HIT EM' WHERE IT HURTS: THE UNITED STATES SHOULD CRIMINALIZE EMPLOYMENT DISCRIMINATION TO MAKE BAD BEHAVIOR KNOWN AND FACILITATE IMPROVEMENT

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I. INTRODUCTION

Suppression of information keeps people in the dark, unaware of problems that should be addressed. In the United States, information in employment discrimination cases is suppressed by using confidential arbitration of disputes. In various other countries, those disputes are made public, and the perpetrators' actions are brought to light, encouraging changes in their behavior. Changes in American practices to reveal concealed facts may help suppress discriminatory behavior, rather than the information about it.

Events that transpired in a Tesla discrimination case demonstrate just how bad employer behavior can be and how it could be remedied. In October of 2021, a federal jury ordered the Tesla company to pay Owen Diaz, a former contract elevator operator, nearly $137 million in punitive and emotional distress damages for racist abuse and discrimination he suffered at the company's automotive plant in Fremont, California.[1]

The contracted employee said that he had been looking forward to working at a well-known tech company.[2] However, instead of the positive experience he expected, he faced horrors "straight from the Jim Crow era."[3] Tesla employees harassed Mr. Diaz by calling him racial slurs, telling him to return to Africa, and leaving drawings of racist and derogatory pictures scattered around the factory.[4] Mr. Diaz testified that he suffered from a loss of appetite which led to weight loss, and he experienced many "sleepless nights."[5] He told the jurors that there were days he would sit on his staircase and cry.[6]

The Vice President for Tesla released a statement in which she said the verdict was unjustified and defended the use of racial slurs in the workplace by stating that employees used the word "in a friendly manner."[7] Mr.

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1. Malathi Nayak et al., *Tesla Hit with $137 Million Judgment in Workplace Racism Case*, FORTUNE (Oct. 5, 2021, 4:03 AM), https://fortune.com/2021/10/05/tesla-137-million-judgement-lawsuit-workplace-racism-case-owen-diaz.

2. Joe Hernandez, *Tesla Must Pay $137 Million to a Black Employee Who Sued for Racial Discrimination*, NPR (Oct. 5, 2021, 1:56 PM), https://www.npr.org/2021/10/05/1043336212/tesla-racial-discrimination-lawsuit.

3. *Id.*

4. *Id.*

5. Nayak et al., *supra* note 1.

6. *Id.*

7. Valerie Capers Workman, *Regarding Today's Jury Verdict*, TESLA (Oct. 4, 2021), https://www.tesla.com/blog/regarding-todays-jury-verdict.

Diaz's case was unusual because Tesla had to defend itself in a public trial.[8] Tesla, like many other companies, normally mandates that arbitration handles employee disputes.[9] A third-party agency contracted with Mr. Diaz, so he did not sign the standard employee mandatory arbitration agreement.[10]

The Tesla arbitration agreements prevent arbitrated employees from directly accessing the courts, force them to waive their rights to all judicial relief, and bar them from bringing class-action lawsuits. Cases concerning arbitrated employees who suffer from sexual harassment, discrimination, racism, and violent threats are kept in the dark, and persons considering working for Tesla or purchasing Tesla products are kept unaware of information those persons may find important and helpful.

Professor Julie C. Suk's article, "Procedural Path Dependence: Discrimination and the Civil-Criminal Divide," explains the current limitations of employment discrimination in the United States because it is, and always has been, treated as a purely civil offense.[11] She argues that American law should break through these limits and forge a new path, as the offense is neither inherently criminal nor inherently civil.[12] Her argument holds strong, especially in modern times, with the latest recognition in the United States that racism and other forms of discrimination are more than morally shameful—they are evil. American values have evolved, and the harsh impact of compulsory arbitration has become clearer since her article was written in 2008. However, while Suk correctly identified the issue of relying on one path of procedure for employment discrimination, she does not necessarily call for criminalizing the injustice. Rather, she argues that the United States Equal Employment Opportunity Commission (EEOC) should step in as a rulemaking body. In 2008 this may have made more sense, but the EEOC has since come under criticism for its shortcomings and lack of response in handling employment discrimination. Although she makes a strong argument advocating for more "flexibility than reliance" on either procedural system, the argument falls short in the way that it trusts administrative agencies to lead the way.[13] Victims of these harmful and evil acts should involve a criminal prosecutor

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[8] Nayak et.al., *supra* note 1.
[9] *Id.*
[10] *Id.*
[11] *See* Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1317 (2008).
[12] *Id.*
[13] *Id.* at 1371.

who would pursue cases with a more viable chance of survival and success in criminal courts.

The United States' inadequate enforcement of laws prohibiting employment discrimination appears to be mainly due to American companies' extensive use of arbitration agreements. These agreements result in sealed cases and limited redress abilities for victims. Practices in other countries offer the United States a solution to this problem: the criminalization of employment discrimination. The United States should utilize this solution to help solve the problem of sweeping the dirty details under the rug and bring to light the cases of employment discrimination in American society. Without the option of concealing wrongful acts from the public, employers will have no choice but to risk public and employee knowledge of their discriminatory practices. Thus, this would hold employers accountable for their bad behavior.

II. SYSTEMS IN FOREIGN COUNTRIES PRESENT MEANINGFUL MODELS OF CRIMINALIZING EMPLOYMENT DISCRIMINATION

Arbitration agreements present many challenges to plaintiffs in employment discrimination cases in the United States. In fact, employment discrimination victims cannot become plaintiffs as they are often barred from litigation. There is a need for an alternative solution to this problem. In several countries such as France and Brazil, the criminalization of employment discrimination has provided meaningful and effective ways to address the issue of forced arbitration agreements barring employees from litigation.

France's treatment of discrimination as a crime originates from a history of criminalizing racist speech. The prohibition of racial defamation in the press became a part of French law when anti-Semitic propaganda began to spread in 1939.[14] French employment discrimination law was built into French anti-racism law, so it became a matter of criminal law.[15] In 1982, a provision of the Labor Code, codified under *Code du travail* Article L. 122-45, made it possible for victims of employment discrimination to pursue their cases in the country's civil system.[16] Later in 2001, France added the EU Race Directive against indirect discrimination and

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[14] *Id.* at 1328; *see also* MICHAEL R. MARRUS & ROBERT O. PAXTON, VICHY FRANCE AND THE JEWS 34-71 (1981).

[15] Suk, *supra* note 11, at 1328.

[16] *Id.* at 1329; *see also* J.O. decision No. 82-689, Aug. 4, 1982, Rec. 2518 (Fr.); Code du travail [C. trav.] [Labor Code] art. L 122-45 (Fr.).

implemented the burden of proof provisions.[17] Today, employment discrimination is both a civil and criminal offense. It imposes on wrongdoers a maximum of three years' imprisonment and a fine.[18] The fines range from 45,000 euros to 225,000 euros depending on the employer's status as an individual or as a company.[19]

Victims of discrimination in France can consult anti-racist organizations to assist them in their legal actions. For example, in 2007, the anti-racist organization SOS-Racisme filed a complaint alleging that the well-known cosmetics company L'Oréal engaged in employment discrimination.[20] The complaint asserted that the L'Oréal marketing director's hiring process instructed against hiring African, Arabic, or Asian women.[21] French prosecutors presented evidence that L'Oréal employed the shorthand "BBR" in a fax transmission to describe the desired look for its female models.[22] "BBR" is a well-known code in the industry. It means bleu, blanc, rouge (the French flag's colors), used to describe white French people. After L'Oréal lost at trial, the court sentenced the marketing director to three months of imprisonment for racial discrimination in her hiring process.[23] SOS-Racisme considered this verdict a triumph and expected that it would influence other companies to pay attention to possible consequences, evaluate their practices, and obey the law.[24]

The French legal system differs from the American one as it provides victims with an option not available in the United States—an option to join the criminal case as civil parties who can receive compensation for their injuries.[25] The criminal process in France does not preclude victims of discrimination from receiving compensation.[26]

Some victims in France turn to the criminal courts to pursue their claims. There are several reasons for electing to go down this route. First,

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[17] Suk, *supra* note 11, at 1330; *see also* Law No. 2001-1066 of Nov. 16, 2001, Journal Officiel de la Republique Frangaise [J.O.] [Official Gazette of France], Nov. 17, 2001, p. 18311.
[18] C. PEN. art. 225-2.
[19] *Id.*; *see also* FLICHY GRANGÉ AVOCATS, EMPLOYMENT LAW OVERVIEW: FRANCE 2019-2020 14 (2020).
[20] *See* Suk, *supra* note 11, at 1343.
[21] Nathalie Brafman, *L'Oreal et Adecco Condamnées pour Discrimination [L'Oreal and Adecco Condemned for Discrimination]*, LE MONDE [THE WORLD] (July 7, 2007, 12:58 PM), https://www.lemonde.fr/economie/article/2007/07/07/l-oreal-et-adecco-condamnees-pour-discrimination_932834_3234.html.
[22] *Id.*
[23] Angelique Chrisafis, *You're Worth It – If White. L'Oreal Guilty of Racism*, GUARDIAN (July 6, 2007, 7:03 PM), https://www.theguardian.com/world/2007/jul/07/france.angeliquechrisafis.
[24] Brafman, *supra* note 21.
[25] Suk, *supra* note 11, at 1331.
[26] *Id.*

the French view discrimination as worthy of criminal punishment, and merely imposing civil sanctions is insufficient in terms of punishment.[27] The prosecutor leads the way against the discriminator as the crime is viewed not only as a wrong to the victim but as "a wrong to the entire republic."[28] This social mindset starkly contrasts the American view of discrimination as a private dispute between two parties.[29]

Second, there are practical considerations for French victims, such as not having to hire a private attorney to pursue their claims. French victims also avoid the challenges of discovery in French civil procedure. The victim can contact the prosecutor or an investigating judge to open an investigation.[30] Once the criminal investigation begins, the victim no longer has the task of proving the facts in dispute.[31]

Third, the French victim benefits from the power and pressure brought by the prosecutor or investigating judge handling the case. Not only can the investigating judge summon parties for questioning, but they also have search and seizure power to obtain documents.[32] French civil action plaintiffs cannot compel discovery from their adversaries to prove claims.[33]

History and tradition also shape a society's procedures, and there is a natural reluctance to deviate from the norm. Oona Hathaway wrote about the American common-law system of *stare decisis* and how it created "path dependence theory."[34] Civil legal systems value predictability, even without applying the doctrine of *stare decisis*.[35] Suk applied this theory to the French legal system, referring to it as "procedural path dependence."[36]

As another example, Brazil's unique history explains the importance of anti-discrimination provisions in its laws. Brazil was the last country in the Western Hemisphere to abolish slavery when it did so in 1888, and it had brought in seven times as many African people to be enslaved than were brought to the United States.[37] In contrast to the white North American settlers relocating as family units, in Brazil, a large number of settlers from

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[27] *Id*. at 1317.
[28] *Id*. at 1333.
[29] *Id*.
[30] *Id*. at 1340.
[31] *Id*.
[32] *Id.* at 1341.
[33] *Id.* at 1335.
[34] Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).
[35] *See* Suk, *supra* note 11, at 1324.
[36] *Id*. at 1315.
[37] Edward Telles, *Racial Discrimination and Miscegenation - The Experience in Brazil,* 44 U.N. CHRON. 46, 46 (2007).

Portugal were single males.[38] Many of them married African, indigenous, and multi-racial females.[39] Today, many Brazilians are proud of the diversity in their history.[40] Even though arbitration agreements have become more prevalent in Brazil since 2017,[41] negotiations of these agreements cannot involve a person's fundamental rights and Brazilian courts can overrule any agreement that violates their constitution, which provides protection against discrimination.[42]

Brazilian law criminalizes acts of discrimination. Section XLII of the Brazilian Constitution states that racism is a non-bailable crime subject to imprisonment.[43] Furthermore, the Brazilian government has enacted numerous laws which protect its people from discrimination, and several acts apply to the area of employment.[44] Victims of employment discrimination begin the process by filing a police complaint.[45] Some victims lack the resources to hire a private attorney. Brazilian law typically employs a system where the loser pays for the legal fees, unlike the American style, in which parties pay their own unless otherwise provided by contract or statute.[46] Similar to France, Brazilian criminal convictions allow victims to seek restitution, and victims can also contribute information and participate in the prosecution.[47] For these reasons, Brazilian victims benefit from seeking justice publicly rather than pursuing a private lawsuit.[48]

In a recent case, the Inter-American Commission on Human Rights ("the Commission") insisted that Brazil enforce its criminal law on discrimination. In 1998, Ms. Neusa dos Santos Nascimento and Ms. Gisele Ana Ferreira each applied for a position at Nipomed, a health insurance company.[49] The hiring manager turned away the applicants of African

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Jose Carlos Wahle, *Employment & Labour Law in Brazil, in* Lexology Navigator — Employment: International (2019).
[42] *Id.*
[43] CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, 2010, art. 42.
[44] *Anti-Discrimination and Equality Laws in Brazil- Racial Discrimination in Employment*, *in* Equal Rights Trust, (Sept. 2009).
[45] Benjamin Hensler, *Nao Valel a Pena? (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-Discrimination Law*, 30 HASTINGS INT'L & COMP. L. REV. 267, 303 (2007).
[46] *Id.* at 304.
[47] *Id.*
[48] *Id.*
[49] Neusa Dos Santos Nascimento and Gisele Ana Ferreira v. Brazil, Inter-Am. Comm'n H.R., Report No. 84/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 7 (2007).

descent and said there were no open positions.[50] Later the same day, the manager offered a position to a white woman and asked her whether she knew of other persons with similar characteristics for another position.[51] The victims filed a police report alleging racist discrimination, and the prosecutor filed a criminal complaint against the hiring manager.[52] The court sentenced the hiring manager to two years' imprisonment in 2004, but the judge ruled that the statute of limitations had passed.[53] The prosecutor's office filed an appeal, arguing that the statute of limitations could not apply to the crime of racism under Article 5 (LXII) of the Federal Constitution of Brazil.[54]

The case went through several rounds of appeals until the victims turned to the Commission, arguing that Brazil violated several articles of the American Convention because it failed to guarantee the exercise of fundamental individual rights.[55] The Commission concluded that Brazil did not provide adequate justice to the victims and, therefore, Brazil had violated the American Convention.[56] The Commission made several recommendations for Brazil to make reparations for the human rights violations, raise awareness on the punishment of racial discrimination, and implement legislation that compels companies to enact due diligence procedures in their hiring processes.[57] The case might never have gotten so far if the victims were required to file all of their appeals through civil procedure, as the criminal process requires state participation. Thus, the Commission's involvement was linked to participation by the state since the actions were against the state and only the state has a duty to investigate, try, and punish cases like this one.

Americans may scoff at the idea of imprisonment as a punishment for acts that have been treated for so long as private disputes, given the United States' long history of preferring civil actions. In the discrimination context, Title VII of the Civil Rights Act of 1964 protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin.[58] Victims of discrimination in the United States must file a "Charge of Discrimination" with the Equal Employment

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[50] *Id.*
[51] *Id.* ¶ 8.
[52] *Id.* ¶ 11.
[53] *Id.* ¶¶ 32-3.
[54] *Id.*
[55] *Id.* ¶¶ 14-5.
[56] *Id.* ¶¶ 57-8.
[57] *Id.*
[58] Civil Rights Act of 1964, P.L. 88-352, § 705(g), 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. § 2000e-2).

Opportunity Commission ("EEOC") within 180 days of the incident (unless the complaint is also covered by a state or local anti-discrimination law, in which the time period is extended to 300 days).[59] If the victim is a federal employee or applicant, the reporting deadline is shorter—forty-five days.[60] The complaint is the first step before consulting with an attorney to begin a civil lawsuit against the employer.[61] Victims may receive compensation for their injuries if the lawsuit is successful. In this way, the law treats employment discrimination as a "tortious injury."[62]

III. THE IMPOSITION OF CRIMINAL RESPONSIBILITY WOULD PROVIDE AMERICAN EMPLOYEES AN ALTERNATIVE TO ARBITRATION AGREEMENTS THAT BAR VICTIMS FROM LITIGATION

Arbitration agreements, such as the forced arbitration agreement in Tesla's employment contract, help companies avoid costly and time-consuming trials, while simultaneously depriving employees, potential employees, and the public at large of valuable information about actual workplace conditions.[63] These agreements favor discriminatory employers.[64] To date, appellate courts in the United States have significantly favored employers. Employee victims need a meaningful alternative to hold discriminatory employers responsible.

In addition to saving money and time, employers also benefit from avoiding juries and their tendency to favor employees more than employers.[65] Juries sympathize with employee victims more than arbitrators, and it is more likely that a jury would award substantial damages.[66] There is a recognized bias in arbitration that benefits the employer called the "repeat player effect."[67] Lisa Bingham introduced this term in 1997 to explain the favoritism displayed by arbitrators for the

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[59] *Filing a complaint,* EEOC, https://www.eeoc.gov/youth/filing-complaint.

[60] *Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations (29 CFR Part 1614)*, EEOC, https://www.eeoc.gov/publications/facts-about-federal-sector-equal-employment-opportunity-complaint-processing.

[61] Filing a complaint, *supra* note 59.

[62] Suk, *supra* note 11, at 1317.

[63] Alexia Fernandez Campbell & Alvin Chang, *There's a Good Chance You've Waived the Right to Sue Your Boss*, VOX (Sep. 7, 2018, 4:21 PM), https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

companies who consistently hire them to arbitrate their cases.[68] In 2011, Alexander Colvin identified another bias. He found that arbitrators were more likely to award smaller amounts of money damages to employees, even after finding the employer at fault.[69]

Employers using mandatory arbitration agreements benefit from handling negative matters privately. Arbitration agreements commonly contain confidentiality clauses.[70] Nearly all the agreements include the term "private," regarding either the arbitrator's neutrality or the arbitration itself.[71] The National Labor Relations Board ("NLRB") initially found that such confidentiality clauses violated Section 7 of the National Labor Relations Act because they prohibited employees from discussing the workplace.[72]

However, the NLRB retracted from this position after recent U.S. Supreme Court and NLRB decisions.[73] The NLRB has since declared that confidential arbitrations do not violate Section 7 of the National Labor Relations Act, but states that settlements should not be kept confidential to the extent that they would prohibit open discussion of the settlements among employees.[74] While there are arguments for confidentiality, the agreements risk employees' rights, such as the protection from discrimination.[75]

By contrast, employee victims who sign arbitration agreements enjoy fewer benefits than the employers. In 2019, approximately sixty million

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[68] *Id.*; *see also* Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 192 (1997).

[69] Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury,* 11 EMP. RTS. & EMP. POL'Y J. 405, 419 (2007).

[70] Bingham, *supra* note 68, at 189.

[71] Laura A. Kaster, *Confidentiality in U.S. Arbitration*, NYSBA N.Y. DISP. RESOL. L., Spring 2012, at 23.

[72] Adam S. Forman & Kyle D. Winnick, *NLRB Holds Arbitration Agreements Can Remain Confidential—for Now*, THE NAT'L L. REV. (Apr. 8, 2021), https://www.natlawreview.com/article/nlrb-holds-arbitration-agreements-can-remain-confidential-now.

[73] *Id.*

[74] Mark Theodore et al., *Requiring Employees to Maintain the Confidentiality of Arbitration Proceedings Held to be Lawful Under the NLRA…For Now*, PROSKAUER (Mar. 26, 2021), https://www.laborrelationsupdate.com/nlra/requiring-employees-to-maintain-the-confidentiality-of-arbitration-proceedings-held-to-be-lawful-under-the-nlrafor-now/.

[75] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration.*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

American employees gave up their rights to litigate disputes.[76] Even if a new employee spends the time to thoroughly read the agreement, signing it may be a requirement to be hired. Aside from having little choice, employees looking for a paying job or a better one may be optimistic and naïve in these matters, and may not foresee the possibility of being a victim of discrimination. Mr. Diaz at Tesla, for example, did not anticipate the distressing treatment he received.

With employers who require the use of the arbitration clause, a potential employee who declines it forfeits the opportunity of the job.[77] This illustrates an imbalance of power during contract formation, and the agreements hinder victims' abilities to hold the employer accountable.

Although the use of mandatory arbitration agreements has recently become popular, arbitration was used in ancient Phoenicia.[78] Since the time of its ancient origins, arbitration subsequently was frowned upon by those who favored the common law system, and courts allowed parties to a lawsuit to retract their arbitration agreements.[79] The use of arbitration continued to evolve as society and lawmakers responded to the "demands of business," which made these agreements as enforceable as any other contract.[80] By treating arbitration agreements as contracts, the door to contract defenses was opened.[81]

In *Diaz v. Sohnen Enterprises*, the employee experienced recurring acts of sexual harassment from a coworker.[82] She informed her manager about the incidents, suffered retaliation, and ultimately filed a lawsuit against the company for discrimination and other claims.[83] Less than a month after Diaz filed the lawsuit, the company informed her about their new dispute resolution policy which required arbitration of all claims.[84] Though she continued to work for the company, Diaz never signed the proposed arbitration agreement. She objected to it twice—verbally and in writing.[85] The trial court judge rejected the defendant's motion to compel arbitration

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[76] Alexia Fernandez Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue their Boss*, VOX (Sep. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.
[77] Colvin, *supra* note 75.
[78] Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 925 (1991).
[79] *Id.*
[80] *Id.*
[81] *Id.* at 926.
[82] Diaz v. Sohnen Enters., 245 Cal. Rptr. 3d 827, 829 (2019).
[83] *Id.*
[84] *Id.*
[85] *Id.*

stating that "there was no meeting of the minds."[86] However, the appellate court reversed and remanded, ruling that Diaz was required to resolve the claims in arbitration. The appellate court ruled that by continuing to work at Sohnen after receiving notification of the arbitration requirement, Diaz gave implied consent to the arbitration requirement.[87]

In the same vein, the Supreme Court of the United States has favored business interests over employee rights since its landmark decision in *Gilmer v. Interstate/Johnson Lane Corp*. in 1991.[88] In *Gilmer*, the Court held that the age discrimination claim was subject to mandatory arbitration pursuant to the signed arbitration agreement.[89] Since then, the Court has continued to show an unwavering preference for employers.[90] In 2018 the Court combined three cases, *Epic Systems Corp. v. Lewis*, *Ernst & Young v. Morris*, and *NLRB v. Murphy Oil*, and held that employers could continue to insist upon arbitration agreements for all work-related claims.[91] Furthermore, the *Epic* decision extended the use of mandatory arbitration to include class and collective waivers.[92] The late Justice Ginsburg wrote the dissent and argued that Congress showed its intent to provide employees with "strength in numbers" to offset the might and resources of employers when it enacted the NLRA.[93] Although these three cases involved wage and hour claims, the Court's decision extended to include sexual harassment and discrimination claims.[94]

In upholding the arbitration requirements, United States courts have allowed the exercise of significant power by corporations.[95] The corporations retain the upper hand in their relationships with consumers and employees since they write the rules, define the procedures used for interpretation and application of said rules when disputes arise, and ban class-action lawsuits.[96] This dynamic allows corporations to take advantage

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[86] *Id*.
[87] *Id.* at 831.
[88] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); *see also* Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—# TimesUp on Workers' Rights*, 15 STAN. J. OF CIV. RTS. & C. L. 43, 44 (2019).
[89] *Gilmer,* 500 U.S. at 26-7.
[90] Green & O'Brien, *supra* note 88, at 52.
[91] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).
[92] *Id.*
[93] *Id.* at 1633 (Ginsburg, J., dissenting).
[94] *Id*.
[95] Colvin, *supra* note 75, at 1.
[96] *Id.* at 3.

of these agreements without consequence. The focus is on the corporation, rather than consumer and labor rights.[97]

If the United States were to add criminal punishment as a consequence for discriminatory practices, criminal trials would be public proceedings and employers would become more accountable and may suffer public embarrassment. Criminal liability would change the relationship dynamic with employers because they would no longer hold as much of the power in their relationships with employees as they currently hold. There would also be less opportunities for the repeat-player bias to occur.

Arbitration agreements aside, there are other problems for plaintiffs with civil litigation remedies being the only available path for employment discrimination victims. Both civil and criminal lawsuits are public proceedings. However, parties in civil matters can settle pre-suit. Settlements may require closure by way of dismissal with terms of confidentiality, with nondisclosure agreements (NDAs) in place. NDAs endanger the complainant's recovery in the event of a violation of the NDA's terms. On the other hand, criminal proceedings generally remain public all the way through.[98] Therefore, criminal prosecutions may present more of a concern for persons or entities who care about their public image.

Companies have a lot to lose if their public image and reputation are damaged. Public scandal risks a decrease in sales, a reduction in shareholder confidence, a bruise to employee morale, and the expenditure of funds to pay for legal fees in dealing with the problem.[99] The advancement of technology and the internet has greatly increased the sharing of opinions and information between potential and existing customers, and previous and current employees.[100] When the pandemic forced many indoors, the internet and social media became the place to socialize and communicate.[101] As such, people spent a "record amount of time online."[102] These technological advancements and the recent pandemic fathered a practice called "cancel culture."[103] Cancel culture refers to "canceling" a person or a company by withdrawing support, whether

[97] *Id.* at 11.

[98] Frederick W. Goundry III, Comment, *When Can the Courtroom be Closed in Criminal Proceedings?* 21 U. BALT. L. F. 17, 17 (1990).

[99] John L. Hines Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97, 97 (2003).

[100] *Id*.

[101] Kian Bakhtiari, *Why Brands Need to Pay Attention to Cancel Culture*, FORBES (Sept. 29, 2020, 6:32 PM), https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=76526cb5645e.

[102] *Id*.

[103] *Id*.

financial or social.[104] Like it or not, the practice is very popular among consumers and the younger generation. Companies that stayed out of politics might find it less avoidable than in the past.[105]

Today, silence and neutrality on political matters may be viewed as complicity, and companies cannot afford to lose customers and employees due to a lack of support.[106] Furthermore, they cannot afford to get it wrong either, or risk being labeled "tone-deaf." In response, some companies have developed and dedicated departments to preserve their image, in terms of political messaging to consumers as well as to employees.[107] In this current age of political messaging, companies will likely show a particular concern toward criminal accusations of discrimination. These dedicated departments have rolled out "diversity and inclusion initiatives," which implement action plans and procedures to encourage a diverse work environment.[108] Some companies, such as Disney, have even created public web pages displaying the diversity within their company in terms of race and gender.[109]

One cannot overstate the importance of public knowledge. The American people deserve to be informed—especially in the employment context—because information regarding workplace environments directly affects jobseekers, family or friends seeking jobs, and those who choose whether to spend their money at a particular business based on the company's values or lack thereof. Additionally, attorneys require knowledge of these details when researching cases for new clients. It is a well-known fact that most civil cases never make it to trial.[110] Many of these cases are settled after negotiations between the parties have resulted in a mutual agreement.[111] During the negotiations, the topic of implementing a confidentiality clause often arises, and such clauses block public knowledge.[112] The right to information should trump the risk of employers looking bad. Adding criminal responsibility would keep the

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[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] Somen Mendal, *Diversity and Inclusion: A Complete Guide for HR Professionals*, IDEAL (Sept. 15, 2021), https://ideal.com/?s=diversity+and+inclusion.
[109] *The Walt Disney Company Workforce Diversity Dashboard,* THE WALT DISNEY CO., https://impact.disney.com/app/uploads/2022/01/FY21-Workforce-Dashboard.pdf.
[110] SHARI L. KLEVENS & ALANNA CLAIR, *SHHH: COMPLYING WITH CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS*, Daily Rep., (2020).
[111] *Id*.
[112] *Id*.

proceedings public, the information would be readily available and, in some cases, publicized by news reporters and journalists.

Victims of employment discrimination would also benefit from the state taking on their claims and treating them not as tortious injuries, but as criminal offenses to the state.[113] The requirement of finding direct economic harm under Title VII can be difficult to prove, especially in hiring discrimination cases.[114] As a result of the low economic harm damages for victims of hiring discrimination, attorneys are less inclined to take the case as their fees would also be low.[115]

Although such cases are rarely brought to the courts, hiring discrimination is still an issue in American society, as shown by the latest labor statistics.[116] The 2021 third-quarter data from the Bureau of Labor Statistics shows Black and Hispanic groups have higher rates of unemployment than those of white people.[117] In treating employment discrimination and consequently, cases of hiring discrimination and hostile work environments as a harm to society, the burden of proof would no longer rest on one individual's shoulders and the focus would shift from proving injury to proving intent.[118] If victims had the opportunity to file their complaints with a prosecutor, the strength of the state and the change in the requirement of proof would add viability to their claims.

IV. ADDING CRIMINAL RESPONSIBILITY TO EMPLOYMENT DISCRIMINATION WOULD SATISFY RETRIBUTION AND DETERRENCE JUSTIFICATIONS FOR PUNISHMENT

Criminal acts carry a societal stigma, and criminalizing employment discrimination would mean that public shame and embarrassment would attach to the crime.[119] This characterization would contribute to the goal of retribution because it would punish the morally reprehensible act in the way that civil penalties fall short, especially when most cases get arbitrated or settled with nondisclosure agreements.[120] Retribution would be satisfied by criminalizing employment discrimination because it would punish more

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[113] *See* Suk, *supra* note 11, at 1368.
[114] *Id*. at 1368.
[115] *Id*. at 1370.
[116] *Id*. at 1369; *see also* U.S. Bureau of Lab. Stat., *Labor Force Statistics from the Current Population Survey* (2021).
[117] Suk, *supra* note 11, at 1369; *see also* U.S. Bureau of Lab. Stat., *Labor force characteristics by race and ethnicity, 2020* (Nov. 2021).
[118] *See* Suk, *supra* note 11, at 1368.
[119] *Id*. at 1333.
[120] *Id*. at 1318.

aspects of the wrongful act, instead of merely placing a price tag on it.[121] In addition to retribution, the imposition of imprisonment and the threat of bad publicity should help to deter employers from engaging in improper discriminatory conduct. Dismissing harm as complex as discrimination in the workplace dismisses its social and psychological effects on workers, and too often, companies' statements lack remorse and understanding.[122] Wrongdoers of the harm deserve to reap what they sow. Their wrongful acts deserve punishment, and the law should evolve to accommodate society's needs as civil remedies alone prove insufficient.

The goal of deterrence would support the criminalization of employment discrimination as a way to work around forced arbitration agreements. First, for many people there is no greater threat than criminal punishment or imprisonment. For companies with millions of dollars, a fine may be an acceptable way to deal with pesky situations and move on from them. Therefore, the threat of criminal punishment would strike a deeper fear because it involves one's liberty. Second, the fear of bad publicity may encourage companies to refrain from discrimination in the workplace and punish it more harshly when they come across it. Bad publicity spreads fast, so employers and companies would be wise to learn from others' mistakes after they learn about the wrongful acts from the internet or news reporters. After offending employers are caught and punished, they should refrain from engaging in the same type of behavior going forward.

Even if the imposition of criminal responsibility on employment discrimination was not enforced, declaring it to be a crime would be a statement of solidarity. The United States government would be sending a message to society—declaring its core values and making them explicit. To discriminate against others in the workplace would no longer constitute an offense only to those individuals, but to society and its core values of equality.

V. CONCLUSION

Since its inception, America has been a place of hope built from the dreams of immigrants and persons of different colors and backgrounds. To deny or hinder one's ability to earn an income based on color, sexual

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[121] *Id*. at 1368.

[122] Valerie Capers Workman, *Regarding Today's Jury Verdict*, TESLA (Oct. 4, 2021), https://www.tesla.com/blog/regarding-todays-jury-verdict (insinuating that a jury verdict finding that the company failed to prevent racial harassment was unjustified and unreflective of company policy).

orientation, gender, religion, or a disability is to deny the person's basic rights of autonomy and happiness.

Mandatory arbitration agreements present a unique challenge to the American legal system and place too much focus on protecting companies, leaving employees vulnerable to discrimination and other harms. These agreements are dangerous because they greatly risk many rights of employees and consumers. Civil procedure has not and cannot provide a solution to this problem that is strong enough to make a difference. Civil procedure presents its own unique challenges to enforcing employment discrimination by way of confidentiality clauses, financial burdens, and its requirement to show sufficient economic harm. Furthermore, the EEOC's effectiveness has recently been seriously questioned.

Adding criminal responsibility would open new doors for victims of employment discrimination and allow for societal change. Two justifications for criminal punishment —retribution and deterrence—would be satisfied and the United States would declare its moral values and send a message of solidarity. Transforming the harm from a private dispute between two parties to a crime against society would give more claims viability and strength. Employment discrimination should be viewed as more than a tortious injury, for its effects are far-reaching and complex.