup> Professor M. Isabel Medina has also noted a trend to grant summary judgment in gender discrimination cases where a genuine and contestable dispute can be seen to exist.<sup>189</sup> Also, Elizabeth Schneider, on the basis of a detailed review of several

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<sup>183</sup> Heidi Li. Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1239 (1994).

<sup>184</sup> *Id.*

<sup>185</sup> Medina, *supra*, note 11, at 362 (where M. Isabel Medina refers to the summary judgment standard as especially “malleable”).

<sup>186</sup> See McGinley, *supra* note 12, at 203, for a good overview of this problem.

<sup>187</sup> See Beiner, *supra* note 11, at 126.

<sup>188</sup> Patricia Wald, *Summary Judgment at 60*, 76 TEX. L. REV. 1897, 1939 (1998); see also SPECIAL REPORT: SPECIAL COMMITTEE ON RACE AND ETHNICITY, reprinted in 64 GEO. WASH. L. REV. 189 (1996).

<sup>189</sup> Medina, *supra* note 11, at 370; see also Beiner, *supra* note 11, at 98; see also Rebecca K. Lee, *Pink, White, and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677 (Spring 2005) (for additional evidence of judges failing to assume a broad perspective in gender cases). Another reason to suspect the existence of a problem in this regard is that in most federal circuits, if the EEOC finds “reasonable cause” to suspect a violation of a right under Title VII, the reasonable cause finding does not limit

illustrative cases, has come to the conclusion that “gender comes into play in the exercise of summary judgment in [many] ‘hidden’ forms... [t]here are myriad and subtle ways that [this] happen[s]—in the evaluation of a female plaintiff, ... in the assessment of the strength of novel claims and in the diminution of the seriousness of harms suffered by women plaintiffs seeking redress in court.”<sup>190</sup> The way gender often comes into play, she concludes, is by restricting the sense of what is reasonable and limiting the validity of women’s experiences.<sup>191</sup> As a result of these findings, we have reason to conclude that many trial judges are not maintaining a sufficiently broad frame of reason in deciding motions for summary judgment in gender discrimination lawsuits.

This misuse of summary judgment has an impact on cases that are already in the system, and on the choice to bring a case at all or to accept a settlement. And this can have a definite impact even on meritorious cases, especially as summary judgment is currently practiced. Because of a failure on the part of a judge to see the issues pertaining to women’s experiences in a sufficiently broad light, a plaintiff can be denied a day in court. As a result the full details of the case that could have come out through live testimony, and which could have been seen more fully in the circumstance of a genuine trial, are never brought forth.<sup>192</sup> So a strong regime of summary judgment can be thought to be especially chilling, and especially destructive of the purposes of the laws advancing equal employment opportunities for women.

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the ability of the trial court to issue summary judgment. In other words, the federal courts often say, in effect, that they know more about what is “reasonable” than the professionals in the EEOC who have tremendous experience in this area. Michael D. Moberly, *Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit*, 24 PEPP. L. REV 37 (1996); see also Julie Tang & Theodore McMillan, *Eighth Circuit Employment Discrimination Law: Hicks and its Impact on Summary Judgment*, 41 ST. LOUIS U. L.J. 519 (Spring 1997), for discussions of this issue. Lastly, we should not forget the sentiment of Judge Weinstein in the Gallagher case, a sentiment that, although not based on scientific study of the issue, should be seen as a kind of fire bell in the night. As recently emphasized by the partners of Hoguet, Newman, and Regal, in arguing for a restricted role for summary judgment in gender discrimination cases, Weinstein argued that “whatever the early life of a federal judge,” he or she will likely lack the “current real life experience” to interpret accurately “subtle...dynamic of the workplace.” *Gallagher v. Delaney*, 139 F. 3d 338, 342 (2d. Cir. 1994), See Hoguet Newman & Regal, LLP, *Is Summary Judgment Dead—Or Alive and Kicking?*, available at <http://library.findlaw.com/1999/Jun/1/129581.html> (last visited Mar. 23, 2006).

<sup>190</sup> Schneider, *supra* note 171, at 6.

<sup>191</sup> *Id.* at 9 (arguing that there are instances where entering summary judgment against plaintiffs involves a “trivialization” of women’s claims).

<sup>192</sup> See Wald, *supra* note 188, at 1905-06 (noting how summary judgment cuts off important sources of information).



iv) The Threat of Intrusive Discovery and Embarrassment at Trial

Even if a claim is represented by counsel, and survives summary judgment, the plaintiff has to be open to a tumultuous process of pre-trial discovery. Moreover, the plaintiff is also subject to the threat of embarrassing evidence of prior sexual activity coming forth at trial. These forms of personal intrusion represent a kind of personal interrogation and examination that can lead many women with meritorious cases simply to drop their lawsuits and accept a relatively inauspicious settlement.<sup>193</sup> These factors are especially so in cases of gender discrimination in the form of workplace sexual harassment.

As has been outlined, the case law surrounding sexual harassment has a welcomeness component: the harassment must be unwelcome subjectively, as well as objectively, and must also be objectively and subjectively irritating.<sup>194</sup> Hence, limited defenses are permitted in the form of claims that the plaintiff is, in fact, a person who welcomed the sexually charged environment or was not irritated by it. Since litigants can pursue discovery of information that is “reasonably calculated to lead to the discovery of admissible evidence,” they can look into this in the pre-trial discovery process.<sup>195</sup> This then leads to the problem of the plaintiff’s life possibly being picked apart, resulting in tremendous embarrassment, and the problem may well get extremely difficult as defendants, who have a case against them that reaches this point in the litigation process, may well pull out all the stops.<sup>196</sup> Defendants therefore can become abusive—often subtly so by asking embarrassing questions about the plaintiff’s sex life and personal life that really do not advance the case but rather serve merely to intimidate or to harass.<sup>197</sup>

Judges do have power to control the use of discovery in civil cases of sexual employment discrimination. Rule 26 of the Federal Rules of Civil Procedure allows judges to issue protective orders shielding plaintiffs from certain forms of discovery.<sup>198</sup> The meaning of this rule has to be seen in light of Federal Rule of Evidence 412. In 1994, Congress changed the Federal Rules of Evidence

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<sup>193</sup> To a considerable extent, what I shall describe takes place before summary judgment in anticipation of it; but if a case survives summary judgment what I describe will doubtless be more intensified.

<sup>194</sup> *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993).

<sup>195</sup> FED. R. CIV. P. 26.

<sup>196</sup> See *Smith*, *supra* note 16, at 98 (describing humiliation of the plaintiff as a deterrent to proceeding to trial); see also *Marhoefer*, *supra* note 82; see also *Schultz & Woo*, *supra* note 15 (noting the lengths to which defense attorneys will go to defend against discrimination claims).

<sup>197</sup> *Marhoefer*, *supra* note 82, at 853-54.

<sup>198</sup> FED. R. CIV. P. 26.

by amending Rule 412 to partially shield plaintiffs in civil cases of sexual discrimination from having their past sexual behavior admitted as evidence.<sup>199</sup> This amendment requires that there be a preliminary hearing by the trial court to determine the admissibility as evidence of the line of inquiry the defendant seeks to explore. The standard governing the judge's determination of the acceptability of the line of inquiry does not establish per se rules, but rather authorizes the judge to exclude certain evidence only after a balancing of the material's prejudicial impact and probative value.<sup>200</sup> In light of this change, many federal appellate rulings have held that district courts should use the power they have to control discovery in a firm way by employing a similar balancing test to shield plaintiffs from inappropriate discovery.<sup>201</sup>

What exactly are the governing standards that are to be employed in regulating the admissibility of evidence and in controlling pre-trial discovery in a way that mirrors Federal Rule of Evidence 412? And what do these standards require of the trial judge?

The standards are complex, but share the following features in common: the judge is to determine if the probative force of the information that would likely be assigned to it by a jury substantially outweighs the information's likely prejudicial impact on a jury in forming a sensible judgment. Additionally, the judge is to look to "the danger of harm to any victim," that this, the judge is to take into account, in the balancing act, the privacy interests of the plaintiff.<sup>202</sup> This vague standard requires judges to imaginatively assume the perspective of the female claimant and her privacy interest, and the perspective of a reasonable jury, in order to determine both how such a claimant would likely be impacted in a prejudicial manner by the admission of the information concerning past sexual conduct, and how a jury would likely construe the probative force of the information. So, in all, the judge is to balance the need of the defendant for the evidence in terms of its probative value to the jury, the embarrassment to the woman that could come from this information being made public, and the likely prejudicial impact on the jury of the information being made known to them. This responsibility, to say the least, creates a very difficult task that requires an ability

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<sup>199</sup> FED. R. EVID. 412

<sup>200</sup> *Id.*

<sup>201</sup> See also Bell, *supra* note 15.

<sup>202</sup> FED. R. EVID. 412; see also *id.* (advisory committee's note stating that Rule 412 "puts 'harm to the victim' on the scale in addition to prejudice to the parties").

to understand the possible implications of evidence from a multiplicity of points of view.<sup>203</sup>

However, evidence exists that judges do not use the power to regulate discovery and the admission of evidence as appropriately as they should. Jennifer Smith notes that case law is replete with instances of judges performing this gate keeping task in a way that does not adequately take into account the real need of a jury to know the information in order to come to a just decision, the possible prejudicial effect of the evidence on the jury, and the likely embarrassment to the female plaintiff.<sup>204</sup> Judges instead—perhaps in order to avoid these difficult determinations,<sup>205</sup> but often also because of an insensitivity to the perspectives of female complainants<sup>206</sup>—simply admit most evidence even remotely relevant to the defendant’s contention. And this can often make plaintiffs desire a settlement, even when their cases are meritorious, simply in order to avoid the embarrassing and prejudicial information that can come out during litigation.<sup>207</sup>

In summary, for the four reasons we have explored—the inadequacy of the EEOC, the difficulty of securing counsel, the restrictive regime of summary judgment, and the problems of abusive discovery and failure to regulate the admission of evidence—even meritorious cases are hard to pursue or settle at a lower rate than might otherwise be the case. Moreover, because of these circumstances, corporations have much less incentive to deal with issues of discrimination in a structural way, which serves to hurt the interests of women’s rights in general. Thus, important laws that protect the employment rights of women are being undermined.

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<sup>203</sup> See Smith, *supra* note 16, at 79 (describing the need for judges to avoid “male-generated stereotypes”).

<sup>204</sup> *Id.* at 82 (describing several examples of the “devastating” effect a judge’s failure to assume a broad frame of reference can have on gender discrimination cases).

<sup>205</sup> *Id.* at 81 (noting that judges may have “grown accustomed to” admitting problematic evidence); see also Barbara Palmer, Judith Baer, Amy Jasperson & Jacqueline DeLaat, *Low-Life-Sleazy Big- Haired-Trailer Park Girl v. the President: the Paula Jones Case and the Law of Sexual Harassment*, 9 AM. U. J. GENDER SOC. POL’Y & L. 283 (2001).

<sup>206</sup> See Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125, 162-63 (1998) (describing the potential for gender stereotyping to infect the evidentiary gate-keeping process); see also Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195 (2001).

<sup>207</sup> See Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims under the 1994 Amendments to Federal Rule of Evidence 412*, 48 Vand. L. Rev. 1155 (1995); see also Lewis B. Gainor, *The Missouri Human Rights Act is the Law of Choice for Sexual Harassment Victims’ Privacy*, 60 J. Mo. B. 20 (2004) (describing how the laws of evidence impact settlement rates).

#### IV. Developing a Response: Evening the Employment Litigation Playing Field

There are, as we have seen, serious deficiencies in contemporary American employment law. These problems are not, I believe, ultimately insurmountable. I shall argue that they can be addressed through a systematic program of reform. Reform must focus on the things making the legal playing field unfair: the lack of support from the EEOC; the problems that generate difficulties in securing counsel; the unfavorable use of summary judgment by federal district judges; and the fact that some federal trial judges are insensitive in the sense that they fail adequately to police the discovery process in the appropriate manner. I shall indicate how proposals can be advanced to address each of these difficulties, and how the proposals can be effective, and can be realized politically. I shall do so by treating these issues in groups. I shall first deal with the failures of the law in reference to the EEOC and the problem of securing counsel—what I refer to as structural problems—and then explore the reforms that I suggest. Secondly, I shall deal with the failures of the federal bench in issues of summary judgment and discovery control—what I refer to as problems of judicial rule enforcement—and then outline the reforms that I argue are appropriate to these problems.

##### i) Structural Problems

I shall address the possibility of changing the structural problems that we have reviewed: the problem of inadequate EEOC support, the problem of the low caps on damages, as well as the problem of uneven rules for certifying class action cases. I do so by advancing two proposals.

First, we should focus on changing the structural circumstance by enhancing the litigation capacities and overall operational strength of the EEOC. Doing so could have important consequences. Of course, we must recognize that the EEOC is swamped by so many cases that the Commission will not be able to litigate most meritorious claims.<sup>208</sup> Nevertheless, as Professor Robert Lieberman has recently argued, the EEOC has been, to some extent, an important force in improving equal opportunity in the workplace, even with relatively low rates of litigation, and it can be an even stronger force with additional resources.<sup>209</sup> The

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<sup>208</sup> Christy Bishop, *About the Employment Legal Process*, available at <http://www.employeerightslawyers.com/employmentlegalprocess/item.nhtml?profile=employmentlegalprocess&UID=103> (last visited Mar. 30, 2006).

<sup>209</sup> Lieberman, *supra* note 42 (describing the EEOC as “remarkably effective” despite the numerous obstacles it faces).

EEOC has power that has been realized and can be realized to an even greater extent in the future, even if it cannot fully and adequately deal with each of the great number of cases it routinely faces. This is so for the following reasons. The current litigation environment across the board downplays trial litigation; mediation and settlement are key factors in almost all civil lawsuits.<sup>210</sup> But the EEOC has had to reduce its mediation program because of cuts in funding.<sup>211</sup> If resources were re-injected into the mediation program a great many individual claimants could benefit.<sup>212</sup> Also, although most civil suits in general tend to settle before trial, many cases (especially cases among claimants with extensive resources and where the outcome at trial is not seen as obvious) do so against what can be called a “bargaining backdrop”; that is, against the threat of an extended trial should the settlement negotiations fail.<sup>213</sup> In other words, the settlement negotiations are sensitive to the possibility of a costly and damaging trial taking place should the negotiations prove inconclusive. The same background conditions could, to some extent, be put in place for the settlement and mediation programs conducted by the EEOC. With more litigation of individual cases, in addition to systemic pattern and practices lawsuits, the bargaining position of claimants in the settlement and mediation programs can be improved over time. If the EEOC can expand its strategically important, and often time-consuming and resource-draining, pattern and practices cases, along with expanding the number of individual cases and broadening the range of employment areas covered by this increase in cases,<sup>214</sup> the EEOC can make a substantial additional contribution to shaping the legal playing field. The effect would be the creation of a bargaining backdrop that can enhance the bargaining position of the claimants who use the EEOC’s mediation program. In addition, the EEOC can, in partnership with private litigation organizations such as the NAACP and NOW, bring justice to more individual claimants and also improve

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<sup>210</sup> Super. Ct. of Cal., County of Calaveras, *Alternative Dispute Resolution (ADR) Information*, available at <http://www.calaveras.courts.ca.gov/information/adr.htm> (last modified Dec. 9, 2003).

<sup>211</sup> Abelson, *supra* note 3.

<sup>212</sup> *Id.*

<sup>213</sup> See Kathryn Spier, *The Handbook of Law and Economics* (Jan. 5, 2005), available at <http://gtcenter.org/Archive/Conf05/Downloads/WLE/Spier117.pdf> (last visited Mar. 30, 2006) (for general rates of settlement, where the author notes that “most private litigants tend to opt out of formal litigation channels” by means of settlement); on the idea of a bargaining backdrop, see Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 322-24 (1991) (describing the idea that close cases go to trial more often and so the degree to which no outcome is obvious influences the threat of closing negotiations and discussing how that the ability of litigants to bear costs is an important factor in); see also *id.* at 328 (noting that the ability to bear costs influence negotiations).

<sup>214</sup> Evidence exists that the EEOC has deemed some areas of low enforcement priority, such as the technology sector. See, e.g., Abelson, *supra* note 3.

the bargaining position of cases that settle in private suits.<sup>215</sup> This can happen through a sharing of resources between the EEOC and these organizations. If private organizations and the EEOC are able to partner together, this could mean that more private cases that are filed can be seen by employers as carrying the risk of being taken to trial should any settlement negotiations prove to be fruitless. Also, more individual private cases could be seen as having a potential impact beyond the instant case. A pattern of non-favorable settlements could trigger these private organizations to take more cases to trial.<sup>216</sup>

Second, we should focus on expanding the statutory caps on damages, easing class action certification, and ensuring immunity from attorneys' fees for plaintiffs whose cases are not totally frivolous but who now face the possible awarding of attorneys' fees against their side should they not prevail at trial. These measures can have important consequences. Indeed, it has been argued that a recent increase in class actions and contingency fee cases in gender discrimination suits is due to the existence of the new compensatory and punitive damages<sup>217</sup>—even though the rate of litigation of this kind is still relatively low. What this means is that there is reason to believe that a further increase in cases could result if the caps were removed or increased and other impediments for filing suits were relaxed.

The question now becomes, can each of these things actually be accomplished? I believe that these things can be done, due both to several general reasons concerning the position of women in American politics that support the possibility of change and several more specific reasons that address the details of current employment law, as well as concrete political reasons that have emerged in the last few months.

First, we can explore a general political reason for the possibility of passing more favorable legislation in the area of gender equality in the workforce. As we have seen, there is reason for believing that there are still considerable instances of gender discrimination in the workplace. Addressing this can be a

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<sup>215</sup> Lieberman, *supra* note 42, at 22; *see also* The U.S. Equal Employment Opportunity Commission, *FY 2003 Annual Performance Plan*, at <http://www.eeoc.gov/abouteeoc/plan/2003app.html> (last modified Aug. 6, 2002).

<sup>216</sup> *See* Lieberman, *supra* note 42, at 22. One area that might remain problematic in regard is the practice of making settlement arrangements secret; *see generally* Laurie Kratky Dore, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S. CAL. L. REV. 791 (2004) (providing an overview of the laws of secrecy in reference to civil settlements).

<sup>217</sup> William C. Martucci, Eric Smith & Karen K. Cain, *Class Action Litigation in the Employment Arena - The Corporate Employers' Perspective*, 58 J. MO. B. 332, 333 (2002).

salient and profitable political issue. For there is strong national support, especially among women, for a stronger set of laws guaranteeing equal employment opportunity.<sup>218</sup> The party that supports an effort to improve the current law can make important gains. Indeed, women, and particularly women who work outside of the home and who have one to two minor children, are swing voters in a highly divided electorate.<sup>219</sup> And the Republican Party in particular is desperate to acquire more women's votes—especially the votes of married women, but also the votes of unmarried women in their late twenties and early thirties,<sup>220</sup> who may be especially likely to appreciate such an effort. So, as we get closer to another presidential election, if a reform proposal were advanced by a Republican, it could likely sway at least a few independent female voters—and numbers do count.<sup>221</sup> Indeed, Republicans strategists have been frantically trying to make inroads with a relatively small number of moderate women in battleground states such as Wisconsin and Oregon.<sup>222</sup> Moreover, given the demographic makeup of the support for the Republican Party, there is no real risk for Republicans in terms of any “gender divide” in American politics in embracing laws that support (at least some) of the rights of women. The Republicans are relatively immune from losing the support of white men. One recent poll found that as few as 22% of white men who identify with a political party, identify with the Democratic Party.<sup>223</sup> The Republicans enjoy solid, deep-

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<sup>218</sup> See Report of the National Women's Law Center, *Slip-Sliding Away: The Erosion of Hard-Won Gain for Women under the Bush Administration and an Agenda for Moving Forward* 6 (Apr. 2004), at <http://www.nwlc.org/pdf/AdminRecordOnWomen2004.pdf> (last visited Apr. 6, 2006). The Senate is considering Bill 17, and the House of Representatives is debating House Resolution 224. These would eliminate the caps on damages. This indicates that there is political support for changing the caps, and it also indicates that is possible for a reform measure designed only to substantially enhance the caps to emerge as a compromise.

<sup>219</sup> Press Release, *Vote Run Lead Organization, Women are Key Undecided Voters* (July 23, 2004), at <http://www.voterunlead.org/press/pressreleases.cfm?pressReleaseID=8> (last visited Apr. 6, 2006) (listing a number of polls showing women as swing group).

<sup>220</sup> For a discussion of “micro-targeting,” see Susan Page, *Married? Single? Status Affects How Women Vote*, USA TODAY, Aug. 26, 2004, at 1A.

<sup>221</sup> Perhaps it is important to note that as of March 16, 2006, Bush enjoyed the support of only twenty-three percent of self-identified independent voters, so there may be in the near future a real need for the Republican Party to make advances to moderate voters. Dick Polman, *Call for Bush Censure Scatters the Democrats*, PHILADELPHIA INQUIRER, Mar. 16, 2006, at A3.

<sup>222</sup> John Judis, *Who Won the Registration Battle?*, THE NEW REPUBLIC ONLINE (Oct. 5, 2004), available at <https://ssl.tnr.com/p/docsub.mhtml?i=express&s=judis100504> (last visited Apr. 5, 2006).

<sup>223</sup> See Fred Barnes, *The (Finally) Emerging Republican Majority*, THE WEEKLY STANDARD (Oct. 27, 2003), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/259yvdec.asp?pg=2> (last visited Apr. 5, 2006).

rooted support from white men, a luxury that can allow them to take measures to broaden their base.<sup>224</sup>

And we can see how political opportunism as a catalyst for change is indeed possible by reviewing important moments of progress for women's rights, and how they have been related to the swing position of women in electoral politics. The appointment of Justice Sandra Day O'Connor was a significant advance for women.<sup>225</sup> Ronald Reagan was trailing in the polls in 1980 among women, in an election that was quite close in the polls leading up the election.<sup>226</sup> Under these conditions, Reagan made a pledge to women's groups to appoint a woman to the Supreme Court.<sup>227</sup> Also, the 1991 Civil Rights Act was an important extension of employment rights.<sup>228</sup> The first Bush administration signed the important extension of the 1964 Civil Rights Act after having first vetoed a very similar bill in 1990.<sup>229</sup> Bush voted for the second bill only as his reelection bid, in which he was trailing, needed the support of moderate women's groups.<sup>230</sup> Therefore, evidence from recent political history shows that politicians are sensitive to the swing position of female voters.

Second, there are more specific arguments concerning the details of employment law that can be made to further underscore the political importance

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<sup>224</sup> William A. Galston, *The White Male Problem*, BLUEPRINT MAGAZINE (July 12, 2001), available at [http://www.dlc.org/ndol\\_ci.cfm?kaid=127&subid=171&contentid=3564](http://www.dlc.org/ndol_ci.cfm?kaid=127&subid=171&contentid=3564) (last visited Apr. 5, 2006). This need to broaden the Republican base may be especially strong in the spring of 2006, given the President's current decline in opinion polls. A CBS News poll on February 27, 2006, showed Bush's approval rating at thirty-four percent, available at <http://www.cbsnews.com/stories/2006/02/27/opinion/polls/printable1350874.shtml> (last visited Apr. 5, 2006).

<sup>225</sup> See Sherry, *supra*, note 1, at 160 (arguing that the mere presence of a female justice has a profound educative function and advances women's rights).

<sup>226</sup> Indeed, Reagan won the popular vote in the election of 1980 by less than one percent. See Barbara C. Burrell, *Gender, Presidential Elections and Public Policy: Making Women's Votes Matter*, 27 J. WOMEN, POL. & POL'Y issue 1/2, 31-40 (2005).

<sup>227</sup> Ronald Reagan, Remarks Announcing the Intention to Nominate Sandra Day O'Connor to be an Associate Justice of the Supreme Court of the United States (July 7, 1981), available at <http://www.reagan.utexas.edu/archives/speeches/1981/70781a.htm> (last visited Apr. 20, 2005).

<sup>228</sup> Civil Rights Act of 1991, 102 P.L. 166.

<sup>229</sup> Civil Rights Equal Employment Opportunities Act, 42 U.S.C. § 2000(e)-2000(e)(17) (2005); see also Charles T. Lester, Jr., *The History of the Lawyers' Committee for Civil Rights under Law, 1963-2003*, available at <http://www.lawyerscomm.org/2005website/aboutus/history/history.html#history> (last visited Apr. 20, 2006) (noting first Bush veto).

<sup>230</sup> See Civil Rights Act of 1991, available at [http://en.wikipedia.org/wiki/Civil\\_Rights\\_Act\\_of\\_1991](http://en.wikipedia.org/wiki/Civil_Rights_Act_of_1991) (last visited Apr. 20, 2006) (noting electoral strategy as part of the reason for signing the bill).



of women's equality in the workplace. These include the following considerations. Congress, in enacting the Civil Rights Act of 1991,<sup>231</sup> greatly expanded the scope of Title VII claims.<sup>232</sup> For the first time plaintiffs were given the right to a trial by jury.<sup>233</sup> In addition, the awarding of compensatory and punitive damages became possible.<sup>234</sup> Prior to 1991, only intentional racial and ethnic discrimination cases were entitled to compensatory and punitive damages.<sup>235</sup> Racial and ethnic forms of discrimination are covered under the 1964 CRA, the 1991 CRA, and section 1981 of the Civil Rights Act of 1866, and the latter act allows plaintiffs to collect damages beyond back pay and front pay, reinstatement, and the entering of injunctions.<sup>236</sup> But according to several federal courts, including the Supreme Court, the 1991 CRA brings all forms of intentional discrimination ". . . into alignment, at least with respect to the forms of relief available to successful plaintiffs."<sup>237</sup> However, this is simply incorrect, for gender cases are subject to a cap on damages, whereas racial cases under section 1981 have no such caps.<sup>238</sup> So, in terms of contemporary political mobilization, it is possible to draw attention to these discrepancies in the way marginalized groups are treated. In light of the long history of gender discrimination, why should important rights for women in the workplace be treated differently than cases of workplace discrimination against male minorities?

Lastly, there may also be the need for Republicans to be on the defensive in light of recent changes to the Supreme Court. There may be some disappointment over Justice O'Connor not being replaced by a woman, and the possible limitations of Roe v. Wade<sup>239</sup> that may result from having a new male member of the Supreme Court. Republicans may need to rebuild capital among women, and may see acting to enhance women's rights in the workplace as a way to do so.

## ii) Problems of Judicial Rule Enforcement

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<sup>231</sup> Civil Rights Act of 1991, Pub. L. No. 102-166.

<sup>232</sup> Susan S. McComb, *Employer Beware: Conservative Court-Pro-Employee Result?*, Damages & Title VII, available at <http://www.ilchamber.org/kc/hr/KCHR3050sexharPollard10700.asp> (last visited Apr. 20, 2006).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See Civil Rights Act of 1866, 42 U.S.C. §1981 (1991).

<sup>237</sup> See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001).

<sup>238</sup> Civil Rights Act of 1866, 42 U.S.C. §1981 (1991); see also Jeffrey L. Needle, *Punitive Damages in a Discrimination Case*, available at <http://jneedlel.home.mindspring.com/Swinton3.htm> (last visited Apr. 20, 2006).

<sup>239</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

In addition to these reforms designed to address structural problems, I propose to focus attention on improving the performance of federal judges in the sensitive areas of discovery control and summary judgment as a second aspect of a comprehensive reform program. To see the need for an approach that addresses the task of improving judicial decision making in these areas, I first discuss several alternative options for reform. I begin by addressing the argument that because the problems relating to summary judgment and discovery control pertain to a failure of trial judges to uphold certain porous rules in an evenhanded way, the reform objective should be to replace the porous rules with rules that remove vague or unstructured power from the trial court. Given that trial judges are often not deploying summary judgment and discovery control powers in a way that is sufficiently open to the validity of women's claims of marginalization and discrimination, one might argue that the best response is to reduce the availability of summary judgment in gender-related cases and to rewrite the rules of evidence to establish per se rules of exclusion concerning evidence of a plaintiff's sexual history, sexual orientation, or other private issues of sexual proclivity. Such a response, however, is admirable in its objective, but unrealistic in its approach. I shall discuss briefly why summary judgment is unlikely to be scaled back. I shall then briefly discuss why reworking Federal Rule of Evidence 412 is also unlikely to take place.

Removing summary judgment, or substantially scaling it back, is not a realistic reform proposal. The reason for this is in part due to the fact that the federal courts have experienced a tremendous increase in caseload over the last thirty years, and summary judgment has emerged as a central tool by which the courts seek to manage their expanding dockets. The federal caseload has increased across the board, and has expanded in certain areas of civil rights law in an especially dramatic way, resulting in what some commentators have called a "litigation explosion" or a "law explosion."<sup>240</sup> There has been a huge increase in federal civil cases and, as part of this, a huge diversification of the types of claims filed in federal court.<sup>241</sup> Indeed, as Professor Thomas Meskill points out, the

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<sup>240</sup> See WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Penguin Books, 1991).

<sup>241</sup> As New York University Law Professor Larry Kramer notes, "The period 1958-1962 marks a [] turning point in civil filings, and caseload growth since then has been consistently very large at both the trial and appellate levels." LARRY KRAMER, *REFORMING THE CIVIL JUSTICE SYSTEM*, 1 (New York University Press, 1996). Numbers in this regard are easily available. Between 1960 and 1990 civil case filings in the federal system increased from approximately 51,000 annually to at least 250,000 annually. ELLEN E. SWARD, *DECLINE OF THE CIVIL JURY*, 13, 136 (Carolina Academic Press, 2001). In 2002 the number of civil filings was 274,841—up from 250,907 in 2001. See U.S. Courts, *Caseload 2002: Index*, available at <http://www.uscourts.gov/caseload2002>

federal caseload appears to be “ever-increasing.”<sup>242</sup> To take two examples from areas where growth has been especially acute, federal civil rights claims increased by 21 percent in one year alone in the 1990s, part of a steady increase across the board, and the number of employment discrimination complaints nearly tripled from 1990 to 1998, with “workplace bias” cases more than doubling from 1992 to 1996.<sup>243</sup> Although the numbers of civil filings leveled off and even declined somewhat during periods in the 1990’s, it is still at extremely high levels, and has increased in the last few years.<sup>244</sup>

In this environment the courts have had to look for ways to expedite their dockets. Summary judgment has emerged as a way to handle the rise in case pressures. Professor Edward Brunet, a noted expert on federal summary judgment practice, argues that “summary judgment occupies center stage in attaining the central goal of conserving the expenditure of judicial resources” in light on enormous case pressures.<sup>245</sup> As Professor Nelken has recently pointed out, “as courts seek solutions to [increased docket pressures], summary judgment has gained renewed appeal as a means of terminating litigation without the expense and delay and congestion to the system of a trial.”<sup>246</sup> Professor Robert Smits has made the same point, calling federal summary judgment “the new workhorse of our overburdened federal court system.”<sup>247</sup> Professor Linda Mullenix, following the same metaphor, has called summary judgment “the beast of burden of the federal district courts.”<sup>248 249</sup>

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(last visited Nov. 23, 2005). These are only direct filings in federal district court. There are other collateral branches of the federal courts that have seen high rates of case filings. The United States Bankruptcy courts heard 1,354,376 cases in 1999, up from 883,457 in 1995. Since final judgments from bankruptcy courts are ultimately appealable to the district courts (subject to various quite complicated restrictions), this is a further burden in addition to the number of district cases per se. The rules of bankruptcy appeals are numerous and highly complex, so I do not make further references to bankruptcy appeals in this work. See U.S. Courts, *Caseload 1999*, available at <http://www.uscourts/caseload/1999> (last visited Nov. 10, 2005).

<sup>242</sup> Thomas J. Meskill, *Caseload Growth: Struggling to Keep Pace*, 57 BROOK. L. REV. 299, 299 (1991).

<sup>243</sup> MAX BOOT, OUT OF ORDER 150 (Basic Books, 1998).

<sup>244</sup> U.S. Courts, *Federal Judicial Caseload Statistic* (Mar. 31, 2004), available at <http://www.uscourts.gov/caseload2004/contents.html> (last visited Nov. 23, 2005).

<sup>245</sup> See generally Brunet *supra* note 163.

<sup>246</sup> Nelken, *supra* note 180, at 53.

<sup>247</sup> Robert K. Smits, *Federal Summary Judgment: The New “Workhorse” of our Overburdened Federal Courts*, 20 U.C. Davis L. Rev. 955, 955 (1987).

<sup>248</sup> Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burden*, 10 AM. J. TRIAL ADVOC. 433, 433 (1987). Several federal courts have noted in various decisions the close connection between expanding case pressures and greater use of summary judgment. See *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1398 (7<sup>th</sup> Cir. 1997), in which the court holds that “the

Moreover, it can be argued that the expansion of the use of summary judgment, precisely because it can help to promote judicial efficiency, is potentially also normatively defensible in terms of expanding the rights of women. To see this we should keep in mind first of all that the very first “activist” trial judges who sought to expand the role of summary judgment—back when this was a decided minority of judges—were liberal progressive judges who wanted to reduce delay so as to increase access to the courts for the poor and those with limited resources.<sup>250</sup> This is unsurprising because increased judicial efficiency helps to ensure access to civil justice, since docket congestion causes delays, and delays in litigation are problematic for a number of reasons that are especially powerful in employment discrimination cases. In discrimination cases, plaintiffs often need compensation relatively soon; delays will pose a serious financial burden in terms of recovering back and front pay. Also, litigation delays tend to expose plaintiffs to expanded discovery and so to additional risks of embarrassment. In addition, the psychological tolls of living with gender discrimination remain longer, with plaintiffs unable to achieve a full measure of closure. Lastly, in almost all cases, delays in reaching trial tend to increase the costs of litigation.<sup>251</sup>

In part, for these reasons, in the early 1990’s Congress passed the Civil Justice Reform Act, which encouraged courts to use devices that would promote judicial efficiency.<sup>252</sup> The chief defender of this proposal was Democratic Senator Joseph Biden, who stressed the importance of efficiency to ensure access to civil justice.<sup>253</sup> Moreover, a report by the Brookings Institution has noted that “time

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expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial [and this] drift is understandable.”

<sup>249</sup> For a detailed discussion of the reasons why summary judgment enhances judicial economy, see, inter alia, Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT’L L. 79 (2003) and Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

<sup>250</sup> See Mullenix, *supra* note 248, at 589-91 (discussing especially Judge Weinstein’s defense of managerial judging, and his drive to “do the Lord’s work”).

<sup>251</sup> See DEBORAH L. RHODE, *IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION* 125-31 (Oxford Publishers, 2003). See also Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

<sup>252</sup> Peter Murray, *Civil Justice Reform in America: The Civil Justice Reform Act on 1990 and its Consequences*, 3 ZEITSCHRIFT FUER ZIVILPROZESSRECHT - INTERNATIONAL 319, 319 (1999).

<sup>253</sup> See Joseph R. Biden, *Equal, Accessible, Affordable Justice under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL’Y 1, 1 (1992) (discussing the objectives of the reform act).

and resources consumed by delay [is one of] the enemies of justice for all.”<sup>254</sup> Indeed, because of their ability to enhance efficiency and so increase access to civil justice, Professor Carter has called the rules of procedure that allow greater judicial supervision of legal proceedings—including the rule permitting summary judgment—a “vindicator of civil rights.”<sup>255</sup> Conclusively, reducing or eliminating summary judgment as such is too blunt an instrument from a normative perspective given the overall position of the federal courts.

Lastly, the expanding use of summary judgment can be seen to be deeply entrenched as a result of concrete political realities. One can argue that summary judgment is deeply entrenched, in part, by noting how the use of summary judgment is supported by a confluence of important political interests. As we have seen, summary judgment has been thought to be defensible from the perspective of many seeking to enhance civil rights, but summary judgment is also strongly supported by the corporate defense bar. Defendants favor its use, as they generally get an opportunity to dismiss a case before the expense and risk of a trial, and if the measure fails, they usually are not placed in any worse position than they would have been otherwise. Moreover, the defense bar, and the business community it serves, also supports summary judgment as a result of the perceived need for greater determinacy in civil litigation. As Professor Sward notes, in a “diverse, interconnected, high-stakes economy,” certainty is an overwhelming desideratum for many litigants.<sup>256</sup> Sward notes, “many have argued that today the need for stability is even greater than before. The country is large, with commercial enterprises that span the nation and even the globe. The population is quite diverse, representing different cultural traditions and different ways of doing business. The global market is even more diverse. Thus, we have a greater need for rules that govern our interactions so that we can have some prior understanding of the consequences of our actions.”<sup>257</sup> Sward points out that many see an expansion of the trial court as a body that regulates the civil jury as a method of enhancing the stability of the law by generating more predictable outcomes in civil litigation. As she notes, many attorneys “feel that [in a common law system,] certainty is better served by having judges rather than juries decide

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<sup>254</sup> INSTITUTION BROOKINGS, *JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION* (Brookings Institution Press, 1989).

<sup>255</sup> Robert C. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989). See also Maria Dakolias, *Court Performance around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87, 88 (1999) (arguing that “delay affects both the fairness and the efficiency of the judicial system; it impedes the public’s access to the courts, which, in effect, weakens democracy, the rule of law, and the ability to enforce human rights”).

<sup>256</sup> ELLEN E. SWARD, *DECLINE OF THE CIVIL JURY*, 140 (Carolina Academic Press, 2001).

<sup>257</sup> Sward, *supra* note 256, at 141.

issues [in part] because judges can be expected to feel more constrained by precedent and considerations of stability. The kind of ad hoc justice that juries provide could be too disruptive.”<sup>258</sup> For these reasons, summary judgment has deep support among parts of the bar, and parts of the bar that have proven in the last decade to have considerable political influence.<sup>259</sup> In summary, the expansion of summary judgment appears to have deep support from a variety of actors in the federal justice system. For all these reasons, it appears that the federal legal system is simply stuck with an expanded use of summary judgment.

As to the judge’s power to control discovery and the admission of evidence, Rule of Evidence 412, with its vagueness and reliance on judicial discretion, is also a rule that it would seem practitioners and reformers need to realize is simply here to stay. Once again, Rule 412 of the Federal Rules of Evidence allows trial judges to regulate discovery, and the ultimate admission at trial, of evidence that pertains to a plaintiff’s private life in a claim of sexual harassment—and especially a claim of a hostile work environment. The rule allows defendants to advance evidence that would indicate that a work environment was not unwelcome and did not cause subjective harm, and so, was not in fact hostile according to the controlling law on hostile workplace litigation. Admission of this evidence, however, is contingent on the judge’s balancing of the probative and prejudicial value of the evidence and the need for privacy of the plaintiff. Given that research indicates that many trial judges often do not use this balancing power in a way that is sufficiently open to the wide range of reasonable claims advanced and the associated need for a vigorous and sensitive application of judicial discretion, one might think that reform measures should focus on changing the surrounding rules by denying defendants the right to advance any evidence pertaining to a plaintiff’s personal life.

However, there are serious constitutional and normative objections that would beset such a call for reform. It is at least imaginable that an employee in a workplace suffused with crude and degrading references may not feel the workplace to be crude and degrading; indeed, it is at least conceivable that she might think of herself as thriving emotionally and professionally in such an environment. It would seem that such workers are few and far between—but they may exist. If a plaintiff were truly not at all upset by an environment that an

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<sup>258</sup> *Id.*

<sup>259</sup> See Lind, *supra* note 121, at 717, suggesting throughout that congress and influential parts of the bar support expanding summary judgment to enhance such values as predictability, and to improve the position of defendants; see also Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999), arguing that the corporate defense bar has considerable political influence

outsider would find obnoxious, it does not seem fair to punish a defendant on grounds of workplace inequality for creating or sustaining such an environment. Perhaps one might argue that laws should be passed to cover such conditions on grounds of objective standards of decency or civility—but such laws would seem not to be directed toward the issue of workplace inequality as such.<sup>260</sup> Absent such a civility code, in a circumstance where a worker really did not find an objectively degrading workplace to be degrading to her, the defendant seems, indeed, to have the right to make the defense that the worker was not offended by the conditions at work, and so the workplace was not genuinely hostile to that worker. As such, the important point for the law of workplace equality is the ability of the trial judge, as the evidentiary gatekeeper, to exercise the appropriate discernment, or judicial intelligence, to determine when a proffer by the defendant does, and does not, genuinely advance the legitimate defense that the worker was not offended by a work environment.

In light of these considerations, the best option for reform appears to be one that addresses the use of the porous rules governing summary judgment and discovery control by the federal district court. The reform goal should be to have judges become more sensitive to the perspectives of women. If judges would exercise discretion more ably—that is, with greater insight into the fact situations presented before them—we could see very important gains for women in court, which would greatly assist in the enforcement of women's rights through a robust system of anti-discrimination statutes.

But once again, the question becomes, can this be done? One reform proposal in this direction might be to improve the judicial appointment process. In light of the substandard performance of many judges in exercising control over discovery and in deciding summary judgment motions, one might first think that the answer is to appoint more women, or more people with the appropriate virtues of judicial perceptiveness and open-mindedness. However, such a proposal is unlikely to bear significant fruit. Indeed, this is a problematic form of response for the following reasons.

The first suggestion, to appoint more women to the district courts, is a category mistake. Even assuming that simply being a woman makes one appropriately sensitive in the area of summary judgment and discovery control,<sup>261</sup>

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<sup>260</sup> Moreover in light of issues of free speech, the difficulties of determining what is civil and not civil, and the Rehnquist Court's resistance to the expansion of federal power in various areas, a national civility code for the workplace would likely be constitutionally highly problematic.

<sup>261</sup> A point made most forcefully by Suzanna Sherry in, among other places, *Civic Virtue and the Feminine Voices in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

trial-level discretion does not result from an amalgam of views, where one might think one can add some group or perspective and receive a better result for the decision making body as a whole. Adding more women to district courts would only help those litigants who end up before female judges.<sup>262</sup> Of course, we would not be able to, nor should we, have only women on the federal courts.

The second suggestion—to improve the appointment process by securing appointees with the appropriate skill sets—is problematic as well. Even if we could clearly identify the presence of the appropriate traits of judicial perceptiveness in the nominees through the selection process, the proposal is still highly prospective. So many judges serve on the federal courts—there are currently over 800 Article III federal judges, all with life-tenured appointments<sup>263</sup>—that a strategy to change the courts in this way is, to a large extent, a strategy of resignation. There are so many judges currently serving that improving the system through the appointment of new judges in effect says that we must simply wait for retirements or for early deaths to see improvements in the federal judiciary.<sup>264</sup>

Moreover, even if turnover were higher than it is, and one could seriously think of shaping the lower federal courts as a whole by a concerted effort to improve the selection process, there are serious political questions concerning the feasibility of such a proposal. There is little effective control by the full senate

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<sup>262</sup> See Pyle, *supra* note 149, at 923.

<sup>263</sup> See Federal Judicial Center, *How the Federal Courts are Organized; Federal Judges and how they get Appointed*, available at <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument> (last visited Apr. 20, 2006).

<sup>264</sup> It is true however that the creation of a very large number of new federal district judgeships at one time has taken place in the past. In the Omnibus Judgeship Bill of 1978 over 150 new judgeships were created. See Elaine Martin, *Gender & Presidential Judicial Selection*, 26 *WOMEN & POL.* 109, 109 (2004). It does seem to be the case, however, that a strategy of reshaping the judiciary through a program involving the creation of a very large number of new judgeships at one time is unlikely for political reasons. First, there may be a fear on the part of members of one party that the appointment of large numbers of new judges could represent, in effect, a capture of the lower courts by the other party, and might also make that party more likely to attempt similar moves in terms of appellate courts. See WILLIAM EASTON, *WHO KILLED THE CONSTITUTION: THE JUDGES VERSUS THE LAW*, 137-38 (Regnery Gateway, 1988). Also, a growing number of judges on the federal courts have become vocally opposed to increasing the number of judges, which could present additional political obstacles. See J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 *EMORY L.J.* 1147 (1994) and William M. Richman, *Rationing Judgeships has Lost its Appeal*, *PEPP. L. REV.* 911 (1997). Hence, it is unsurprising that legislation that has sought to make significant changes to the courts by creating new judgeships, such as the so-called Biden Bill of 1990, created only 61 new federal district judgeships at one time.



over trial level appointments, and an extensive role is still played at the district level by the practice of senatorial courtesy.

A nominating process that focused in a searching way on securing nominees with a high level of sensitivity to women's perspectives would be politically difficult in light of the fact that often a relatively large number of district court appointments are made at one time;<sup>265</sup> the senate would be hard-pressed to searchingly review each individual candidate.<sup>266</sup> Moreover, such a mode of response would be quite difficult in light of the politics of district level appointments. As Judge Posner, Professor Hughes, and many others point out, the appointment of district court judges is largely a product of state-level political considerations, with the senior senator of the president's party from the state in which the new judge is to serve enjoying considerable influence in the selection of a nominee.<sup>267</sup> Moreover, senators have deeply entrenched reasons for wanting to retain discretionary power over whose nomination they support. Such a power is an important way to influence prominent lawyers and political activists in a particular state to support the senator because the senator can thereby carry the prospect of granting a nomination to one of these individuals. For this reason, as one of the leading experts on the appointment of federal judges, Professor Sheldon Goldman, notes, "it is...unrealistic to expect that the senate will relinquish its hold on the process [of lower court] appointments"<sup>268</sup> to any board that might claim to "certify" nominees as appropriately virtuous, especially in circumstances, which we can easily imagine, where a nominee might be supported by a senator for political reasons, yet be seen by any such board as failing to possess the proper traits of character. Evidence for these considerations can be found in the history of reform measures designed to alter the way district court nominations are made; these efforts have been less than inspiring. As Professor Hughes points out, President Carter attempted to radically alter the process of appointing federal judges by having nominations made by special nominating boards composed of legal experts.<sup>269</sup> Yet, such a program was so

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<sup>265</sup> These relatively high numbers usually represent individuals who are replacing exiting judges, although congress has continued to increase the total number of judgeships. See J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J., 1147, 1169-70 (1994).

<sup>266</sup> Jon O. Newman, *Litigation Reforms and the Dangers of Growth of the Federal Judiciary*, 70 TEMP. L. REV. 1125, 1129 (1997).

<sup>267</sup> JOHN C. HUGHES, *THE FEDERAL COURTS, POLITICS, AND THE RULE OF LAW*, 65 (Harper Collins College Publishers, 1995) (noting that senators from the state where the judge is to serve "are particularly important, and wield enormous influence over who is likely to be considered").

<sup>268</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN*, 362 (Yale University Press, 1997).

<sup>269</sup> Hughes, *supra* note 267, at 75.

unpopular with senators that it was soon dropped in reference to district level appointments, and it enjoyed only limited success with respect to appellate nominations.<sup>270</sup> Senatorial courtesy (as the discretion of senators over district level appointments is often referred to) appears to be deeply entrenched, and it makes the prospects of reforming the nomination process, to secure uniformity among appointees on a previously agreed metric, quite unlikely.<sup>271</sup>

It seems then that a new approach with respect to the questionable performance of federal district judges in applying porous rules of procedure—an approach that goes beyond the attempt to reform the selection process—is called for. I propose a response based on improving judicial education. That is, I propose adopting a program that would improve the way judges perform their duties after they reach the federal court. But is this idea too utopian? Two questions need to be answered to determine whether such a program could be feasible. First, can a program be established that actually would help judges to realize the appropriate kinds of improvements in performance? Second, can establishing such a program be achieved politically?

In responding to the first question concerning the development of an effective training program, we need to state once again exactly what judges are required to do in exercising control over discovery and deciding motions for summary judgment in the context of employment litigation. In both discovery control and summary judgment, judges need traits that enable them to see like a reasonable jury and to see from a multiplicity of viewpoints, including what is often a very alien viewpoint. The judge in an employment discrimination case must imaginatively assume a variety of competing perspectives and enter a perceptive and highly fact-specific judgment. In both cases, the judge must see in a broad-minded way that includes the perspective of the defendant, the perspective of the plaintiff (usually a woman), and the perspective of the jury. Therefore, the requirements for properly entering summary judgment, and properly controlling the admission of evidence, share the same essential

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<sup>270</sup> *Id.*

<sup>271</sup> Michael Gerhardt notes that “the most devastating defeats [that] presidents have had in the judicial selection process have involved direct attacks to weaken or alter senatorial courtesy.” As such, he calls senatorial courtesy “the most robust” institutional norm in the selection process. Michael Gerhardt, *Symposium on Ideology in Judicial Selection: Federal Judicial Selection as War, Part Three: The Role of Ideology* 15 REGENT U. L. REV. 15, 19, 22 (2002/2003). Michael Gerhardt notes that “the most devastating defeats [ ] presidents have had in the judicial selection process have involved direct attacks to weaken or alter senatorial courtesy.” As such, he calls senatorial courtesy “the most robust” institutional norm in the selection process. Michael Gerhardt, *Symposium on Ideology in Judicial Selection: Federal Judicial Selection as War, Part III: The Role of Ideology* 15 REGENT U. L. REV. 15, 22, 19 (2002/2003).

characteristics of seeing from a variety of viewpoints, including views that are often quite different from one's initial way of seeing things.

With these requirements in mind, we can now address the question, is there a program that can help to nurture the abilities of judges in this direction? To answer this question we first need to know if there is an ideal standard for this project. I believe that we can identify a theoretical polestar for such a project: it can be found in the Arendtian and Whitmanian idea of internal diversity and largeness—what Whitman calls democratic individualism, or the breadth of mind of the “great composite democratic individual.”<sup>272</sup> Judges, it seems, need to become composite persons who contain multitudes, people who can subsume a range of competing perspectives.

Arendt's thought is relevant in terms of assisting judges to approximate the perspective of the jury and in developing the ability to engage in diverse inner dialogue that can elicit a variety of points of view on a particular issue. Arendt describes a mode of intellectual activity that she refers to as “enlarged understanding.”<sup>273</sup> An enlarged understanding is based on the idea of a reflective judgment, a judgment that is not readily subsumed under a general concept.<sup>274</sup> A reflective judgment is formed by “representative thinking.” Ideally, representative thinking entails thinking “from the position of all others,” and rendering these views mutually communicable.<sup>275</sup> The practitioner of enlarged understanding desiderates a “universal communicability,” or universal communicative exchange, where points of view, once understood, can be put into dialogue with each other.<sup>276</sup> Therefore, enlarged understanding involves imaginatively communicating with a range of viewpoints. Whitman's idea of democratic individualism expresses the same perspective.

A kind of Arendtian inner dialogue and a Whitmanian inner multiplicity are capable of being inculcated to an appreciable extent. The view held by both concerning aggregative communicability, or the ability to bring together a wide variety of viewpoints and put them into intelligible conversation with each other, is capable of being cultivated. Here we should note that Arendt saw the capacity for enlarged understanding as related to political engagement, in the way that

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<sup>272</sup> WALT WHITMAN, *Song of Myself*, in LEAVES OF GRASS (1900), Reprinted in, *Leaves of Grass and other Writings: Authoritative Texts, Other Poetry And Prose*, Criticism, (Michael Moon ed. 2002).

<sup>273</sup> MAURIZIO PASSERIN D'ENTREVES, ARENDT'S THEORY OF JUDGMENT IN THE CAMBRIDGE COMPANION TO HANNAH ARENDT 252-53 (Dana Villa ed., Cambridge University Press 2000)

<sup>274</sup> D'Entreves, *supra* note 273, at 252-53.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

political activity involves “the ability to see things from not only one’s own point of view” but from the perspective of “everyone else.”<sup>277</sup> The practice of judging and participation in politics share the quality that they can both be seen as “a being with others.”<sup>278</sup> As such, Arendt notes that enlarged judgment can be more closely approximated by means of participation in public life, “where people have the opportunity to exchange their opinions on particular matters and see whether they accord with the opinions of others.”<sup>279</sup> Moreover, to stimulate enlarged understanding there must be, as Professor D’Entreves notes, a genuine encounter with a variety of viewpoints, and so, public engagements must be done on the basis of equality among the distinct participants.<sup>280</sup> In other words, decisions must be arrived at not through hierarchical commands issued by superiors, but through a dialogical process where each voice in the debate is given an equal hearing. Moreover, the interaction must be a direct form of political participation, i.e. it must be deliberation about a concrete course of action, and it must be one that addresses issues that are not matters that mere survival or material necessity forces on the participants.<sup>281</sup> Arendt suggests that cultivating an enlarged understanding requires political engagement of a particular kind—engagement that is a direct form of decision making among roughly equal individuals and which is free from dire necessities for those involved.<sup>282</sup>

In the judicial context, Arendt’s thought would have to be applied to trial judges in a particular way.<sup>283</sup> Certain aspects of political life that she finds important—especially its equality among participants, its communicative give and take, and deliberations that are free from personal concern over material necessity—can be found in a number of community activities. If a judge were to serve on a rotating basis as a certain kind of advisor to a range of community organizations to which the judge has no personal connection, including perhaps school boards or municipal or community associations, the beneficial aspects of political life that Arendt emphasizes could be brought to the fore. This could be

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.* See also, HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 221 (Penguin 1968) (1961).

<sup>279</sup> D’Entreves, *supra* note 276, at 253-54.

<sup>280</sup> D’Entreves, *supra* note 276, at 252-53. See also, GEORGE KATEB, *HANNAH ARENDT: POLITICS, CONSCIENCE, EVIL* 14 (Rowland & Allanheld 1984).

<sup>281</sup> Kateb, *supra* note 280, at 14, 18, 25. Arendt, *supra* note 278, at 153.

<sup>282</sup> Kateb, *supra* note 280, at 14, 18, 25.

<sup>283</sup> I do not advocate that judges be elected. The threats to the impartiality of the judiciary are in my opinion simply too great. Moreover Dietlind Stolle’s research, which I discuss below, suggests that activity in one group (such as a political party) for a significant period of time actually reduces levels of interpersonal openness, flexibility, and other traits that can be considered important for trial judges. Dietlind Stolle, *Bowling Together, Bowling Alone: The Development of Generalized Trust in Voluntary Associations* 19 *POL. PSYCHOL.* 497, 521 (1998).

especially true if the judge, in working with a wide range of organizations, is treated not as an expert immediately to be followed, but as one voice in an on going conversation.

Additionally, new research indicates that such forms of associational activity can indeed augment the ability to entertain a wide range of perspectives. Based on extensive empirical research, Professor Dietlind Stolle argues that participation in diverse groups increases robust levels of generalized trust, that is, trust in others outside one's established group and openness to a range of competing claims.<sup>284</sup> Her research finds that members who are active for a relatively short period of time in community groups are more open-minded than those who are not.<sup>285</sup> Generalized trust and open-mindedness can grow as a result of relatively short-term participation in a range of community activities. Moreover, Stolle finds that if the groups in which one participates are, themselves, internally diverse, the beneficial results of participating in them in this way are even more pronounced.<sup>286</sup> It should be emphasized that this is not the result of selection effects— levels of education and prior socialization on the part of those who participated in these kinds of local engagements, and those who did not, were held constant. Stolle's research, therefore, supports the conclusion that activity in a range of diverse groups can have beneficial consequences.<sup>287</sup> This conclusion then would further support the idea that virtues necessary for good reflective judgment and genuine breadth of mind can be inculcated to a considerable extent.

The second question that we must confront is whether this program can be seen as politically feasible. Can such a program be implemented as a matter of politics?<sup>288</sup> It is a practicable program for at least two reasons.

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<sup>284</sup> Stolle, *supra* note 283, at 521.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> An additional question might concern the possibility of this in terms of the code of judicial ethics. Would such activity produce an appearance of impropriety or bias? Several points need to be made in response to this query. First, the rules of recusal allow and even in some cases demand judges to remove themselves from cases to which they have been extensively exposed; this mechanism reduces the problem of judicial bias. And again the participation in various groups is to be widely engaged in and for a relatively short period of time in each association; this further reduces the possibility of bias. Also, the kinds of community organizations the involvement in which I am advocating are not likely often to be parties to federal litigation. Lastly, judicial participation in the community off the bench enjoys a rich history among federal judges. As Professor Lubet has remarked, the restrictions on out of court activities for federal judges that do exist have been seen as "controversial departures from past practice." They are not therefore set in stone, and reasonable changes could be made to the code of ethics to accommodate this proposal.

First, the same political pressure that can focus attention on reforming the EEOC and expanding the caps on damages can focus attention to the virtues of trial judges. As we have seen, American politics are divided, and this basically translates into a search by both parties for swing voters. An effort to broaden the perspectives of trial judges could be of some small but not completely inconsequential benefit in this regard. Moreover, there is not much reason for senators to object to such a proposal of addressing judicial education, as federal trial judges do not, in general, set national policy through their decisions, and so measures to improve district-level professional training would have relatively low salience in terms of larger, more hot-button political disputes.<sup>289</sup>

Second, there is an additional political incentive that can be seen to work in favor of this proposal. If the last point indicates that there are no strong reasons to oppose a program of reforming judicial education, this next point suggests a reason congresspersons could have to support such a program. This reason pertains to the political incentive that senators may have to position themselves in a certain way with respect to high-profile appeals court nominations.

Professor Richard Davis has recently argued that the public “image” of nominees to the federal circuit courts and, above all, to the United States Supreme Court, has emerged as a central aspect of the nomination and confirmation process.<sup>290</sup> Davis argues convincingly that appointments are increasingly being made, supported, and opposed on the basis of “image.”<sup>291</sup> By a nominee’s “image,” Davis means the perception held by the general public of the nominee’s narrative or life story, his or her personal traits, and his or her general and vaguely defined world-view.<sup>292</sup> For Davis, this image is not formed by the public in terms of a nominee’s position on specific legal questions, but arises from an assessment, both of the person’s overall sense of the world, and his or her personal attributes.<sup>293</sup> Davis argues that focusing on image has come to be a central

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See STEVEN LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 28 (American Judicature Society 1984).

<sup>289</sup> Indeed, a determination of a question of law by the senior-most district judge in a circuit has no precedential value for the judges in that circuit, or in any other circuit. See Neil A. Lewis, *Move to Limit Clinton’s Judicial Choices Fails*, N.Y. TIMES, April 30, 1997, at D1 (describing how there is more political contestation over appellate court nominees than over district court nominees because the later are “far more influential in shaping the law”).

<sup>290</sup> RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATIONS PROCESS* 105-27 (Oxford 2005).

<sup>291</sup> Davis, *supra* note 290, at 129-56 (noting that “the battle of competing images dominates the confirmation period”); *Id.* at 150 (noting that “image making determines confirmation success”).

<sup>292</sup> *Id.* at 132.

<sup>293</sup> *Id.*

concern for the choice of whom to select, for the process by which a defense of the selection is made to the senate, and for the ways in which opposition is mounted to a nominee.<sup>294</sup> He advances two reasons why this is so. These two reasons appear to be deeply entrenched, and so, the centrality of image-construction in the confirmation process must in turn be seen as deeply seated.<sup>295</sup>

The first reason why image has become so important to the confirmation of Supreme Court nominees is that the appointment process has come to be influenced greatly by outside special interest groups who make appeals to the wider society as a strategy to ensure the confirmation of nominees whom they support, and, in turn, image construction and maintenance has emerged as an effective way to influence mass society.<sup>296</sup> Davis argues that the appointment process has come to be influenced heavily by groups that make appeals to the wider society for at least two reasons. First, the salience of Supreme Court opinions, especially on hot-button social issues, has increased the degree to which the wider society has become concerned with the high court.<sup>297</sup> This development has meant that interest groups now have more success in mobilizing popular support or opposition to a nominee.<sup>298</sup> Second, members of congress have begun to routinely seek the assistance of outside groups in opposing or supporting nominees.<sup>299</sup> In part, they have done so with greater regularity as a way of adapting to the increasing extent to which the American government, over the last five decades, has become divided.<sup>300</sup> Over the last fifty years, Congress and the presidency have been held by different political parties to a greater extent than at any other time in American history.<sup>301</sup> This fact has increased the degree to which nomination battles have become common.<sup>302</sup> In turn, this has driven the competing parties to bring in outside help from advocacy organizations who can make appeals to the wider society to assist in the battles.<sup>303</sup>

As the process has become more open to influence by external interest groups making direct appeals to mass society, Davis argues that the process has become more open to the construction and maintenance of a certain image of the

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<sup>294</sup> *Id.* at 129-56.

<sup>295</sup> *Id.* at 157-58.

<sup>296</sup> Davis, *supra* note 290, at 105-27, 129-56.

<sup>297</sup> *Id.* at p. 82.

<sup>298</sup> *Id.* at 82-86.

<sup>299</sup> *Id.* at 77-81.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 78.

<sup>302</sup> Davis, *supra* note 290, at 79.

<sup>303</sup> *Id.* at 77-79.

judicial nominee.<sup>304</sup> This is so because image, understood as a perception on the part of segments of the general public of the personal values and broad worldview of the judicial nominee, is one of the aspects of a nomination that the wider society can most easily follow and understand.<sup>305</sup> It is so easily understandable because it need not be based on a detailed knowledge of legal philosophy or technical aspects of public policy.<sup>306</sup>

A second reason why image has become so central grows naturally out of the first. In the wake of the emergence of an appointment process so open to appeals to the general public made by outside advocacy groups, presidents have tended to change how they approach the nomination process. In light of the increasing publicity surrounding Supreme Court nominations, presidents have tended to become gun-shy, so to speak, in appointing individuals with clear ideologies that could draw considerable public protest.<sup>307</sup> In response to the growing publicity of the confirmation process, presidents have to an increasing extent deliberately chosen to nominate individuals who will not spark ideological contestation.<sup>308</sup> As a result, presidents often seek nominees who can be defended by persuasive appeals to the individual's personal narrative and other aspects of judicial image, while avoiding a bruising fight over ideology.<sup>309</sup>

This process of appointing an apparently non-ideological candidate makes issues pertaining to the personal characteristics of the nominee important for two reasons. First, as image increasingly becomes the central selling point of a nominee, it increasingly becomes the way opposition is made to a nominee. In other words, opposition to a nominee increasingly takes the form of a counter-narrative told to the general public about the nominee's life story, personal values, and overall worldview.<sup>310</sup> Indeed, once the executive makes its case for a nominee in terms of image, it becomes imperative for the opposition to soon advance an opposing image before the original image of the candidate advanced by the White House becomes indelibly set in the minds of many in the broader

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<sup>304</sup> *Id.* at 75-103.

<sup>305</sup> *Id.* at 125-27, 129.

<sup>306</sup> *Id.* at 125-27 (arguing that by "personalizing the process" the "public need only assess a person, not bills or policy papers").

<sup>307</sup> Davis, *supra* note 290, at 135 (noting that presidents now appoint "at their peril" nominees "with well-known ideological views"). See also pp. 134-35, 150-53.

<sup>308</sup> Davis, *supra* note 290, at 135.

<sup>309</sup> *Id.* at 135, 129-31 (noting that image making is easier with a candidate with a blank ideological slate).

<sup>310</sup> *Id.* at 130-31, 138-39.



society.<sup>311</sup> Second, in responding to the nomination of appointees with little paper trial or few controversial statements about how they would rule as a Supreme Court justice, opposition groups often can only mount a case based on image.<sup>312</sup> In making an appeal to the wider society to oppose a nominee who has little paper trial, the personal characteristics of the candidate can become important clues—often the only clues—to the individual’s overall world-view.

For these reasons, the debates in the senate over many judicial appointees often involve personal issues. Davis has called this the “personalizing of the process.”<sup>313</sup> And according to Davis, the personalization of the confirmation process appears to be deeply seated.<sup>314</sup> In light of this, perhaps we can use this entrenched practice to our advantage by making it such that senators cannot afford not to support attention to judicial virtue in the federal judiciary, including at the level of the district courts. When one looks at the politics of the appointments process *in toto*, an incentive seems to exist for senators to support an attention to judicial education programs at the district level. This can enhance their political capital in terms of their public persuasiveness as they position themselves for the battles over appointments above the level of the district. Therefore, a senator who supports education reform measures, even at the district level, can claim credit for a serious attention to what might be called the “balancing humaneness” and “appropriate judicial temperament” of all judicial appointees. This can be an excellent boast in presenting him-or herself in public, with respect to the hard battles over the higher courts, as a dispassionate defender of the highest ideals of

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<sup>311</sup> *Id.* at 139 (noting how “opposing groups must...mobilize quickly” to fight the “image-campaign”).

<sup>312</sup> See Davis, *supra* note 290, at 140 (describing Souter as a “cipher” due to lack of a paper trial and the fact that by the time of his nomination he had not written one federal opinion), and Davis, *supra* note 293, at 138 (noting how the Souter confirmation battle became a struggle between “the White House image of a solid New Englander with an open mind versus the opposition’s portrayal of a monastic loner who had little contact with real-world social problems”). One could argue that the emergence of the issue of Samuel Alito’s membership as a student in an organization intended to oppose changes to Princeton University’s admissions policies arose because Alito had made few remarks in the years before his nomination about how he might rule on certain cases if he had the power to set federal precedent. See also T.R. Goldman, *Lobby Groups Following Bork Playbook for Alito*, LEGAL TIMES (Dec. 13, 2005), available at <http://www.law.com/jsp/article.jsp?id=1134394504003> (last visited Apr. 20, 2006).

<sup>313</sup> Davis, *supra* note 290, at 125.

<sup>314</sup> See *id.* at 157-78 (arguing that the best reform to the personalization of the appointment process is not to attempt to lessen influence by outside groups, but rather to make the process “conform to what [it] actually has become,” given that “external groups will not go away”). Davis argues that an amendment should be made to the Constitution to allow the election of Supreme Court justices given that the process has become deeply influenced by the strategy of cultivating popular perceptions of the images of the nominees. Given these deep roots, the best thing to do, he maintains, is actually to hold judicial elections. *Id.*

good character appropriate to the American legal system.<sup>315</sup> By supporting a federal judicial education program, a senator can claim greater legitimacy in making arguments about appellate nominees concerning their image—and image often includes issues of temperament and judgment—since he or she can claim, with concrete evidence, to be greatly concerned about the issue of temperament and character in general.<sup>316</sup> In other words, by supporting enhanced judicial education programs, senators can appear to be deeply concerned with, and somewhat expert on, the virtues appropriate to judging, and in doing so, they can better position themselves to engage in battles over personalities, which Supreme Court nomination contests increasingly have become. So if a bill were proposed to establish something like a national program for trial court judicial virtue, then senators would have a strategic reason to support it, for not to do so would be a liability in the increasingly image-based contests over appellate court nominations.

In all, we can help to improve the legal environment faced by women pursuing gender discrimination lawsuits. By doing so we can increase the likelihood that strong individual cases will proceed further in the legal system, enabling them either to settle at appropriate levels or to reach favorable verdicts, which can both advance justice in individual cases and enhance the deterrent effect of the laws surrounding workplace inequality.

#### V. Conclusion: The Efficacy of Promoting Gender Equality Through Federal Statutes

Gender equality in the workforce is an important value. However, there are problems confronting the project of securing this value through the use of

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<sup>315</sup> Davis, *supra* note 290, at 150.

<sup>316</sup> The importance of personalizing the process of appeals court nominations—which my argument does not endorse but merely sees as a long-standing process and attempts to turn to the advantage of this proposal—can be especially salient if public opinion sours of ideological fights over the courts. Moreover this strategy may be especially important at the current moment in terms of lower court nominees, for the following reason. In the aftermath of Bush’s controversial nominations to the appeals courts in 2005, and the filibuster threats that arose in response, and the eventual compromise that resulted from this, ideology may play an even more reduced role in circuit court nominations. The compromise that developed as a result of the battle over the circuit nominees holds that ideology is not in general an “extraordinary circumstance” meriting a filibuster. (See Charles Babington & Susan Schmidt, *Filibuster Deal Puts Democrats in Bind*, WASHINGTON POST, July 4, 2005, at A01.) So if the Democrats in the senate are deeply opposed to a controversial conservative appellate court nominee on ideological grounds, they may need to find other ways to attack the nominee. So they may need to redouble the tactic of attacking character, if possible, in lieu of ideology. See Charles Babington & Susan Schmidt, *Filibuster Deal Puts Democrats in Bind*, WASHINGTON POST, July 4, 2005, at A01.

federal legislation. This fact raises serious questions concerning the efficacy of moving toward greater equality of opportunity by means of a strong system of federal law. I have argued, however, that reform measures are possible to mitigate these concerns. This conclusion, then, means that we can have greater confidence that gender equality can, in fact, be assisted by the use of federal statutes. As a consequence, by being able to make the legal environment fairer to claimants with meritorious cases we can help to preserve the great strides women have made in the workforce in the last thirty years, strides that the career of Justice O'Connor so well exemplifies. If we stay committed to the strong system of federal law currently in place, and make the adjustments that that system requires, Justice O'Connor's success in the legal profession—a profession once dominated by men—can remain an inspiration for all Americans. She can remain a shining example of what can happen when women and men are judged not by their gender, but by their talents, their aspirations, and their wisdom.