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# THE LIMITS OF MULTIPLE RIGHTS AND REMEDIES: A CALL FOR REVISITING THE LAW OF THE WORKPLACE

*Ann C. Hodges\**

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 initiated an era of expansive legislative protection of individual employment rights. At the time of its passage, Title VII was much needed to address the widespread discrimination and segregation in the workplace. While it has not been an unqualified success, the years since Title VII have seen obvious substantial improvements in distribution of jobs on the basis of race, gender, and ethnicity, and a reduction in the earnings gap between whites and blacks and men and women. Equally obvious, Title VII has neither eliminated discrimination in the workplace nor has it resulted in complete equality.<sup>1</sup> The fortieth anniversary of its passage is an appropriate time to reflect on the state of the law in the workplace and to consider where the law is and where it should be.

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\* Professor of Law, University of Richmond. I am grateful for the valuable research assistance of Josh Laws and Rebecca Royals-Breland, Class of 2005 and Luke P. Wright, Class of 2006, University of Richmond. Many people over the years have contributed to my education about labor and employment issues – professors, workers, union leaders and members, attorneys, employers, NLRB and EEOC staff, and students. This article is a result of my interactions with all of them, yet the recommendations and whatever errors they contain are my own.

1. Indeed, in speaking at a forum celebrating the fortieth anniversary of Title VII, longtime civil rights attorney Julius Chambers noted that plaintiffs continue to face the same problems that existed at the enactment of the statute when he commented there are “no money, no lawyers, and no precedent to help them establish a violation.” *Appeals Court Judge, Rights Lawyers Recall Early Title VII Years, Mixed Progress Record*, 120 DAILY LAB. REP. A-5 (June 23, 2004). These same problems are highlighted *infra* and form part of the basis for my recommendation for reinvigoration of collective rights.

The decline of unionization, although largely unobserved in 1964, had already begun, and has since proceeded apace.<sup>2</sup> As many scholars have pointed out, the focus of our system has shifted from collective workplace rights to individual workplace rights.<sup>3</sup> A greater number of potential legal claims are available to employees to enforce workplace protections, but far fewer employees are covered by collectively bargained contracts that provide enforceable rights and benefits.<sup>4</sup> Despite the proliferation of individual legal rights, the collective system remains, resulting in two parallel and often intersecting regimes for governing the workplace. Some labor law scholars wisely recognized the problems created by this shift in the legal regime years ago. Professor Clyde Summers cautioned that the expanding and sometimes cumulative rights would “hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery.”<sup>5</sup> Professor Katherine Van Wezel Stone argued that the overlapping systems endanger both collective and individual rights, because labor law broadly pre-empts state law rights and the decline of unions has reduced pressure to create, retain, and enforce individual rights.<sup>6</sup>

It is never easy to reconcile varying schemes of state and federal regulation, but the workplace provides a particularly apt example of the difficulties inherent in patchwork regulation by state and federal statutory and common law and, more importantly, the difficulties inherent in two different approaches to workplace rights, the collective and the individual. The exponential increase in individual legal rights since 1964, when many of our civil rights became law, has compounded the problem of these dual systems.<sup>7</sup> The growth of alternative dispute resolution,<sup>8</sup> often unilaterally imposed by the employer, has added another layer of complication. It has been argued that section 301 preemption has had the effect of depriving unionized employees of “the benefit of the explosion of individual employee rights.”<sup>9</sup> More recently, the decision of the Na-

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2. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10 n.10 and corresponding text (1988); see Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578-79 (1992).

3. Stone, *supra* note 2, at 584; see Summers, *supra* note 2, at 10.

4. Summers, *supra* note 2, at 11; Stone, *supra* note 2, at 584.

5. Summers, *supra* note 2, at 19.

6. See Stone, *supra* note 2, at 635.

7. *Id.* at 616.

8. *Id.* at 633.

9. *Id.* at 619-20.

tional Labor Relations Board in *IBM Corp.*,<sup>10</sup> provided another view of the problem of intersecting rights. In *IBM*, the Board restricted the right of nonunion employees to have a coworker present at an investigatory interview that could reasonably result in disciplinary action, based on the potential of a contrary rule to interfere with the objective of eliminating workplace discrimination.<sup>11</sup> Analysis of this case suggests it is time to renew the call for a comprehensive reconsideration of the law in the workplace.

Some might ask what relevance an NLRB decision has to Title VII? The answer is that the individual right to be free from discrimination granted by Title VII was used to restrict employee rights under section 7 of the National Labor Relations Act ("NLRA").<sup>12</sup> Using the rights created by one statute to limit the rights under another is problematic for all participants in the system of workplace regulation.<sup>13</sup> I do not suggest that Title VII was not necessary to redress widespread employment discrimination, nor do I question the need for continuing protection against discrimination by employers and unions. I do urge, however, that we reexamine the current system to determine if it is working well for its constituencies (employees, employers, and unions), as well as society as a whole.

There is some risk in challenging the status quo. We may end up with a system that is worse instead of better. It is a particularly risky gamble for workers and unions because their lobby is less powerful and their cause does not always draw strong support, even from those who would seem to benefit from increased protection. There is no guarantee that a revised system will provide workers a stronger voice in the workplace than the current system. Nevertheless, it seems that a comprehensive reconsideration of the law of the workplace is needed, because as Professor Summers predicted, the only beneficiaries of the current system may be the lawyers.

The *IBM* decision illustrates two major problems with current workplace regulation. First, there are two distinct but overlapping systems – the individual and the collective – which often collide. The result is, at best, an imperfect realization of rights under both systems, and perhaps more often, the sacrifice of rights under one to rights under the

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10. 341 N.L.R.B. 148, 2004 WL 1335742, at \*1 (2004). This right to representation during investigative interviews is known as a *Weingarten* right, named after the decision in which it was established, *NLRB v. Weingarten*, 420 U.S. 251 (1975).

11. *Id.*

12. *Id.* at 5.

13. See generally, Stone, *supra* note 2, at 635.

other. Second, the multitude of forums available for litigation results in multiple claims arising out of the same action, as well as tribunals deciding issues outside their expertise. After analyzing the *IBM* decision, I will consider the costs and benefits of the current regulatory system for employers and employees. Finally, I will make some broad suggestions for change, urging a revitalization of the collective system and creation of a system of labor courts to resolve workplace disputes.

## II. THE *IBM CORP.* DECISION<sup>14</sup>

The *IBM* decision dealt with an issue which has engaged the Board off and on for more than twenty years – whether the right to union representation in investigatory interviews that could lead to discipline,<sup>15</sup> recognized by *NLRB v. Weingarten*,<sup>16</sup> applies in the nonunion workplace.<sup>17</sup> The Board concluded, in this latest reconsideration of the issue, in a 3-2 decision, that although application of the *Weingarten* right to nonunion employees is a permissible interpretation of the statute, policy considerations weigh against such interpretation.<sup>18</sup> Accordingly, the *IBM* decision reversed *Epilepsy Foundation*,<sup>19</sup> which four years earlier found employee rights to *Weingarten* representation in Section 7 of the statute.<sup>20</sup> In introducing the policy considerations on which it relied, the Board majority in *IBM* noted that

[t]he years after the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country. Employers face ever-increasing requirements to conduct workplace investigations pursuant

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14. 341 N.L.R.B. 148, 2004 WL 1335742 (2004).

15. *Id.* at \*1.

16. 420 U.S. 251, 251, 267 (1975).

17. See *Materials Research Corp.*, 262 N.L.R.B. 1010, 1027 (1982) (holding that an unrepresented employee has the right to co-worker representation at an investigatory interview that could reasonably lead to discipline); *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 232 (1985) (holding that the NLRA does not provide *Weingarten* rights to nonunion employees); *E. I. DuPont de Nemours*, 289 N.L.R.B. 627, 629-30 (1988) (holding that although the presence of a co-worker at an investigatory interview might benefit both employer and employee, more powerful policy reasons dictated that *Weingarten* rights should not be available to nonunion employees); *Epilepsy Found.*, 331 N.L.R.B. 676, 698 (2000) (holding that nonunion employees have *Weingarten* rights to request co-worker representation), *enforced in relevant part*, 268 F.3d 1095, 1105 (D.C. Cir. 2001), *overruled by IBM Corp.*, 2004 WL 1335742, at \*1.

18. *IBM Corp.*, 2004 WL 1335742, at \*1.

19. 331 N.L.R.B. at 676.

20. *Id.* at 678.

to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment.<sup>21</sup>

The Board then set forth its supporting policy rationales, several of which focused on the inability of coworkers to serve the same purposes as a union representative.<sup>22</sup> The rationale that most directly impacts the intersection of individual and collective rights, however, is that employer investigations conducted pursuant to laws designed to prevent harassment and create safe workplaces may be compromised by the presence of a coworker.<sup>23</sup> The court reasoned that a coworker is more likely to interfere with the effectiveness of the investigation than a union official, who owes duties to all bargaining unit members.<sup>24</sup> While the majority recognized that under the *Weingarten* doctrine the employer could forgo the investigatory interview to avoid the confidentiality concern,<sup>25</sup> it concluded that the employer might be faced with liability because of its failure to conduct a fair and full investigation.<sup>26</sup> Thus, the majority concluded “that, on balance, the right of an employee to a coworker’s presence in the absence of a union is outweighed by an employer’s right to conduct prompt, efficient, thorough and confidential workplace investigations.”<sup>27</sup>

### III. THE PROBLEMS ILLUSTRATED

The *IBM* decision highlights two major problems with the current workplace regulation. First, the Board, which is charged with interpreting and enforcing the NLRA,<sup>28</sup> evaluated the impact of rights under the NLRA on Title VII, an independent statute outside its expertise.<sup>29</sup> The problem with the availability of multiple forums for various claims that may intersect is that a tribunal may not accurately interpret laws that lie outside its jurisdiction. Even if the assessment of the law is accurate, the

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21. *IBM Corp.*, 2004 WL 1335742, at \*6.

22. *Id.* at \*5-8.

23. *Id.* at \*8-9.

24. *Id.* The majority recognized that the risk existed with respect to union officials as well but considered the risk to be lower. *Id.*

25. *Id.* at \*9.

26. *Id.*

27. *Id.* at \*10.

28. 29 U.S.C. § 160(a) (2000).

29. Although some Board members may have prior experience with Title VII issues, such expertise is not required. *See id.* § 153(a).

decisional body, at a minimum, may not evidence a nuanced understanding of the legal implications of its interpretation.<sup>30</sup>

In *IBM*, for example, one of the predominant concerns of the Board was confidentiality of investigations.<sup>31</sup> The majority suggested that a right to coworker representation might discourage complaints by employees about coworker conduct, in addition to possibly interfering with employer investigations in two ways.<sup>32</sup> First, the coworker's presence could inhibit the targeted employee from answering questions honestly, and second, the coworker might disclose to others information that could interfere with the employer's efforts to discover the truth.<sup>33</sup>

Although confidentiality is a legitimate concern, the *IBM* decision failed to give sufficient weight to a number of other factors. First, only employees have section 7 rights, and under the NLRA, supervisors, managers and independent contractors are not considered employees, so investigations of workers in any of those positions would not be affected by the decision.<sup>34</sup> Second, most employees do not report harassment.<sup>35</sup> The added impact of a right to coworker representation for an employee accused of harassment may, as a practical matter, have little impact on reporting. Third, the person under investigation can breach confidentiality as easily as a supporting coworker. The majority in *IBM* never considered whether safeguards could be put into place to minimize the potential negative effects while preserving the employees' Section 7 rights. For example, the Board might have allowed the employer to impose confidentiality obligations on the coworker representative or to limit the representatives to coworkers not involved in the incident under investigation.<sup>36</sup>

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30. While NLRB unfair labor practice decisions are appealable to the federal appellate courts (see *id.* § 160(f)), as are other federal employment law claims, the deference owed to the NLRB as an administrative agency may limit the appellate courts' abilities to logically accommodate both the NLRA and other federal employment statutes. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990); *Ford Motor Co. v. NLRB*, 441 U.S. 466, 496-97 (1988); *Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984).

31. *IBM Corp.*, 2004 WL 1335742, at \*8.

32. *Id.* at \*9.

33. *Id.*

34. 29 U.S.C. § 152(3); see *NLRB v. Bell-Aerospace Co.*, 416 U.S. 267, 289 (1974) (holding that "'managerial employees' are not covered by the [NLRA]").

35. See Mindy E. Bergman, et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. OF APPLIED PSYCHOLOGY 230, 237 (2002); Louise Fitzgerald, et al., *Why Didn't She Just Report Him?: The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 121 (1995); Sandy Welsh & James E. Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, 36 CANADIAN REV. OF SOC. & ANTHROPOLOGY 559, 559-60 (1999).

36. See *Caesar's Palace*, 336 N.L.R.B. 271, 272 (2002) (finding that where an employer im-

To be fair, given the Board's limited authority, it may have been unable to envision an accommodation of these rights which it could implement. If, for example, the employer's investigation was delayed or rendered less effective by its obligations under Section 7, the Board could offer employers no assurance that such factors would be taken into account in determining whether the employer's response to harassment was sufficiently prompt and effective to avoid liability.<sup>37</sup> The potential impact of a requirement of coworker representation on an employer's defense in a sexual harassment case is a complex question that would not be easily determined by courts that regularly decide such cases, much less the Board, which regularly decides only cases under the NLRA.

The broader point, however, is that the *IBM* decision, under the guise of protecting the confidentiality of harassment reporting procedures,<sup>38</sup> took away the Section 7 rights of all employees to coworker representation in investigatory interviews.<sup>39</sup> The real reason for the decision may be to protect the employer's ability to investigate, for purposes of eliminating and punishing problem employees and defending itself against harassment claims. But the fact remains that the individual right was used to limit the collective right, and overall, employees lost. The existence of a right to coworker representation in the nonunion workplace is not well known and unlikely to discourage many reports of harassment, because in most cases nothing prohibits the harasser from disclosing information.<sup>40</sup> Yet based on the limited potential for interference with employee reports of sexual harassment, all nonunion employees lost the right to representation at investigatory interviews as a result of the *IBM* decision.

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posed a confidentiality rule on each employee interviewed during an investigation of unlawful drug activity, section 8(a)(1) of the NLRA was not violated because the purpose of the rule was to protect witnesses, prevent the destruction of evidence, and preclude the manufacture of false testimony in a situation involving allegations of a cover-up and threats of retaliation and violence); see also *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002) (finding that a rule prohibiting employees from discussing sexual harassment complaints among themselves was a violation of section 8(a)(1), but suggesting, based on *Caesar's Palace*, that such a rule could be justified where the need for confidentiality outweighed the section 7 rights).

37. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (establishing affirmative defense to liability where supervisors engage in harassment).

38. *IBM Corp.*, 341 N.L.R.B. 148, 2004 WL 1335742, at \*7-8 (2004).

39. *Id.* at \*10.

40. Accused harassers might be reluctant to reveal information relating to the harassment due to embarrassment, but that certainly will not be true in every case. Under certain circumstances, the employer may be able to restrict discussion of an ongoing investigation into misconduct and such restrictions, where permissible, could be applied to both the alleged harasser and his co-worker representative. See *supra* note 36.



This phenomenon has worked in reverse as well, in cases where collective rights have interfered with individual rights. In *Emporium Capwell v. Western Addition Community Organization*,<sup>41</sup> the activity of two employees seeking to press the employer to end discrimination was found to be unprotected because the employees bypassed the union and tried to pressure the employer to deal with them directly.<sup>42</sup> While the employees believed that they were taking the most effective route to combat race discrimination, they lost their jobs because they did not work through the chosen collective representative.<sup>43</sup> Their individual rights to protest race discrimination were limited because they were part of a collective bargaining unit. Like *IBM*, this case protects the interests of the employer, here to be free from any economic pressure other than that of the chosen union representative. Neither the union nor the other employees objected to the protest activities. Rather, it was the employer who fired the employees and complained about being subjected to conflicting obligations – economic pressure to bargain with a group of employees who were not the certified bargaining representative.

Employers also suffer under the present system. While it allows them to pit different employee rights against one another, often negating one in favor of another as in *IBM*, employers do face conflicting obligations under various statutes.<sup>44</sup> In addition, employers may be required to defend employment actions in several different forums.<sup>45</sup> One consequence of this phenomenon has been employer efforts to confine disputes with employees to employer-created alternative dispute resolution procedures.<sup>46</sup> While many employee advocates have decried this effort as interfering with employee access to the courts,<sup>47</sup> others have suggested

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41. 420 U.S. 50 (1975).

42. *Id.* at 65-70.

43. *Id.* at 56.

44. See, e.g., Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 *MIAMI L. REV.* 567, 603-08 (1994) (discussing conflicting obligations under the NLRA and the Americans with Disabilities Act).

45. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 *B.C. L. REV.* 351, 398-99 (2002) (discussing the possibility of multiple claims when only one employee is fired); Summers, *supra* note 2, at 18-24.

46. See *Circuit City Stores v. Adams*, 532 U.S. 105, 109-10 (2001); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 72-73 (1999); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

47. For criticisms of employer mandated arbitration, see generally Cliff Palefsky, *The Civil Rights Struggle Against Mandatory Arbitration - From "Separate But Equal" to "Just Another Forum,"* in DANIEL P. O'MEARA, *ARBITRATION OF EMPLOYMENT DISPUTES* 534 (2002); Sarah Rudolph Cole, *Incentives & Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 *UMKC L. REV.* 449 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14

that the lower cost arbitral forum offers a better opportunity for some employees to obtain justice.<sup>48</sup>

#### IV. THE ENFORCEMENT PROBLEM

Employees have more legal rights than ever before, yet data regarding enforcement of those rights indicate that the rights are often more theoretical than real.<sup>49</sup> The cost of litigating such claims is beyond the means of the average employee and an even greater hurdle for the discharged employee with substantially reduced income.<sup>50</sup> Many attorneys charge several hundred dollars just for an initial consultation, a substantial barrier for the low wage employee.<sup>51</sup> In addition, attorneys who work on a contingent fee arrangement will take only cases with a very strong chance of success and a relatively high potential recovery.<sup>52</sup> Because of the substantial cost of litigation, many aggrieved employees find it difficult to obtain legal counsel to enforce their rights. Only a small percentage of individuals seeking representation for employment claims actually obtain it.<sup>53</sup>

Government agencies do not adequately fill the enforcement gap. The agencies with employment law responsibilities have limited resources. The Equal Employment Opportunity Commission ("EEOC"), which enforces most of the federal employment discrimination statutes,

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HOFSTRA LAB. L. J. 1 (1996); 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 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017 (1996).

48. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 561-63 (2001); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L. J. 83, 91-93 (2001).

49. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 29-30 (1998).

50. *Id.* at 56 (stating that "the cost of litigating an employment dispute is at least \$10,000, even if the case is resolved without trial. If a trial is required, the cost increases to at least \$50,000.").

51. *Id.* at 57.

52. *Id.* (citing study that revealed that lawyers representing plaintiffs generally refused to handle cases without a potential recovery of at least \$60,000 in damages in order to insure adequate compensation for their time and expenses).

53. See *id.* at 58 (reporting testimony of Paul Tobias, founder of the National Employment Lawyers Association, that 95% of employees that seek assistance from private attorneys for employment law claims do not obtain counsel); see also St. Antoine, *supra* note 48, at 91 (noting that one plaintiff's attorney kept records revealing that he agreed to represent one of every eighty-seven potential clients who contacted him).

received 81,293 charges from private sector employees in fiscal year 2003<sup>54</sup> and filed or participated in 393 lawsuits.<sup>55</sup> The agency obtained benefits for another 13,533 employees in the administrative process.<sup>56</sup> The Occupational Safety and Health Administration ("OSHA"), which administers the Occupational Safety and Health Act, conducted 39,817 workplace inspections in fiscal year 2003.<sup>57</sup> Although that number may sound high, considering that OSHA is responsible for monitoring seven million workplaces, the inspections are clearly inadequate.<sup>58</sup>

While legal aid organizations handle some employment claims for low-income clients, these claims are a small percentage of the caseload, and consist primarily of income maintenance cases like unemployment compensation claims.<sup>59</sup> Some national public interest organizations also handle employment litigation, although the amount and type varies significantly among such organizations.<sup>60</sup> These organizations tend to focus on high visibility issues such as discrimination and litigate a small number of cases that are likely to be influential.<sup>61</sup> Professor Jolls, who has researched the role of public interest organizations in employment law enforcement, concludes that neither the legal services organizations, nor the national public interest organizations "succeed very well in meeting the full set of employees' needs for legal representation."<sup>62</sup> Difficulties in obtaining legal representation disadvantage employees attempting to enforce legal rights. Empirical evidence demonstrates that individuals

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54. EEOC, *Charge Statistics FY 1992 Through FY 2003*, at <http://www.eeoc.gov/stats/charges.html> (last modified January 27, 2005).

55. EEOC, *EEOC Litigation Statistics FY 1992 Through FY 2003*, at <http://www.eeoc.gov/stats/litigation.html#fn1> (last modified April 22, 2005).

56. EEOC, *All Statutes FY 1992 - FY 2003*, at <http://www.eeoc.gov/stats/all.html> (last modified January 27, 2005). This figure includes successful conciliations, settlements, and cases withdrawn with some benefit to the charging party.

57. Occupational Safety and Health Administration, U.S. Department of Labor, *OSHA Enforcement Remains Strong, Fair and Effective*, at <http://www.dol.gov/opa/media/press/opa/OPA2003750.htm> (November 18, 2003).

58. Occupational Safety and Health Administration, U.S. Department of Labor, *OSHA Fact Sheet*, at [http://www.osha-slc.gov/OshDoc/data\\_General\\_Facts/factsheet-inspections.pdf](http://www.osha-slc.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf), (last visited May 13, 2005).

59. CHRISTINE JOLLS, *THE ROLE AND THE FUNCTIONING OF PUBLIC-INTEREST LEGAL ORGANIZATIONS IN THE ENFORCEMENT OF THE EMPLOYMENT LAWS* 16 (Harvard Public Law Working Paper No. 105), available at <http://ssrn.com/abstract=574806> (May 18, 2004).

60. See generally *id.* at 11-15.

61. *Id.* at 25.

62. *Id.* Professor Jolls attributes the limitations of these organizations in part to the amount and sources of funding. *Id.*

without counsel are less likely to prevail when their employer has legal representation.<sup>63</sup>

In some cases unions may either litigate or finance litigation of statutory claims on behalf of employees.<sup>64</sup> However, where the union is trying to organize the employees, several federal appellate courts have recently found a union's provision of legal services to employees to be an unlawful pre-election benefit which warrants setting aside representation elections won by unions.<sup>65</sup> Where the union is already the majority representative, however, it can assist employees in enforcing their rights. Unions brought over one-third of the cases litigated under the Worker Adjustment and Retraining and Notification Act ("WARN")<sup>66</sup> a significant number since unions represent less than 10% of the private sector work force.<sup>67</sup> While unions can provide significant enforcement assistance, employees without union representation in this era of declining unions have extremely limited enforcement options and resources.

Employees' claims are often unsuccessful, even when they are able to obtain expensive and often elusive legal representation. In general, individual plaintiffs fare worse in litigation than corporate plaintiffs.<sup>68</sup> Em-

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63. See Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 548, 553 (1987) (study conducted shows odds of winning an arbitration were the same where both parties or neither party were represented, but where one party was represented and the other was not, the party with legal representation was more likely to prevail); Ann C. Hodges, *The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution*, 38 WAYNE L. REV. 1803, 1830 n.138 (1992) (citing a study demonstrating that employees had a 30% chance of obtaining unemployment compensation benefits when unrepresented and the employer had an attorney, but a 50% chance when both parties had legal representation); Rick McHugh, *Lay Representation in Unemployment Insurance Hearings: Some Strategies for Change*, 16 CLEARINGHOUSE REV. 865, 866 (1983) (citing a 1979 study by the National Commission on Unemployment Compensation demonstrating that represented employees were more likely to obtain benefits).

64. See generally Michael Carlin, Note, *Are Union-Financed Legal Services Provided Prior to a Representation Election an Impermissible Grant of Benefit?: An Analysis of Nestle, Novotel, and Freund*, 79 N. C. L. REV. 551 (2001).

65. See, e.g., *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 579 (9th Cir. 1995). Although the NLRB did not agree, the *Freund* decision renders the Board's position permitting such assistance futile. See Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 60-61 (2002) (arguing in favor of the Board position).

66. 29 U.S.C. §§ 2101-2109 (2000). WARN does not grant enforcement authority to any governmental entity or agency. See *id.* § 2104.

67. Bureau of Labor Statistics, U.S. Department of Labor, *News: Union Members Summary*, at [www.bls.gov/news.release/union2.nr0.htm](http://www.bls.gov/news.release/union2.nr0.htm) (January 27, 2005) ("About 36 percent of government workers were union members in 2004, compared with about 8 percent of workers in private-sector industries.").

68. Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. OF ECON. S92, S108 (1997).

pirical studies of employment law claims show that plaintiffs have limited success at every level of the process.<sup>69</sup> Plaintiffs in employment law cases have a lower success rate than those in insurance cases and personal injury cases at all levels, including those tried before administrative agencies, juries and judges, and those disposed of by pretrial motion.<sup>70</sup> Plaintiffs' victories in employment discrimination cases are reversed far more often on appeal than those of defendants, a discrepancy that far exceeds cases in other areas of law.<sup>71</sup> Data also indicate that lower paid employees are less successful than higher paid employees both in litigation and arbitration, and that lower paid employees have less access to courts.<sup>72</sup> While employees have obtained high jury awards, most victorious employees recover relatively small ones.<sup>73</sup> Further, a study of California jury verdicts revealed that women and nonwhites fare worse than other plaintiffs in both wrongful discharge cases and employment discrimination cases.<sup>74</sup> These data reveal that not only do those who have more resources fare better than those with fewer resources, but also that plaintiffs in employment cases do not succeed at the same rate as plaintiffs in the legal system as a whole, a result that is not likely attributable purely to differences in available resources.

Supporters of the current system argue that the threat of large jury verdicts and the potential for class action suits causes employers to comply with legal obligations, even though many employees may be unable to successfully vindicate their rights. Certainly large damage recoveries exist, as do large settlements, particularly in class action cases,<sup>75</sup> where

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69. See Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 559 (2001).

70. *Id.* at 559-60. Plaintiffs in ADA cases have a particularly difficult time prevailing. *Id.* at 561 (citing studies by Ruth Colker and the ABA). Indeed, employment discrimination plaintiffs in federal court are less successful than plaintiffs in almost every other category of civil case. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUDIES 429, 452, 455 (2004).

71. Clermont & Schwab, *supra* note 70, at 450-51.

72. THEODORE EISENBERG & ELIZABETH HILL, EMPLOYMENT ARBITRATION AND LITIGATION: AN EMPIRICAL COMPARISON 10, 13-14 (N.Y.U. Sch. Law, Pub. L. & Legal Theory Research Paper Series No. 65, 2003).

73. See JAMES N. DERTOUZOS, ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 44 (1988) (finding in a study of California jury verdicts in the 1980s that although the average jury award in employee suits was \$650,000, the median employee received only about \$30,000 after post-trial reductions in awards and payment of costs and fees).

74. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 548-49, 552 (2003).

75. See, e.g., *Zolnick v. Graphic Packaging Corp.*, No. 00-CV-1800 (D. Colo. Sept. 9, 2004) (jury award of \$8,006,000 for disability discrimination, reduced by the court to \$1 million); Latino

the attendant publicity may result in legal compliance or early settlement of meritorious cases. However, employer responses to such actions are not limited to compliance with the law. Pressure is mounting for class action “reform” based on business complaints that class actions are used to extract settlements unrelated to the merits of claims.<sup>76</sup> Many employers are using arbitration to limit class actions,<sup>77</sup> which further impairs the legal rights of employees, particularly those with smaller claims that are unlikely to be economically viable as individual claims in arbitration.<sup>78</sup> Moreover, a Rand Corporation study found that the legal costs of being sued for wrongful termination are only about .1% of labor costs (or \$100 per termination), but that employers have responded to this potential liability as if labor were more expensive.<sup>79</sup> The non-legal costs are as much as one hundred times greater than the legal costs.<sup>80</sup> Accordingly, the potential legal claims may reduce employment opportunities far in excess of their cost to employers or value to employees.<sup>81</sup>

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Officers Ass’n of New York, Inc. v. City of New York, No. 99-9568, 2004 WL 2066605, at \*3 (S.D.N.Y. 2004) (\$24,800,000 settlement in class race discrimination suit); see also Jones v. R.R. Donnelley & Sons, No. 96 C 7717, 2005 U.S. Dist. Lexis 1316, at \*3 (N.D. Ill. 2005) (\$15,000,000 settlement approved by court in class race discrimination suit).

76. See Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 551 (2000).

77. See Attorney Urges Employers to Adopt Mandatory Programs as Risk Management Tools, 17 INDIVIDUAL EMP. RTS. NEWSL. NO. 11 (May 29, 2001) (noting that “major advantages of mandatory arbitration . . . are to limit damages and eliminate class actions”); Paul E. Starkman, *Open Issues After Circuit City: Still No Easy Answers on Mandatory Arbitration*, 27 EMP. REL. L.J. 69, 76 (2002) (indicating that arbitration can prevent class actions, the “bane of employers”); Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-6, 8-9 (2000).

78. See Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 336, 339 (1980); Eisen v. Carlisle, 417 U.S. 156, 161 (1974) (stating that “[e]conomic reality dictates that petitioner’s suit proceed as a class action or not at all”). It has been argued that one purpose of class actions is to enable plaintiffs to bring claims that would otherwise be economically impractical to litigate. HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1:6, at 26; see, e.g., Cruz v. Abbey, 778 F. Supp. 605, 612 (E.D.N.Y. 1991) (claims for compensation for lack of required notice of plant closing under WARN where court noted in decision certifying class that many individuals would be unlikely to pursue claims in the absence of class certification); Bailey v. Ameriquet Mortgage Co., 145 Lab. Cases (CCH) 54,031, 54,035, 2002 U.S. Dist. LEXIS 14866 (2002) (claim for overtime pay under the Fair Labor Standards Act).

79. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY 63 (1992). An empirical study of wrongful termination claims found employer attorney fees for defending claims to be rising substantially. DERTOUZOS, ET AL., *supra* note 73, at 45 (1988) (finding annual increases from 15% to 24%).

80. DERTOUZOS & KAROLY, *supra* note 79, at 63.

81. The same Rand Study also found that employment levels dropped in the states adopting the most employee-favorable exceptions to the doctrine of employment at will. *Id.* at 51, 52, 62.

Thus, the current picture of employment regulation is not a pretty one. Employees have many legal rights, but the great difficulty employees have enforcing these rights penalizes employers who comply voluntarily with the law and must compete with those who ignore it. In some cases, rights under one law are negated by another. Employers are faced with myriad and sometimes conflicting legal obligations, imposing substantial cost and encouraging employers to relocate to countries where operations are less expensive. Unions represent a shrinking percentage of the work force, and as a result, their power to aid those workers that they still represent has been weakened. Clearly the current system, while benefiting a few, is not working well for any group as a whole, except perhaps the lawyers.

#### V. RE-EMPHASIS ON COLLECTIVE RIGHTS

While the collective system is the older and perhaps more outdated of the two intertwined regulatory systems currently in effect, I suggest that an updated system of collective representation is better suited to our current economy than the extensive individual rights system. Why elevate collective rights over individual rights? First, collective rights give more power to workers. As demonstrated *supra*, individual rights without collective enforcement are often hollow. Moreover, a higher rate of unionization is associated with greater individual legal rights.<sup>82</sup> Second, a system of collectively negotiated benefits offers more flexibility to employers than mandated legal rights applicable to all. And third, a collective system provides a democratic experience for workers and requires them to interact with one another creating a more communal system which benefits all of society. Thus, a reinvigorated collective system will benefit all participants in the workplace. I will treat each of these arguments for the collective system in turn.

##### A. Employee Empowerment

As noted above, individual enforcement of legal claims is limited. The premise of the NLRA, that employees have more power as a group vis à vis their employers than they would have alone,<sup>83</sup> still holds true.

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82. See DERTOUZOS & KAROLY, *supra* note 79, at 23-25 (describing results of empirical analysis of state law exceptions to the doctrine of employment at will, and confirming that states with right to work laws and states with lower union membership are less likely to allow employees to sue employers at common law to challenge terminations).

83. 29 U.S.C. § 151 (2000).

Unionized employees continue to have higher wages and benefits on average, and greater protection against arbitrary employer action.<sup>84</sup> Legal class actions, a form of collective action, tend to enforce legal rights and bring about change more effectively than do individual cases.<sup>85</sup> Examples abound of employees collectively pressuring employers to achieve change in the workplace.<sup>86</sup> The support of coworkers can make the difference for employees between pursuing claims or giving up.<sup>87</sup> Collective action can spread the benefits among more workers, unlike the individual rights system, which tends to reward the few who have the most resources, the greatest persistence, or the most favorable facts to support their legal claims. And most workers desire some form of collective representation to provide a voice in the workplace.<sup>88</sup>

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84. See SAMUEL ESTREICHER & STEWART J. SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW 65, 67 (2000) (discussing union wage premium); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L. J. 1097, 1143 (1989) (confirming that unionized employees enjoy higher wages and greater job security than non-unionized counterparts).

85. See Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 206 (1991) (stating that “[i]n one [class action] suit, many wrongs can be righted that would likely never have been righted [in an individual action]”).

86. See, e.g., Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1938-39 (1994) (describing instance where twenty seamstresses confronted their supervisor about harassment, causing him to leave the workplace and even the city without collecting his final paycheck); Bernice Lott & Lisa M. Rocchio, *Standing Up, Talking Back, and Taking Charge: Strategies and Outcomes in Collective Action Against Sexual Harassment*, in CAREER STRATEGIES FOR WOMEN IN ACADEME: ARMING ATHENA 249, 257-68 (Lynn H. Collins, et al. eds., 1998) (detailing creation of an organization to combat harassment by faculty and students at the University of Rhode Island); Martha C. Nussbaum, *The Modesty of Mrs. Bajaj: India's Problematic Route to Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 633, 649-50 (describing women's collective response to employer harassment in India); Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 365, 377 (describing collective efforts of female electricians to address problems of pornography in the workplace ignored by their union); Yukiko Tsunoda, *Sexual Harassment in Japan*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 618, 621-22 (describing women's formation of trade unions to combat sexual harassment in Japan) (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); see also Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 25-29 (1988) (describing informal methods of collective resistance to employer oppression).

87. See ELLEN BRAVO & ELLEN CASSEDY, THE 9 TO 5 GUIDE TO COMBATING SEXUAL HARASSMENT 81-87, 122-131 (1992); Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38 J. SOC. ISSUES 5, 18 (1982); GINNY NICARTHY, ET. AL., YOU DON'T HAVE TO TAKE IT!: A WOMAN'S GUIDE TO CONFRONTING EMOTIONAL ABUSE AT WORK 281-319 (Scal Press, 1993).

88. See, e.g., Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 607-610 (2004) (describing the results of a survey conducted by Freeman and Rogers that show that American workers want “more ‘voice’ in the workplace”).



With respect to discrimination law, many scholars have recognized that much of today's discrimination results from workplace structures and policies rather than intentional ill will.<sup>89</sup> Further, scholars are beginning to recognize discrimination as a collective injury requiring a collective response and remedy.<sup>90</sup> The discrimination laws,<sup>91</sup> as they have been interpreted, are not well-suited to finding and remedying such collective discrimination.<sup>92</sup> Negotiation and collective pressure are superior methods of addressing necessary structural changes in the workplace. If the law were to facilitate collective action as opposed to individual law suits, change might be forthcoming. Collective action, combined with minimum labor standards, might better protect the rights of existing employees to be free from discrimination.<sup>93</sup> Notably, the bulk of discrimination cases today involve claims of unlawful termination and harassment, in contrast to hiring claims that predominated in the early years of Title VII litigation.<sup>94</sup> Negotiation of protections against unjust discipline<sup>95</sup> and all forms of harassment would eliminate the need for discriminatorily disciplined or harassed employees to prove unlawful motive, often an insurmountable hurdle in discrimination cases. For example, the employee victimized by the equal opportunity harasser has no current claim under the discrimination laws because the harassment is not "based on sex."<sup>96</sup>

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89. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 178-84 (describing the structuralist view of workplace discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468-74 (2001).

90. See, e.g., Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 247, 257-61 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Roberts, *supra* note 86, at 365-78; see also Sturm, *supra* note 89, at 530-35 (describing collective efforts of employee groups to address discrimination).

91. The "discrimination laws" include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, 42 U.S.C. § 1981, and related state laws prohibiting discrimination on the basis of race, religion, national origin, gender, age, disability and sexual orientation.

92. See Sturm, *supra* note 89, at 475-77 (indicating that a problem-solving approach is superior to using litigation in a "rule-enforcement" approach for remedying "second-generation" discrimination issues).

93. See Crain, *supra* note 86, at 1938 (arguing that "[f]eminist strategies that place working class women at the center of the agenda would also favor collective action and non-litigation strategies, which are likely to be quicker, less costly, and tend to have an empowering effect"); Nussbaum, *supra* note 86, at 633, 649-50 (suggesting collective action as a better approach than legal action to address sexual harassment in India); Resnik, *supra* note 90, at 258-61.

94. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

95. Virtually all union contracts contain protection against unjust discipline. See LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 258 (2000).

96. See Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55, 70-78 (1995) (noting that a person who directs invective at each

A workplace collective could negotiate protection from all workplace bullying, eliminating the need to prove the sex-based motivation in a Title VII lawsuit.<sup>97</sup>

Those aware of some labor unions' history of discrimination might be reluctant to rely on collective agreements for protection against discrimination. The response to this reluctance is three-fold. First, a collective representation system need not look the same as the current system. While delineating the precise contours of such a system is beyond the scope of this essay, I would note that many scholars have proposed alternative systems or elements of reform that are worthy of consideration.<sup>98</sup> Second, the collective organizations in a revitalized system might not even be similar to today's labor organizations,<sup>99</sup> and labor organizations are necessarily becoming more inclusive.<sup>100</sup> Third, the shift to arbi-

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employee is not guilty of harassment because of sex under Title VII because the behavior is not motivated by gender differences).

97. See David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000). Yamada does note, however, that "[w]ith unionized workers comprising only fifteen percent of the American workforce, it is sadly unrealistic to look to collective bargaining as the primary source of even the most minimal rights for most workers at present or in the near future." *Id.* at 535.

98. See, e.g., CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* (1993); CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 162-76 (2003); CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK* 184-230 (2005); PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); Befort, *supra* note 88, at 641-51; Befort, *supra* note 45, at 443-52; Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993); Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 IND. L.J. 103 (2001); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); *The Dunlop Commission on the Future of Worker-Management Rights: Final Report*, DAILY LAB. REP. (BNA) (The Dunlop Commission, appointed by the Secretary of Labor and the Secretary of Commerce in 1993 to answer three questions regarding improvements to labor relations), January 10, (1994) available at

<http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DunlopCommissionFutureWorkerManagementFinalReport.pdf> (last modified February 17, 2004); see also Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1834-46 (2001) (urging that an affirmative legal duty to promote workplace equality be imposed on unions).

99. See Sturm, *supra* note 89, at 530-35 (describing the role of existing unions and new forms of employee organizations in addressing systemic issues of workplace inequality); see also sources cited *supra* note 86 (detailing various formal and informal collective efforts to combat discrimination, some by creating new organizations). The collective organizations might not need to be majority representatives of all employees. See MORRIS, *supra* note 98, at 173-83 (arguing that members only bargaining is permissible under the NLRA).

100. See Crain & Matheny, *supra* note 98, at 1784-85, 1829-30 (describing the AFL-CIO's recent initiatives to appeal to women, people of color and immigrant workers, and to focus on social justice); Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern*

tration of statutory discrimination claims authorized by the Supreme Court is already severely limiting employee rights to litigate discrimination claims.<sup>101</sup> Building collective organizations, which can aid employees in bringing claims, can only assist employees in battling discrimination.

### *B. Employer Flexibility*

It is difficult, if not impossible, to vary legal requirements based on the needs of each employer in the workplace. In today's rapidly changing economy, employers need flexibility in order to adjust to changes in the market. By working collectively, groups of workers can tailor wages, hours, benefits, and other conditions of employment to the needs of each particular workplace and allow for negotiated changes necessitated by changing conditions. Furthermore, employers and employees can create flexible internal workplace systems for dealing with discrimination and harassment.<sup>102</sup> Prior to the rise of individual rights, the determination of terms and conditions of employment in many workplaces was made through negotiations with the union. When unions were more prevalent, they had negotiating power that enabled them to represent employees effectively and obtain contracts enforceable through grievance and arbitration procedures. As unions have declined, however, it has become more difficult for those that remain to succeed in negotiating contracts with substantial benefits for employees.

For a collective system to work effectively again, the legal framework must be carefully drawn to ensure that the collectives of employees have sufficient power,<sup>103</sup> and the information necessary to deal with the employer on a level playing field.<sup>104</sup> This article will only outline a few

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*California*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 99, 99-128 (2001) (describing and analyzing successful and unsuccessful efforts to organize immigrant workers); Stone, *supra* note 2, at 581-82 (pointing out that unions have appealed to women and people of color).

101. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-19 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-35 (1991); see also *supra* notes 46-48 and accompanying text.

102. See Sturm, *supra* note 89, at 491-520 (describing such systems in three different workplaces designed to address internal structural problems contributing to workplace inequality).

103. Sham employee collectives without real participation or power will not accomplish the goals described herein. See CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 68-69 (1970) (indicating that to evaluate the value of worker participation for democracy, one must distinguish "pseudo-participation" from actual participation, partial or full); Sturm, *supra* note 89, at 490 n.96 and accompanying text.

104. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (finding an employer duty to fur-

essential parameters of a modified collective system, most of which exist in the current NLRA, but may require some modification to insure effective application.<sup>105</sup> The employees' collective activity must be clearly and unequivocally protected, with adequate remedies to address employers' violations. Perhaps most important, employees must be aware of their rights to act collectively even without a formal union.<sup>106</sup>

There must be mechanisms through which employees can select their representatives and resolve disputes where the parties are unable to agree,<sup>107</sup> and employees must be allowed to use some work time for collective activity. Finally, there must be some minimum conditions, such as the existing minimum wage and provisions prohibiting discrimination, which set floors below which the parties cannot go in their negotiations. Absent discrimination, however, the employees' collective representative(s) and the employer should be free to agree to terms and conditions of employment desired.

Employer concerns about the cost of negotiations and the lost productivity from employee participation in negotiations should be alleviated by the reduced need for concerns about legal compliance and by greater flexibility.<sup>108</sup> In addition, evidence indicates that unionized workforces generally are more stable and more productive.<sup>109</sup> Many employ-

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nish information to union where employer claims financial inability to pay union bargaining demands); PATEMAN, *supra* note 103, at 69 (noting that effective employee participation cannot occur without the necessary information).

105. Indeed, Professor William Corbett has suggested that the current NLRA provides many of the needed protections already and should be a vital part of the new vision for labor and employment law. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 277-78 (2002). He suggests that a broader interpretation of existing law would reinvigorate the statute and provide substantial protection for nonunion employees to engage in collective action. *Id.* at 298-301. One significant element of Professor Corbett's argument is the holding in *Epilepsy Found.*, 331 N.L.R.B. 676 (2000). Corbett, *supra*, at 277-79. *Epilepsy Found.*, of course, was reversed by *IBM Corp.*, 341 N.L.R.B. 148, 2004 WL 1335742 (2004).

106. A simple proposal for such notification is a requirement that employers post notices in the workplace regarding NLRA rights, a requirement that exists already under most federal employment statutes. See Corbett, *supra* note 105, at 297-98.

107. Currently, economic action by both parties is permitted to break an impasse and to pressure the other party to accede to proposed contractual terms. Many public sector collective bargaining systems use arbitration or other alternative mechanisms such as mediation or fact-finding to resolve negotiation impasses. See JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 326-70 (2004).

108. Employee participation in the workplace is consistent with economic efficiency. PATEMAN, *supra* note 103, at 83.

109. See ESTREICHER & SCHWAB, *supra* note 84, at 69-84; see also PATEMAN, *supra* note 103, at 62-66 (discussing consistent findings in empirical research on employee participation in the workplace that it is desired by employees and enhances job satisfaction with, at minimum, no loss of productive efficiency).

ers recognize the inherent value of workplace participation and independently provide mechanisms for employees to participate.<sup>110</sup> Building on this trend, the collective system fostered by the law must insure that such participation is real and effective. The employer can then capture the productivity value desired and the flexibility offered, which should enable American business to compete more effectively in the global marketplace.

### C. Democratic Participation

Last but not least, the workplace is widely viewed as a training ground for democratic participation.<sup>111</sup> One of the ascribed purposes of the NLRA was to bring democracy to the workplace.<sup>112</sup> Senator Wagner, the primary sponsor of the Act, relied on the vision of Louis Brandeis, who asserted the importance of workers' participation in the conduct of business as a "daily experience of 'responsibility' . . . necessary to their 'intellectual, moral and spiritual development' . . . ."<sup>113</sup> The NLRA, like the U.S. Constitution, gave workers a role in their self-government and a collective voice in their choice of a representative to deal with their employer. The alternative is either corporate or bureaucratic despotism, however benign.<sup>114</sup> While the vision of the NLRA's proponents has not been fully realized by the Act in practice, the importance of employee participation in workplace governance as vital in a democratic nation is still widely accepted.<sup>115</sup> Indeed, a strong independent labor movement

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110. See ESTREICHER & SCHWAB, *supra* note 84, at 58.

111. PATEMAN, *supra* note 103, at 32-35 (discussing John Stuart Mill's theory of the educative function of participation). For a recent related empirical study, see Lisa Schur et al., *High Involvement Work Systems and Political Efficacy: A Tale of Two Departments*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE 56 TH ANNUAL MEETING 9, 9-10 (Adrienne E. Eaton ed. 2004).

112. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423-27 (1993); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 502-03 (1993). This goal was not exclusively related to the interests of the workers. Some thought that providing workers with a voice in the workplace would reduce chances of worker rebellion against the existing social order. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C.L. REV. 939, 950 (1996).

113. Barenberg, *supra* note 112, at 1426 (quoting PHILIPPA STRUM, LOUIS D. BRANDEIS 192 (1984)).

114. See *id.* at 1425; CHARLES HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 251-52 (1988). Heckscher notes that as unions have declined, the government has stepped in to regulate corporate activity directly. *Id.*

115. See ESTLUND *supra* note 98, at 134-39; PATEMAN, *supra* note 103, at 83-84, 102, 105-06; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV.

has been identified as essential to democracy.<sup>116</sup> The role of the Solidarity labor movement in transforming Poland from a communist dictatorship to a democracy has been cited as evidence of the important role that the labor movement and its members can play in democracy.<sup>117</sup>

Cynthia Estlund has recently made a related argument – that the workplace “fosters social ties and civic skills that are essential in a diverse democratic society.”<sup>118</sup> She argues that the workplace is the locus of most intergroup relationships among the diverse membership in American society, and thus plays an important role in enabling individuals from different backgrounds to live together cooperatively in a democratic society.<sup>119</sup> Thus, she urges that the law encourage and protect collective action to foster the connections among diverse workers that are essential to American society.<sup>120</sup>

Robert Putnam documented the decline in social capital in American society in his classic study, *Bowling Alone*.<sup>121</sup> The term “social capital” refers to the connections among individuals that are essential in a civil society for creating norms, establishing community bonds, and insuring an efficient society.<sup>122</sup> Putnam identifies workplace organizations such as unions and professional associations as primary sources of “civic connectedness.”<sup>123</sup> The decline of unions, the limited growth of professional associations, and the growth of contingent work have reduced the importance of the workplace as a source of social capital, paralleling a general reduction in social capital in other parts of society.<sup>124</sup> Encouraging collective activity in the workplace could be one part of a strategy to encourage renewal of community bonds.<sup>125</sup>

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1563, 1596 (1996); Paula B. Voos, *Democracy and Industrial Relations*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE 56TH ANNUAL MEETING 1, 1, 3 (Adrienne E. Eaton ed. 2004); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1822-23 (1983).

116. Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 417 (1992); Voos, *supra* note 115, at 3-4.

117. For a discussion of the role of Solidarity in Poland's transformation, see Shannan C. Krasnokutski, *Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform*, 33 CASE W. RES. J. INT'L L. 13, 19-23 (2001).

118. ESTLUND, *supra* note 98, at 137.

119. *See id.* at 3-20, 177-81.

120. *Id.* at 162-76.

121. ROBERT D. PUTNAM, *BOWLING ALONE* (2000).

122. *Id.* at 18-24.

123. *Id.* at 80.

124. *Id.* at 81-89.

125. *See id.* at 406-07; ESTLUND, *supra* note 98, at 162-76.

Workplace democracy of the future need not look precisely like workplace democracy of the past. Indeed, “flexibility and adaptability” are key features of the “collective bargaining model of industrial democracy.”<sup>126</sup> Some traditional unions have moved away from their democratic origins.<sup>127</sup> New or altered organizations may be necessary in lieu of, or in addition to, existing unions. The law should be structured to facilitate various forms of collective activity which will model and encourage democratic participation and build social ties among workers, both of which are important for American society.

#### *D. Summary*

For the three reasons set forth above, the collective system of workplace rights in a democratic society offers more promise for the future than the individual system. The law of the workplace should be revisited with a view toward strengthening and encouraging the collective system, while still ensuring that minority interests<sup>128</sup> are represented. While the current NLRA can serve as a starting point for reviewing the system, a broader vision taking into account the changes in the workplace since 1935 will help tailor the new collective system to the current conditions. Care must be taken to ensure true representative democracy, along with actual collective power. Neither the interests of business nor the interests of entrenched unions can dominate reform. Instead, the focus must be on creating a system that meets the goals of providing employee power, allowing employer flexibility, and assuring democratic participation in the workplace.

### VI. THE LABOR COURT

A second reform, which could be undertaken with or without the one previously suggested,<sup>129</sup> directly addresses the problem of multiple tribunals for various labor and employment law claims. Many other in-

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126. MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 534 (1970).

127. *Id.* at 516-17, 526.

128. I use the term “minority” here in a broad sense to encompass any group whose interests are in a minority in the particular workplace. This would include racial, ethnic and gender groups when they have minority status in the workplace.

129. If comprehensive law reform reduced the number of potential legal claims through greater emphasis on collective negotiation of employment terms, the number of legal issues would be reduced. Nevertheless, a unitary forum for decision on those claims could provide many of the same benefits produced by consolidation of the myriad of current claims into one tribunal.

dustrialized countries utilize specialized labor courts to resolve disputes.<sup>130</sup> Several years ago, calls for creation of a single forum for enforcement of labor and employment law in the United States were common. Proponents of this procedural change cited the complexity and number of laws, and the enforcement by various agencies and in various forums.<sup>131</sup> Since these calls for change, which were most prominent in the late 1960s and early 1970s, the number of federal employment laws has increased substantially.<sup>132</sup> It is time to re-examine the case for creation of a United States labor and employment court.

A specialized court would offer the advantage of judges with extensive labor and employment expertise.<sup>133</sup> While the NLRA is administered by a specialized tribunal, most other statutes are enforced through actions in federal and state courts, which have general jurisdiction and no particular experience in labor and employment law.<sup>134</sup> Indeed, these judges regularly decry the number of labor and employment cases that occupy their dockets.<sup>135</sup> An additional advantage of a specialized court is

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130. See Benjamin Aaron, *The Administration of Justice in Labor Law: Arbitration and the Role of Courts: International Survey*, 3 COMP. LAB. L.J. 3, 5 (1979-80). In some countries, however, the law distinguishes between individual and collective disputes and locates them in different tribunals. *Id.* at 11-13. See generally Alvin L. Goldman, *Comparative Overview of the Role of Third Party Intervention in Resolving Interests Disputes*, 10 COMP. LAB. L.J. 271 (1989) (discussing the role of labor courts in particular countries); Ian Holloway, *The Constitutionalization of Employment Rights: A Comparative View*, 14 BERKELEY J. EMP. & LAB. L. 113 (1993) (discussing the role of labor courts in particular countries).

131. See Benjamin Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 UCLA L. REV. 847 (1969); Charles J. Morris, *The Case for Unitary Enforcement of Federal Labor Law - Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471 (1972); see also Guy Farmer, *Transfer of NLRB Jurisdiction over Unfair Labor Practices to Labor Courts*, 88 W. VA. L. REV. 1 (1985); Joseph J. Shutkin, *One Nation Indivisible - A Plea for a United States Court of Labor Relations*, 20 LAB. L.J. 94 (1969). The Farmer and Shutkin articles rely primarily on criticism of the NLRB and identified problems with existing labor law to support calls for labor courts. I share some, but certainly not all, of the concerns of these authors, but neither focuses on the extensive law of individual rights in arguing for a labor court.

132. E.g., Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. §§ 2001-2009 (2000) (enacted in 1988); Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109 (2000) (enacted in 1988); Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654 (2000) (enacted in 1993); Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered Sections of 29 U.S.C. and 42 U.S.C.).

133. See Michael Mankes, Comment: *Combating Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67, 83 (1994).

134. See *id.*

135. See generally Gregory Todd Jones, *Testing for Structural Change in Legal Doctrine: An Empirical Look at the Plaintiff's Decision to Litigate Employment Disputes a Decade After the Civil Rights Act of 1991*, 18 GA. ST. U. L. REV. 997, 1028 (2002) (noting that the federal docket is



that it would encourage representation by attorneys specializing in labor and employment law. Such attorneys may be more likely to seek remedies and settlements that address broader workplace problems and the deeply embedded structures frustrating equal employment opportunity.<sup>136</sup>

Consolidation of claims in one tribunal could reduce the problems resulting from conflicting claims decided by multiple courts and agencies. All related claims could be heard in one proceeding, minimizing issues of res judicata and collateral estoppel.<sup>137</sup> A tribunal with broad jurisdiction and expertise could better accommodate overlapping and conflicting rights, remedies, and defenses because of its in-depth knowledge of relevant laws. Resources of all parties, courts, and relevant administrative agencies would be conserved by eliminating the need to litigate in several forums.

In making a persuasive case for a unitary enforcement system in 1972, Professor Charles Morris described the existing system as follows:

The scene presented by the foregoing survey of enforcement problems besetting the nation's principal labor laws is one of confusion and frustration. It is a picture of inefficient administration and inadequate compliance; a jurisdictional nightmare of overlapping and conflicting decisions. There exists a tableau of never-ending campaigns to achieve accommodation among separate tribunals with related but different areas of interest.<sup>138</sup>

Professor Morris recommended a constitutional court to decide cases, as well as consolidated government agencies, one for investigation and prosecution of claims under federal labor laws,<sup>139</sup> one for repre-

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clogged by the increase in employment related litigation); see also J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 518 (1985) (indicating that Chief Judge Seitz of the United States Court of Appeals for the Third Circuit cited "employment cases as his primary example of unwarranted litigation currently clogging the federal dockets").

136. See *Discrimination: Appeals Court Judge, Rights Lawyers Recall Early Title VII Years, Mixed Progress Record*, 120 DAILY LAB. REP. A-5 (June 23, 2004) (paraphrasing EEOC Chairman William Brown (1969-1973) who commented about the increasing representation of plaintiffs by personal injury trial lawyers who are less likely to seek settlements addressing underlying issues).

137. The extent to which such issues would remain would depend on whether future changes in the law allow consolidation of state and federal claims, and on the state of private dispute resolution.

138. Charles J. Morris, *The Case for Unitary Enforcement of Federal Labor Law - Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471, 495 (1972).

139. *Id.* at 498. Specifically, Professor Morris cited Title VII, the NLRA and the Railway Labor Act. *Id.*

sentation functions under the NLRA and the Railway Labor Act, and one for mediation.<sup>140</sup> While the changes that have occurred since 1972<sup>141</sup> warrant a careful look at the proposal to ascertain whether it appropriately addresses changed circumstances, Professor Morris' thoughtful blueprint for a unified enforcement system provides a valuable starting point for consideration.

## VII. CONCLUSION

The two proposed reforms, alone or in tandem would enhance the possibility for achieving the underlying goal of Title VII, namely equal employment opportunity for people of all races, colors, genders, religions, and national origins. Consigning any portion of the responsibility for equal employment opportunity to employee collectives in 1964 would have been unthinkable. While discrimination and unequal power between races, genders, and religious and ethnic groups persist, the changes that have occurred since 1964 make empowering employee collectives to strive for employee rights and benefits a more realistic strategy. As of 2004, Title VII has largely stalled in its efforts to make dramatic changes in the workplace. An alternative approach may re-ignite the fire for improving and eliminating workplace discrimination.

Changing the law of the workplace is always a daunting task. The valuable and Herculean efforts of the Dunlop Commission appointed by President Clinton and composed of representatives from labor, management, and government, did not lead to reform.<sup>142</sup> The interests are entrenched and powerful, and the resulting lobbying fervent. Many are invested in the current system and fearful of change; change is unlikely to come about without increased recognition of the benefits of the collec-

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140. *Id.* at 498-99.

141. The rapid growth of alternative dispute resolution in the nonunion workplace and the additional statutory claims are two factors that must be taken into account in any proposal. In addition, the form of the new tribunal will have to be determined, whether an Article III court or some other adjudicative body. A final issue to be determined is whether to federalize some or all employment law claims and include them in the new tribunal's jurisdiction. If state law claims remain outside the tribunal's jurisdiction, some multiple forum problems would remain. Preemption issues would also remain, although clearly written federal preemption provisions could reduce litigation. See Summers, *supra* note 2, at 24-25. If state law were subsumed by federal, however, the creativity and experimentation in legal development that occurs at the state level could be stifled, perhaps resulting in detrimental stultification of labor and employment law. See *id.* at 24.

142. See Dunlop Commission Report, *supra* note 98. The Commission was appointed by President Clinton to consider and make recommendations designed to "build more cooperative and productive workplace relations." *Id.* at 10.

tive system for employees and employers alike. I hope that this article will contribute in some small way to that recognition.

Perhaps American individualism is simply at odds with the concept of collective representation.<sup>143</sup> The collective system was adopted during a time of great national stress due to depression and war, and substantial immigration from European countries with a stronger tradition of unionization and collective action. Thus, it may be an historical anomaly, which cannot be revived in any significant regard. Any effort to structure a new collective system may be doomed to fail as well. If this is the case, I suspect that we will all be the worse for it.

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143. Befort, *supra* note 45, at 376-77.