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Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a “Mandatory Arbitration Act”

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INTRODUCTION

The debate over the mandatory arbitration of employment discrimination cases has been raging since the Supreme Court’s 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹ Detractors argue that predispute mandatory arbitration is inherently unfair and should be prohibited.² Advocates contend that arbitration³ offers significant advantages over litigation as a means of resolving employment rights disputes.⁴ In 1999, we examined the anti-arbitration arguments

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1. 500 U.S. 20, 23 (1991) (finding enforceable a predispute agreement compelling arbitration of statutory discrimination claims).

2. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36, 125–31 (arguing that *Gilmer* “created a monster,” and that predispute mandatory arbitration agreements should not be enforced); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1674–75 (2005) (“Mandatory private arbitration . . . is indeed unjust . . .”); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1040 (1996); cf. 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, 290 (1996) (“[C]ompulsory arbitration, while lawful, is not acceptable and should not be enforced absent the establishment of certain safeguards and processes . . .”).

3. In the interest of brevity, we often refer to “arbitration” where we mean “mandatory” arbitration or “mandatory pre-dispute” arbitration.

4. See, e.g., Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW (Michael L. Wachter & Cynthia Estlund eds., 2010); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (“[A]rbitration . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach.”); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003) (arguing arbitration offers affordable and substantial due process to middle- and lower-income employees under mandatory arbitration agreements); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 21 (2003) (“[A]rbitration is like a granola bar; not quite as sweet as the candy [i.e., mediation], tasty nonetheless, healthy in the long run and certainly better than the alternative, costly and drawn-out litigation—like a plate of

and proposed a statute that we believed addressed the most salient concerns commonly voiced.⁵ While the article has been cited over fifty times, our “Mandatory Arbitration Act” (MAA) has never caught on, and, sadly (for us), has not played the role we envisioned for it in the ongoing arbitration debate. Thus, instead of focusing energies on developing a working model that capitalizes on the best aspects of arbitration *and* litigation in discrimination adjudication, scholars (including the authors of this Article) have continued to debate which is the preferred method for adjudication, as if the Hobson’s choice were any more than illusory, and as if this were ultimately a productive use of time, given authors’ views on both sides of the debate about problems inherent in the current system of resolving employment rights disputes. Indeed both David Schwartz and Dave Sherwyn have published articles on: (1) the mandatory versus voluntary debate—we disagree⁶ and (2) the empirical examination of arbitration versus litigation—we somewhat agree.⁷ Professor Schwartz and the coauthors of this Article agree that the debate is flawed because regardless of how many cases we examine, the cases adjudicated in arbitration are qualitatively distinct from those resolved in litigation; thus, we will never ascertain from the relative strength or weakness of the cases and their outcomes, anything informative about the preferability or ultimate fairness of the forum.⁸

Much has been written about arbitration since we last copublished on this topic in 1999—including Professor Schwartz’s fine piece in the *Notre Dame Law Review*.⁹ We initially intended to simply continue the debate in this Article because we have not addressed the latest anti-arbitration arguments. In the back of our minds, however, was a persistent nagging belief that the two sides are now so entrenched and polarized in their respective conclusions that it would be unlikely for minds to change on either side.¹⁰ It seems to many detractors of mandatory

liver and onions with a side of over-cooked brussel [sic] sprouts.”).

5. See David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 125–37 (1999).

6. Compare Schwartz, *supra* note 2, at 53–66, 119 (arguing that while predispute mandatory arbitration agreements are fundamentally unfair, in the postdispute setting the plaintiff is in a better position to decide whether to submit to arbitration), and David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration”*, 8 NEV. L.J. 400, 421–22 (2007) [hereinafter Schwartz, *Set It Free*] (calling for congressional action rejecting predispute arbitration agreements), with Sherwyn, *supra* note 4, at 65–68 (arguing that postdispute voluntary arbitration would incur abysmal participation and, at the same time, eliminate the benefits of predispute arbitration agreements).

7. Compare David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283–1315 (2009) (identifying flaws in empirical analyses comparing litigation with arbitration and arguing the results tend to support that mandatory arbitration is unfair), with David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78, 1586–91 (2005) (reviewing prior empirical research and presenting the results of a case study finding arbitration faster and more efficient than litigation).

8. See Schwartz, *supra* note 7, at 1289–91; Sherwyn et al., *supra* note 7, at 1564–66.

9. Schwartz, *supra* note 7.

10. Professor Schwartz seems to have reached this conclusion as well. See, e.g.,

arbitration that if this is something employers want, it must be something employees would prefer not to have. Why else would employers want something? Certainly not to give away money to employees. The suspicion is that employers self-select into mandatory arbitration programs in large part because they plan to use this system to repress employee rights and to reduce the employers' costs of violating the law. Proponents of arbitration are equally entrenched in the view that these claims are inaccurate, and that it is unfair to assume that (a) employers are out to find ways of getting away with breaking the law and (b) employers that implement mandatory arbitration systems are doing something that is bad for employees. A common lesson taught to negotiators is to avoid the distributive bargaining "fixed-pie assumption,"—that what is good for your counterpart is axiomatically bad for you, or vice-versa—and to instead seek out integrative "win-win" solutions that make the pie bigger for both you and your counterpart.¹¹ Supporters of mandatory arbitration continue to believe detractors are making this erroneous presumption about mandatory arbitration.

Accepting the premise that arguing pro or con might be counterproductive, we went back to what originally attracted us to this issue—the proposition that the discrimination resolution system is broken and needs to be fixed. Simply changing the adjudication system for discrimination lawsuits will likely be insufficient on its own. Instead, we propose that we need to start from scratch by eliminating employment at-will. To paraphrase our 1999 article,¹² instead of throwing out the bathwater and saving the baby, it is finally time—forty-six years after the passage of Title VII of the Civil Rights Act of 1964 and eleven years after *Gilmer*—to birth a new baby. Before we can talk about how wonderful the new baby is, however, we need to explain why there is a need for a new system and why arbitration will not solve the problem on its own.

I. THE PROBLEM WITH THE ARBITRATION FAIRNESS ACT OF 2009

The Arbitration Fairness Act of 2009 (AFA) would have eliminated predispute mandatory arbitration.¹³ Professor Schwartz argues that postdispute voluntary

Schwartz, *Set It Free*, *supra* note 6, at 401 (“[T]he debate among legal commentators on [the fairness of mandatory arbitration] is now over a decade old [and] the debaters have long ago stopped listening to each other . . .”); Schwartz, *supra* note 7, at 1335–36 (“I doubt whether the mind of a single participant in the mandatory arbitration debate has yet been changed by an existing empirical study, and . . . there is little reason to hope that will happen in the future.”). Although, anecdotally, one prominent academic, who shall remain anonymous, at least in this publication, has told me that (s)he was persuaded, in part by our arguments, to amend her/his pre-existing views on the subject that mandatory arbitration should be banned. (S)he is now of the mind that mandatory predispute arbitration offers significant trade-offs for justice for low-wage earners as compared to litigation.

11. Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEHAV. SCIENTIST 211, 215–18 (1983).

12. Sherwyn et al., *supra* note 7.

13. See Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3(a), 402(a) (2009) (“[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment . . . dispute.”). The bill was introduced in the House of Representatives as well. H.R. 1020, 111th Cong. § 4, 2(b) (2009). In 2007, a bill to the same effect was introduced in the Senate and House of Representatives. See Arbitration Fairness Act of 2007,

arbitration is a viable alternative.¹⁴ We disagree and point to our 2003 study of a voluntary arbitration system in which the parties in over 200 cases received offers to arbitrate and in not one case did both parties agree.¹⁵ While we agree with Professor Schwartz that there are instances in which both parties should and would agree to arbitration, we contend that the number of such cases is so small that such a system would have no real effect on discrimination.¹⁶ In addition, it is not those cases that concern us. If there is a factual dispute in which each side has a reasonable interpretation of events, whether the parties agreed before the dispute arose or after is really irrelevant to the question of whether pre- or postdispute arbitration is *better than the status quo*—litigation. In such an instance, whether the parties litigate or arbitrate, neither side would be able to exploit the high costs and related barriers of litigation to leverage an *unjust* result. This is because the factual dispute is legitimate. The kinds of cases that are relevant to the inquiry are ones in which either bad-actor employers or bad-actor employees could exploit the high costs of litigation to leverage an *unjust* result in either forum. The bad actors (employers or employees with knowingly unwinnable cases) are able to exploit the high costs of defending or prosecuting litigation in order to compel the other side to settle for less than the high cost of winning. So, in these cases, we would prefer arbitration because that would reduce the costs of adjudication on the merits, and hence, reduce the ability to leverage those costs to achieve the unjust result. Postdispute voluntary arbitration will have no effect on bad-actor employers' or bad-actor employees' respective abilities or likelihoods of leveraging high costs to achieve unjust results. This is because after the dispute arises they are strongly incentivized against agreeing to the cheaper, faster forum. Therefore, only where the parties agreed to arbitrate claims before the dispute arose would the arbitration agreement prevent bad-actor employers or bad-actor employees from leveraging costs of litigation to achieve unjust results.

Because voluntary arbitration is not really a solution, the AFA simply ensures the status quo—a perpetuation of unjust cost-driven exploitation by bad-actor employers and bad-actor employees. We are troubled when arbitration detractors fail to compare arbitration results to litigation results in a salient way,¹⁷ and believe, or by implication allege, that a “fair” system is one in which employees win at least 50% of claims filed (independent of an assessment of the merits of the claims, or assuming that, all else equal, at least 50% of employee claims have merit).¹⁸ The first problem is simply an omission of facts to help support a conclusion that arbitration is unfair. Fortunately, the first problem seems to be resolved as scholars are now comparing the results of arbitration to litigation.¹⁹ The second problem,

S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007).

14. See Schwartz, *supra* note 2, at 119; Schwartz, *Set It Free*, *supra* note 6.

15. See Sherwyn, *supra* note 2, at 62–65.

16. *Cf id.* at 62 (premising that a participation rate of less than 1% of a court's caseload would indicate that a voluntary arbitration system is ineffective).

17. Professor Schwartz attempts to address this shortcoming by arguing that the burden to prove, by empirical evidence, that arbitration is fair should be placed on advocates of mandatory arbitration. See Schwartz, *supra* note 7, at 1259–61.

18. See, e.g., *id.* at 1262–63 (measuring “fairness” by either aggregate pro-plaintiff outcomes or individual plaintiff recoveries).

19. See, e.g., Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil*

however, is still an issue. Implicit in the arguments against mandatory arbitration and in favor of the AFA are three presumptions: (1) a fair system is one in which plaintiffs are compensated; (2) the vast majority of plaintiffs have been discriminated against and deserve remuneration; and (3) the current system is both fair and just for society as a whole. We contest each of these assertions.

EEOC statistics, litigation statistics, and the costs of each of these systems, as well as our professional experiences, form the basis of our contention that the current system is “broken.” By this, we simply mean that the litigation system does a poor job of generating outcomes that approximate what outcomes would be if the normative outcomes were determined by an objective third-party observer with justice and the best interests of all U.S. citizens in mind.

Observation and analysis of case outcomes puts forth a persuasive argument that the current system is ineffective. The EEOC classifies successful (i.e., pro-plaintiff) resolutions as “merit resolutions.”²⁰ In the last fourteen years, merit resolutions as a proportion of total resolutions have ranged from a high of 22.9% (2007) to a low of 11% (1997).²¹ This means that in 1997 the EEOC failed to find merit in 89% of the cases it resolved. The numbers look even worse when one considers that merit resolutions include settlements.²² Anyone who has practiced on either side of the table knows that a significant percentage of settlements are nuisance-value settlements, where the employer gives the employee an insignificant amount of money (or some nonmonetary consideration such as an apology or promise not to discriminate in the future) in order to avoid the costs of defense.²³ This happens independently of any assessment of the merits.

Rights, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 308–12 (2004); Curtis Brown, *Cost-Effective, Fast and Fair: What the Empirical Data Indicate About ADR*, METRO. CORP. COUNS., Nov. 2004, at 56, 70 (summarizing several empirical studies comparing litigation with arbitration).

20. A qualification is in order. “Merit resolutions . . . include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.” *Definitions of Terms*, U.S. EQUAL EMP. OPP. COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm>. “Successful conciliations” are settlements after the EEOC has found reasonable cause. *Id.* “Unsuccessful conciliations” are findings of cause that are not settled and thus considered by the EEOC for litigation. *Id.* However, “negotiated settlements” (settlements to which the EEOC is a party) and “withdrawals with benefits” (settlements to which the EEOC is not a party) may include some cases in which the EEOC has found reasonable cause. *Id.* Therefore, “merit resolutions” is not, by any measure, a perfectly accurate proxy for merit. Resolutions not classified as merit resolutions include “administrative closures” and findings of “no reasonable cause.” *Id.*

21. *All Statutes: Fiscal Year 1997–Fiscal Year 2010*, U.S. EQUAL EMP. OPP. COMM’N [hereinafter EEOC Data], <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

22. See *EEO-1 Job Classification Guide*, U.S. EQUAL EMP. OPP. COMM’N, <http://www.eeoc.gov/employers/eo1survey/jobclassguide.cfm> (describing each of the EEOC’s classifications).

23. We refer only to “nuisance-value settlements”—situations in which an employee brings a non-meritorious claim strategically to extract a settlement that is economical from the perspective of the employer. See generally Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1855–58 (2004) (defining the scope of the nuisance-value settlement problem).

Of course, one could argue persuasively that many meritorious cases are not classified as merit resolutions. Indeed, according to a 1988 General Accounting Office study,²⁴ between 41% and 82% of no-cause findings were attributable to the EEOC's failure to adequately investigate the charge.²⁵ The EEOC numbers cited above imply that the vast majority of cases are without merit—an argument employers find appealing. Alternatively, plaintiffs and their lawyers will point to the GAO's findings as calling into question the EEOC's procedures.²⁶ Not to be outdone, employers can raise issues with the EEOC procedures to support their own arguments. Accordingly, one could argue that certain EEOC and state agency procedures undermine the integrity of anti-discrimination laws and hurt *both* employees and employers. For example, because state agencies are compensated by the number of cases they bring in, there is an incentive to take any case and “fit” it into the framework provided by the statute.²⁷ Bringing a large number of frivolous claims hurts both employers and employees.²⁸ Employers are forced to waste significant resources defending these claims. Employees are faced with investigators, employers, lawyers, and judges who are so jaded that they rarely believe the plaintiff. In fact, we interviewed several investigators and asked them what their initial reactions to new cases are.²⁹ Investigators stated that they believe discharge cases to be baseless before they open the files.³⁰ The fact that investigators will pressure both sides to settle cases without discussing the merits further perpetuates what we have referred to as “de facto severance.”³¹ Not only has this problem not gone away since we first mentioned it,³² but it has been institutionalized with mediation.³³ Regrettably, but understandably, the theme of

Nuisance-value settlements are distinguishable from “negative expected value claims”—claims that may have merit but, for one reason or another, would be uneconomical for the charging party to pursue in court. *See id.* at 1903–04. *See generally* David C. Croson & Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 HARV. NEGOT. L. REV. 65, 67–69 (1996) (presenting the model for the negative expected value claim).

24. The GAO has since changed its name to the Government Accountability Office.

25. *GAO Report Charges EEOC with Failure to Fully Investigate Majority of Complaints*, 198 Daily Lab. Rep. (BNA) A-7 (Oct. 13, 1988).

26. *See id.*

27. *See* U.S. EQUAL EMP. OPP. COMM'N, FY 2011 CONGRESSIONAL BUDGET JUSTIFICATION 33 (2010) [hereinafter EEOC BUDGET JUSTIFICATION], available at <http://www.eeoc.gov/eeoc/plan/upload/Final-FY-2011-Congressional-Budget-Justification.pdf>.

28. *See* Sherwyn et al., *supra* note 7, at 80–89; Sherwyn, *supra* note 4, at 17–20.

29. *See* Sherwyn et al., *supra* note 7, at 86 n.68.

30. *See id.*

31. *See id.* at 81–83. “De facto severance,” in our parlance, is the payment an employer is willing to make to settle a nuisance-value unlawful discharge claim to avoid the cost of defense, which can be tremendous even in the face of a nonmeritorious claim. *See* Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 92 (2001) (“Even if successful, a defense before a jury may cost \$100,000 to \$200,000 or more.”).

32. *See* Sherwyn et al., *supra* note 7, at 81–83.

33. *See The Charge Handling Process*, U.S. EQUAL EMP. OPP. COMM'N, <http://eeoc.gov/employees/process.cfm> (describing the agency's procedures, which include mediation).

investigation and mediation is not answering the question, “Has this employer discriminated against this employee?” Instead, it is, “What is the minimum dollar amount the employer will pay, and the employee accept, to make this case go away?”

Litigation statistics are similarly alarming. Employees should fare better in trials than employers for several reasons. First, the EEOC seemingly eliminates a large number of non-meritorious cases. When the EEOC administratively closes a case the employee cannot bring an action in court.³⁴ In the last fourteen years, the percentage of administratively closed cases has ranged from a low of 16.4% (2005) to a high of 28.3% (1997).³⁵ In that same time period the percentage of cases in which the EEOC found no cause ranged from 57.2% (2001) to 64.3% (2010) of the cases.³⁶ While employees who receive a no cause finding may bring an action in court, it seems logical that plaintiffs’ lawyers would be wary of cases with a no cause finding and thus, would be less likely to take such cases on a contingency basis. Because the EEOC settlement and mediation procedures should, and do, weed out bad cases and because the procedures provide plaintiffs’ lawyers with significantly more information about discrimination cases than other types of contingency cases, one can assume that at least a majority of the cases that make it to litigation have merit.³⁷ However, the majority of cases, according to the courts, do not have merit.

Before trial, cases are often resolved by dispositive motions. Lewis Maltby found that, in 1994, federal courts resolved 2051 (60%) of their 3419 employment discrimination cases by pre-trial motions.³⁸ Of these 2051 cases, employers prevailed in 2010 (98%).³⁹ Thus, the trial statistics begin with almost 60% of the non-meritorious cases taken out of the pool. There are a number of scholars who have examined trial statistics. Howard found that employees prevailed at a rate of 38% in front of juries and 19% in bench trials.⁴⁰ Eisenberg and Hill found that in

34. The reasons for closing a case administratively include:

failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

Definitions of Terms, *supra* note 20.

35. EEOC Data, *supra* note 21.

36. *Id.*

37. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMP. LEGAL STUD. 175, 177 (2010) (“Although the EEOC occasionally provides a remedy and, according to plaintiffs’ lawyers, occasionally provides investigative material that may be useful at a later stage of litigation, most often the EEOC process results in considerable delay without producing meaningful investigation or conciliation.”).

38. Maltby, *supra* note 19, at 47.

39. *Id.*

40. See William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40, 41–42 (examining Federal Judicial Center data on federal employment case terminations

federal employment discrimination cases, the employee win rate was 36.4%.⁴¹ Nielsen, Nelson, and Lancaster found that of 1672 employment discrimination cases filed in federal courts between 1988 and 2003, 19% were dismissed, 50% were settled early in the discovery process, 18% were dismissed on summary judgment, and another 8% were settled late, leaving plaintiffs to win at trial in only thirty-two cases, or 1.9%.⁴² When one combines the several studies and includes the pretrial motions, the employee win rate is significantly less than 15%. Of course, the employee win rate even in jury trials may be negatively affected by the difficulties of proving intent against employers savvy enough to avoid discovery of proverbial smoking gun evidence.⁴³ Moreover, it is reasonable to assume that, like the worst cases, the best cases are removed from the pool by being settled and not adjudicated.⁴⁴ Still, it seems difficult to justify an adjudication system where less than 15% of the cases are deemed meritorious, unless the system was so cost effective that the value of giving employees “their day in court” outweighed the costs. While we argue that could be the case in arbitration,⁴⁵ it is clearly not the case in litigation.

Litigation costs are outrageous. Management lawyers report that the EEOC process alone can cost up to \$10,000.⁴⁶ Taking a case to summary judgment will almost always cost over \$50,000, and taking a case through trial will cost anywhere from \$100,000 to over \$1 million.⁴⁷ There are two major problems with the costs of litigation. First, the almost standard operating procedure of employers settling baseless cases for the costs of defense flies in the face of justice, creates a cynicism about the process, and incentivizes employers to discriminate in hiring to avoid having to defend baseless claims when terminating employment of individuals in protected classes.⁴⁸ Second, the high costs prevent anyone but highly paid

from June 1, 1992 to May 31, 1994).

41. See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 48 & tbl.1 (examining federal court trial data (1999–2000) gathered from the Administrative Office of the United States Courts).

42. Nielsen et al., *supra* note 37, at 187 fig.1.

43. See, e.g., *Valentino v. Village of S. Chi. Heights*, 575 F.3d 664, 672 (7th Cir. 2009) (“[I]t would be rare for a plaintiff to have smoking gun evidence”); *Jakimas v. Hoffman-La Roche, Inc.*, 485 F.3d 770, 785 (3d Cir. 2007) (similar); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1423 (2004) (“Absent ‘smoking gun’ evidence, which is rare, the cases are very difficult to prove.”).

44. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6–30 (1984) (presenting a model for selecting disputes for litigation).

45. See, e.g., *Sherwyn et al.*, *supra* note 5, at 132–33. *But see Stone*, *supra* note 2, at 1037 (arguing mandatory arbitration raises due process concerns in part because employees must pay their own attorney’s fees and often the arbitrator’s fee).

46. See *Sherwyn et al.*, *supra* note 5, at 81 & n.39.

47. See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 369 n.20 (2008) (listing attorney’s fees estimates of \$250,000–\$450,000 for single employment discrimination claims and up to \$7 million for class actions).

48. See John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment*

employees from gaining access to the system. For example, as Professors John Donohue and Peter Siegelman concluded, it would not be economical for an employee to pursue a case unless the employee earned more than \$22,500 per year.⁴⁹ In a 1995 survey of plaintiffs' lawyers, Howard found that lawyers would not take a case unless the employee had at least \$60,000–\$65,000 in provable back-pay damages.⁵⁰ Furthermore, the survey found that plaintiffs' lawyers require a \$3000–\$3600 retainer—tough to come up with if you have no job.⁵¹

We contend that the EEOC/litigation system favors bad actors and hurts good actors. Bad-actor employers use the delays and costs inherent in the system to force employees to either accept nuisance settlements for legitimate claims or to even walk away because they cannot overcome the significant barriers to entry. Conversely, bad-actor employees leverage the disproportionately high costs of defense, as well as the threat of publicity, to extort employers into paying what we call, as stated above, “de facto severance.”

We submit that arbitration solves many of these problems endemic to the EEOC/litigation system. Arbitration adjudication is significantly faster and cheaper than EEOC litigation. The average EEOC case takes 373 days to resolve, while the figure is 709 days in litigation.⁵² In our study of a company with an in-house arbitration system, we found that the average time to resolution was less than twenty-one days.⁵³ Consequently, costs and lost productivity were minimized while the retention rates were extremely high in arbitration.⁵⁴ Because arbitration is so much faster and cheaper than litigation, we contend that bad-actor employers will be drastically curtailed in their abilities to use their resources to wear down employees with legitimate claims. Similarly, bad-actor employees will not be able to extort employers into paying to avoid huge costs of winning on a motion at trial following what could be an extensive discovery process. Unflagging critics nevertheless contended that arbitration is a “rigged system” that favors employers.⁵⁵ What constitutes an unfair system is, however, a question of perspective. As found in a 2005 Stanford Law Review article, arbitration win/loss rates are similar to that in litigation, and more “employee friendly” than that of the EEOC.⁵⁶ We believe that reduced barriers to entry and similar or even better employee win/loss rates seemed like a positive outcome for employees. Similarly,

Discrimination Litigation, 43 STAN. L. REV. 983, 1024 (1991) (arguing that when making hiring decisions, employers consider the probability and cost of potential litigation for future discriminatory firing, which applies particularly to female and minority candidates).

49. *See id.* at 1008. The calculation incorporated the probability of success at trial, the weeks of unemployment as a result of termination, and the costs of initiating the suit. *Id.* It found a \$450 weekly salary to be the threshold, which is \$22,500 for fifty weeks worked in a year. *See id.* This is roughly \$36,100 when adjusted for inflation from 1991 dollars to 2010 dollars. *See CPI Inflation Calculator*, BUREAU LAB. STAT., <http://data.bls.gov/cgi-bin/cpicalc.pl>.

50. Howard, *supra* note 40, at 44.

51. *Id.*

52. Sherwyn et al., *supra* note 7, at 1588.

53. *Id.* at 1589 fig.3.

54. *See id.* at 1589.

55. Lorraine M. Brennan, *CPR News*, 27 ALT. TO HIGH COST LITIG. 98, 112 (2009) (quoting a Washington, DC public interest attorney).

56. *See* Sherwyn et al., *supra* note 7, at 1578.

we believe that employers would be better off with arbitration because the reduction in time and costs of defense would result in: (1) less productive time lost and (2) significant reduction of settlements of frivolous cases entered into to avoid the high cost of defense. Thus, good-actor employees would be rewarded as their claims would be heard; good-actor employers would be rewarded as they would be able to reasonably defend their cases; bad-actor employers could no longer leverage time and expense to stymie just results; and bad-actor employees could no longer extort de facto severance. Thus, we believe that arbitration results in a system that is more just than EEOC and litigation.

There are, however, problems with arbitration. For example, the fact that it is private reduces the disincentive to discriminate (on the other hand it also reduces the incentive to use the law to extort money when there is no legitimate claim); it does not allow for the development of the law (arbitration decisions have no real precedential value); it may provide a disincentive for plaintiffs' lawyers to take the case;⁵⁷ and the "repeat player" effect may result in a system that favors employers.⁵⁸ We believe the problems are either overstated or can be corrected⁵⁹ by our proposed statute, the Mandatory Arbitration Act (MAA).⁶⁰ The MAA provides the following:

1. Filing of Claims

All employers with arbitration policies must submit copies of such policies to the EEOC within fifteen days of their enactment. Prior to submitting their cases to arbitration, employees may file their claims with the EEOC. The EEOC will have thirty days to determine if the

57. One would expect a plaintiff's attorney to welcome arbitration. Because it is both cheaper and faster, it should result in a higher "effective hourly rate" over time than litigation, even when considering the probability of success and average damages awards. However, plaintiffs' attorneys harbor some of the same fears of arbitration as defense attorneys. See Sherwyn, *supra* note 4, at 41–46. For more on the concept of "effective hourly rate" and contingent-fee attorney case management, see generally Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. UNIV. L.Q. 739, 761–72 (2002).

58. For more on the "repeat player" effect, see Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

59. See Sherwyn et al., *supra* note 5, at 125–28 (presenting the Model Arbitration Act, a proposal designed to address critics' concerns about mandatory arbitration).

60. We drafted the Model Arbitration Act for employment discrimination claims after studying *Gilmer*, the conclusions of the Dunlop Commission on the Future of Worker-Management Relations, and the arguments made by the EEOC and other numerous critics of mandatory arbitration. Additionally, we consulted both the American Arbitration Association's Rules for the Resolution of Employment Disputes and the CPR Institute for Dispute Resolution's model rules for arbitrations. Accordingly, the MAA specifically addresses many of the problems identified by the Court, commission, and critics. If adopted, the MAA would provide employers with a statutorily enforceable arbitration policy. While parties would always be free to contract out of the MAA's provisions, such agreements would be unenforceable if contested.

case fits within its national enforcement plan. If so, and if the employee wishes the Agency to be involved in the case, the EEOC may litigate on behalf of the plaintiff(s) or class. If the employee does not wish the EEOC to be involved, or if the case does not fit into the EEOC's national enforcement plan, the case will be deferred to arbitration.

2. The Law and Damages

The arbitrators must follow applicable federal and state substantive law. Arbitrators must comply with the statutorily prescribed damage provisions.

3. Establishment of a Body to License, Select, and Monitor Arbitrators

Congress shall create or empower an agency that serves three functions: licensing, selecting, and monitoring arbitrators.

a. Licensing

Unlike labor arbitrators, employment discrimination arbitrators need to be trained in the law of the land, not the law of the shop. The agency will establish criteria that all discrimination arbitrators must meet. These criteria will include education and practical experience in the field. A mandatory licensing exam will ensure that the arbitrators are knowledgeable in the applicable law. From those that are licensed, the agency will establish a panel of a limited number of arbitrators for each geographic area.

b. Selection

When a case is set for arbitration the agency will randomly select seven arbitrators from its panel. The arbitrators will be submitted to the parties. Each party will have one peremptory challenge and unlimited challenges for cause. An arbitrator will be randomly selected from those who are not disqualified.

c. Monitoring Arbitrators

Arbitrators will be required to file written opinions with the agency and the EEOC. The arbitrators will delete the names of the employer and the employee from the opinion. These opinions must describe: (1) the facts of the case; (2) the applicable legal standards; and (3) the application of the law to the facts so that the conclusion drawn can be understood. The agency will continually employ experts in the field to review the cases of the arbitrators to ensure that they are qualified to remain on the panel. The EEOC can use these opinions to ensure that arbitrators are applying the law correctly. If not, the EEOC can draft new regulations, propose new legislation to Congress, or make the issue part of its national enforcement plan.

4. Arbitration Procedures

a. Discovery

The parties will be allowed document requests as well as a limited number of interrogatories and depositions. The parties can depose the plaintiffs, defendants, and the defendants' decision makers. The parties must submit a witness list one month prior to arbitration. All discovery must be completed within three months of the case being deferred to arbitration.

b. Burden of Proof

The burden of proof will be in accordance with federal law.

c. Damages

All damages provided by the Title VII, the ADA, and the ADEA, including attorney's fees, will be available.

d. Rules of Evidence

Arbitrators are permitted discretion in rendering appropriate, yet simplified, rules of evidence and procedure.

e. Costs

The employer will be liable for the cost of the arbitration. Each party will bear all of its own other costs.

5. Arbitration Agreements

Arbitration agreements cannot be part of an employee handbook. Instead, they must be embodied in the form of a separate document that clearly states the parameters of the agreement. For example, the document must state if employment is at-will or not. It must also inform employees that they are free to hire counsel and file claims with appropriate government agencies.⁶¹

We contend that arbitration accompanied by the MAA provides a more just system than litigation for resolving employment rights disputes. Despite our beliefs, however, the fact is arbitration is still regarded as a form of rustic justice and has not been widely accepted. Because there seems little room to correct arbitration's ills, the paradigm offered is to either simply revert back to EEOC/litigation or to develop a new method for addressing this issue. Because we find the EEOC/litigation paradigm untenable, we suggest developing a new system to cure the ills of the current system.

Scholars, lawyers, advocates, legislators, and other interested parties have been attempting to develop a new system for resolving employment disputes for decades. From administrative agencies to litigation, to mediation, to arbitration, to work tribunals, there have been innumerable attempts to try to address the classic battle between labor and capital. We do not pretend that we, in limited space, can devise the perfect system. We do, however, believe that it is time to change the debate from "arbitration or not" to: "EEOC/litigation is not working and we need to develop something different." Accordingly, in the remaining space allowed, we propose a new way to address discrimination and the vast majority of discrimination disputes—the first step of which is to eliminate employment at-will.

II. ELIMINATING EMPLOYMENT AT-WILL CAN FIX THE DISCRIMINATION PROBLEM

We believe that one of the root causes of the problems with the current system is *de facto severance*.⁶² The ability to receive *de facto severance* encourages the filing of false discharge claims. The proliferation of false discharge claims (1) causes delays; (2) increases costs; (3) forces nuisance settlements; and (4) undermines the legitimacy of the law and the system. Of course, there are false failure to hire and harassment cases.⁶³ Because failure to hire cases are difficult to prove,⁶⁴ employers

61. Sherwyn et al., *supra* note 5, at 125–28 (citation omitted).

62. See Antoine, *supra* note 31.

63. Indeed, many employers report that employees file harassment cases to set up

are less apt to settle them, and bad-actor employees are less likely to file them. Similarly, harassment claims (not associated with a termination) can be investigated and resolved by parties who still maintain working relationships. Therefore, these cases do not lend themselves to the perverse incentives of de facto severance, or are at least significantly less likely to do so. Thus, we attempt to attack the discrimination problem by addressing terminations.

A. The Problems

As a threshold matter, the fact that the vast majority of discrimination cases are discharge cases is a problem.⁶⁵ The purpose of the discrimination statutes is, in large part, to open doors to those in protected classes, and to effect social change.⁶⁶ Indeed, after the passage of the ADA, Senator Edward Kennedy referred to it as the “emancipation proclamation for the disabled.”⁶⁷ In practice, however, up to 86% of all discrimination cases filed with the EEOC are discharge cases.⁶⁸ Thus, one can cynically spin discrimination lawsuits as follows: when hiring, the company is an equal opportunity employer. With regard to employees, however, the company discriminates and, in fact, fires people because of their race, sex, color, national origin, religion, age, and disability. Of course, this theory is not foolproof and there are several explanations of the large percentage of discharge cases. For example, one could argue that the decision makers change in between hiring and the decision to terminate,⁶⁹ which happens often in larger bureaucratically structured organizations. Similarly, it is sometimes the case that hiring is either an automated process or outsourced to consulting companies, but decisions to promote, retain, or terminate employees are performed internally. Perhaps a more compelling and non-mutually exclusive argument is that discrimination in the twenty-first century is

retaliation cases. See Howard Zimmerle, *Common Sense v. the EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, 30 J. CORP. L. 627, 642 (2005) (“There is also the possibility that an attorney will ‘set up’ an employer for a lawsuit by bringing a baseless harassment claim but waiting for retaliatory conduct on which to base a retaliation lawsuit.”).

64. This is another problem with discrimination law that is beyond the scope of this Article.

65. See John J. Donohue, III & Peter Siegleman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993).

66. Nielsen et al., *supra* note 37, at 177–80.

67. Press Release, Senator Edward M. Kennedy, Statement of Senator Kennedy Praising Senate Passage of the Americans with Disabilities Act (Sept. 7, 1989), available at <http://tedkennedy.org/page/-/legacy/pdf/kennedy-speech-1989-ADA.pdf>.

68. See Vincent J. Roscigno & Lisette Garcia, *Race Discrimination in Employment*, in THE FACE OF DISCRIMINATION: HOW RACE AND GENDER IMPACT WORK AND HOME LIVES 21, 26–27 & fig.1.3 (2007); Donohue & Siegelman, *supra* note 48, at 1016 (data from 1985); Nielsen et al., *supra* note 37, at 190, 200 (reporting 60% of cases involved firing, and noting that “private sector EEOC cases overwhelmingly involve firing”).

69. A change in decision maker, of course, might account for the occasional discriminatory firing. See, e.g., *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 44–46 (1st Cir. 1999) (finding discrimination where a change in the plaintiff’s supervisor marked a noticeable difference in performance reviews ultimately leading to the plaintiff’s layoff).

subtle. Decision makers hold members of protected classes to different standards, set them up to fail, often do not realize their biases,⁷⁰ and, if they do, very rarely leave a smoking gun. That is, it is possible for decision makers to hold negative views of minorities in protected categories, but know it is wrong not to hire people in that category (because it is illegal, or even because of extra-legal socio-normative constraints). When these biased decision makers review performance or other metrics, this bias might manifest in weighting performance of those in the protected category lower than those not in the protected category. Thus, we are not saying that there is no discrimination in terminations. What we are saying is that many of the discharge cases processed through the EEOC are not discrimination claims and would not have been filed as such if employees had other recourse—which employees now lack.

Employees who believe they were terminated unfairly, even if not discriminatorily, soon find that their only recourse is to file a discrimination charge.⁷¹ Such “false,” “square peg in a round hole” charges are facilitated by several key features: (1) the EEOC and state agencies are in the business of bringing claims and thus, their funding is dependent on claims coming through the door;⁷² (2) if one is terminated unfairly, it is natural to try to fit the facts of the termination into actionable boxes as described on websites like the EEOC’s;⁷³ and (3) the majority of American employees believe that they cannot be fired without

70. One study put it this way:

[b]ecause aversive racists consciously endorse egalitarian values and deny their negative feelings about Blacks, they will not discriminate directly and openly in ways that can be attributed to racism. However, because of their negative feelings, they will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race

John F. Dovidio, Samuel L. Gaertner, Kerry Kawakami & Gordon Hodson, *Why Can't We All Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULT. DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 90 (2002) (finding subjects displayed racial bias in selecting candidates for a job only when there was more discretion, that is, where competing candidates were neither clearly qualified nor clearly unqualified). See generally Franita Tolson, *The Boundaries of Limiting Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 355–96 (2008) (discussing “unconscious discrimination” and the lack of success in court of plaintiffs alleging unconscious employment discrimination).

71. Because every state except for Montana is an employment at-will state, there is no cause of action for “wrongful discharge.” Because the majority of employees do not have contracts and the other employment protections are more specific, discrimination becomes the cause of action of last resort.

72. See generally EEOC BUDGET JUSTIFICATION, *supra* note 27, at 1–2 (setting forth reasons for the budget increase and listing performance metrics).

73. As the EEOC website describes, “If you plan to file a lawsuit alleging discrimination on the basis of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, genetic information, or retaliation, you first have to file a charge with one of our field offices (unless you plan to bring your lawsuit under the Equal Pay Act, which allows you to go directly to court without filing a charge).” *Filing a Lawsuit*, U.S. EQUAL EMP. OPP. COMM’N, <http://www.eeoc.gov/employees/lawsuit.cfm>.

cause.⁷⁴ Accordingly, people who truly believe an unfair termination is *unlawful* will often, with or without the encouragement of their peers, attorneys, and the EEOC, file claims. The proliferation of wrongful discharge cases being miscast as discrimination claims overwhelms the system and increases the rate at which true discrimination cases are either settled for nuisance value, lost in the system, or otherwise mishandled leading to less recovery than justified. One could characterize this effect as a negative externality of misclassifying unfair terminations as discrimination. In addition, some larger institutional employers may regard the higher percentage of claims filed against them that do not rightfully belong in one of the discrimination check-box categories as costs of doing business, devoid of the signal that there may be real discriminatory practices occurring in their workplaces that need correction. Even more troubling is the fact that employers, fearing that they cannot fire “protected class” employees, may discriminate in hiring to ensure a homogeneous workplace less susceptible to legal attack.⁷⁵ We contend we can solve the de facto severance system, reduce the EEOC and federal court docket, change the way employers view discrimination charges, and greatly reduce the incentive to discriminate by eliminating employment at-will.⁷⁶

B. The Proposed Solution

While the devil is, of course, in the details that cannot be fleshed out in the limited space we have, the remainder of this Article will outline a new employment standard that will provide employees with protection, allow employers to operate with certainty, and restore creditability and accountability to the discrimination law. We propose that employees engaged in interstate commerce can be terminated only if there is cause for the termination or severance pay given in lieu thereof.

The concept of cause is probably the most difficult aspect of any reduction or elimination of employment at-will. “Cause” as applied in the union setting may have led some to believe that employers can rarely, if ever, terminate an employee.

74. See Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997) (finding 89% of survey respondents erroneously believed that being fired out of personal dislike would be unlawful even absent discriminatory animus); cf. Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 381 (2008) (finding 31% of respondents at a company believed the mandatory arbitration clause in the employment agreement they signed would be unenforceable).

75. See Donohue & Siegelman, *supra* note 48, at 1024.

76. The concept of employment at-will is the Mark Twain of labor and employment law—its death has been greatly exaggerated. In the 1950s, the rise of unions led to the pronouncement that employment at-will was dead. In the 1960s, 70s, 80s, and 90s, it was the discrimination law, the implied covenant of good faith and fair dealing, and the public policy exception that were supposed to swallow the rule. In 2010, however, employment at-will is still the standard in forty-nine of the fifty states. It is well beyond the scope of this Article to argue the merits or shortcomings of employment at-will in a vacuum. Instead, we contend that because of public perception, the discrimination law, and other statutory and common law exceptions to employment at-will, its continued existence is no longer tenable.

Indeed, labor arbitration reports contain a fair number of discharge cases in which seemingly outrageous employee behavior did not prevent arbitrator orders of reinstatement with no back pay or, even worse, reinstatement with full back pay.⁷⁷ Accordingly, there are those who argue that cause in the union setting is found most often in extreme or outrageous employee conduct, but much less consistently and perhaps less frequently in less clear factually disputed cases. While employers may argue that it is nearly impossible to fire a union employee, in an unpublished manuscript Professor Laura Cooper found that employers in the union context prevail in 60.37% of cases in which the alleged basis of “cause” is unsatisfactory performance.⁷⁸ When found in employment contracts, terminations for cause are often limited to theft, drugs, violence, and moral turpitude. There are, however, state court cases in which courts apply a broader definition of the term “cause.” We propose that in addition to obvious infractions, such as violence, drug use, and theft, “cause” should include: (1) violation of evenly applied work rules and (2) documented poor performance. The actual definition of cause would have to be further developed.

Our system has several parts. First, employers that wish to terminate an employee who has worked for the employer for more than 180 days must have cause *or* must provide severance. The severance requirement is simple: the employer must provide the employee with two weeks’ severance for each year the employee worked with a minimum of two weeks and maximum of fifty-two weeks. Employers who do not assert having cause must offer severance. Employees have a choice. If they accept the severance pay out, they are precluded from filing a discrimination charge. Employees who refuse the money may force the employer into a newly created adjudicative system. Employers who have cause also have a choice. They can either offer the employee full or partial severance, or adjudicate the issue of cause.

The adjudication system will be a combination of employer and government administration. Employers will be required to have a two-step grievance procedure that includes meetings with the decision maker and the employer’s director of human resources or an executive. If the case is not resolved informally, the case will be heard by administrative law judges (ALJs) who are employed by an appropriate agency that will administer the process. The ALJs will hear cases in an informal legal proceeding. There will be limited discovery, relaxed rules of evidence, no motions, and informal post-hearing letter briefs that either side may submit. Employees who can show financial hardship will be assigned counsel (either via pro bono work provided by private firms or by government employees like the National Labor Relations Board (NLRB)).

A prevailing employer will not owe the employee any severance and will have successfully precluded the employee from filing a discrimination lawsuit. Employees who prevail will receive severance, costs and fees, and a right to sue letter to file a discrimination case in court. Thus, before defending discrimination

77. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 281 (4th ed. 1985).

78. Professor Cooper, along with Professors Stephen Befort and Mario Bognanno, analyzed over 2000 labor arbitration discipline and discharge cases, published and unpublished, over twenty-four years in a single state.

discharge cases, the employer will have to prove that it had cause. Employers that fail to prove cause will face discrimination litigation with the full damages set forth in antidiscrimination statutes.

This new system will not affect harassment cases, failure to hire cases, or any other case in which employees have not lost their jobs. What it will do is remove many of the wrongful discharge and de facto severance cases from the discrimination litigation mix. This will make the system significantly more manageable and should reduce the perverse incentives that favor bad-actor employers and employees discussed above. Bad-actor employers will be unable to force the employee to wait more than one year for the EEOC to “resolve” the case and, instead, will have to provide severance pay, costs, and fees after a relatively quick process. Bad-actor employees will not be able to extort money based on outrageous costs of defense. Employers will no longer fear hiring those employees in protected classes and will have to apply policies fairly and document infractions.

CONCLUSION

This Article suggests a shift away from the paradigm of arguing in favor of or against mandatory arbitration as a means of adjudicating employment rights disputes. Instead, we offer an outline of a proposal that seeks more fair, just, and accessible means of redress in the workplace. Our hope is to identify systematic flaws in the existing system and to focus attention on problems that are less controversial than what has become a focal point in academic discussions of ways to ameliorate the status quo. Much of the discourse around the question of how to improve workplace dispute resolution and reduce discrimination in the workplace has focused too much on win rates and too little on understanding how pathways to disputes create incentives to frame, defend, and resolve claims brought. Citing high employer win rates—often while implicitly or explicitly presuming that employees *should* win about 50% of claims filed—some commentators conclude that the current system is unfair for employees and that the way to fix this is to jump on the teeter-totter to propel the employee win rate up. This is one of the ways that some have justified banning mandatory arbitration, arguing that since it is picked by employers it must be something that they use to leverage disproportionately and inappropriately high (greater than 50%) win rates. The conclusion they reach is that banning mandatory arbitration will eliminate this assumed injustice. Sidestepping this debate, we offer what we allege to be a more productive focus and framing for the conversation. Hopefully, by focusing more on the incentives generated by the realities of the current system, we can move the conversation forward. We think that our proposal about eliminating at-will is one way of doing this.⁷⁹

In an ideal world of unlimited resources, the goal of employment litigation functioning as a means of reducing workplace discrimination might be a reasonable one. However, because the litigation system is fraught with economically

79. There are good permutations of policy amendments that would complement the contemplated proposal. For instance, some discuss the importability of features of the United Kingdom’s approach to workplace dispute resolution. *See* Estreicher & Eigen, *supra* note 4. Such views are complimentary to the proposals expressed herein.

motivated incentives and disincentives for both employers and employees, we have learned over time that this goal is not one that is attainable (at least most of the time) through litigation alone. As Nielsen, Nelson, and Lancaster note, “[e]mployment discrimination litigation is not so much an engine for social change, or even a forum for carefully judging the merits of claims of discrimination, as it is a mechanism for channeling and deflecting individual claims of workplace injustice.”⁸⁰ It is time to concern ourselves more with fixing a broken system to augment access and permit more employee voice through fair adjudicatory systems, than to worry about the smaller volume of employee beneficiaries of the existing system. We are hopeful that continued empirical work exploring the incentives and mechanisms underlying the existing system’s results will help propel the conversation beyond banning mandatory arbitration towards a more productive one about constructing an accessible, fast, cost effective, reliable means of providing wronged employees redress.

80. Nielsen et al., *supra* note 37, at 196.