

Strengthening accountability for discrimination

Confronting fundamental power imbalances in the
employment relationship

By **Jenny R. Yang** and **Jane Liu** • January 15, 2021

SECTIONS

Executive summary

Over a half century after transformative civil rights laws such as Title VII of the Civil Rights Act of 1964 made discrimination illegal, America is still grappling with its history of racial injustice and the profound ongoing impact of systemic discrimination. The promise of our nation's anti-discrimination laws has not been fully realized because our current enforcement and legal system has failed to confront the fundamental power imbalance underpinning the employment relationship. At the root of the problem is a system that places the primary responsibility for enforcing anti-discrimination laws on individual workers, who must file complaints with their employer or a government agency. Yet the enforcement system does not adequately protect workers from retaliation. The problem is compounded by the dramatic asymmetries of information and resources between employers and employees, asymmetries that often create insurmountable hurdles for workers to defend their rights. This power imbalance has enabled employers to write contractual rules, including forced arbitration clauses and nondisclosure agreements that strip away employee rights and undermine effective enforcement.

In addition, federal anti-discrimination laws such as Title VII have carved out from protections many of our most vulnerable workers, such as domestic workers and migrant farmworkers on small farms, by excluding smaller employers. Furthermore, courts have interpreted our anti-discrimination laws in ways that have not confronted the vast information and power imbalances between employers and workers. And businesses are increasingly outsourcing labor to reduce labor costs and responsibility for workers by contracting out work to independent contractors (who may be misclassified employees) or through temporary staffing agencies. These models create hurdles for workers in obtaining protection under anti-discrimination laws and have fostered a lack of accountability for widespread discrimination in hiring as well as rampant sexual harassment.

Due to this failure of our legal and institutional structures

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to confront vast information and power imbalances between employers and workers, particularly the most vulnerable workers, our enforcement scheme allows systemic discrimination to go unaddressed. The few workers who speak up do so at great risk and face a small chance of success. As a result, many workers do not come forward to report discrimination, and, with little chance of accountability for harm, organizations do not make it a priority to address the problems.

To fulfill the promise of our anti-discrimination laws, the laws must be consistently enforced, and they must reliably protect workers who come forward to raise concerns. To that end, we must confront head-on the fundamental problem of a system that places the primary burden of enforcement on workers. Instead, our enforcement mechanisms should be restructured to rebalance the power disparities and place a greater responsibility on entities better situated to address discrimination in the workplace. In other words, rather than primarily focusing on proving discrimination after the fact, our laws must create more powerful incentives for employers to adopt practices designed to prevent discrimination, audit systems for bias, and proactively correct problems. For example, technology has intensified information and power asymmetries as employers adopt artificial intelligence-driven hiring screens and subject workers to increasing surveillance. Employers should have a greater obligation to audit systems for bias before these hiring screens are used and disclose how these systems operate and make decisions.

In addition, to counter the power imbalance between workers and employers, government enforcement agencies need greater resources to vindicate workers' rights, especially on behalf of the most vulnerable workers. To root out problems while protecting workers, enforcement agencies can strengthen relationships with stakeholders, including worker organizations and employer associations, to help identify patterns of violations and barriers to compliance. Finally, our courts need to interpret anti-discrimination laws with a much deeper understanding of the practical realities of the power and information imbalances in the employment relationship to provide workers with a meaningful private right of action.

The solutions to the problems of information asymmetries and unequal bargaining power must work together by integrating (1) policies that encourage employer transparency and require data collection to support prevention and accountability; (2) greater resources for government agencies and workers' advocates, to level the playing field and enable workers to take a stand against discrimination; (3) revitalized legal doctrines that align with the language and purpose of anti-discrimination laws; and (4) legal protections for workers to address significant gaps in coverage under federal anti-discrimination laws and to preclude employer practices, including forced arbitration clauses and nondisclosure agreements, that coerce employees to contract away their rights and undermine enforcement of anti-discrimination laws.

At a time when our nation is grappling with staggering inequities that leave our most vulnerable workers at great risk of exploitation, discrimination, and retaliation, it is urgent that we restructure our enforcement system to rebalance the power disparities

between employers and workers and ensure meaningful accountability for discrimination.

Key solutions to confront power and information asymmetries

Stronger incentives for employers to prioritize anti-discrimination efforts through greater employer transparency and accountability structures

- Employers should be required to collect data on their employment practices and disclose certain information to enforcement agencies, workers, their unions, and the public, in order to create greater transparency and accountability.
- Employers need to strengthen their internal complaint systems by moving away from a compliance and liability avoidance model to one that proactively addresses and prevents discrimination and retaliation. They must ensure that human resources departments have the resources and leadership buy-in to effectively implement anti-discrimination efforts. To identify patterns of discrimination and retaliation, employers should track discrimination and retaliation complaints and longer-term outcomes, including turnover, pay, and promotion rates, for those who come forward.
- Employers should provide alternative complaint and dispute resolution mechanisms that offer a range of options for resolving employee concerns while also protecting workers from retaliation; these mechanisms include ombuds offices and means for confidential or anonymous reporting.

Strengthened enforcement by government agencies and engagement with stakeholders, including worker organizations and employer associations that can promote compliance

- Federal, state, and local enforcement agencies require significantly greater funding to meet the need for robust investigation and enforcement of employment discrimination claims. The two major federal enforcement agencies—the U.S. Equal Employment Opportunity Commission, which enforces anti-discrimination laws against private employers and investigates concerns of discrimination by public employers for litigation by the U.S. Department of Justice, and the U.S. Department of Labor’s Office of Federal Contract Compliance Programs, which ensures that federal government contractors satisfy anti-discrimination and affirmative action requirements—are vastly under-resourced. Both agencies need budgets that are at least double the level they were during the Obama administration in order to provide vital staffing and resources to incentivize stronger employer action to promote equal opportunity

for millions of workers across the country.

- Unions can play a critical role by obtaining information and demographic data regarding employer hiring, pay, and other employment practices as part of the collective bargaining process; by pursuing justice for members facing discrimination; and by bargaining with employers for contract language and concrete measures to protect workers' civil rights.
- In furtherance of their mission, government agencies should build relationships with community organizations, unions, and worker centers to strengthen outreach and education to workers and increase engagement with employer groups that can assist in promoting employer compliance.

Legal protections to prevent coercive employment contracts and to ensure that all workers are protected by anti-discrimination laws

- Legal protections for workers should prohibit inequitable employer practices such as forced arbitration agreements, nondisclosure agreements, and no-rehire clauses, all of which coerce employees to contract away rights that are integral to discrimination prevention and enforcement of anti-discrimination laws.
- Legal protections should ensure that all workers are covered under our anti-discrimination laws, regardless of the size of their employer or their status as independent contractors or temporary workers.

Revitalization of legal doctrines to align with Title VII's language and purpose

- Policymakers should advance legislation and policies to eliminate onerous legal standards and evidentiary hurdles for workers who file lawsuits and revitalize legal doctrines to align with the language and broad purpose of Title VII and other anti-discrimination laws.
- The Supreme Court's recent *Bostock v. Clayton County* decision provides a promising opportunity to re-examine the "intent" standard in Title VII disparate treatment cases to align with the plain language of the statute. Title VII prohibits an employer from discriminating against an employee "because of" the employee's race, sex, or other protected status. Yet courts have created an "intent" standard requiring evidence of racist, sexist, or otherwise discriminatory "animus" to establish a violation. The *Bostock* decision frames Title VII's but-for causation standard as whether an employee was treated differently "because of" a protected basis, without regard to the employer's specific state of mind. The *Bostock* decision provides a foundation for courts to re-examine their narrow and often insurmountable standards for "but-for causation" and intent.
- To promote equal access to justice, our judicial system needs more federal judges with significant legal experience representing workers and litigating civil

rights cases to ensure that courts approach employment discrimination cases with an understanding of the power and information asymmetries between workers and employers.

Introduction

Over a half century after transformative civil rights laws such as Title VII of the Civil Rights Act of 1964 made discrimination illegal, our nation is still grappling with its history of racial injustice and the profound impact of ongoing systemic discrimination. Although America's anti-discrimination laws have led to substantial progress in tackling egregious discrimination, many structural forms of discrimination remain entrenched in our employment systems. The promise of these laws has not been fully realized because the nation's enforcement system does not effectively confront the fundamental power imbalance underpinning the employment relationship. Many of the legal doctrines and organizational practices that predominate today fall short of creating meaningful accountability for discrimination. Because workers encounter a vast information asymmetry, along with economic vulnerability, the predominant complaint-driven system of enforcement often creates insurmountable hurdles for challenging systems that perpetuate discrimination. An extreme resource imbalance between employers and workers undergirds a legal system that has empowered employers to write contractual rules that strip away employee rights and undermine accountability for discrimination. In addition, federal anti-discrimination laws create gaps in coverage for many of our most vulnerable workers, leaving them without fundamental civil rights protections.

Workplace discrimination plays a persistent and central role in the social and economic inequalities facing our nation. The Covid-19 crisis has exacerbated the harm of longstanding occupational segregation and deep economic inequality. Black, Latinx, Native American, and Asian American workers are facing disproportionately higher rates of unemployment than white workers.¹ Moreover, Black and Latinx workers are overrepresented in hazardous and low-paying jobs deemed essential and face greater economic and health insecurity from Covid-19 than white workers.² The pandemic has also ignited racism against Asian Americans who have faced increased xenophobia, harassment, and hate crimes.³ Workers of color, particularly Black men, are experiencing a slower recovery of jobs than white workers.⁴ Workers with disabilities likewise are facing disproportionately higher unemployment and slower recovery of jobs.⁵ Women, and especially women of color, have been disproportionately hit by unemployment and a growing child care crisis impacting both caregivers and those who rely on them to work.⁶

The surge in economic insecurity and job loss raises new and unprecedented concerns as workers, particularly low-income workers, are increasingly fearful of filing complaints in an unstable job market and are already facing retaliation for organizing.⁷ Even more troubling, research indicates that Black workers are twice as likely as white workers to report that they or someone at work may have been punished or fired for raising safety concerns about Covid-19.⁸

These conditions have magnified inequities. The momentum building for racial justice in response to police killings of Black Americans has put a sharp focus on inequality and the role of structural racism in perpetuating discrimination across the nation's social and economic systems. Thus, we are in a critical moment to reexamine employment

discrimination, our current enforcement system, and the power imbalances in the employment relationship that undermine workers' civil rights. This paper explores multiple ways that the imbalance of power between employers and workers drives organizational structures and legal doctrines that weaken civil rights protections and then considers policy solutions to create a more effective and just system.

First, this paper highlights the persistence of employment discrimination in reinforcing longstanding patterns of occupational segregation and the problems with our current enforcement system. Second, this paper examines how the asymmetry of power and information between employers and employees perpetuates inequities throughout the employment process, from recruitment, hiring, pay, and promotion to complaint reporting. Technology has intensified information and power imbalances as employers adopt hiring screens driven by artificial intelligence (AI) and subject workers to increasing surveillance. Our civil rights enforcement system places a heavy burden on workers to come forward to file a formal complaint to report discrimination to their employer or a government enforcement agency. These structures fail to recognize the vast power and information disparities between workers and employers. Indeed, by some estimates 99.8% of workers facing sexual harassment do not file a complaint due to concerns of retaliation or harm to their career.⁹ This underscores the need to shift enforcement systems to promote greater action from entities, including employers, enforcement agencies, unions, worker centers, and community organizations that have the capacity to advance systemic change. These institutions must play a more vigorous role in tackling employment discrimination in the workplace while also providing workers with more effective protections against retaliation.

Third, this paper examines how our legal system and doctrines have impeded access to the courts by enabling employers to write rules that undermine accountability. These rules include anti-discrimination laws that have historically excluded many of the most vulnerable workers, particularly women and people of color working as domestic or farm workers. Increasingly, companies are evading accountability under workplace laws by classifying workers as independent contractors, outsourcing work to subcontractors, and relying on staffing agencies to provide temporary workers. Many of these workers face gaps in protection under federal anti-discrimination laws, only further exacerbating the power imbalance and the lack of employer accountability for discrimination. In addition, the legal system has empowered employers to write contractual rules, including forced arbitration clauses, nondisclosure agreements, and "no rehire" clauses, that undermine workers' power and access to the courts. Even when workers do go to court, they face substantial barriers to achieving justice from a judiciary that lacks diversity and comprises disproportionately those who have spent careers representing corporate interests. Many legal standards developed by the judiciary, such as class certification and criteria for surviving motions for dismissal or summary judgment, create insurmountable hurdles for plaintiffs challenging employment discrimination in court. To increase access to justice we need a more balanced judiciary—one that includes those who have represented workers—to ensure that legal doctrines effectively root out discrimination by counteracting rather than reinforcing extreme power disparities between employers and workers.

At a time when our nation is grappling with staggering inequalities that leave the most vulnerable workers at greater risk of exploitation, discrimination, and retaliation, there is an

urgent need to restructure our enforcement system to shift the power imbalance between employers and workers and ensure meaningful accountability for discrimination.

The problem of employment discrimination and our current enforcement system

As our country confronts systemic racism and economic injustice, it is critical that we tackle employment discrimination and its role in perpetuating economic inequality. Structural racism, gender stereotypes, and bias based on national origin, religion, age, and disability are embedded in many employment practices that lead to discrimination and hostile work environments. Decades of research show that job applicants with “nonwhite-sounding” names (like Jamal or Mei Chen) are substantially less likely to obtain an interview when compared with those with “white-sounding” names (like Peter and Emily) with the same qualifications.¹⁰ In the corporate sector, women remain underrepresented at every level, and women of color and women with disabilities report facing more barriers to advancement and receiving less support and sponsorship from managers than other women.¹¹ Notably, people of color and white Americans report stark differences in their understanding of these issues. For example, while nearly two-thirds of Black professionals believe that Black employees need to work harder than their colleagues to advance in their careers, only 16% of white professionals agree with that statement.¹²

The costs and harm of employment discrimination are immense and multilayered with personal, societal, and business costs. Discrimination causes lower job satisfaction, productivity, and job performance; higher turnover; and negative physical and mental health outcomes, including stress, depression, and lower self-esteem.¹³ In a recent study of people of color employed in professional occupations, the majority of respondents across all racial and ethnic minority groups reported paying an “emotional tax” of feeling “highly on guard,” due to anticipating racial bias, gender bias, and other biases in the workplace.¹⁴ Research has also shown that experiences with discrimination and racism increase stress and cause negative health outcomes, such as higher rates of hypertension and infant mortality for Black women and increased cardiovascular stress for Latinas.¹⁵

Occupational segregation—where one demographic group is over- or underrepresented among types of jobs—has persisted for decades and is a key driver of racial and gender gaps in earnings and income. Differences in education or skills explain only a small part of these inequities. Its origins stem from slavery and Jim Crow laws that explicitly excluded Black people from nearly all occupations but for a handful of low-paid ones, such as laborers, domestic workers, and agricultural workers. Black people who did become professionals were prohibited from serving white clientele. In addition, labor markets have devalued work performed by immigrants and women in such industries as agriculture and domestic work.¹⁶ In the decade following the passage of the Civil Rights Act of 1964, which outlawed employment discrimination, occupational segregation declined dramatically. However, progress on integrating jobs stalled in the 1980s, and millennial workers today

experience nearly as much racial and ethnic segregation in the workplace as prior generations.¹⁷

Today many longstanding practices, such as segregated job recruiting and referral networks and subjective hiring and promotion criteria, operate to perpetuate occupational segregation. In addition, structural changes in the economy—including the increasing proportion of Black and Latinx workers in temporary and precarious jobs—exacerbate inequality. The Covid-19 pandemic has highlighted the harms of occupational segregation, as Black and Latinx workers are overrepresented in hazardous and low-paid “essential” jobs and are the least likely to be able to work from home.

Given the staggering personal, societal, and business costs of employment discrimination, it is critical that we rethink our enforcement system. Our anti-discrimination laws have been weakened by an enforcement system that does not create meaningful accountability or incentivize employers to identify structural barriers to prevent discrimination. At the root of the problem is a system that places far too much of the burden, responsibility, and risk of addressing discrimination on workers without confronting the inherent power and information asymmetries between workers and employers.

Currently, the primary means of enforcing our anti-discrimination laws is for individual workers to come forward and file complaints with their employer or a government agency. Under Title VII and most federal employment discrimination laws, workers must first file a formal charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) or a state or local fair employment agency before they can sue their employer in court. Even before employees reach the EEOC, most employers rely on a formal complaint process in which employees are expected to file an internal complaint. Although our enforcement structures are premised on the notion that it is the employee’s responsibility to file a complaint accusing an employer of discrimination, research shows this rarely leads to a satisfactory result for employees, and instead forces many to leave their employment.¹⁸

Further exacerbating this problem, workers must contend with gross asymmetries of information and power as compared to employers, a situation that often creates insurmountable barriers for employees to raising complaints. The operation of anti-discrimination laws and institutional structures fail to confront these vast information and power imbalances; instead, they often act to tip the scales further in favor of employers. The few workers who speak up do so at great risk and with a small chance of success. As a result, many workers do not come forward to report discrimination, and, with little chance of accountability for harm, organizations often do not prioritize addressing discrimination.

To confront these information and power asymmetries, our current enforcement system must be restructured so that the responsibility of enforcement does not fall almost entirely on workers. Instead, employers—who have the information and power to address discrimination—should bear a greater responsibility to prevent discrimination and to audit their policies and processes for disparities and bias. Furthermore, government enforcement agencies need sufficient resources to counter the power imbalance between workers and employers through effective enforcement of the law, especially on behalf of

the most vulnerable workers. And government agencies can strengthen enforcement by developing stronger relationships with stakeholders, including with worker and community organizations, to educate workers on their rights, better understand problems on the ground, and identify patterns of violations to inform enforcement.

Power and information asymmetries weaken workers' rights and undermine employer accountability

Workers' lack of access to information

The asymmetry of power and information between employers and employees in all aspects of the employment relationship, from hiring to pay and complaint reporting, makes it challenging for workers to discover and prove discrimination. Before workers can bring a complaint, they must first have some evidence that they have been subjected to discrimination. Yet, under our employment structures, most workers have little or no access to the information needed to identify discrimination. As a result, employers are unlikely to be held accountable for discrimination, which further incentivizes inaction to address or prevent it.

Information about recruitment and hiring discrimination

The asymmetry of information and power between workers and employers is perhaps nowhere more apparent than in the recruitment and hiring process. Hiring discrimination continues to be a pervasive problem. Researchers have found that hiring discrimination against Black and Latinx workers has declined little or not at all over a 25-year period, with white applicants receiving 36% more callbacks than Blacks and 24% more callbacks than Latinx applicants.¹⁹ Another study found that Asian-named applicants were 20% less likely to receive callbacks from large employers and nearly 40% less likely to receive callbacks from smaller employers.²⁰ Researchers also found that Black and Asian applicants who submitted resumes for entry-level jobs that had been “whitened” by being stripped of racial clues received callbacks at a much higher rate than those that clearly indicated an applicant’s racial identity.²¹ Moreover, workers of color also report significant experiences of discrimination. In a 2018 nationwide survey, 56% of Black Americans, 33% of Latinx respondents, 31% of Native Americans, 27% of Asian Americans, 31% of women, and 20% of LGBTQ people responded that they had experienced discrimination in applying for jobs because of their race, ethnicity, gender, sexual orientation, or gender identity.²²

Organizational and cultural factors play a critical role in amplifying workplace discrimination.²³ Subjective decision-making has long been known to allow biases to influence workplace decisions.²⁴ Additionally, in the hiring and promotion processes, employers often consider cultural “fit” in hiring,²⁵ yet employers may use this subjective assessment to replicate the current workforce and leadership team.²⁶

In a 2014 study on hiring discrimination by fine-dining restaurants, testers who were people of color had a lower likelihood of receiving a job interview and, if interviewed, a lower likelihood of receiving a job offer, resulting in a 22% net rate of discrimination for applicants of color.²⁷ Restaurant employers often relied significantly on assessments of an applicant's personality or other "soft skill" criteria, but these criteria were significantly influenced by gender and race bias, resulting in the exclusion of workers of color and female workers.²⁸

In recruitment, discrimination manifests in commonly adopted structures such as referrals based on social networks and personal connections to identify applicants. A 2017 survey of 53,000 employees, in which about one-third of those surveyed had received a referral, found that referrals overwhelmingly benefit white men, with white women, men of color, and women of color much less likely to receive referrals.²⁹

Job applicants typically have little or no information regarding employers' recruiting practices, resume screening decisions, and other hiring-related decisions and processes. Applicants are rarely provided with an explanation as to why they were denied a job. Nor do they have information regarding the qualifications of other applicants or the decision-making process of the employer. Without this information, applicants cannot assess the legitimacy of employers' hiring decisions. The asymmetry of information between workers and employers in detecting discrimination is particularly problematic in light of studies suggesting that "targets of discrimination often underestimate the significance of discrimination in their own lives, even as they recognize it as a problem facing their group."³⁰ As a result, many instances of hiring discrimination go undetected. Moreover, employers often have little incentive to collect, analyze, or disclose information about their hiring process to employees and may even oppose disclosure to avoid public scrutiny and litigation.

Employers' increasing use of technology-driven hiring assessments, including those driven by artificial intelligence, has heightened the problem of worker and employer information asymmetry. To identify and screen job applicants, major employers across industries are using data-driven, predictive hiring tools such as online job advertisements, gamified selection assessments, and video-based interviews that measure facial expressions and voice patterns.³¹

Hiring assessment technology can operate to replicate and deepen existing inequities by relying on inaccurate, biased, or unrepresentative data that can produce discriminatory decisions. Even the most sophisticated tech companies struggle to ensure their AI systems are not discriminatory. Two years ago, Amazon abandoned an AI screening program because the system is reported to have taught itself to prefer male candidates over women, based on the company's past hiring patterns.³² In 2019, Facebook settled several lawsuits which alleged that advertisers, including employers, had used Facebook-provided targeting tools and algorithms to direct ads based on race, national origin, disability, gender, and age.³³

Hiring assessment technology has the potential to help expand the applicant pool by measuring abilities rather than relying on proxies for talent, such as an elite college

degree, employee referrals, or recruitment from competitors, all of which may exclude qualified workers who have been historically underrepresented. By moving away from traditional criteria, employers could potentially hire from a more diverse pool of qualified candidates. But without sufficient oversight to ensure systems are designed to prevent and monitor for bias, automated systems create a substantial risk of making potentially discriminatory decisions virtually unchecked.

As a result of the complex and opaque nature of these systems, workers—particularly those who are screened out without their knowledge—often have little or no information about these systems, making it difficult to challenge discrimination.³⁴ Vendors often refuse to disclose essential information about the system’s design and operation, asserting intellectual property protections. Workers are thus unable to obtain sufficient information about the operation of the screen to file a case. Where there is little likelihood that workers will have sufficient information to challenge the operation of a system, employers may not prioritize investments in ensuring that these systems do not operate in a discriminatory fashion. Because technology provides a sense of objectivity and scientific analysis, discriminatory decisions can become magnified and rapidly expanded.

Information about pay and wage discrimination

Employees’ lack of access to information also contributes to pay discrimination, which continues to be a problem for many workers, including women, people of color, older workers, and workers with disabilities.³⁵ In a 2018 nationwide survey on experiences with discrimination, 57% of Black Americans, 32% of Latinx respondents, 33% of Native Americans, 25% of Asian Americans, 41% of women, and 22% of LGBTQ people reported that they had personally experienced discrimination with respect to equal pay or promotion in the workplace.³⁶ Another study found that the wage gaps between white men and three different groups—Black men, Black women, and white women—existed throughout their careers, with the gap widening over time for the majority of the three groups.³⁷

As with other employment decisions, many workers lack access to their co-workers’ pay information. Most employers do not make this information available and do not report this information to enforcement agencies. According to a 2017 report by the Institute for Women’s Policy Research, only about 17% of private companies practice pay transparency (making employee pay information public). In fact, 41% of private companies discourage and 25% explicitly prohibit discussion of salary information among their employees,³⁸ even though the National Labor Relations Act prohibits employers from retaliating against nonsupervisory employees and job applicants who discuss wages with other employees.³⁹ Without this information, workers and enforcement agencies are unable to detect pay discrimination and challenge pay disparities. This lack of information also undermines workers’ ability to negotiate for fair pay. Often, employers withhold information from workers not only about employee pay but also about an employer’s pay-setting practices and processes. In fact, in pay discrimination lawsuits, employers frequently oppose discovery of information or seek to seal documents regarding their pay practices. As a result, pay disparities remain difficult to challenge. Given the low likelihood

of accountability, employers are often incentivized not to conduct regular pay audits or to proactively evaluate pay-setting processes to minimize bias.

Women and people of color are particularly disadvantaged by a lack of access to pay information, because employers often offer them lower pay than men and white workers hired for the same role.⁴⁰ For instance, a 2019 study of tech industry workers found that 63% of women in the tech industry had been offered a lower salary than men for the same job at the same company.⁴¹ Moreover, women and Blacks are more likely to face backlash in pay negotiations.⁴²

In 2016, to promote greater accountability for pay equity the EEOC required employers with 100 or more employees and federal contractors with at least 50 employees to report aggregate compensation data by race, gender, and ethnicity in an annual filing called the Employer Information Report (EEO-1). Employers have opposed the EEO-1 pay data collection, questioning its utility and arguing that it creates an administrative burden.⁴³ In 2017, the Trump administration's Office of Management and Budget halted implementation of the pay data collection with little explanation. The National Women's Law Center and the Labor Council for Latin American Advancement sued, and a federal court ruled in their favor, directing the EEOC to collect pay data for 2017 and 2018. However, in September 2019, the EEOC announced that it would not be renewing its request for authorization to collect pay data.⁴⁴

Information about discrimination in promotions and work conditions

Employees also face information asymmetries with respect to discrimination in promotions, performance evaluations, and discipline. This is particularly the case where the discrimination at issue is more subtle or when a pattern of behavior or culture of discrimination may be difficult for employees to prove. For instance, women face harsher discipline for workplace misconduct than men do.⁴⁵ One recent study of a financial advisory industry found that following an incident of misconduct, female advisers were 20% more likely to lose their jobs and 30% less likely to find new jobs relative to male advisers. Female advisers also faced harsher outcomes despite engaging in misconduct that was 20% less costly and having a substantially lower propensity toward repeat offenses.⁴⁶ This type of discrimination is difficult for an individual employee to identify and challenge since a worker is unlikely to have access to data on disciplinary actions against other employees.

Similarly, research shows that Black workers receive extra scrutiny from their bosses, are more likely to have their job performance monitored, and are disproportionately punished for mistakes on the job.⁴⁷ Black customer service workers are also rated lower by customers and supervisors on evaluations than white workers, even when their performance is the same.⁴⁸ Again, this type of discrimination, which can lead to disparities in pay, raises, promotions, terminations, and performance reviews, may be difficult for workers to identify and prove, because detecting such discrimination requires access to company-wide data.

As with hiring decisions, employers are increasingly relying on data and technology-driven tools to evaluate worker performance, raising the risk of biased decisions without accountability. Customer ratings have become an increasingly important performance measure for workers as employers and technology platforms seek to incorporate customers' feedback in determining pay and access to work. Yet these systems, while appearing neutral, can operate with bias that adversely impacts workers based on protected categories. For example, studies have found evidence of bias along racial and gender lines in online marketplace platforms.⁴⁹ On Fiverr, a freelance services platform, researchers found evidence that Black and Asian American workers received lower ratings than white workers. Again, this type of discrimination is difficult for employees to identify and prove, since employees do not have access to system-wide data.

Retaliation undermines workers' power

One of the greatest barriers for workers in bringing a complaint of discrimination is the risk of retaliation and harm to their career. This well-founded fear leads to only a small fraction of employment discrimination concerns ever being reported. Employers may conclude that they do not have discrimination problems because they have not received complaints, when in fact the absence of complaints can be a symptom of a lack of trust in the process. Although employers are prohibited from retaliating against employees under all federal employment discrimination laws, data show employers frequently retaliate against employees who report discrimination. In 2019, 53% of private-sector charges filed with the EEOC included an allegation of retaliation.⁵⁰ A 2018 report by the Center for Employment Equity found that 68% of sexual harassment charges during 2012-2016 included a retaliation charge and 64% of those who filed sexual harassment charges reported losing their job as a result of their complaint.⁵¹

Retaliation can take many forms, including termination, discipline, negative evaluations, department or shift changes, demotion, increased surveillance, hostility or ostracization by co-workers, and blackballing and adverse job references if the employee wants to find a job elsewhere. Employers often react to internal discrimination complaints by attacking those who complain in order “to isolate the charging party and to send a message to other workers that the cost of pursuing legal remedies to discrimination will be prohibitively high.”⁵²

People of color, women, and others in marginalized groups are particularly at risk of retaliation in the form of interpersonal costs, such as being ostracized by their co-workers or experiencing damage to their reputation.⁵³ In one study, a Black job candidate who attributed rejection to race discrimination was perceived by participants as more of a “troublemaker” than a Black job candidate who attributed the rejection either to his or her interviewing skills or to job competition, even when the discrimination was blatant.⁵⁴ Similarly, studies have found that women who label conduct toward them as harassment are evaluated negatively.⁵⁵ Women who experience sexual harassment also do not report because they fear being blamed for the harassment.⁵⁶ Although these types of social costs present a significant barrier to workers coming forward, courts have often found that ostracization by co-workers is not sufficient to rise to an “adverse action” by the employer,

which an employee must prove to win on a claim of retaliation.⁵⁷

The prevalence of overt retaliation by employers despite legal prohibitions on retaliation reflects the significant power imbalance between employers and employees and fundamentally undermines enforcement of the law. Most employees who file discrimination complaints are not motivated primarily by monetary damages; rather, they want to improve working conditions, have their job back, see the perpetrator punished, or prevent future discrimination against themselves and their co-workers.⁵⁸ In deciding whether to bring a complaint, workers will often determine that the risks that they will likely lose their job, face hostility or negative work conditions that will force them to leave their job, or be blackballed in their industry, outweigh the benefits, particularly where it is unlikely the employer will take effective action to address the problem.

Moreover, the costs and risks of coming forward are often greater for vulnerable workers, including low-wage and immigrant workers. Research has shown that workplace harassment is more likely to occur in organizations that are male-dominated and highly hierarchical, with a significant power imbalance among employees.⁵⁹ Because power imbalances are often severe in the workplaces of low-wage workers who are disproportionately women of color and immigrant women, these workers are at heightened risk for discrimination and especially harassment. Yet they are the most likely to keep silent, due to greater barriers in coming forward. In particular, many cannot afford to risk losing their jobs.⁶⁰ Undocumented immigrant workers may not come forward out of fear of disclosure of their immigration status. Immigrant workers face language and other barriers to learning their rights. Placing the overwhelming burden of enforcement on these workers fails to reckon with the reality created by power imbalances. As one author writes: “If power imbalances leave those at the bottom of the hierarchy vulnerable, more needs to be done to even out the scales.”⁶¹

Power imbalances undermine workers’ access to complaint systems

Even when workers come forward to raise concerns of discrimination in their workplaces, they confront a lack of accountability fueled by the vast power disparities between workers and employers. Employers’ human resources staffs and internal grievance processes often serve to protect employers from liability rather than address and prevent discrimination faced by employees. As a result, employees are often reluctant to report issues internally.

The #MeToo movement has brought national attention to the prevalence of workplace harassment and other forms of discrimination. It has highlighted how power imbalances between employers and workers shape internal reporting structures, such as in human resources (HR) operations. Even in 2016, before the #MeToo movement went viral, the co-chairs of the EEOC’s Taskforce on the Study of Harassment in the Workplace found that HR trainings and procedures are “too focused on protecting the employer from liability.”⁶² As a result, HR systems often respond to complaints as a threat to the organization. Especially when perpetrators are star employees viewed as having high economic value,

organizational leaders often do not support meaningful disciplinary action.⁶³ Workers who report discrimination through formal complaint mechanisms often find that their employer seeks to discredit them and fails to investigate complaints promptly and thoroughly.⁶⁴ Rather than take meaningful steps to address and prevent discrimination, organizations frequently respond by attempting to establish that conduct did not meet legal standards for actionable harassment.⁶⁵ Companies rarely punish perpetrators, and instead more often transfer the victim to a different department or location.⁶⁶ Many companies will even keep the outcome of a complaint or investigation secret, resulting in the victims feeling frustrated or defeated when they do not see the perpetrators facing consequences.⁶⁷

In the 30 years since Anita Hill, testifying at Clarence Thomas's Supreme Court confirmation hearings, brought national attention to workplace sexual harassment, HR departments have been accepted as having primary responsibility for an organization's efforts to prevent and address concerns of discrimination.⁶⁸ Yet there is an inherent tension in the structure of most HR departments, which are not designed to serve the needs of employees who experience discrimination but rather to function primarily to protect the company from liability. In most organizations HR is given multiple roles with often conflicting interests, including to recruit and maintain top talent, protect employers from discrimination complaints and liability, run an internal complaint process and conduct investigations, and prevent discrimination and improve work culture.

The #MeToo movement has put in sharp focus a longstanding problem: HR structures can reinforce existing power disparities by protecting powerful actors in organizations rather than advocating for the rights of the most vulnerable workers. To ensure that the needs of employees are protected, organizations should consider separating these functions, providing employees their own advocates in internal complaint systems and establishing neutral and independent mechanisms to help resolve concerns.⁶⁹ HR personnel cannot change workplace climate and culture on their own; institutional change requires support, resources, and buy-in from the top.⁷⁰ As the EEOC report stated, "in working to create change, the leadership must ensure that any team or coalition leading the effort to create a workplace free of harassment is vested with enough power and authority to make such change happen."⁷¹

The challenges of current employer complaint systems must be examined in the context of their development in response to two Supreme Court decisions, issued over 20 years ago, on the same date, that established an affirmative defense—the *Faragher-Elleth* defense—for employers against Title VII claims for harassment that creates a "hostile environment." Employers have structured their complaint processes and discrimination policies to ensure that they can shield themselves from liability through this defense.⁷²

In *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Elleth*, the Supreme Court held that an employer could raise an affirmative defense to liability for damages in cases alleging harassment amounting to a "hostile environment" actionable under Title VII by proving two elements: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise[.]"⁷³

Federal courts have subsequently interpreted the *Faragher-Ellerth* test to require very little of employers in demonstrating the efficacy of their anti-harassment measures. Specifically, courts have consistently held that employers satisfy their duty to prevent harassment under the first prong of the defense by merely having an anti-harassment policy and grievance procedure in place, rather than actually assessing whether the policies and procedures are effectively implemented.⁷⁴ Moreover, under the second prong of the defense, federal courts have routinely held that when an employer has a grievance procedure in place, an employee's delay in reporting or failure to report is per se unreasonable. Thus, courts have transformed the issue of reasonableness in both prongs of the defense from a fact-intensive inquiry into one that can be easily satisfied through symbolic compliance efforts, where organizations adopt policies and procedures on paper that do little to protect employees from harassment.⁷⁵

However, a recent appeals court decision provides an important approach to the application of the *Faragher-Ellerth* test in recognition of the power asymmetries between workers and employers. In *Minarsky v. Susquehanna County*, the Third Circuit Court of Appeals overturned the lower court's dismissal of the case, holding that the fact that the employer had an anti-harassment policy was insufficient in and of itself to show that the employer had exercised reasonable care to prevent sexual harassment. The court found that the plaintiff's failure to report the sexual harassment internally may have been reasonable in light of evidence that the employer did not respond effectively to prior complaints.⁷⁶ Notably, the court recognized "national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims."⁷⁷ This decision reflects an important shift to look beyond an employer's assertions and require employers to show effective action rather than merely having harassment policies and procedures, in order to satisfy their legal obligations.

Enforcement strategies to address power imbalances

As discussed above, workers face vast information and power imbalances throughout the employment process that undermine enforcement of worker rights and shield employers from accountability for employment discrimination. In order to create a more effective enforcement system, we must confront head-on the fundamental problem of a system that places the primary burden of enforcement on workers. Instead, we need to address and correct the power disparities and create enforcement mechanisms that place a greater responsibility on entities with the most information and power to address discrimination in the workplace.

Under this approach, rather than primarily focusing on proving discrimination after the fact, our laws would create more powerful incentives for employers to adopt practices designed to prevent discrimination, audit systems for bias, and proactively correct problems. In addition, to counter the power imbalance between workers and employers, government enforcement agencies would have greater resources to investigate and prosecute cases, especially on behalf of the most vulnerable workers. To root out

problems while protecting workers, greater collaboration with worker organizations, including unions and worker centers, would help enforcement agencies identify patterns of violations to inform government action. Finally, to provide workers with an effective private right of action, our courts should interpret and enforce our anti-discrimination laws with a much deeper understanding of the power and information imbalances in the employment relationship.

The solutions to the problems of information asymmetries and unequal bargaining power must work together. These solutions include (1) policies that encourage greater employer transparency and require data collection to support accountability; (2) investments that give workers, advocates, and government agencies the tools and resources that they need to take action against harassment and discrimination; and (3) revitalized legal doctrines and frameworks that align with the language and broad purpose of Title VII and other anti-discrimination laws.

Data collection, transparency, and accountability

To address information and power asymmetries that make it difficult for workers to identify and prove discrimination, employers should be required to collect data regarding their employment practices and decisions and disclose certain information to enforcement agencies, workers and their unions, and the public to create greater transparency and accountability for their policies and practices. Employers are in the best position to collect data and monitor the impact of their recruiting, hiring, employment, and pay practices and decisions.

Studies have shown that when companies set up transparency and accountability structures, such as collecting and tracking data, identifying gender and racial disparities, and devising hiring and promotion plans to address disparities, the diversity of employees at the management level improves.⁷⁸ Moreover, greater pay transparency can help to hold managers accountable and reduce pay disparities by gender and race.⁷⁹ Greater transparency and accountability also ensure that employers establish policies and procedures to guide employment decisions that are fairly and consistently applied. A 2019 study of the San Francisco-area restaurant industry found that working with restaurants to decrease informal processes and implement standardized hiring processes contributed to greater racial equity in hiring and less racial segregation across restaurants.⁸⁰

The growing use of hiring assessment technology has heightened the need for greater transparency and accountability in hiring screens. Without adequate safeguards, algorithmic assessments can perpetuate patterns of systemic discrimination already present in the workforce.⁸¹ Civil rights leaders have released an important set of “civil rights principles” to guide tech developers, employers, and policymakers in the development, use, and auditing of hiring assessment technologies.⁸² These principles recognize that to prevent discrimination and advance equal opportunity, hiring assessment technologies must be explainable, job-related, and audited.

Improving internal complaint systems

Even when employers are more transparent about their decision-making, that transparency is only effective at combating discrimination if it is coupled with effective accountability mechanisms. Employers need to strengthen their internal complaint systems to move from a compliance and liability avoidance mindset to a commitment to preventing discrimination and retaliation. Leadership must ensure that human resources departments have the resources and leadership backing to support anti-discrimination efforts and that dispute resolution mechanisms are designed to address power imbalances.⁸³ Employers also need to ensure that discrimination complaints are investigated in a prompt and thorough manner, and that effective accountability mechanisms consistently hold perpetrators and the organization accountable for their actions. Human resources departments should regularly reinforce employee education and training regarding workplace civil rights in order to increase employees' comfort with using the complaint process. Employers should also track discrimination complaints and outcomes to identify potential patterns and implement solutions to improve outcomes and build employee trust.⁸⁴ In addition, employers should monitor potential retaliation against those filing complaints, by tracking employee turnover rates, pay, and time to promotion.⁸⁵

In order to create more effective systems for resolving concerns and to better protect employees from retaliation, employers should also provide alternative mechanisms to report discrimination. One potential model is the ombuds office, which acts as a neutral party that helps to facilitate options for resolving concerns.⁸⁶ Another potential model is an employee assistance plan, which provides free, confidential assistance to employees with issues in and outside of work that affect workers.⁸⁷ Confidential and/or anonymous reporting mechanisms, such as telephone hotlines or websites to report complaints, enable employees who fear retaliation to come forward. Some employers have embraced tech-enabled third-party complaint and ombuds processes⁸⁸ that can serve as early warning systems by using anonymous and aggregated data to reveal trends and identify systemic issues within an organization. Regular workplace climate surveys can also aid employers in identifying problem areas and ensuring that concerns of discrimination are being addressed proactively.

Increased enforcement by federal, state, and local agencies

Greater transparency is an important first step, but meaningful access to civil rights protections requires consistent enforcement with reliable anti-retaliation protections. The government plays a fundamental role in rebalancing the power disparities between workers and employers. More robust government enforcement is particularly critical because of the information asymmetry facing workers and the high costs of bringing a private lawsuit. The EEOC has the power to investigate charges of discrimination, including the ability to subpoena employer information that may be necessary to support the filing of a complaint.

Employees—particularly low-wage workers—rarely have the resources to take on a much-

better-resourced employer. Workers face difficulty in finding lawyers willing to represent them given the high costs and hurdles involved in prevailing in court.⁸⁹ Even if a worker is able to retain an attorney, the worker must then pay attorney fees and other legal expenses, as well as expend time and energy to advance the case. Federal litigation can drag on for months and years, and the costs and stress of prolonged litigation only increase over time. Increased enforcement by federal agencies alleviates these costs to individual workers by confronting the vast resource asymmetry between workers and employers.

In order for enforcement agencies to play a greater role in enforcement, the agencies need adequate resources to meet the demand for their services. In particular, the EEOC's budget should be doubled so that the agency has the resources and staffing it requires for enforcement. Since 1980, the U.S. workforce has increased by 50%, but the EEOC has a smaller budget today than in 1980, adjusted for inflation, and 42% fewer staff.⁹⁰ This means investigators have larger caseloads, and the agency does not have the ability to pursue many meritorious charges or proactively challenge systemic practices that perpetuate discrimination. As a result, there is a significant delay in investigating and resolving charges, and the agency must make difficult choices on where to focus limited investigatory resources. Frequently, information needed to prove an employee's allegation of discrimination is in the hands of the employer, and the EEOC is uniquely well-situated to obtain this information through an investigation.⁹¹ Thus, while the EEOC plays a critical enforcement role, the need for the agency's investigation and enforcement power to address the 70,000 to 100,000 discrimination charges filed each year far outstrips the resources allocated. To make matters worse, the Trump administration's February 2020 budget request slashed funding for 14% of staff at the EEOC.⁹²

Even where employees do not feel comfortable coming forward to file a charge of discrimination, commissioners of the EEOC have authority to open a commissioner's charge under Title VII and the Americans with Disabilities Act, and EEOC district offices may open a directed investigation under the Age Discrimination in Employment Act and the Equal Pay Act where concerns arise. Commissioner's charges often address claims of systemic discrimination⁹³ and are an important tool for the EEOC to root out problems in cases where workers may fear retaliation for filing a charge of discrimination.

Commissioner's charges and directed investigations also enable the EEOC to investigate and address discriminatory practices in cases where workers are unlikely to have information such as hiring. During 2011-2015, 75% of commissioner's charges focused on discrimination in hiring.⁹⁴ With additional resources, the EEOC could also strengthen its ability to analyze and utilize its EEO-1 data to understand the workforce demographics of an employer, industry, or region. This information could inform commissioner's charges or its investigations and identify potential systemic issues, such as barriers to hiring that lead to occupational segregation.⁹⁵

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) plays a significant role in ensuring the government does business with companies that adhere to nondiscrimination and affirmative action requirements. With oversight responsibility for 200,000 federal contractors⁹⁶ employing over 20% of the labor force,⁹⁷

OFCCP needs a budget that is at least double its current levels to ensure effective oversight of contractors' compliance with their affirmative action and nondiscrimination obligations. Despite its critical enforcement role and the vast number of federal contractors, OFCCP's capacity is limited, with current staffing levels well below that during the Obama administration. OFCCP has enforcement authority over Executive Order 11,246, signed in 1965 by President Johnson, which requires the inclusion of an equal opportunity clause in each government contract and subcontract.⁹⁸ Importantly, government contractors must take "affirmative action" to address employment discrimination and must have affirmative action plans that outline the steps that an employer has taken and will take to ensure equal employment opportunity.⁹⁹ Thus, unlike the EEOC, which operates under a primarily complaint-driven system to enforce anti-discrimination laws after a violation, OFCCP's work has a proactive focus on conducting audits to review and evaluate contractors' compliance with affirmative action requirements and other anti-discrimination laws. OFCCP also has a mandate to promote proactive efforts to promote hiring and equal pay for underrepresented groups.¹⁰⁰

In addition to the EEOC and OFCCP, state and local enforcement agencies play a critical role in filling enforcement gaps by providing alternative avenues to address discrimination in the workplace.¹⁰¹ Because some states and local jurisdictions have anti-discrimination protections that are broader than federal anti-discrimination laws in terms of protected groups, employer size, and legal standards,¹⁰² agencies in these states and municipalities may be in a better position to robustly enforce workers' civil rights. States and municipalities may also have more flexibility to spearhead new initiatives and innovate policy solutions to identify and combat workplace discrimination at the local level. It would be beneficial for the EEOC to proactively engage state and local enforcement agencies that are leading strong enforcement efforts to increase collaboration, data sharing, and learning between federal and state enforcement agencies.

Enforcement and accountability through greater collaboration with worker organizations

Unions, worker centers, and other worker organizations have played a critical role in ensuring that workers' civil rights are protected, and those efforts can be further strengthened. Our country has a renewed opportunity to build greater racial and gender equity into its practices, and unions can help lead that effort.¹⁰³ Although some unions have had a history of discriminatory practices, which requires intentional focus to overcome,¹⁰⁴ unions have historically played an important role in driving down racial wage gaps¹⁰⁵ because Black workers have been more likely to be in unions, and those in unions have benefitted from the largest increase in wages.¹⁰⁶ Wages for union jobs are, on average, 16% higher than for nonunion jobs¹⁰⁷ because of union workers' ability to bargain collectively for higher pay and more transparent hiring and promotion policies, and because of the existence of grievance procedures for addressing pay discrimination and other issues.¹⁰⁸ Research has found that Black workers have historically sought union jobs in order to protect themselves from discriminatory treatment in nonunion sectors.¹⁰⁹ The significant decline in the unionized workforce over the last several decades,¹¹⁰ which has resulted in growing wage inequality and poorer working conditions,¹¹¹ has particularly

impacted Black workers.¹¹² A 2012 study found that if union representation had remained steady over the last several decades, the weekly wage gaps between Black and white workers would be nearly 30% lower for women and 3-4% lower for men.¹¹³

At the same time, this is a critical moment for unions to accelerate efforts to build a more inclusive and diverse movement with a focus on advancing equity. Hiring halls—job placement organizations, typically run by unions, that refer jobs from various employers out to workers—have been a powerful organizing tool for unions in achieving the bargaining strength to obtain better pay and working conditions. Yet hiring halls can also serve as barriers to opportunity for underrepresented groups, including Black, Latinx, and Asian American workers as well as women in trades.¹¹⁴ Ensuring promising practices to achieve fair and equitable referral procedures and recruit diverse apprenticeship candidates are vital steps to promote equity.¹¹⁵ There has been progress in some locales such as New York City, where apprenticeship programs in construction have become increasingly diverse.¹¹⁶

Unions can enhance their role in enforcement and addressing discrimination in the workplace by pursuing justice for members facing discrimination and by bargaining with employers for concrete measures to protect workers' civil rights; examples of the latter include establishing pay transparency and making raise and promotion processes clearer.¹¹⁷ Through such collective action, unions help rebalance power disparities both by supporting individual workers and by negotiating for more equitable employment practices for all workers. For example, UNITE HERE successfully bargained for contract language requiring employers to provide its members with “panic buttons” that can be used to get immediate assistance if an employee is being assaulted or harassed.¹¹⁸ The union's efforts yielded legislation throughout the country requiring hotels to provide room attendants with panic buttons and other protective measures.¹¹⁹

Given the information and power asymmetries for workers, unions continue to play an important role in protecting workers through collective bargaining agreements that contain anti-discrimination language that workers can enforce through a grievance process—which is usually faster and less expensive than legal proceedings. Unions can also obtain information and demographic data regarding employer hiring, pay, and other employment practices as part of the collective bargaining process. Unions have a legal duty to fairly represent all members, and investigation of discrimination is a legitimate purpose related to a union's collective bargaining duties and a legitimate basis for an information request.¹²⁰ In a 2018 decision, the National Labor Relations Board held that “[a] union may...be entitled to information that is relevant and necessary to determining whether a particular employment action is discriminatory, even if the employment action itself is not a mandatory subject” of bargaining, because “the elimination of race and sex discrimination is a mandatory subject of bargaining.”¹²¹

Another approach is for government enforcement agencies to better focus resources on industries and workplaces where violations are most likely to occur; agencies can gain insight into problems on the ground by engaging with community organizations, unions, and worker centers.¹²² Building these relationships can help the government educate workers on their rights and promote greater employer compliance.¹²³ Worker centers and

community organizations can also assist by preparing charges of discrimination on behalf of workers, since organizations, to protect an employee's identity, may file charges with the EEOC on the employee's behalf.¹²⁴ Several cities have implemented successful programs to build collaborative models.¹²⁵

Farmworkers in Florida established the Coalition of Immokalee Workers, which has created a groundbreaking worker-driven social responsibility model to address sexual harassment and other workplace discrimination and abuses faced by farmworkers.¹²⁶ The Fair Food Program has constructed a partnership among farmworkers, growers, and major retail buyers that purchase from the growers. Through organizing efforts, the coalition obtained buyers' commitments to consider farmworkers' working conditions when making purchases. This arrangement provided the coalition with the power to hold growers accountable for abusive working conditions, including sexual harassment and assault.¹²⁷ The program provides for regular audits by the Fair Food Standards Council (FFSC), an independent investigation and enforcement body funded by buyers; in the audits at least 50% of the workforce must be interviewed each season.¹²⁸ The program also set up an alternative complaint system, through which workers can file complaints with the FFSC and have access to investigators; the investigators look into complaints, seek to resolve them, and enforce against retaliation.¹²⁹

Legal system creates gaps in protections and enables employers to write rules that undermine accountability

Gaps in legal protections for many workers prevent enforcement and undermine employer accountability

The efficacy of our current enforcement scheme in protecting workers' civil rights is undermined by significant gaps in Title VII coverage that leave many workers, particularly low-wage workers and workers of color, without protection. Title VII's protections apply only to employers with 15 or more employees, which means that employees of organizations with fewer than 15 employees have no federal anti-discrimination rights. The number of employees affected by this gap is considerable: As of 2017, over 12 million workers worked for firms with fewer than 10 employees.¹³⁰ Across all industries in the U.S., Title VII consistently excludes about 14% of the workforce from its protections.¹³¹

One group of workers largely left unprotected under our federal anti-discrimination laws are 2.2 million domestic workers who work as home care aides, child care workers, and house cleaners in private homes.¹³² Over 91% of these workers are women and 52% are

Black, Asian American and Pacific Islander, or Latinx.¹³³ Because they are isolated and work out of public view, domestic workers are particularly vulnerable to harassment, discrimination, and exploitation; at the same time, most are not protected under our federal anti-discrimination laws. Migrant farmworkers on H-2A visas are also highly vulnerable as workers; they are isolated and confront abuses such as dilapidated housing, illegally low wages, and even forced labor.¹³⁴ Nationally, 22% of farmworkers on H-2A visas are left uncovered by Title VII, with an even higher rate of 31% in the South due to the lack of protection under state laws.¹³⁵

In addition, the increasing reliance on business models that outsource labor through independent contractors or subcontracts, such as through temporary staffing agencies, is weakening worker power and undermining enforcement. In the past two decades, companies have shed jobs as well as accountability for workers by classifying workers as independent contractors, outsourcing work to subcontractors, and relying on staffing agencies to provide temporary workers. Independent contractors face exclusion from most federal anti-discrimination laws.¹³⁶

Almost 10 million U.S. workers are treated as independent contractors for their primary job. Many are in low-wage jobs—in home care, nail salons, construction, cleaning, and landscaping—held disproportionately by immigrants, women, and people of color.¹³⁷ Internal Revenue Service data show that low-income earners represent the fastest-growing population of independent contractors.¹³⁸ Between 10% and 30% of audited employers misclassified workers, according to federal and state studies.¹³⁹ Online platform companies have accelerated the shift toward precarious work by classifying their workers as independent contractors and not employees. By deploying business models that classify workers as independent contractors, companies create major hurdles for workers who must first prove their employee status to avail themselves of anti-discrimination protections.

In addition, businesses are increasingly outsourcing labor through layers of contracting and subcontracting, including franchising and reliance on temporary staffing agencies to reduce labor costs and responsibility for workers. Temporary workers are disproportionately people of color: Black workers account for approximately 13% of the overall workforce but nearly 26% of the temporary workforce. Latinx workers make up nearly 17% of all workers but 25% of temporary workers.¹⁴⁰

Discrimination in hiring has been a problem for many temporary staffing agencies,¹⁴¹ which refer applicants based on client preferences for workers by race, color, sex, national origin, age, or absence of a disability. As litigation by the EEOC has documented, many agencies either refuse to hire Black workers or send them to the least desirable jobs, while hiring Latinx workers and subjecting them to hazardous working conditions, harassment, and lower pay.¹⁴² Discriminatory steering patterns have persisted because, under temporary staffing models, there is often a lack of clarity around when a host company will be deemed a joint employer of the workers procured by a staffing agency. Where a staffing agency adheres to the discriminatory preferences of a client company, workers face the additional hurdle of proving that the host company is a joint employer responsible for the discriminatory hiring decisions.

Although businesses may rely on temporary workers for flexibility to expand or contract their workforce, it can also be a strategy for avoiding responsibilities as an employer and keeping workers from organizing a union. Host companies may deny temporary employees access to their anti-discrimination complaint procedures, and temporary workers face hurdles in identifying the appropriate contact point to report violations. These outsourcing arrangements have eroded worker power and contributed to declining wages, benefits, and health and safety conditions.¹⁴³ The heightened insecurity of temporary work, where assignments can end at any moment, with little recourse, exacerbates the imbalance of power and makes it difficult for workers to organize and challenge discrimination.¹⁴⁴

Addressing gaps in coverage

To address these significant gaps, states have passed legislation to expand worker protections. A number of states and the District of Columbia have already passed legislation to ensure that their anti-discrimination laws cover employers with fewer than 15 employees at various size thresholds.¹⁴⁵ States and cities have also passed legislation explicitly protecting domestic workers under state anti-discrimination law, often as part of broader legislation called the Domestic Workers Bill of Rights.¹⁴⁶ States have also passed laws to protect independent contractors from discrimination in employment or contracting¹⁴⁷ and have enacted legislation to address the misclassification of employees as independent contractors.¹⁴⁸

For temporary workers, greater transparency by staffing agencies on the demographics of those they hire would be a first step to identifying patterns of discrimination. Private employers with more than 100 employees (and federal contractors with at least 50 employees) are required to report the demographic data of their workforces to the EEOC on annual EEO-1 surveys. Temporary staffing agencies file this survey for their internal staff positions but are exempt from reporting on their temporary worker employees referred out to host companies. This leaves a significant gap in understanding patterns of discriminatory steering by staffing agencies. During the Obama administration, the EEOC identified the need to study the issue of collecting these data from temporary staffing agencies to enable the government enforcement agencies to use those data to inform enforcement.

Ensuring anti-discrimination protections for all workers is a critical component of restructuring our current enforcement system to more effectively address workplace discrimination. Gaps in legal protections leave far too many workers vulnerable and unprotected from discrimination. Changing workplace structures are only increasing the lack of accountability for employers. These gaps significantly exacerbate the power imbalance between workers and employers, allowing employers to structure their employment relationships in ways that shield them from accountability and leaving many workers with no legal recourse when they face discrimination in the workplace.

Power imbalances in employer practices

undermine accountability

Employers have exploited their vast information and power to set terms of employment that are favorable to their own interests and that further undermine workers' ability to enforce their civil rights and hold employers accountable. Often buried in a stack of onboarding paperwork, "click through" online contracts, or a long employee handbook, these provisions force employees to give up federally protected rights as a condition of employment or in settlement of a claim. These terms of employment or conditions of settlement can strip employees of important workplace rights. They are also used to intimidate employees from reporting problems to enforcement agencies, initiating complaints with their employer, or sharing their experiences with other workers who may have experienced similar forms of discrimination. Legal protections for workers are essential to ensure that employers do not exploit power asymmetries to coerce workers to contract away their rights.

Forced arbitration

One of the most potent strategies employers have adopted to limit their accountability is the use of forced arbitration clauses. These clauses, often concealed as a provision in a "dispute resolution program," now cover over 55% (60 million) of American workers.¹⁴⁹ The clauses typically require that employees bring "any dispute" arising out of the employment relationship exclusively to the employer's dispute resolution program, which culminates in a binding arbitration decision in a private and confidential forum.

This trend has been a major force undermining many legal rights, including civil rights protections previously afforded to workers. Research suggests that where employers impose forced arbitration, claims are suppressed, with fewer than 2% of claims expected to enter arbitration ever actually doing so.¹⁵⁰ Arbitration claims are less likely to succeed and the damages awarded are likely to be significantly lower than those awarded in court.¹⁵¹ In addition, attorneys may decline to represent workers in arbitration. By enabling employers to compel employees to agree to arbitration as a condition of employment, the legal system has eroded access to justice, thereby allowing companies to shield themselves from legal accountability.¹⁵²

The EEOC and other government enforcement agencies maintain authority to investigate charges and challenge a pattern or practice of discrimination regardless of whether an aggrieved party may be subject to a forced arbitration provision.¹⁵³ Yet, when workers are barred from going to court, they are often deterred from reporting discrimination to the EEOC.¹⁵⁴ If concerns are never brought to enforcement agencies, and instead confined to confidential arbitration proceedings, enforcement agencies are deprived of critical information to help identify patterns of discrimination.

Distorted judicial doctrine fueled adoption

A series of Supreme Court decisions have shifted power away from workers and propelled employers toward an increasing use of forced arbitration clauses in employment

contracts.¹⁵⁵ The court has grounded this shift in an expansive interpretation of the Federal Arbitration Act (FAA), passed in 1925. For decades the FAA was understood to apply only to commercial disputes, not employment disputes.¹⁵⁶ The Supreme Court's first major ruling expanding the applicability of the FAA to employment contracts was issued in 1991, when only about 2% of workers were bound by such clauses.¹⁵⁷ This share increased to nearly 25% by the early 2000s, when another Supreme Court ruling held that arbitration can be a condition of employment.¹⁵⁸

Lack of power to bargain over arbitration

Any notion that typical workers have the ability to bargain over whether they are subject to arbitration clauses is illusory. Contract law has many examples in which courts have identified bargaining power imbalances as a reason to invalidate a contract, such as on the basis of unconscionability. Arbitration has become a unique exception to these doctrines because of the expansive interpretation of the FAA. Even when workers are aware of their rights forfeited by forced arbitration, their attempts to bargain have been undermined by a legal doctrine favoring arbitration. In the case of *Fonza Luke*, in *Luke v. Baptist Medical Center*, the United States Court of Appeals for the Eleventh Circuit found that the employee was still bound by an arbitration clause, although she had twice refused to sign it, because she continued to work as a nurse at the hospital that employed her for nearly 30 years. The court found that even if a worker explicitly refuses to agree to arbitration, the employer can impose it.¹⁵⁹

Repeat player bias

Another disturbing aspect of forced arbitration is “repeat player bias.” Employers generate considerable business for arbitrators, and so arbitrators have a financial incentive to maintain favorable relationships with the employers. Research shows that companies overwhelmingly prevail in arbitration.¹⁶⁰ Unlike the public judicial system, which is funded by taxpayers, the arbitration system is funded by paying clients, who are typically large employers who have set up dispute resolution programs that culminate in binding arbitration. The employer or company has full discretion in how its arbitration program operates, with little judicial oversight for fairness. In employment cases, typically an outside dispute resolution organization administers the process, and the parties agree upon the arbitrator. Because the employer is a party to arbitration more frequently than the worker, this arrangement leads to more favorable results for the employer. The competition among dispute resolution organizations can create a “race to the bottom” for protections offered to workers. One Harvard Law School professor, testifying publicly about her experience as a consumer dispute arbitrator, perceived that she was effectively blacklisted for issuing a single decision favorable to a consumer after having issued many decisions favorable to the industry.¹⁶¹

Lack of judicial review and transparency

One of the most dangerous aspects of forced arbitration is that it creates a cloak of secrecy by requiring that employees keep every aspect of the arbitration confidential. For example, where an employee experiences significant harassment at work and attempts to

raise the alarm by filing a complaint, a forced arbitration program would bar this claim from ever going to court, shuttle it directly into private arbitration, and effectively silence the worker. This procedure hides problems from public view and prevents workers from learning about colleagues who experience similar concerns. The current standard for judicial review of arbitral decisions is “one of the narrowest standards of judicial review in all of American jurisprudence.”¹⁶² Forced arbitration removes one of the most powerful incentives for employers to correct problems by preventing workers’ from holding companies publicly accountable. Also troubling is the fact that forced arbitration clauses typically state that they apply to “any dispute” arising out of the employment relationship. Therefore, even the enforceability of other suspect contract provisions, such as class action bans, nondisclosure agreements, and noncompete and no-rehire provisions, discussed below, are never evaluated by a court or made public, further undermining accountability.

Bans on class and collective actions

Provisions waiving workers’ rights to pursue a class action are common in arbitration agreements. Prior to *AT&T v. Concepcion*, courts generally found that a clause purporting to forfeit a worker’s right to join a class action was unenforceable. In *Concepcion*, the Supreme Court found that because the class action ban was part of an arbitration program, and the FAA precludes efforts to constrain arbitration, the class action ban was valid.¹⁶³ The Supreme Court’s 2018 decision upholding the use of employment class action bans in *Epic Systems*¹⁶⁴ has all but settled the question of whether the rule in *Concepcion* extends to employment cases and will potentially trigger an increase in class action bans in employment contracts.

The problem of class action bans affects all workers, but low-wage workers in particular. The time and expense needed to bring individual claims makes it all but impossible for low-wage workers to file individual lawsuits, whereas proceeding as a collective action allows workers to pool their resources and reduces the burden on participants.¹⁶⁵ Further, because the financial claims of lower-wage workers are inherently smaller on an individual basis, it is particularly difficult to secure an attorney who can successfully bring such claims absent multiple plaintiffs.¹⁶⁶

Class action bans also deprive workers of the ability to come together collectively to demonstrate the existence of widespread problems. The prospect of a class action can help keep employers vigilant in monitoring for systemic problems. Alternatively, the use of class action bans allows employers to largely insulate themselves from class cases, thus removing one important tool workers can deploy for accountability.

Nondisclosure agreements

The use of nondisclosure agreements (NDAs) has been a longstanding practice as both a condition of employment and in settlements of a dispute. A 2017 study found that nearly one in three workers is bound by an NDA.¹⁶⁷ NDAs are particularly common in the tech industry, where 65% of workers have them with their employers, and 38% of those workers

say that their NDA prevents them from speaking out about “injustices in the workplace.”¹⁶⁸ Although certain types of NDAs can serve a legitimate business purpose, such as prohibiting the disclosure of trade secrets or protecting employee privacy, there is also a public interest in learning about discriminatory conduct. This is particularly true for repeat offenders such as Harvey Weinstein, Roger Ailes, and Bill O’Reilly, all of whom used NDAs¹⁶⁹ to shield themselves from accountability after multiple credible accusations of sexual assault and harassment.

In reality, most workers do not have the ability to bargain regarding NDAs since employers have the power to condition terms that may be vital to workers, such as a severance payment or a positive reference, on a promise to not speak out about their experience. Even if years pass, and victims find themselves in better positions professionally or financially to speak out, most are afraid to violate the NDA because of often severe financial penalties. Thus, the power of the employer to maintain a victim’s silence may extend in perpetuity. Troublingly, courts have limited oversight over these matters. Although courts have the power to void confidentiality agreements in civil cases in which disclosure benefits the public interest,¹⁷⁰ NDAs are often covered by an arbitration agreement, and so disputes about the NDA must go before a private arbitrator rather than a public court. Given that an NDA may implicate important public interests, workers should have a choice as to whether to pursue their claims in court or in arbitration.

No-rehire and noncompete clauses

Two additional contract mechanisms that have become common— no-rehire clauses and noncompete clauses—have the effect of deterring worker complaints and exacerbating the power imbalance between workers and employers. Employers often include no-rehire clauses in settlement agreements to bar a departing worker’s ability to apply for a position with the employer in the future. In addition, employers have increasingly included noncompete clauses in employment agreements that restrict an employee’s ability to work for rival companies in the same industry after they leave a job. Because these clauses limit employment opportunities, particularly in “one company towns” or in industries that are heavily dominated by one or two large companies, they can intimidate workers into staying at companies in which they may be facing discrimination or other workplace problems. If workers know that any settlement will prevent them from working for the same company again or that they will be foreclosed from employment by competitors, they may be deterred from raising concerns of discrimination.

As with forced arbitration agreements and NDAs, workers rarely have the power to limit the scope of no-rehire clauses and noncompetes. This is particularly the case with the latter. Nearly all workers who are asked to sign a noncompete agreement sign it, and only one in 10 workers seek legal counsel to review the contract.¹⁷¹ Also, the timing of noncompete agreements decreases the likelihood of negotiation: 70% of workers with noncompete agreements were asked to sign only after receiving their job offer.¹⁷²

An issue of growing concern is the increased use by employers of noncompete agreements for low-wage workers.¹⁷³ One study found that 29% of responding employers where the average hourly wage was less than \$13.00 use noncompete agreements for all

their workers.¹⁷⁴ For example, one sandwich chain settled litigation brought by two state attorneys general in 2016 challenging their practice of requiring low-level employees to sign contracts with noncompetes that prohibited them from taking jobs at competitor sandwich businesses within a two- to three-mile radius of any of their franchises for a period of two years.¹⁷⁵ Courts can and do strike down noncompete agreements that are unnecessarily restrictive,¹⁷⁶ but low-wage workers typically cannot afford to seek legal advice and have little bargaining power to negotiate these terms.

Ultimately, these nonnegotiable contracts—arbitration programs, class action bans, NDAs, noncompetes, and no-rehire provisions, often used together, work to undermine workers' rights and bargaining power, reducing their freedom to leave a job or access the courts. The Supreme Court's failure to acknowledge the inherent power imbalance between workers and employers in interpreting the FAA to have supremacy over other federal laws makes arbitration programs a formidable mechanism to bar workers from exercising their federally protected rights.

Legislation limiting NDAs, no-rehire provisions, and forced arbitration clauses

To address problematic employer practices, such as forced arbitration and NDAs, that have undermined workers' rights, new legal protections are needed to ensure that employers cannot use their power to force workers to relinquish critical rights as a condition of employment or the resolution of disputes. Given the FAA's broad preemption of state and local efforts to curb these practices, federal reform is needed to pass a comprehensive bill to amend the FAA and clarify its scope. The Forced Arbitration Injustice Repeal (FAIR) Act¹⁷⁷ is proposed legislation that would prohibit pre-dispute forced arbitration and class action bans primarily by amending the FAA. A number of states, including New Jersey, New York, California, Tennessee, and Washington, have passed legislation in recent years restricting the use of nondisclosure agreements in some types of employment situations.¹⁷⁸ Vermont was the first state to address no-rehire provisions when it passed legislation in 2018.¹⁷⁹

Legal standards and doctrines fail to confront information and power asymmetries in the employment relationship

Even if workers are able to navigate the complaint process and are not bound by a forced arbitration clause, workers who file lawsuits face substantial barriers in succeeding on their claims in court due to onerous legal standards such as heightened proof requirements for filing a complaint, surviving summary judgment, certifying a class, and proving a claim. These rules create enormous evidentiary hurdles for workers and disregard the reality of extreme information asymmetry where workers often lack access to the evidence that courts require to support employment discrimination claims.¹⁸⁰ As a result, employment discrimination plaintiffs face an extremely low success rate in pretrial

adjudications: During the period from 1979 to 2006, employment discrimination plaintiffs won fewer than 4% of pretrial adjudications in federal court, while other plaintiffs won 21%.¹⁸¹

Pleading standard

Employment discrimination plaintiffs face hurdles at the outset of a case in defeating employers' motions to dismiss their complaints, due in part to two decisions by the Supreme Court in the late 2000s that heightened pleading standards for complaints. Prior to these decisions, a defendant could succeed on a motion to dismiss based on a failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹⁸² This standard was consistent with the Federal Rules of Civil Procedure, which require that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁸³ In *Bell Atlantic Corp. v. Twombly* and *Aschcroft v. Iqbal*, the Supreme Court, while claiming to be merely interpreting the requirements under Rule 8a(2), held that a complaint must set forth allegations sufficient to make the appearance of a violation "plausible on its face" in order to withstand a motion to dismiss the complaint.¹⁸⁴ The court further stated that "naked assertion[s] devoid of 'further factual enhancement,'" were insufficient.¹⁸⁵ In both decisions, the court appeared to be most concerned with the burden of discovery and litigation on defendants.¹⁸⁶

The heightened pleading standard presents a significant hurdle in employment discrimination cases, given the information asymmetries discussed above. In discrimination cases, plaintiffs generally must allege sufficient facts to plausibly support that the plaintiff is a member of a protected class, was qualified, and suffered an adverse employment action, and that the employer had a discriminatory motivation.¹⁸⁷ Very often, plaintiffs are unable to access critical information regarding their claims until the discovery process, where employers are required to provide information. Thus, a dismissal of their complaints for a lack of sufficient factual allegations at the outset prevents them from obtaining the necessary evidence in the discovery process. For this reason, many workers do not even file a lawsuit, because they do not have sufficient information to survive a motion to dismiss.¹⁸⁸

Summary judgment standard

Plaintiffs who survive the motion to dismiss stage face an even greater hurdle at the summary judgment stage before a full trial. The judge makes the determination as to whether the case goes to the jury, and in order to defeat an employer's motion for summary judgment and allow the case to go before a jury, an employee must show that a genuine dispute as to a material fact exists, based on the discovery record and affidavits. In employment discrimination cases, summary judgment motions are the "tool of choice" for employers to defeat workers' claims.¹⁸⁹ Such motions are extremely difficult for employees to defeat, because courts have established legal standards that place a high burden of proof on employees. Specifically, if an employer alleges a nondiscriminatory reason for its action, the plaintiff then has to present enough evidence to show that the

reason put forth by the employer is a “pretext” or a “coverup for a racial discriminatory reason.”¹⁹⁰ Often, plaintiffs’ claims are dismissed at this stage. The employer’s burden is minimal—once the employer merely articulates a nondiscriminatory business reason for its action, the employee then bears the burden of providing sufficient evidence to show that the employer’s reason is false or should not be believed. Thus, courts have essentially converted the statutory inquiry of disparate treatment discrimination into an inquiry on whether the plaintiff has met his or her burden to disprove a reason strategically asserted by the employer,¹⁹¹ a standard that heavily favors employers.

Demonstrating that an employer’s reason is pretextual places an enormous evidentiary burden on plaintiffs in employment discrimination cases. Employers are unlikely to express discriminatory intent explicitly, so plaintiffs rarely have direct evidence of discriminatory intent and must instead rely on circumstantial evidence, which is difficult for plaintiffs to obtain given the informational asymmetries described above. Moreover, employers are not required to provide a reason for their action until the summary judgment stage, so they are able to exploit information asymmetries to ensure success on their motion for summary judgment:

[B]y finding out through admissions in discovery what a plaintiff does *not* know, the employer can orchestrate the factual mosaic so as to make the employer’s legitimate business decision to be *undisputed* by positing it based on what plaintiff admits it does not know—and what the employer can then craft knowingly without opposition—thereby preventing a plaintiff from mounting a pretext case[.]¹⁹²

The “intent” standard

One of the most fundamental hurdles for workers is the intent standard that courts have created in disparate treatment cases. This standard essentially requires victims of discrimination to show that the person who fired or failed to hire them was motivated by discriminatory animus, ill will, or malice.¹⁹³ In race and sex discrimination cases, it leads courts down a rabbit hole in search of evidence of racist or sexist comments or even a pattern of racist or sexist conduct. But the language of Title VII does not impose an intent standard. Title VII prohibits an employer from discriminating against an employee “because of” the employee’s race, sex, or other protected status.¹⁹⁴ The statute does not speak to “intent” or the particular mental state or motivation of the employer.

This judge-made intent standard exacerbates the information asymmetry between employers and employees by creating an often-insurmountable hurdle for plaintiffs to prove a specific state of mind of their supervisor or employer that is infected with bias. It also ignores the reality of contemporary discrimination in the workplace, which often involves more subtle forms of implicit bias or stereotyping and structural forms of discrimination, rather than overt and explicit discrimination.¹⁹⁵ Legal scholars have long criticized this judicially created intent standard, arguing that the “because of” language in Title VII does not require proof of animus or specific “intent” and instead requires a showing of a causal link between the adverse employment action and the employee’s membership in a protected class.¹⁹⁶ Such a standard is not only more consistent with the

plain language of Title VII, but also would better serve the purpose of the law to prevent discrimination.

The Supreme Court's recent landmark decision in *Bostock v. Clayton County*, holding that Title VII prohibits employment discrimination on the basis of sexual orientation or transgender status, provides a promising opening to rethink the intent standard.¹⁹⁷ In an opinion authored by Justice Gorsuch, the court methodically explained that Title VII's language "to discriminate because of" establishes a "but-for causation" standard in which liability is "established whenever a particular outcome would not have happened 'but for' the purported cause."¹⁹⁸ The court described but-for causation as a "sweeping standard" that permits "multiple but-for causes."¹⁹⁹ The court held that "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."²⁰⁰

The *Bostock* decision provides an opportunity to reconsider the application of a causation standard that is consistent with the plain language of Title VII.²⁰¹ *Bostock* recognizes that an unlawful action is "because of" sex when it made a difference in the outcome—without requiring evidence of specific animus to establish a violation of the law. Courts should focus on the outcome: whether an employee suffered adverse treatment "because of" a protected basis, which could be demonstrated through data showing a disparity based on a protected basis and evidence of policies that caused the disparity. The statutory language and the court's interpretation of the statute focus on the act, not the actor's specific mental state that drove the action. While evidence of the employer's animus could be offered to support causation, it is not necessary, because the employee only needs to show that the employer treated the employee differently based on a protected basis. The court construed the meaning of "discriminate against a person" as "intentionally treat[ing] a person worse because of sex."²⁰² In this context, "intentionally" does not require animus or a bias, but an action that harms someone because of sex or another covered basis under Title VII.²⁰³ Employers should be responsible when their policies harm employees "because of" a protected basis. This would shift responsibility for Title VII where it should be—on employers to conduct pay audits and analyze data on hiring and promotions to prevent discrimination, rather than taking the approach of avoiding knowledge of problems and arguing "good intentions," despite a failure to proactively identify discriminatory practices.

Judicial doctrines such as "stray remarks" and "business judgment rule"

Courts have effectively heightened the burden of proof for plaintiffs through a number of judicially created tools that essentially convert factual issues that should be decided by a jury at trial into questions of law that courts can use to dispose of cases at summary judgment. For example, courts have found that evidence of discriminatory statements made by supervisors and other employees, particularly those that are made on an "infrequent basis" or by non-decision makers,²⁰⁴ are "stray remarks" that should not be considered as evidence of discrimination to defeat summary judgment motions.²⁰⁵

A frequent criticism of the “stray remarks” doctrine is that judges use it to improperly exclude evidence, particularly at the summary judgment stage. In addition, judges often use it to make essentially factual findings that should be left to the jury.²⁰⁶ For instance, recently in *Eaglin v. Texas Children’s Hospital*,²⁰⁷ the Fifth Circuit Court of Appeals upheld the district court’s grant of summary judgment on the plaintiff’s employment discrimination claims, finding that her supervisors’ conduct towards her, including “flipp[ing]” her hair and asking how much she paid for it, asking the plaintiff if she ate watermelon and fried chicken on holidays, referring to plaintiff and a co-worker as the “black girls” and questioning whether it was professional to wear braids in the medical field, and making comments indicating that someone in the hospital’s administration wanted to replace the plaintiff with a Hispanic employee, constituted “stray remarks” that were insufficient to constitute direct evidence of intentional discrimination.

A number of federal courts have also adopted a “business judgment rule” in employment discrimination cases under which they defer to business management decisions unless employers act in a manner that cannot be attributed to any rational business purpose, even if the decision is unreasonable or unwise. The United States Court of Appeals for the First Circuit has emphasized that courts “do not assume the role of a ‘super personnel department,’ assessing the merits or even the rationality of employers’ nondiscriminatory business decisions.”²⁰⁸ The problem with the business judgment rule is that courts have relied on it to limit the type of evidence plaintiffs can raise to establish pretext and to prevent a pretext case from going to a jury by deferring to the employer, even when the stated reason is implausible. This practice essentially undermines plaintiffs’ ability to present evidence to show that the employer’s stated reason is not worthy of belief and simply a pretext for discrimination. Moreover, this doctrine also denies the plaintiff the benefit of all favorable inferences, which a court must grant a nonmoving party when deciding a summary judgment motion.²⁰⁹

Class certification standards

Heightened standards for employees to bring class actions have also made it harder for workers to band together to share resources and challenge systemic problems. In 2011, the Supreme Court in *Wal-Mart v. Dukes*²¹⁰ held that a class of nearly 1.5 million female employees could not be certified in a sex discrimination case against Wal-Mart, because the employees had failed to demonstrate a common issue of law or fact that would satisfy the “commonality” requirement of Rule 23(a), the federal procedural rule governing class actions.²¹¹ The court held that because the inquiry under Title VII focuses on the reason for an employment decision, plaintiffs needed to show “glue” holding together the reasons for all of the class members’ employment decisions. The court further found that because Wal-Mart had a policy of allowing discretion by local managers over employment decisions, plaintiffs’ statistical and anecdotal evidence was insufficient to show that Wal-Mart had a general policy of discrimination or a common mode of exercising managerial discretion. The court also found that the plaintiffs’ claims for backpay were not properly certified under Rule 23(b)(2) and needed to meet the more stringent and onerous requirements of Rule 23(b)(3).²¹²

While courts continue to certify employment discrimination cases,²¹³ the *Wal-Mart* decision placed additional hurdles for employees seeking to challenge systemic employment discrimination.²¹⁴ In particular, plaintiffs challenging employer policies involving decentralized, discretionary decision-making have faced difficulties in obtaining class certification.²¹⁵ Moreover, even in cases where plaintiffs are successful in obtaining class certification, employer defendants continue to aggressively challenge certification motions on the basis of *Wal-Mart*.²¹⁶ In this way, *Wal-Mart* has allowed employers to drag out lawsuits through excessive litigation over class certification. By further delaying the progress of class action lawsuits, which already take years to resolve, *Wal-Mart* has served to disincentivize plaintiffs and their lawyers from pursuing employment discrimination class actions, particularly those cases where it may be difficult to obtain certification. Indeed, research suggests that fewer employment discrimination class action lawsuits are being filed after *Wal-Mart*.²¹⁷

Attacks on Title VII plaintiffs' ability to sue on a class-wide basis further increase the power imbalance between employees and employers in enforcing Title VII. Class actions play a critical role in ensuring Title VII enforcement because they enable employees to identify and expose widespread discriminatory conduct that is much easier for an employer to hide and justify when it is challenged at an individual level.²¹⁸ Class actions also allow individual employees with small claims and limited resources to pool their resources and share risks and burdens in order to pursue a lawsuit, which they would be unlikely able to do if they had to bring it individually. Class actions also allow for remedies and injunctive relief that are much broader and more likely to ensure systemic change than relief obtained in individual cases.²¹⁹ Moreover, a finding of class-wide liability in a case alleging a pattern or practice of employment discrimination shifts the burden of proof in favor of the plaintiff, creating a rebuttable presumption that the employer discriminated against each class member.²²⁰ By creating more hurdles to class certification in employment discrimination cases, courts have made it only more difficult for employment discrimination plaintiffs in vindicating their claims.

Challenging harmful judicial doctrines

As discussed above, the recent *Bostock* decision promisingly opens the door for courts to apply a standard that focuses on causation, based on the “because of” language in Title VII, rather than applying a disparate treatment “intent” standard that has often been interpreted to require evidence of animus by an employer—a requirement that poses an often insurmountable evidentiary hurdle for plaintiffs. Applying a standard that focuses on causation would also eliminate the problem of inconsistent application by courts of the intent standard and the numerous judicially created ancillary doctrines that have forced plaintiffs to try to fit their claims into judicially created legal frameworks, rather than Title VII's prohibition of adverse treatment based on protected bases.²²¹

Judicial skepticism and lack of diversity

Workers who file lawsuits face the significant hurdle of judicial skepticism toward employment discrimination claims. Compared to the population it serves, the federal

judiciary lacks diversity and comprises disproportionately those who have spent careers representing corporate interests. Plaintiffs in federal employment discrimination cases have long experienced extremely low success rates, much lower than plaintiffs in other types of civil lawsuits. Between 1979 and 2006, federal plaintiffs won only 15% of employment discrimination cases compared to a 51% win rate in other civil cases.²²² In cases that went to trial before a judge, plaintiffs in federal employment discrimination cases won less than 20% of the time, whereas plaintiffs in all other civil cases won over 45% of the time.²²³ Plaintiffs in employment discrimination cases also do not fare well on appeal, with federal appellate courts reversing plaintiffs' wins far more often than they reverse defendants' wins in trial courts.²²⁴

Judicial skepticism toward employment discrimination cases is a major factor in the low success rates of employment discrimination plaintiffs in federal courts. Courts' attitudes are influenced by the widespread misperception that employment discrimination cases are easy to win and that the high volume of employment discrimination cases reflects an excessive number of plaintiff nuisance suits.²²⁵ Similarly, the low success rate for plaintiffs on appeal is likely due to an "anti-plaintiff effect" in which appellate judges perceive—or more accurately, misperceive—trial courts to be pro-plaintiff and as a result show favoritism for defendants.²²⁶

Judges are influenced by their experiences and can develop various biases based on the nature of the claim.²²⁷ In race discrimination cases, which are generally the most difficult cases to win,²²⁸ judges frequently exhibit the belief that the claims generally have no merit.²²⁹ Judges are often reluctant to infer racial discrimination on the basis of circumstantial evidence, even though courts have long recognized that racial discrimination is subtle and can be inferred from circumstantial evidence.²³⁰ Judges' views have likely been shaped by broader perceptions, particularly among whites,²³¹ that racism in contemporary society has significantly decreased.²³² Recent polls have shown dramatic shifts in attitudes concerning systemic racism in response to the Covid-19 crisis and protests against police killings of Black Americans, with the majority of Americans saying that racism and race relations are major problems facing our country.²³³ This moment presents an important opportunity to re-evaluate legal doctrines and judicial precedents with a deeper understanding of systemic forms of discrimination.

Judges' decisions are also influenced by the reality that the federal judiciary is not professionally diverse, drawing disproportionately from lawyers whose prior legal experiences are as corporate lawyers or criminal prosecutors who have served large institutional actors, rather than individuals.²³⁴ Few federal judges possess any legal experience representing plaintiffs in labor, employment, or civil rights cases, and few have substantial legal experience working for nonprofit organizations, organizations or government agencies that enforce civil rights, or organizations that represent low-income clients.²³⁵

A lack of racial and gender diversity on the federal bench also impacts outcomes in employment discrimination cases. As of August 2019, 80% of sitting federal judges were white and 73% were male.²³⁶ Studies have found that plaintiffs in workplace harassment cases are more likely to succeed on their claims if they appear before a judge of the same

race as themselves, as “[j]udges of each racial group can more readily identify with injustices that happen to their racial group.”²³⁷ Plaintiffs who claim racial workplace harassment are 2.9 times more likely to succeed before Black judges than before judges belonging to other races and ethnicities.²³⁸ Female plaintiffs with workplace sex discrimination claims are also much more likely to have positive outcomes before female judges.²³⁹ A recent study found that the presence of even one female judge on a three-judge federal appellate panel influences male co-panelists to be more likely to vote for a female plaintiff in Title VII sex discrimination cases.²⁴⁰ Another study found that judges with daughters are more likely to rule in favor of women on gender claims than judges with only sons,²⁴¹ suggesting that judges’ personal experiences and relationships can impact decision-making.

Given the critical role that courts play in enforcing workers’ civil rights, much more work needs to be done to ensure a fair and diverse judiciary, including the appointment of federal judges with more legal experience representing workers and litigating civil rights cases.

Conclusion

As workers come together to demand greater workplace equity, and America’s institutions make powerful statements in support of Black Lives Matter and racial justice, we have reached a pivotal moment for revitalizing the nation’s anti-discrimination laws and enforcement systems. By rebalancing the extraordinary power disparities that have contributed to the under-enforcement of our civil rights laws and reforming decades of legal doctrines and employer practices that minimize employer liability, we can rebuild our enforcement systems to empower workers to stand up and confront civil rights violations in their workplaces. This rebuilding requires strong legal protections for workers with meaningful opportunities to enforce their rights and obtain remedies for harm. For employers, our enforcement structures should create accountability mechanisms and incentives to identify and address the root causes of discrimination within their workplaces and to prevent discrimination before it harms workers. To do this, laws should require greater transparency of employment decisions such as hiring and pay setting, as well as disclosures on the demographics of each workplace to promote public awareness and create momentum to evaluate and eliminate bias from current employment processes. Our nation must also invest in greater enforcement resources for government agencies as well as worker organizations to balance the vast resource and information asymmetries between workers and employers.

About the authors

Jenny R. Yang served as commissioner, vice-chair, and chair of the U.S. Equal Employment Opportunity Commission from 2013 to 2018. Under her leadership, the commission launched the Select Task Force on the [Study of Harassment in the Workplace](#). Ms. Yang led efforts to tackle systemic discrimination, including enhancing the EEOC’s annual data

collection to include employer reporting of pay data. After her service on the EEOC, as a senior fellow at the Urban Institute, Ms. Yang worked to revitalize anti-discrimination laws and dismantle systemic barriers to opportunity. In addition, as a strategic partner with Working IDEAL, Yang assisted employers in comprehensive harassment and anti-discrimination prevention efforts; independent investigations; and the design of employment practices to promote diversity, inclusion, and equality of opportunity. Prior to joining the EEOC, Ms. Yang spent a decade representing workers in civil rights actions nationwide as a partner at Cohen Milstein Sellers & Toll PLLC. From 1998 to 2003, she served as a senior trial attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section.

Jane Liu has litigated public interest and civil rights cases, including employment discrimination cases, for over 13 years. Currently, as senior litigation attorney at the Young Center for Immigrant Children’s Rights, she advocates for the rights and best interests of immigrant children. Prior to joining the Young Center, she was the legal director of the National Asian Pacific American Women’s Forum (NAPAWF), where she established the nation’s first legal program dedicated to advancing the rights of Asian American and Pacific Islander (AAPI) women and girls. At NAPAWF, Ms. Liu spearheaded advocacy on the issue of workplace sexual harassment of AAPI women and provided legal services to AAPI women facing employment discrimination. In 2019, Ms. Liu testified before the U.S. Commission on Civil Rights on the issue of workplace sexual harassment in federal government workspaces and its impact on AAPI workers. Previously, Ms. Liu was a partner at Terris, Pravlik & Millian, LLP, a public interest law firm in Washington D.C., where she litigated public interest and civil rights class actions. She began her legal career as a public defender in Boston; she graduated from the University of Pennsylvania Law School and Princeton University.

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179. Roy Maurer, “[Vermont Bans No-Rehire Clauses](#),” SHRM, August 7, 2018.
180. See Brian S. Clarke, “[A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine](#),” *Rutgers Law Review* 65, no. 3 (2013): 723-86.
181. Kevin M. Clermont and Stewart J. Schwab, “[Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?](#)” *Harvard Law & Policy Review* 3, no. 1 (2009): 103-32.
182. *Conley v. Gibson*, 355 U.S. 41, 42-43 (1957).
183. Fed. R. Civ. P. 8(a)(2).
184. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007).
185. *Ashcroft v. Iqbal*, 556 U.S. 662, 684-686 (2009).
186. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 557-559 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
187. See, e.g., *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015).
188. Steven R. Semler, “[Hijacking of Title VII Employment Discrimination Plaintiffs on the Way to the Jury](#),” *Hofstra Labor & Employment Law Journal* 32, no. 1 (2014): 49-89.
189. Cynthia Remmers, “Summary Judgment Motions in Discrimination Cases: Bringing, Defending and Appealing,” *ABA Section of Labor and Employment Law Annual Meeting*, August 6, 1997.
190. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973).
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192. Semler 2014.

193. Amelia M. Wirts, “Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination,” *Boston College Law Review* 59, no. 2 (2017): 809-56; Sandra F. Sperino, “Into the Weeds: Modern Discrimination Law,” *Notre Dame Law Review* 95, no. 3 (2020): 1077-22.
194. 42 U.S.C. 2000e-2(a).
- [195] See Linda Hamilton Krieger and Susan T. Fiske, “Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment,” *California Law Review* 94, no. 4 (2006): 997-1062 (social science research shows that discriminatory attitudes and behavior still exist today, and a large percentage of bias, prejudice, and discriminatory behavior is due to unconscious factors).
196. See, e.g., Amelia M. Wirts, “Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination,” *Boston College Law Review* 59, no. 2 (2017): 809-56; Sandra F. Sperino, “Into the Weeds: Modern Discrimination Law,” *Notre Dame Law Review* 95, no. 3 (2020): 1077-22.
197. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020).
198. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020).
199. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1739 (2020). The *Bostock* Court’s explanation of but-for causation contradicts lower court decisions that have construed the “but-for causation” standard as “elevat[ing] the burden of proof.” See, e.g., *Arthur v. Pet Dairy*, 593 Fed. Appx. 211, 219 (4th Cir. 2015) (“Gross elevated the burden of proof”).
200. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020).
201. *Bostock*’s broad view of the but-for causation standard also applies to ADEA and ADA claims. The ADEA’s “because of” language is identical to Title VII and was derived from Title VII. See *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584, n. 12 (1978) (“the prohibitions of the ADEA were derived *in haec verba* from Title VII”).
202. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1740 (2020), relying on *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59 (2006) and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988).
203. The *Bostock* Court repeatedly explains “intentional discrimination” as designed to achieve a purpose without regard to underlying animus or bias, or whether the employer’s state of mind was benevolent or malevolent. For example, the court held an employer “liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level.” *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1744 (2020).
204. *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076 (2010), abrogated by *Torgerson v. City of Rochester*, 643 F.3d 1031 (2011).
205. National Employment Lawyers Association, *Judicial Hostility to Workers’ Rights: The Case For Professional Diversity on the Federal Bench*, February 2012.
206. Steven R. Semler, “Hijacking of Title VII Employment Discrimination Plaintiffs on the Way to the Jury,” *Hofstra Labor & Employment Law Journal* 32, no. 1 (2014): 49-89.
207. *Eaglin v. Texas Children’s Hospital*, No. 19-20222, slip op. at 2, 9 (5th Cir. Feb. 4, 2020) (per curiam).
208. *Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991).

209. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“In deciding a motion for summary judgment, the court must view the factual evidence in the light most favorable to the non-moving party”).
210. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
211. Author Jenny Yang served as co-counsel for plaintiffs in this case.
212. The court also found that Wal-Mart was entitled to individualized determinations of each employee’s eligibility for backpay and had the right to raise individual affirmative defenses to each class member’s backpay claim. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
213. Ross Todd, “[Report: Plaintiffs in Employment Cases Won Class Certification at Record Rates in 2019](#),” *Law.com*, January 7, 2020; Michael Selmi and Sylvia Tsakos, “[Employment Discrimination Class Actions After *Wal-Mart v. Dukes*](#),” *Akron Law Review* 48 (2015): 803-30.
214. Suzette M. Malveaux, “[The Power and Promise of Procedure: Examining the Class Action Landscape After *Wal-Mart v. Dukes*](#),” *DePaul Law Review* 62 (2013): 659-73.
215. See, e.g., *Moussouris v. Microsoft Corp.*, No. 18-35791 (9th Cir. Dec. 24, 2019); *Guzman v. Chipotle Mexican Grill*, No. 17-cv-02606-HSG (N.D. Cal. Jan. 15, 2020).
216. Michael Selmi and Sylvia Tsakos, “[Employment Discrimination Class Actions After *Wal-Mart v. Dukes*](#),” *Akron Law Review* 48 (2015): 803-30.
217. Selmi and Tsakos 2015.
218. Suzette M. Malveaux, “[Fighting to Keep Employment Discrimination Class Actions Alive: How *Allison v. Citgo’s* Predomination Requirement Threatens to Undermine Title VII Enforcement](#),” *Berkeley Journal of Employment & Labor Law* 26, no. 2 (2005): 405-34.
219. Malveaux 2005.
220. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001), cert. denied, 535 U.S. 951 (2002).
221. See Sandra F. Sperino, “[Rethinking Discrimination Law](#),” *Michigan Law Review* 110, no. 1 (2011): 69-125.
222. Kevin M. Clermont and Stewart J. Schwab, “[Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?](#)” *Harvard Law & Policy Review* 3, no. 1 (2009): 103-32.
223. Clermont and Schwab 2009.
224. Clermont and Schwab 2009.
225. Michael Selmi, “[Why Are Employment Discrimination Cases So Hard to Win?](#)” *Louisiana Law Review* 61, no. 3 (2001): 555-74.
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227. See, e.g., Cathy Ventrell-Monsees, “[It’s Unlawful Age Discrimination—Not The ‘Natural Order’ of the Workplace!](#)” *Berkeley Journal of Employment & Labor Law* 40, no. 1 (2019): 91-133 (discussing judicial skepticism in age discrimination cases).

228. Race discrimination complaints filed with the EEOC also have the lowest success rate among all types of complaints, despite the fact that they are one of the commonly filed complaints. Maryam Jameel and Joe Yerardi, [Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own](#), Center for Public Integrity, February 28, 2019.
229. Michael Selmi, “[Why Are Employment Discrimination Cases So Hard to Win?](#)” *Louisiana Law Review* 61, no. 3 (2001): 555-74.
230. Selmi 2001.
231. Pew Research Center, [Race in America 2019](#), April 2019 (in 2019 poll, whites far more likely than any other racial or ethnic group to say that too much attention is paid to race and racial issues; of those who responded that being black hurts people’s ability to succeed, whites far less likely than blacks to say that racial discrimination and a lack of access to high-paying jobs are major reasons).
232. In a 2019 study, respondents were sharply divided by race on whether Blacks are treated less fairly with respect to hiring, pay, and promotions in the workplace, with 44% of whites and 82% of Blacks responding that such discrimination exists. Pew Research Center, [Race in America 2019](#), April 2019.
233. Eugene Scott, “[Majority of Americans Say Race Discrimination Is a Big Problem in the U.S.](#),” *Washington Post*, July 10, 2020.
234. Barry J. McMillion, “[U.S. Circuit and District Court Judges: Profile of Select Characteristics](#),” Congressional Research Service, 2017.
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236. Danielle Root, Jake Faleschini, and Grace Oyenubi, “[Building a More Inclusive Federal Judiciary](#),” Center for American Progress, October 3, 2019.
237. Pat K. Chew and Robert E. Kelley, “[The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race](#),” *Harvard Journal on Racial and Ethnic Justice* 28 (2012): 91-115.
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