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LESS IS MORE: PROCEDURAL EFFICACY IN VINDICATING CIVIL RIGHTS

*Jennifer Bennett Shinall**

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ABSTRACT

Eradicating discrimination is a lofty goal, and since the second half of the twentieth century, the United States has largely relied upon the legal system to achieve this goal. Yet a great deal of scholarship suggests that the legal system may not always do a credible job. Scholars have documented multiple instances of discrimination laws' inaccessibility to discrimination victims individually and inability to improve the labor market prospects of victims as a whole. Still missing from the literature, however, is an assessment of what separates effective discrimination laws from ineffective ones. This Article fills this gap, using both qualitative and quantitative methods to determine the types of enforcement mechanisms that successfully and systematically improve the labor market outcomes of individuals protected by discrimination laws. The Article takes advantage of jurisdictional variation in laws that prohibit weight-based employment discrimination, which create a natural experiment for testing what types of laws and what types of remedies lead to meaningful improvement in the employment outcomes of protected workers. Applying the lessons learned from the weight-discrimination context to employment discrimination law more generally, the Article concludes that the existence of civil rights legislation on the books does little good for a protected class if a jurisdiction fails to allocate resources to enforcement appropriately. The study provides a cautionary tale for advocacy groups that focus all their resources on lobbying for new civil rights protections; their purposes might be better served by devoting significant resources to facilitating representation and raising public awareness about existing civil rights laws.

I. INTRODUCTION

Vindicating civil rights sounds good in theory, but is the law any good at it? Scholars, attorneys, and members of the public all complain about the increasing difficulty of bringing, let alone winning, a discrimination lawsuit.¹ The complaints often center on a common theme—namely, that

1. See, e.g., Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), <http://www.wsj.com/articles/SB123500883048618747>; Steve Vogel, *EEOC Struggles with Huge Workload, Diminished Staff*, WASH. POST (Feb. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020202452.html>. Even U.S. senators have complained recently about the difficulties that employment discrimination plaintiffs currently face in bringing an employment discrimination case. See Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Alexander Calls on EEOC Nominees to Say How They Would Address EEOC Practices that “Cost Taxpayers, Hurt Victims of Workplace Discrimination” (Nov. 13, 2014), <http://www.help.senate.gov/chair/newsroom/press/alexander-calls-on-eeoc-nominees-to-say-how-they-would-address-eeoc-practices-that-cost-taxpayers-hurt-victims-of-workplace-discrimination>.

the processes and procedures associated with enforcing these claims have become too costly, too time-consuming, and too complicated to be practicable. For plaintiffs, the frustrations often begin at the charge-filing stage. The Equal Employment Opportunity Commission (EEOC), the federal agency in charge of administering employment discrimination charges, is notoriously underfunded, resulting in a backlog of cases, long wait times for charge investigation, and fewer resources for the agency to litigate claims in the public interest.² The obstacles become still more cumbersome if a plaintiff makes it through the charge-filing phase to the litigation phase. Complex, unforgiving proof structures render these cases virtually impossible to pursue without an attorney.³ Even with the assistance of an attorney and a meritorious underlying claim, plaintiffs face increasingly hostile courts and evidentiary burdens that some worthy plaintiffs will never be able to satisfy.⁴ All of these developments have worked to raise the personal and financial costs associated with bringing a discrimination lawsuit,⁵ which has led to an overall decline in the number of such lawsuits filed at the federal level in recent years.⁶

2. See Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 445–46 (2015) (discussing how the underfunding of the EEOC has led to a precipitous decline in public interest lawsuits filed by the agency in recent years); Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995) (arguing that the EEOC should cease processing discrimination charges because it is so overwhelmed with them due to lack of resources); see also Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 347 (2000) (arguing that the “EEOC has been so underfunded and so understaffed for such a long time that you can’t fault them for the [backlog] situation anymore” (alteration in original) (quoting Darryl Van Dutch, *Paralysis for EEOC Feared*, NAT’L L.J., Aug. 24, 1998, at A1)).

3. Accord Laura Beth Nielsen, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010) (“[P]ro se [plaintiffs] . . . are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment.”).

4. See, e.g., Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (arguing that courts’ requirements that discrimination plaintiffs identify a similarly situated comparator prevents many employees with legitimate claims, particularly employees with unique job titles, from succeeding).

5. See Andrea Giampetro-Meyer, *Standing in the Gap: A Profile of Employment Discrimination Plaintiffs*, 27 BERKELEY J. EMP. & LAB. L. 431, 434 (2006) (pointing out the heavy toll that employment discrimination suits take on plaintiffs). According to one plaintiff, “If you ever go into a lawsuit because you think it’s about money, you won’t last a week. . . . It has to be that you are so passionately moved by what you believe. . . . [F]or me, I knew, win or lose, [this lawsuit’s] gonna cost me my career.” *Id.* (second alteration in original).

6. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009) [hereinafter *From Bad to Worse*] (demonstrating empirically that employment discrimination lawsuit filings declined between 2002 and 2007); see also Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (expressing concern that employment discrimination plaintiffs (and their attorneys) are becoming frustrated by low rates of success in federal court).

At the same time, the legal scholarship largely maintains that discrimination laws have played some role, at least historically, in the advancement of civil rights.⁷ A recent review of empirical evidence on the labor market effects of Title VII of the 1964 Civil Rights Act, for instance, concluded that in spite of its failure to achieve complete workplace equality, the Act “changed the legal norm from one of exclusivity to one of inclusivity” by “fundamentally alter[ing] the at-will employment scheme that otherwise governed the U.S. labor market.”⁸ Still missing from the literature, however, is a systematic investigation of the types of administrative and enforcement practices that have led to the most meaningful changes in the lives of discrimination laws’ intended beneficiaries. Current scholarship leaves much reason for advocates and policymakers to be concerned about drafting a civil rights law that sounds good in name, but does nothing in practice⁹—or even worse, drafting a civil rights law that has unexpected, negative consequences on its intended beneficiaries.¹⁰ Yet the scholarship leaves advocates and policymakers

7. See, e.g., John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that Title VII is efficient under neoclassical economic theory, and noting that the Act “stands as the most visible legislative pronouncement of this country’s commitment to equal opportunity for all Americans”); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005) (arguing that the 1964 Civil Rights Act created “‘Rights of Belonging,’ [or] those rights that promote an inclusive vision of who belongs to the national community and that facilitate equal membership in that community”). But see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 10 (1992) (arguing for the repeal of the 1964 Civil Rights Act, although admitting, “knowing what I know today, if given an all-or-nothing choice, I should still have voted in favor of the Civil Rights Act in order to allow federal power to break the stranglehold of local government on race relations”).

8. Hersch & Shinall, *supra* note 2, at 450.

9. See, e.g., Jennifer Bennett Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, 5 IZA J. LAB. ECON. 1 (2016) (finding no employment effects of the Americans with Disabilities Act Amendments Act on newly protected workers); see also Tracey E. George et al., *The New Old Legal Realism*, 105 NW. U. L. REV. 689 (2011). In the George et al. study, a team of legal researchers interviewed Las Vegas casino employees about the impact of a well-known Title VII decision, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106–17 (9th Cir. 2006) (en banc), on their job’s grooming requirements. In *Jespersen*, a casino bartender in Reno challenged her former employer’s sex-based grooming standards under Title VII, and in response to her claim, the Ninth Circuit’s opinion seemed to open the door to challenging workplace grooming requirements under Title VII. In spite of the decision’s widespread media coverage, the authors found that the casino workers, who stood to gain the most from the decision, were completely unaware of it. And when the authors made them aware of the favorable legal decision, the casino workers expressed unwillingness to come forward and enforce their newfound rights.

10. For example, a series of empirical studies conducted by economists have found that labor market outcomes of disabled individuals have, at best, stayed the same and, at worst, declined, since the passage of the Americans with Disabilities Act. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 915–57 (2001) (finding a negative effect); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000) (finding a negative effect); Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RESOURCES 887 (2004) (finding no effect); Douglas Kruse & Lisa Schur, *Employment*

berent of guidance on how to craft a discrimination law that actually works. Investigating the mechanisms behind an effective civil rights law becomes particularly critical in the wake of calls for new civil rights laws, particularly from the lesbian, gay, bisexual, and transgender (LGBT) community.¹¹

The investigation of how laws work and whether they function in their intended manner has formed the basis of the law-in-action movement.¹² One method of determining how law works in action is to conduct qualitative research, interviewing actors on the ground to ask their opinion of how the law works.¹³ Although qualitative research can provide remarkable insight into the motivations of relevant actors, concerns about sample selection bias¹⁴ are difficult to overcome in the absence of empirical proof that the interviewed population is sufficiently representative of the relevant population as a whole.¹⁵ Perhaps a more systematic way of evaluating how a law works in action is to study the law's effects quantitatively. An obvious way to evaluate a law's efficacy in the employment discrimination context is to compare labor market data (such as wages and employment) before and after a law's enactment in order to determine whether conditions have improved for the newly protected

of People with Disabilities Following the ADA, 42 INDUS. REL. 31 (2003) (suggesting that a finding of no effect or of a negative effect depends upon the underlying assumptions in analyzing the data).

11. At the federal level, LGBT advocates have successfully convinced members of Congress to consider a bill that explicitly provides employment protections to the LGBT community, known as the Employment Non-Discrimination Act (ENDA), in virtually every session of Congress since the mid-1990s. See Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> (detailing the history of the various attempts to pass ENDA since 1994). *But see* Tierney Sneed, *Why LGBT Groups Turned on ENDA*, U.S. NEWS (July 9, 2014), <http://www.usnews.com/news/articles/2014/07/09/why-lgbt-groups-turned-on-enda> (discussing some LGBT movement members' concerns about the religious exemption in the latest version of proposed ENDA legislation). The bill has never simultaneously passed both houses. See *id.* (describing how two different versions of the bill have passed the House and the Senate, but during two different sessions of Congress).

12. For examples of law-in-action scholarship, see Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001); Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be,"* 2005 WIS. L. REV. 365 (2005); Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 LAW. & SOC'Y REV. 463 (2012).

13. See, e.g., George et al., *supra* note 9.

14. Sample selection bias occurs whenever a sample is drawn non-randomly from the population intended to be studied. For a discussion of the biases that result from sample selection bias, and an econometric correction for such bias, see James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 ECONOMETRICA 153 (1979).

15. "Sample selection bias can have various effects. It can create a false appearance of discrimination, or it can change the apparent magnitude of a real discriminatory practice, . . . [or it] may conceal, or partially conceal, discrimination . . ." Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 47 (1984) (footnote omitted).

group. Many economists have conducted precisely such research.¹⁶ The downside, of course, of empirical studies is that, while they can provide a more complete picture about *whether* a law is working, they generally cannot say much (other than guess) about *why* a law is working.

Hence, the best approach to evaluating what types of employment discrimination laws work—and why they work—is to use both qualitative and quantitative methods, which is precisely the aim of this Article. To conduct such a study requires identifying a group that is protected by law in some jurisdictions, but not all jurisdictions, so that there exists variation. This variation will allow comparison between labor market outcomes of the group in protecting jurisdictions and non-protecting jurisdictions. As a result, none of the federally protected classes (e.g., race, sex, disability) are good candidates for study since all U.S. jurisdictions prohibit this type of discrimination. From a qualitative perspective, protected classes that are good candidates for study will also be protected by laws with jurisdictional variation in enforcement mechanisms. If the labor market data indicate that one jurisdiction's law works better than another jurisdiction's law, differences in enforcement mechanisms between the jurisdictions may be able to explain why one jurisdiction has better results.

With the federally protected classes ruled out, the next step becomes identifying another group that is protected in some U.S. jurisdictions, but not all. To be a good candidate for study, the sometimes-protected class (1) must have the variation in legal coverage described above, and (2) must also be identifiable in labor market data. One obvious candidate for evaluation is the effect of LGBT discrimination laws on members of the LGBT community. Although there exists substantial variation across U.S. jurisdictions regarding whether members of the LGBT community are legally protected from employment discrimination,¹⁷ identification is what makes the empirical study of LGBT employment laws difficult. Labor market datasets do not generally collect information on respondents' sexual orientation or gender identity.¹⁸ Consequently, from an empirical

16. See, e.g., Acemoglu & Angrist, *supra* note 10 (evaluating the labor market effects of the Americans with Disabilities Act empirically); Kenneth Y. Chay, *The Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972*, 51 INDUS. & LAB. REL. REV. 608 (1998) (evaluating the labor market effects of Title VII empirically); DeLeire, *supra* note 10 (evaluating the labor market effects of the Americans with Disabilities Act empirically); Joanne Song, *Falling Between the Cracks: Discrimination Laws and Older Women* (Dec. 2012), <http://paa2013.princeton.edu/papers/130235> (evaluating the labor market effects of the Age Discrimination in Employment Act empirically).

17. For an updated list of the states that prohibit employment discrimination on the basis of sexual orientation and/or gender identity, see *Non-Discrimination Laws: State-by-State Information – Map*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> [hereinafter *Non-Discrimination Laws Map*] (last visited Sept. 12, 2016).

18. For a discussion of the difficulties of studying the labor market outcomes of the LGBT community—given the imperfect (at best) measures of sexual orientation and gender identity in existing

standpoint, it becomes impossible to tell whether wage and employment outcomes improve for individuals who identify as LGBT after a jurisdiction passes a protective law.

Fortunately, another sometimes-protected group exists that meets both the criteria above: obese individuals. Obese individuals are identifiable in a handful of labor-market datasets that collect information on respondents' body mass index (BMI).¹⁹ Moreover, ten jurisdictions across the United States prohibit employment discrimination against obese individuals through bans on weight and/or personal appearance discrimination. The jurisdictions include the state of Michigan; the Maryland counties of Harford, Howard, and Prince George; and the cities of Madison, Wisconsin; Washington, District of Columbia; Urbana, Illinois; Santa Cruz, California; San Francisco, California; and Binghamton, New York. In of all these places, laws protect weight (or personal appearance generally) in the same manner that Title VII of the Civil Rights Act protects race, sex, color, religion, and national origin.²⁰

Together, the laws present a unique opportunity to conduct a natural experiment.²¹ This natural experiment can address questions that lack of jurisdictional variation and lack of data have previously impeded researchers' ability to answer—questions such as, what types of employment discrimination remedies best equalize the playing field for underserved groups in the labor market? What kinds of enforcement practices discourage plaintiffs from coming forward and pursuing meritorious claims? And how legitimate is the concern that workers do not know their legal rights? To provide insight into these questions, this Article will first use the ten weight/personal appearance laws to investigate quantitatively which (if any) of these laws have led to meaningful improvement in labor market outcomes of obese individuals.

datasets—see Christopher S. Carpenter, *Self-Reported Sexual Orientation and Earnings: Evidence from California*, 58 *INDUS. & LAB. REL. REV.* 258, 258–73 (2005).

19. Throughout this Article, weight categories are defined according to body mass index (BMI), which is calculated using the following equation: $BMI = \frac{weight(lb) \times 703}{(height(in))^2}$. Using BMI, individuals are

then classified as underweight if their BMI is less than 18.5, normal weight if their BMI is greater than or equal to 18.5 but less than 25.0, overweight if their BMI is greater than or equal to 25.0 but less than 30.0, obese if their BMI is greater than or equal to 30.0 but less than 40.0, and morbidly obese if their BMI is greater than or equal to 40.0. See *Obesity: Symptoms*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/obesity/basics/symptoms/con-20014834> (last visited Sept. 12, 2016).

20. See *infra* Part III.

21. A natural experiment is a term used by social scientists to describe “a wide variety of studies that resemble . . . randomized field experiments . . . but that lack the researcher control or random assignment characteristic of a true experiment.” See DAHLIA K. REMLER & GREGG G. VAN RYZIN, *RESEARCH METHODS IN PRACTICE: STRATEGIES FOR DESCRIPTION AND CAUSATION* 428 (2011).

With these quantitative results in mind, the Article will then rely on both personal interviews and historical archive work to investigate qualitatively the differences in legislative purpose, administration, and enforcement between the effective and ineffective laws. The study will conclude that the laws with the quickest and cheapest enforcement mechanisms, not coincidentally, are also the ones that have been most effective in improving labor market outcomes. Of particular importance to effective enforcement of civil rights are mandatory mediation requirements, swift adjudication timelines, accommodation of pro se plaintiffs, and promotion of public awareness.

In conducting this quantitative and qualitative investigation, the study will proceed as follows: Part II discusses prior scholarly critiques of the enforcement design of employment discrimination laws and then explores the institutional and procedural design mechanisms that might improve current laws. Part III introduces the arguments as to why obese individuals may require additional labor market protections and then details the ten local protections that currently exist. The Part next describes the empirical techniques and data necessary to test the efficacy of the laws as well as the results of the empirical analysis. Part IV discusses the differences in enforcement mechanisms that make some weight-discrimination laws more successful than others, and Part V discusses the implications of this study for employment discrimination laws more generally.

II. DESIGNING EFFECTIVE CIVIL RIGHTS PROTECTIONS

A. *Failures of the Current Design*

Employment discrimination scholars have repeatedly lamented the inability of current laws, particularly at the federal level, to rid the workplace of discrimination. Undoubtedly, the relative position of minorities and women in the labor market has improved over the half-century that has passed since the 1964 Civil Rights Act.²² Yet neither group has fully escaped their historical disadvantage; even after adjusting for differences in other observables like education and working hours, white women continue to earn about 10% less than white men,²³ while African-

22. See Hersch & Shinall, *supra* note 2, at 439–50 (concluding from the available empirical evidence that neither women nor minorities have caught up to men in the workplace, although these historically underserved groups have made significant progress since the passage of the 1964 Civil Rights Act).

23. See, e.g., Dan A. Black et al., *Gender Wage Disparities Among the Highly Educated*, 43 J. HUM. RESOURCES 630, 652 (2008) (estimating that white women earn approximately ninety-one cents for every dollar that a white man earns).

American men continue to earn about 15% less.²⁴ Blame for the persistence of discrimination in the workplace—in spite of legal protection—has taken a number of forms, with scholars citing everything from social causes (such as minorities' continued poor access to quality education²⁵ or women's continued role as the primary family caretakers²⁶) to legal causes (such as the judicially created proof structures in federal discrimination cases²⁷). Although prior scholars have identified a number of problems with employment discrimination law, a significant number of these issues fall under the category of administration and enforcement.

The agency charged with the administration and enforcement of the federal law has been the subject of particular scrutiny by legal scholars. As discussed in the Introduction, some of the concerns raised regarding the EEOC are practical in nature. Current law requires all Title VII and Americans with Disabilities Act plaintiffs to file a charge with the agency, which has, not surprisingly, led to bottlenecks in agency investigations.²⁸ Given the widely recognized shortage of agency funding²⁹—and the improbability of Congress significantly increasing agency funding³⁰—practical critiques have focused on how the agency may best utilize its scarce resources. For instance, Michael Z. Green has suggested that the agency move from an optional mediation model to a mandatory mediation

24. See, e.g., Dan A. Black et al., *Why Do Minority Men Earn Less? A Study of Wage Differentials Among the Highly Educated*, 88 REV. ECON. & STAT. 300, 306 (2006) (estimating that African-American men earn approximately eighty-three to eighty-seven cents for every dollar that a white man earns).

25. See generally *id.* (discussing the difficulties in adequately controlling for education in estimating the minority-white wage gap, given the known persistence of differences in education quality).

26. See Joni Hersch & Jennifer Bennett Shinall, *Something To Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. (forthcoming 2017) (discussing that women continue to bear the primary burden of caretaking responsibilities at home).

27. One of the most frequently noted points of failure in employment discrimination adjudication is the judicially created proof structure that encourages (and in some federal circuits, requires) indirect proof of discrimination through the use of similarly situated comparators. See, e.g., Goldberg, *supra* note 4; Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009).

28. According to one district office director, EEOC charge investigations regularly exceed a year. See Telephone Interview with Katharine Kores, Dist. Dir. of Memphis Office, Equal Emp't Opportunity Comm'n (Jan. 9, 2012); see also Munroe, *supra* note 2, at 260-61 (discussing how the agency has always had a "backlog" of cases).

29. Indeed, lack of funding has been an issue for the agency since its beginnings. See DESMOND S. KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA 104 (2011) (discussing the effects of agency underfunding as early as the 1970s).

30. See, e.g., Green, *supra* note 2, at 349 (describing Republicans' concern that the agency is too employee-friendly and "Congress's use of its funding whims as a control on the EEOC in mind").

model, forcing employers to take this step more seriously,³¹ while Maurice E. R. Munroe has recommended that the agency get out of the charge-processing business³² altogether and use its funding solely for large-scale litigation.³³

Most of the scholarly concerns raised regarding the agency, however, are structural in nature. These arguments contend that even if Congress were more generous with the EEOC's funding, fundamental flaws would remain in the design of employment discrimination law enforcement. Marcia McCormick, for example, has questioned whether the rights of "rank and file employees" can ever be adequately protected under the judicial enforcement model since pursuing low-value claims is not financially worthwhile for attorneys, and discrimination cases are difficult to win *pro se*.³⁴ McCormick and others have consequently advocated for granting the agency adjudicative powers and shifting the agency's focus away from investigating every claim.³⁵ Based on similar concerns, Michael Selmi has recommended that the EEOC be transformed from a mandatory into an optional step for employment discrimination claimants, or more radically, that the agency should be eliminated altogether.³⁶ These repeated

31. See *id.* at 355 (proposing that "private mediation sessions will become the main charge processing vehicle instead of the charge prioritizing triage procedures currently being used by the EEOC").

32. To gain relief under Title VII or the Americans with Disabilities Act, a claimant must first exhaust her administrative remedies—that is, file a charge with the EEOC within 180 days (or 300 days in states with a Fair Employment Practice Agency). For a summary of the charge-filing process, and the nonimportance of the EEOC's investigatory determination, see Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 6–10 (1996).

33. See Munroe, *supra* note 2, at 220–21 (arguing that "The EEOC can do more to reduce discrimination by spending its resources on attacking practices than by spending the same funds on resolving individual complaints, . . .").

34. Marcia L. McCormick, *The Truth is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 227 (2009) ("Rank and file employees lack access to the courts because they cannot find attorneys to take their cases, in part because the cases are so difficult to win.")

35. See *id.* at 227 (arguing that "a federal agency that performs adjudication can provide greater access to justice for employees and small employers, and stronger enforcement than reliance on the court system or ADR alone"); see also Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 90 (2012) (proposing that the "EEOC should also be given adjudicative authority, not just investigative authority, and should be the primary vehicle for individuals seeking redress from small employers. Employees of larger entities who do have the option of bringing claims in court should be given the option of pursuing administrative adjudication or bypassing the agency and proceeding directly to court in order to avoid duplicative processes and waste of resources."). Interestingly, the idea of granting the EEOC adjudicatory powers surfaced several times in the early years of the agency. For a brief recounting of this history—and a full consideration of Congress's choice to withhold adjudicatory power from the EEOC—see Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 383–88 (2010).

36. Selmi, *supra* note 32, at 10 (arguing that the agency's current "procedures amount to a rather strange and vacuous process—one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the

calls for sweeping reform—to the point of abolishing the current federal enforcement agency and starting from scratch—juxtaposed with the lack of consensus on the most effective type of reform raises the question: what are the design characteristics of an effective discrimination law? That question is precisely what this article seeks to answer by way of qualitative and quantitative comparison of local discrimination laws. Yet before turning to this analysis, stepping back to consider prior work on the role of institutional design choices, both inside and outside the employment context, is warranted.

B. Improving the Future Design

As discussed in the prior Subpart, scholarly critiques, which have principally focused on federal discrimination laws, have identified four harmful consequences of current enforcement mechanisms. By depriving the EEOC of any adjudicative authority, discrimination victims are forced to pursue relief for unsettled claims in court, which is both time-consuming and costly. Related to this concern is that representation is more critical in judicial adjudication, but attorneys may be difficult to find, or completely unattainable, for low-value claimants. Even for discrimination victims who are able to secure representation, the delays introduced by the EEOC's investigatory process prolong victim access to a remedy, especially for meritorious claims that fail to settle at the agency level and proceed to further docket-related bottlenecks in federal court. Finally, to the extent that victims wish to avoid the delays of litigation, utilizing alternative dispute resolution may prove challenging since mediation is not required by the agency and the employer may decline to participate. This Part will consider potential design solutions to these four consequences of the present design, looking to prior literature on the efficacy of alternatives.

1. Are Administrative Remedies Superior to Judicial Remedies?

Many scholars have lamented the EEOC's lack of adjudicative authority, but how much adjudicative authority the agency should have remains a source of debate. Some have argued that providing a mandatory administrative remedy for discrimination claimants through the EEOC is the best solution.³⁷ Others have argued that providing an optional

parties. Ironically, despite their apparent vacuity, these administrative procedures have led to a tremendous amount of litigation with issues ranging from the particular time-frames for filing a claim to the scope of the charge, to the weight to be accorded a cause or no-cause determination, to the time a right-to-sue notice has been received").

37. Under the mandatory approach, individuals would not be able to use the judicial system to vindicate their discrimination claim. See, e.g., David A. Strauss, *The Law and Economics of Racial*

administrative remedy through the agency would be ideal.³⁸ Even if an optional administrative remedy is the most suitable solution, less clear is whether a claimant's pursuit of an administrative remedy should preclude pursuit of a judicial remedy. Given the multiple calls for administrative adjudication—but the lack of consensus on the details of such a reform—stepping back to assess the comparative benefits of administrative adjudication, even outside the employment discrimination context, becomes a useful exercise.

On one hand, substituting administrative enforcement for judicial enforcement gives the agency control over the claims and issues pursued. This control may prove particularly helpful in the employment discrimination context, where complaints about meritless claims congesting federal court dockets³⁹ as well as complaints about the difficulties of enforcing meritorious claims⁴⁰ abound. On the other hand, in the absence of judicial enforcement, the agency has complete control over the claims and issues that are enforced. Complete agency control potentially stifles the amount of enforcement (given the agency's budgetary constraints), the type of enforcement (since the agency must determine its priorities in the face of constraints), and innovative theories of enforcement (since private plaintiffs and attorneys have less input into the agency's actions).⁴¹

Giving claimants the choice of pursuing an administrative remedy, a judicial remedy, or both might be an optimal middle ground; after all, a fundamental tenet of economic theory is that more choice is better. Even

Discrimination in Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619, 1655 (1991) (“First, private individuals should not be able to bring suits for discriminatory treatment under the employment discrimination laws. Discriminatory treatment claims should be screened in the way that unfair labor practice claims are currently screened by the National Labor Relations Board: a government agency decides, on the basis of an informal investigation, whether the claim has merit.”).

38. For example, Selmi, *supra* note 32, at 60–63, considers the possibility of giving the agency enough adjudicative powers to address low-value claims that might not be worth bringing in a judicial setting. He dismisses the idea of adjudicating all discrimination claims through the EEOC, however, because proposals to move to an exclusively administrative remedy “ignore the actual operation of the EEOC, which issues cause findings in so few cases and resolves comparatively few cases in favor of plaintiffs that allowing the EEOC to have the final word on claims of discrimination—without a substantial restructuring of the agency—would be tantamount to providing employers a license to discriminate.”

39. Accord Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 64 (2008) (arguing that the “proliferation of these meritless claims [in employment cases] causes many problems, including public suspicion about the necessity or effectiveness of our anti-discrimination laws, as well as an employer's reluctance to hire employees who might be deemed more difficult to fire because they can at least fashion a plausible claim against their employers (regardless of the ultimate success of that claim)”).

40. Accord Clermont & Schwab, *From Bad to Worse?*, *supra* note 6 (arguing that employment discrimination plaintiffs (and their attorneys) are unlikely to succeed in federal court and as a result, are discouraged from filing actions).

41. For a comparison of the advantages and disadvantages of agency enforcement, see Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106–21 (2005).

still, individuals may make the wrong choice—that is, pursuing a judicial remedy when they would be better served to pursue an administrative remedy (or vice versa). Or they may all make the same choice—for example, if everyone chooses an administrative remedy over a judicial remedy, disastrous consequences may ensue if the agency is not equipped to handle every claim. Moreover, if claimants are not forced to choose, and instead are allowed to pursue simultaneous administrative and judicial remedies, serious questions arise regarding the efficiency and wastefulness of duplicative enforcement actions.

Finally, whether administrative remedies are the panacea that prior discrimination scholars have argued them to be somewhat depends on how agency decision-making compares to judicial decision-making. The EEOC's historically liberal interpretations of discrimination laws⁴² may suggest that agency adjudication would bring about different results (at least in some cases) than judicial adjudication. But in examining this issue in the context of Title VII and the EEOC, Margaret Lemos has concluded that the EEOC's historically liberal position is the direct result of its lack of adjudicative powers. Lemos further argues that "courts may act more like agencies than is commonly assumed. Judges' methodological commitments lead them to seek coherence both across and within statutes, which generates a form of inter-issue consistency."⁴³ By way of extension, Lemos's argument implies that granting the EEOC claim-adjudication powers may not increase the overall level of enforcement or amount of remedies granted to discrimination victims—particularly if it results in the agency becoming less liberal in its construction of employment discrimination statutes.

Still, the group that undoubtedly stands to gain the most ground from the introduction of an administrative remedy is low-value claimants. The plight of low-value claimants in the absence of an administrative remedy has already been raised by employment discrimination scholars, but similar arguments exist in other areas of the law. For example, multiple scholars have argued that judicial adjudication favors politically and financially powerful parties;⁴⁴ to the extent that low-value claimants overlap with low-income individuals,⁴⁵ such arguments support the idea that low-value

42. *Accord* Lemos, *supra* note 35, at 389 ("[T]he EEOC's interpretations of Title VII have, on the whole, been more 'liberal' than the Court's.")

43. *Id.* at 435.

44. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 123–50 (1994); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205, 206–07, 217 (1982).

45. *Accord* Selmi, *supra* note 32, at 33 (1996) ("Moreover, to the extent that low-damage claims are correlated with low-wage jobs, these cases may be concentrated among low-income individuals.¹²¹ Given that members of minority groups and women are also disproportionately found among low-

claimants will never be well served by judicial adjudication of discrimination claims. Relatedly, one of the most common arguments raised in favor of administrative adjudication of discrimination claims is the fact that low-value claimants are unable to find representation, which is essential for the claimant's success under judicial adjudication. For this reason, the role of representation in claim outcomes is explored next.

2. *The Problem of Representation in Low-Value Claims*

Employment discrimination scholars have repeatedly pointed to the difficulty of finding an attorney for a low-value discrimination claim.⁴⁶ Of course, low-value claimants may nonetheless proceed without the assistance of an attorney, but is proceeding pro se a certain failure? The question has never been explored empirically in the employment discrimination context, although anecdotal evidence abounds regarding the difficulty of succeeding without the assistance of an attorney. Employment discrimination claims are procedurally complex to litigate,⁴⁷ suggesting that pro se discrimination plaintiffs may face an uphill battle. Yet pleading standards are less stringent for pro se plaintiffs,⁴⁸ and courts may further relax other standards of the litigation process for claimants without an attorney. If judicial standards are sufficiently and systematically relaxed, then pro se discrimination cases may not necessarily be doomed to failure.

In the absence of empirical evidence within the employment discrimination context, examining evidence from other contexts can shed light on the pluses and perils of proceeding without an attorney—although admittedly, the conclusions drawn from prior pro se research are mixed. For example, a 2015 study on the effect of counsel in immigration court proceedings found that represented parties “fare[d] better at every stage of the court process—that is, their cases [we]re more likely to be terminated, they [we]re more likely to seek relief, and they [we]re more likely to obtain the relief they s[ought].”⁴⁹ The procedural complexity of immigration proceedings analogizes well to employment discrimination proceedings,

income groups, these cases may disproportionately involve race, gender or national origin claims—precisely the kind of cases that the system should target.”)

46. *Accord* McCormick, *supra* note 34, at 227 (lamenting the difficulties of representation access faced by “[r]ank and file employees”).

47. *Cf.* Sullivan, *supra* note 27, at 192 (“Hidden beneath judicial and scholarly obsession with formal proof structures for individual disparate treatment cases is a simpler, more direct method of establishing discrimination.”).

48. *See generally* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (“[P]ro se complaint[s], ‘however inartfully pleaded,’ [are] held to ‘less stringent standards than formal pleadings drafted by lawyers’” (quoting Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam))).

49. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015).

suggesting that the same conclusions might be inferred for pro se discrimination plaintiffs.

Yet other recent evidence from the employment context—unemployment benefit appeals—counsels caution in drawing too many inferences from the immigration study. This 2012 study found that randomized offers of free representation from a legal clinic “had no statistically significant effect on the probability that a claimant would prevail, but . . . did delay the adjudicatory process.”⁵⁰ Unemployment appeals are administrative, not judicial, in nature, again suggesting caution in drawing too many inferences with respect to employment discrimination cases. But given the generally contradictory findings of these two empirical studies, perhaps the only takeaway is that individuals *may* be capable of credibly representing themselves—as long as they are given sufficient resources and support to do so.⁵¹

3. *The Value of Time*

The right to a speedy trial is only guaranteed in criminal proceedings,⁵² yet parties typically favor swift adjudication in other types of proceedings as well.⁵³ Economic theory teaches the monetary value of time,⁵⁴ along these lines, prior scholars have raised concerns regarding the adverse effects of adjudication delays in a variety of contexts.⁵⁵ As Jean Sternlight has argued, such concerns are particularly heightened in the employment discrimination context because

50. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2124 (2012).

51. This argument has been made previously in the criminal context. See Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1300 (2013) (“A meaningful alternative to providing lawyers would be to simplify smaller cases, which would make it easier for pro se litigants to navigate them on their own.”).

52. See U.S. CONST. amend. VI.

53. Accord Michael J. Bolton, *Choosing to Consent to a Magistrate Judge: A Client's View*, FED. LAW. 90, 91 (May/June 2014) (reporting that parties, and particularly corporate parties, favor speedy trials). On the other hand, a party may introduce unnecessary delays into litigation in order to pressure the other side into settlement. See generally J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016).

54. Cf. Paul Heaton & Eric Helland, *Judicial Expenditures and Litigation Access: Evidence from Auto Injuries*, 40 J. LEGAL STUD. 295, 303 (2011) (“[A]s adjudication time falls, the value of pursuing a suit increases, so plaintiff demand for suits shifts outward.”).

55. See, e.g., Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1651 (2015) (discussing the problems surrounding long adjudication times in medical malpractice cases, which “exacerbate stress on doctors, deny compensation to needy and deserving claimants, encourage malingering, complicate insurance pricing, and impede physicians’ efforts to learn from their mistakes, . . .”); Daniel Kessler, *Institutional Causes of Delay in the Settlement of Legal Disputes*, 12 J.L. ECON. & ORG. 432 (1996) (demonstrating empirically that trial court delays also delay settlement).

[w]hile there is often a societal interest in resolving legal claims quickly, the interest in speedy resolution is particularly strong in the case of employment discrimination claims. From the victim's standpoint, delay is often an amplification of the problems that have already been alleged. For example, a person who brings a claim of employment discrimination for denial of promotion or benefits while still retaining her job at the company is in a very awkward position. . . . Equally, the claimant who has been fired or denied a job often has a rather desperate need for salary or benefits. . . . Time is also a critical factor from the perspective of the alleged perpetrator. The individual who has been accused of discrimination often feels that she has been vilified or slandered. She wants the claim to be resolved quickly, and in her favor, so that she can earn back the respect of her employer, friends, and family. Equally, the company, whether or not it has been directly named as a defendant, would typically prefer to end the claim of discrimination as quickly as possible.⁵⁶

Notwithstanding these arguments for swift adjudication of employment discrimination cases, in reality, such cases are rife with delays—beginning at the EEOC's claim investigation phase, which can often draw out longer than one year.⁵⁷

Although no empirical evidence exists regarding the effect of delays on employment discrimination claims, empirical evidence from the torts context suggests that such delays may discourage plaintiffs from vindicating their rights. A 2011 study presented suggestive empirical evidence that increasing state-level court expenditures encourages parties injured in automobile accidents to pursue litigation.⁵⁸ The study's authors theorized that increasing court expenditures, among other things, decreases adjudication time and thus reduces the cost of plaintiffs vindicating their rights through litigation.⁵⁹ If this finding is generalizable outside the automobile accident context, it suggests that the delays associated with employment discrimination adjudication may discourage plaintiffs with meritorious claims from coming forward. Indeed, evidence already exists

56. Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1480–81 (2004).

57. See Telephone Interview with Katharine Kores, *supra* note 28 (estimating that claim investigation averages approximately one year in her office).

58. See Heaton & Helland, *supra* note 54.

59. See *id.* at 329 (“[C]ase delay likely represents an important barrier to access . . .”).

that fewer discrimination plaintiffs are coming forward;⁶⁰ slow adjudication times may at least partially explain why.

4. *Mediation: Worthwhile or Wasteful?*

The slow adjudication times of employment discrimination claims make alternative dispute resolution options sound appealing. Yet whether such options can remedy the current problems in employment discrimination enforcement depends upon their underlying efficacy. Early survey evidence indicated that, at least from a procedural justice standpoint, claimants preferred lawyers and traditional adjudicative methods.⁶¹ Nevertheless, more recent empirical research has called these early findings into question; at least two experimental studies have suggested that litigants prefer processes in which they have some control over presentation of the evidence, as in a mediation proceeding.⁶² Even in the criminal context, surveys of defendants report higher satisfaction with the fairness, accuracy, and outcomes in victim-offender mediation processes, as compared to traditional criminal adversarial processes.⁶³ Furthermore, experimental evidence indicates that alternatives to traditional adversarial processes are not only perceived to be fairer and more accurate; they actually are fairer and more accurate.⁶⁴

This experimental and survey evidence appears to suggest that alternative dispute resolution, and particularly mediation, may be the solution to the woes of employment discrimination law enforcement. However, the EEOC incorporated mediation into its charge investigation process over fifteen years ago⁶⁵—and the problems in employment

60. See Clermont & Schwab, *From Bad to Worse?*, *supra* note 6, at 117–20 (showing that employment discrimination lawsuit filings declined between 2002 and 2007, although attributing the decline to low success rates in discrimination cases).

61. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). For a helpful summary of the literature on adjudicative, inquisitorial, and alternative dispute resolution, see Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 976–84 (2006).

62. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 3–4, 363–75 (1988); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Close, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 230–46 (2004).

63. See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 179–93.

64. See, e.g., Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOL. 320, 322–29 (1980); Neil Vidmar & Nancy M. Laird, *Adversary Social Roles: Their Effects on Witnesses' Communication of Evidence and the Assessment of Adjudicators*, 44 J. PERSONALITY & SOC. PSYCHOL. 888, 888–98 (1983).

65. For a history of the agency's mediation program, see *History of the EEOC Mediation Program*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/mediation/history.cfm> (last visited Oct. 9, 2016).

discrimination enforcement still remain. Recall that the EEOC's mediation process is optional, not mandatory, so employers may decline to participate. Mediation also occurs prior to cause determination, at a time when employers may take a discrimination claim less seriously. Thus, perhaps it is not the mediation itself that is the problem with the agency's current program, but instead the timing and discretion in participating.⁶⁶ In sum, evaluating the mechanisms behind successful discrimination law enforcement regimes requires looking beyond the mere existence of an alternative dispute resolution program—and instead assessing program details like timing and participation requirements. With these lessons of the institutional design literature in mind, I turn now to the comparative study of ten local employment discrimination law regimes.

III. TESTING THE EFFICACY OF WEIGHT DISCRIMINATION LAWS

A. *Weight and Appearance Discrimination Laws: An Overview*

Obese workers face an unenviable situation in the labor market. Over two decades of economics research has shown that obese workers, and particularly female obese workers, encounter both a wage penalty and lower rates of employment compared to their normal-weight counterparts.⁶⁷ No researcher, thus far, has been able to account fully for these trends based on productivity differences alone, and in fact, a recent study indicates that at least some of the obesity penalty arises from taste- or preference-based discrimination against the obese in the labor market.⁶⁸ The economics research does not indicate that the obesity penalty is diminishing over time,⁶⁹ simultaneously, obesity rates are burgeoning throughout the United States. Over the past two decades, the adult obesity

66. Recall Michael Z. Green's proposal to reform the EEOC charge process through a mandatory, instead of optional, mediation program. See Green, *supra* note 2, at 347–50.

67. See, e.g., Susan Averett & Sanders Korenman, *The Economic Reality of The Beauty Myth*, 31 J. HUM. RESOURCES 304 (1996); John Cawley, *The Impact of Obesity on Wages*, 39 J. HUM. RESOURCES 451 (2004); Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008 (1993); Jose A. Pagan & Alberto Davila, *Obesity, Occupational Attainment, and Earnings*, 78 SOC. SCI. Q. 756 (1997).

68. See Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. (forthcoming 2016) (demonstrating that employers exclude obese women, but not obese men, from high-paying jobs that require interaction with the public and, as a result, obese women are forced to work in low-paying jobs that require high levels of physical activity and have poor working conditions).

69. Compare *id.* with Gortmaker et al., *supra* note 67 (finding similar obesity penalties in employment using data that are two decades apart).

rate has tripled, growing from less than 12% in 1991 to its current rate of 34.9%.⁷⁰

This rapid increase in obesity juxtaposed with the continued presence of an obesity penalty in the labor market suggests the potential need—or, at the very least, growing demand—for a legal solution. The absence of an explicit federal remedy seems to leave obese individuals who encounter weight discrimination in the labor market without legal protection.⁷¹ In ten jurisdictions across the country, however, obese individuals are unequivocally protected against weight-based discrimination. Very little work, scholarly or otherwise, has been done regarding these ten laws.⁷² The dates of passage, protected categories, procedures, and remedies available under the laws are summarized in Table 1; a more detailed account of the laws is presented in the Appendix.

As Table 1 makes clear, the laws have some features in common, in spite of being passed at very different times for very different reasons. All ten jurisdictions with a local law have an oversight commission, and, at a minimum, all provide compensatory damages relief for successful claimants. Four of the local laws enumerate weight specifically as a protected class; the other six protect personal/physical appearance more broadly. Eight of the ten laws (with the exception of Madison and Urbana) allow claimants to resolve their claims through private suit, and eight of the ten laws (with the exception of Santa Cruz and Binghamton) allow claimants to resolve their claims through an administrative process. Within the eight jurisdictions that allow for both administrative and judicial enforcement, the processes are almost always mutually exclusive—only San Francisco permits claimants to pursue simultaneous judicial and administrative actions. In addition to traditional dispute resolution

70. *Obesity Trends Among U.S. Adults Between 1985 and 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/downloads/obesity_trends_2010.pdf (last visited Oct. 9, 2016).

71. Some obese individuals may have an employment discrimination claim under the Americans with Disabilities Act or Title VII of the 1964 Civil Rights Act. For an exploration of when weight-based discrimination is prohibited under these two federal laws, and when each statutory remedy applies, see Shinall, *supra* note 68.

72. In fact, no one has ever before assembled a complete list of these laws. One legal scholar has briefly considered the laws in Michigan, Urbana, Madison, Washington, Santa Cruz, San Francisco, and Howard County—but the analysis leaves out Binghamton, Prince George's County, and Harford County. See DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 113–32 (2010). Another scholar of labor economics has also mentioned the laws in Michigan, Urbana, Madison, Santa Cruz, San Francisco, and Howard County—but similarly neglects the laws in Binghamton, Washington, and the two other Maryland Counties. DANIEL S. HAMERMESH, *BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL* 152–53 (2011). Even the list compiled by the National Association to Advance Fat Acceptance (NAAFA), the premier weight discrimination rights organization, is incomplete, as it leaves the three Maryland Counties off its list. See *Weight Discrimination Laws*, NAAFA, <http://www.naafaonline.com/dev2/education/laws.html> (last visited Oct. 9, 2016).

processes, all but one jurisdiction (Binghamton) has an alternative dispute resolution program, although the jurisdictions vary on whether program participation is mandatory (Madison, Santa Cruz, Urbana, Washington) or optional (Howard County, Harford County, Michigan, Prince George's County, San Francisco).

Perhaps the most surprising feature of these laws that stands out within Table 1 is the date of passage. Even though obesity is typically considered a recent public health issue—the Centers for Disease Control and Prevention pinpoint the start of the “obesity epidemic” at the early 1990s⁷³—seven of the weight/personal appearance discrimination laws passed in the 1970s. In one case, Michigan, the law’s passage was visionary and, arguably, ahead of its time. There, a lone state representative, Thomas Mathieu, championed the addition of weight as an enumerated category within Michigan’s civil rights law in 1976. Mathieu, a former grassroots organizer, was inspired to take on the novel cause after seeing “with [his] own eyes how people lost out on job opportunities, just because of the way they looked. . . . [He] was deeply moved by the persons who had suffered such job rejections, simply because of the way they looked. Mostly it was overweight females,”⁷⁴

For the other seven local laws originating in the 1970s, however, concerns about using appearance as pretext for other types of discrimination motivated passage. The most common concern was racial discrimination; the legislative councils in Washington, D.C. and the three Maryland counties sought to prohibit employers from discriminating against African-Americans on the basis of wearing their hair in natural styles, cornrows, or dreadlocks, or on the basis of wearing traditional African garments.⁷⁵ Concerns about sex discrimination against men with long hair also motivated the passage of laws in Madison, Washington, and Howard County,⁷⁶ while sexual-orientation discrimination motivated the

73. See *Obesity Trends*, *supra* note 70; see also *The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/cdctv/diseaseandconditions/lifestyle/obesity-epidemic.html> (last visited Oct. 9, 2016).

74. Email from Thomas C. Mathieu, Former Michigan State Representative from Grand Rapids, to author (Aug. 17, 2011) (on file with author).

75. See *Proceedings of Public Hearings: Hearing on Bill No. 76-81*, Harford Cty. Council, Legis. Day No. 76-33, at 46 (Md. 1976) (on file with Harford Cty., Md., Council), <http://www5.harfordcountymd.gov/WebLink8/0/doc/3312/Page29.aspx>; Telephone Interview with C. Vernon Gray, Adm’r, Howard Cty., Md. Office of Human Rights (Oct. 28, 2013) (on file with author); e-mail from Michael Lyles, Prince George’s Cty. Human Relations Comm’n Exec. Dir., to author (Nov. 12, 2013) (on file with author); Telephone Interview with Sterling Tucker, Former Chairman, D.C. City Council (Sept. 14, 2011).

76. See *Equal Opportunity Report*, CAPITAL TIMES, Sep. 24, 1975, at 24; Telephone Interview with C. Vernon Gray, *supra* note 75; Telephone Interview with Sterling Tucker, *supra* note 75.

passage of laws in Madison and Urbana.⁷⁷ Indeed, according to the advocate whose efforts were largely responsible for the passage of Urbana's law, the legislative council added appearance as an enumerated category in order to distract the public from the law's real, and more controversial, purpose: the prohibition of sexual-orientation discrimination.⁷⁸

In contrast to the motivations behind most of the 1970s laws—in which concerns about appearance discrimination were secondary to concerns about other types of discrimination—the motivations behind the three modern laws in Santa Cruz, San Francisco, and Binghamton were (at least in part) appearance discrimination. Indeed, one specific type of appearance discrimination particularly concerned the legislative councils in these three cities: weight discrimination.⁷⁹ For example, although advocacy efforts in Santa Cruz initially arose due to concerns about sexual orientation discrimination (and the lack of legal protections at the state level), the effort only gained traction with the local council once LGBT advocates joined forces with local fat rights⁸⁰ advocates to push for a new law “to protect more of the non-mainstream.”⁸¹ The San Francisco law traces its origins to a February 1999 billboard campaign by 24 Hour Fitness that depicted an alien and the message, “When they come, they’ll eat the fat ones first.”⁸² The protests, advocacy efforts, and hearings that followed led the local council to adopt new protections against weight discrimination the following year.⁸³ Like Santa Cruz, Binghamton's law was initially aimed at

77. See *Equal Opportunity Report*, *supra* note 76; Press Release, Jeffrey Graubart, JUSTICE NOW! (Mar. 2, 1976),

http://outhistory.org/oldwiki/Press_Release_Initiating_the_Sit-in; Telephone Interview with Dr. John Peterson, Former Urbana, Ill. City Councilman (Jan. 26, 2012).

78. See e-mail from Jeffrey Graubart to author (Feb. 17, 2012) (on file with author).

79. These three laws explicitly enumerate weight as a protected class. See BINGHAMTON, N.Y., MUNICIPAL CODE § 45-2 (2008); S.F., CAL., POLICE CODE § 3307(b) (2002); SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.120 (1995).

80. The fat rights movement (the preferred name chosen by members of the movement) advocates for acceptance of all body types.

81. Laura Myers, *Santa Cruz Moves to Protect the Weird*, PRESCOTT COURIER, Jan. 15, 1992, at 3A, <https://news.google.com/newspapers?nid=886&dat=19920115&id=vakkAAAIBAJ&sjid=sn0DAAAIBAJ&pg=6871,2638284&hl=en>. The Body Image Task Force, National Organization of Women, and the Woman's International League for Peace and Freedom also joined the LGBT advocates. Correspondence Folder for Ordinance 92-11 (1992) (on file with Santa Cruz, Cal. City Clerk Office).

82. Edward Epstein & Ken Hoover, *Ammiano Takes Aim at Fat Bias: Supervisor Wants Laws to Cover Fat Individuals*, S.F. CHRON., Feb. 18, 1999, at A16; Ulysses Torassa, *Persons of Heft Protest Health Club's Ad Saying Space Aliens Would Gobble Up Fat Folks*, S.F. EXAMINER, Feb. 16, 1999, at A1.

83. See, e.g., ; Edward Epstein, *Fat People Get a Positive Hearing in S.F.: Supervisors Set Vote on Protected Status*, S.F. CHRON., May 4, 2000, at A1; Epstein & Hoover, *supra* note 82; Jason B. Johnson, *S.F. Rights Commission Flexes Muscle: Panel, Fat Activists Write Letter Over Gym Billboard*, S.F. CHRON., Feb. 26, 1999, at A20; Torassa, *supra* note 82.

filling the gap in state-level protections for LGBT individuals who experienced discrimination, but the liberal councilmember sponsoring the new legislation soon decided that “since we were creating a new law, we might as well create as comprehensive [a] law as possible.”⁸⁴ As a result, Binghamton relied on the San Francisco law (and on the advice of advocates responsible for the San Francisco law) as a model for its weight discrimination law.⁸⁵

Undoubtedly, some common themes run through the legislative histories of weight and appearance discrimination laws. Yet important differences remain at the enforcement level. First, the remedies for successful claimants vary significantly in size. The most generous local discrimination laws (Harford County, Michigan, Santa Cruz, Washington) not only provide for compensatory damages but also injunctive relief, civil fines, and attorney fees.⁸⁶ Second, in addition to the previously discussed variation in judicial and administrative procedures available to enforce the laws, the support for claimants, particularly claimants pursuing administrative remedies, provided by local commissions differs. In jurisdictions like Urbana and Prince George’s County, the oversight commission director serves as prosecutor in cases that make it to the hearing stage, eliminating the claimant’s need for a lawyer.⁸⁷ Madison facilitates self-representation in the administrative process by providing claimants with specific instructions on how to present evidence,⁸⁸ while Washington, D.C. appoints attorneys to represent claimants in administrative hearings.⁸⁹ Third, adjudication time varies sharply between jurisdictions. For example, Urbana sets any claim found to have probable cause for an administrative hearing if not resolved within forty-two days.⁹⁰ On the other hand, the timeliness of enforcement in the judicial setting is heavily dependent on local court dockets.⁹¹ With all these differences and

84. E-mail from Sean G. Massey, Former Binghamton, N.Y. City Councilmember, to author (Jan. 25, 2011) (on file with author).

85. *Id.*

86. See MICH. COMP. LAWS §§ 37.2603-2605 (2013); D.C. CODE § 2-1403.13 (2001); SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.120 (1995); HARFORD COUNTY, MD., CODE §§ 95-13 to 95-14 (1978).

87. See Telephone Interview with Todd Rent, Urbana, Ill. Human Relations Officer (Jan. 3, 2012); e-mail from Michael Lyles, *supra* note 75.

88. See, e.g., *Equal Opportunities Commission, CITY OF MADISON*, <http://www.cityofmadison.com/dcr/commeoc.cfm> (last visited Sept. 15, 2016).

89. See *Employment, Education, and Public Accommodation Complaints: What to Expect*, DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS, <http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/EmploymentFlowChart.pdf> (last visited Oct. 9, 2016).

90. See Telephone Interview with Todd Rent, *supra* note 87.

91. Court dockets at the local, state, and federal levels are famously congested; for a discussion of at least one adverse effect associated with burgeoning court dockets, see Bert I. Huang, *Lightened*

similarities between the ten laws in mind, the next Part empirically tests the effectiveness of each law on employment outcomes of obese workers.

B. Methodology and Data

To test the effectiveness of the ten local laws discussed in the previous Part, I use a difference-in-differences approach.⁹² The idea behind difference-in-differences, also known as double-difference estimation,⁹³ is to compare employment of the obese inside a jurisdiction with a weight-discrimination law to employment of the obese in nearby, similar jurisdictions without such a law.⁹⁴ The difference-in-differences estimate will be equal to the boost in employment that obese workers receive in jurisdictions with a weight-discrimination law, differencing out (1) employment of the obese in nearby jurisdictions without such a law, and (2) employment of the non-obese inside and outside the jurisdiction.

In order to estimate the effects of each law using difference-in-differences, I use data from the Behavioral Risk Factor Surveillance System (BRFSS). The BRFSS is a health survey dataset administered annually by the Centers for Disease Control and Prevention (CDC) since 1984. Although only fifteen states participated in the first year of the BRFSS, most states participated by 1990, and all states and territories have participated from 1994 until the most recent year of availability, 2012.⁹⁵

Scrutiny, 124 HARV. L. REV. 1109, 1127–52 (2011) (presenting empirical evidence of less frequent appellate reversals when court dockets are overwhelmed).

92. Throughout this paper, I will use the terms “difference-in-differences estimation” and “double-difference estimation” interchangeably to describe the empirical technique outlined above. Similarly, I will use the terms “difference-in-difference-in-differences estimation” and “triple-difference estimation” to describe the empirical technique outlined below.

93. More formally, my estimation procedure takes the following form for each of the ten jurisdictions: $Y = X\beta + O\gamma_1 + J\gamma_2 + (O * J)\gamma_3 + T\tau + \varepsilon$. Here, Y is an indicator variable equal to one if the individual is employed for wages. X is a vector of individual demographic characteristics that includes age, race, ethnicity, education, and marital status, and O is an indicator variable equal to one if the individual is obese (i.e. the individual has a body mass index (BMI) greater than or equal to thirty). J is an indicator variable equal to one if the individual lives in a jurisdiction with a weight- or personal appearance-discrimination law, and T is a set of year indicator variables. The coefficient of interest, γ_3 , is the difference-in-differences estimate.

94. In the results presented here, I compare employment and labor market participation rates of obese individuals in the jurisdiction with legal protection to the employment and labor market participation rates of obese individuals in the rest of the state. As a robustness check (not reported here), I have also used surrounding counties and similarly sized cities within the state as comparators (instead of using the entire rest of the state as a comparator). The results are substantially the same. In addition, the results presented here are estimated using a linear probability model. I have also estimated the results using a probit model (not reported here), and the results are very similar.

95. See *Behavioral Risk Factor Surveillance System*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/brfss/> (last visited Sept. 14, 2016). This study will only use data from 1985 onward as the 1984 data does not contain all of the variables of interest necessary for this study. Although state-by-state 2013 and 2014 data are now available, BRFSS stopped releasing county-level

The BRFSS is ideal for the present study because of its large size; each year of the BRFSS contains at least 50,000 respondents. Since some jurisdictions with weight-discrimination laws are quite small in population—including Urbana, Illinois (2012 population: 41,581), Binghamton, New York (2012 population: 46,551), and Santa Cruz, California (2012 population: 62,041)⁹⁶—smaller datasets will not contain a sufficient number of observations from these jurisdictions.⁹⁷

Because the focus of the BRFSS is health status and behaviors, the survey asks respondents to self-report their weight and height,⁹⁸ from which I calculate their BMIs. In addition to the health-related questions, the BRFSS asks respondents about their age, gender, race, ethnicity, education, and marital status. The BRFSS also asks respondents whether they are employed, to which they can answer that they are employed for wages, self-employed, out of work for less than one year, out of work for more than one year, a homemaker, a student, retired, or unable to work. To construct my dependent variable of interest, employed for wages, I create an indicator variable equal to one if the respondent is employed for wages, and equal to zero for all other respondents.⁹⁹ In later estimations, I will also look at labor market participation,¹⁰⁰ which I define as an indicator variable

data in the 2013 survey. County-level data is necessary to identify all ten jurisdictions of interest in this study.

96. *Population Estimates, Incorporated Places and Minor Civil Divisions Datasets: Subcounty Resident Population Estimates: April 1, 2010 to July 1, 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/cities/totals/2012/SUB-EST2012.html> (last visited Sept. 14, 2016).

97. When estimating a double-difference estimate for Santa Cruz, San Francisco, and Binghamton, I will only use the BRFSS data that was collected in the years following the passage of their weight/personal appearance laws. Thus, I will use 1993–2012 BRFSS data for Santa Cruz, 2001–2012 BRFSS data for San Francisco, and 2009–2012 BRFSS data for Binghamton.

98. Using self-reported weight and height data may raise concerns about measurement error (in particular, systematic under-reporting of weight and/or systematic over-reporting of height), which could bias the results. But several researchers have demonstrated that any bias from using self-reported weight and height is not severe and generally does not affect the results. See, e.g., Cawley, *supra* note 67, at 451–74 (2004); John Cawley et al., *Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity*, 49 J. OCCUPATIONAL & ENVTL. MED., 1317, 1318 (2007); Darius Lakdawalla & Tomas Philipson, *Labor Supply and Weight*, 42 J. HUM. RESOURCES 85, 92 (2007); Charles L. Baum & Shin-Yi Chou, *The Socio-Economic Causes of Obesity* (Nat'l Bureau of Econ. Research, Working Paper No. 17423, 2011), <http://www.nber.org/papers/w17423.pdf>.

99. I examine differences in employment for wages instead of employment generally (i.e., employment for wages and self-employment) because antidiscrimination laws should only increase the number of individuals employed for wages. Individuals who are self-employed should not have discriminated against themselves, so I would not expect to see an increase in self-employment as the result of an antidiscrimination law. (If anything, I would expect to see a decrease in self-employment since some individuals might have chosen self-employment after being unable to find employment for wages). Nonetheless, as a robustness check, I have tested the effects of the ten laws on employment generally—including self-employment—and the results are very similar to the ones presented in Part III.C.

100. For an explanation why labor market participation is an important indicator of labor market success, see *infra* Part III.C.

equal to one if the individual is employed for wages, self-employed, or out of work (for more or less than one year), and equal to zero otherwise.

Because the BRFSS contains observations going back to the 1980s, for the two most recent weight-discrimination laws in San Francisco and Binghamton, I can perform a second estimation, which compares labor market outcomes of the obese inside and outside a jurisdiction with a weight-discrimination law before and after the law passed.¹⁰¹ In other words, for these two jurisdictions, I can go beyond a double-difference estimate and obtain a triple-difference (or difference-in-difference-in-differences) estimate.¹⁰² The triple-difference estimate will represent the change in employment of the obese within a jurisdiction with a weight-discrimination law, differencing out (1) changes in employment of the obese inside the jurisdiction before the law passed, (2) changes in employment of the obese outside the jurisdiction before and after the law passed, and (3) changes in employment of the non-obese inside and outside the jurisdiction both before and after the law passed. With these estimation techniques in mind, I turn now to present the results of my estimates.

C. Results

Table 2 presents summary statistics for the percentage of the population employed for wages by BMI classification (underweight/normal weight, overweight, and obese) and by jurisdiction.¹⁰³ For each of the ten jurisdictions with a weight or personal-appearance discrimination law, summary statistics for the surrounding state (or in the case of Michigan and DC, for bordering states) are also presented for comparison. In the ten jurisdictions and their surrounding states, overweight men tend to have the highest rates of employment for wages, while for women, the underweight and normal weight generally have the highest rates of employment for wages. In a few instances, however, obese individuals have the highest rates of employment for wages in their jurisdictions. Obese men in Urbana, Santa Cruz, Harford County, and Howard County, and obese women in

101. Although the Santa Cruz law was passed in 1992, the BRFSS does not contain enough pre-1992 observations from Santa Cruz to draw a meaningful comparison of labor market outcomes of obese individuals before and after passage of its weight-discrimination law.

102. More formally, the triple-difference estimate is computed using the following equation: $Y = X\beta + O\gamma_1 + J\gamma_2 + P\gamma_3 + (O * J)\gamma_4 + (O * P)\gamma_5 + (J * P)\gamma_6 + (O * J * P)\gamma_7 + T\tau + \epsilon$. Here, Y , X , O , J , and T are defined in the same manner as before. See *supra* note 93. The only new variable to the above equation is P , which is an indicator variable equal to one if the observation comes from any year after the jurisdiction of interest passed a weight-discrimination law. The coefficient of interest, γ_7 , is the difference-in-difference-in-differences estimate.

103. The number of observations used to estimate Tables 2, 3, 4, and 5 are reported in Appendix Table 1.

Madison, Urbana, Binghamton, and Prince George's County all have the highest rates of employment for wages in their respective jurisdictions.

Table 3 presents summary statistics for the percentage of the population in the labor market (i.e., employed for wages, self-employed, or out of work) in the ten jurisdictions and their surrounding states. While rates of employment for wages measure how successful individuals are in finding and keeping a job, rates of labor market participation measure how encouraged individuals feel about their prospects of finding and keeping a job. If an individual's labor market prospects become too grim—perhaps because the individual has repeatedly tried, but failed, to get a job—the individual may become a “discouraged worker.”¹⁰⁴ A discouraged worker is someone who is willing to work but has stopped looking for a job (and has exited the labor market) because of inability to find a job.¹⁰⁵ Comparing labor market participation rates by BMI classification can reveal whether heavier workers are less discouraged about their prospects of obtaining a job in jurisdictions with weight and personal appearance laws.

According to Table 3, overweight men generally have the highest rates of labor market participation, while underweight and normal weight women tend to have the highest rates of labor market participation. As in Table 2, however, there are exceptions to this general rule. Obese men in Madison, Urbana, Santa Cruz, and Harford County and obese women in Madison, Binghamton, Santa Cruz, and Prince George's County all have the highest rates of labor market participation in their respective jurisdictions. Although the summary statistics in Tables 2 and 3 indicate that heavier individuals in jurisdictions with weight-discrimination laws may fare better in the labor market than heavier individuals in jurisdictions without such laws, the summary statistics do not control for the role of other observable characteristics. Any observable differences in labor market participation and employment rates for heavier individuals within the ten jurisdictions may not be driven by the presence of a weight or personal appearance law. They may instead be driven by systematic differences in these individuals' education, experience, or other demographic characteristics.

The regression analyses presented in Tables 4 and 5 control for any systematic differences in demographic characteristics in order to determine whether labor market outcomes of heavier individuals in the ten jurisdictions are positively influenced by the presence of a local weight/personal appearance law. Table 4 presents the difference-in-differences estimates, which compare labor market outcomes of overweight and obese

104. See *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Dec. 9, 2013), <http://www.bls.gov/cps/lfcharacteristics.htm>.

105. *Id.*

individuals to the labor market outcomes of underweight and normal weight individuals, both inside and outside the ten jurisdictions.¹⁰⁶ The results vary widely between jurisdictions.

In one jurisdiction, Michigan, heavier men and women have *worse* labor market outcomes than the heavier men and women in bordering states without such legal protections. Despite offering the only statewide prohibition against weight discrimination, the Michigan law appears to have decreased labor market participation of obese men by 2.6 percentage points and decreased employment for wages of obese men by 2.5 percentage points. In four other jurisdictions—San Francisco and the three Maryland counties—weight discrimination laws have not impacted either labor market participation or employment for wages of obese men and women.

In three jurisdictions—Washington, D.C., Santa Cruz, and Binghamton—the results are mixed. The three laws seem to have improved the labor market outcomes of obese men, but they have not improved labor market outcomes of obese women. Indeed, in Washington, D.C. and Santa Cruz, the laws have negatively impacted the rates of labor market participation and the rates of employment for wages of obese women. Only in two jurisdictions, Madison and Urbana, have weight/personal appearance laws universally improved labor market outcomes of heavier men and women. The estimates of these laws' impacts on labor market participation and employment for wages are all positive, and in general, are also statistically significant. For obese women in Madison, for example, the local weight/personal appearance law has improved their rate of employment for wages by 9.5 percentage points. Obese women in Urbana have seen a 12.8 percentage point increase in their rate of employment for wages.

Table 5 serves as a robustness check for the main analysis in Table 4. Table 4, which presents the double-difference, compares labor market outcomes of the obese to the non-obese, inside and outside jurisdictions with a weight/personal appearance law, using only observations from after the passage of each jurisdiction's weight/personal appearance law.¹⁰⁷ But for two cities, San Francisco and Binghamton, the BRFSS data contains observations that pre-date these cities' passage of their weight-discrimination laws. Thus, for these cities, I can go a step further and

106. The results reported here compare labor market outcomes within the ten jurisdictions to labor market outcomes in the surrounding states. For a description of robustness checks run comparing the protected jurisdictions to surrounding counties and to surrounding similarly sized cities within the state, see *supra* note 94.

107. See *supra* note 97 (describing how the double-difference estimates for Santa Cruz, San Francisco, and Binghamton (presented in Table 4) do not use the full range of 1985–2012 BRFSS data since their weight/personal appearance laws passed after 1985).

compare the labor market outcomes of the obese to the non-obese, inside and outside jurisdictions with a weight/personal appearance law, *before and after* passage of the law. The results of this triple-difference estimation are presented in Table 5.

The triple-difference estimates for San Francisco and Binghamton presented in Table 5 are very similar to the double-difference estimates for these cities in Table 4. Once again, the San Francisco law appears to have had little impact on the labor market outcomes of overweight and obese individuals, and the Binghamton law seems to have helped overweight and obese men (but not women). The similarity of the triple-difference results in Table 5 to the double-difference results in Table 4 suggest that the double-difference results are reliable estimates of the laws' labor market effects.¹⁰⁸

In sum, the estimates in Tables 4 and 5 demonstrate that only two of the weight discrimination laws have had universally positive effects for heavier individuals of both genders. The laws in Madison and Urbana have improved both the rate of employment for wages and the rate of labor market participation for overweight and obese individuals of both genders. Meanwhile, the laws in Binghamton, Santa Cruz, and Washington, D.C. have had mixed outcomes, and the other five laws have not improved anyone's labor market outcomes. The next Part will look to differences in administration and enforcement of the ten laws in order to explain why some of these laws are more successful than others.

IV. ENFORCEMENT: THE SECRET BEHIND THE SUCCESS

Determining why some of these laws have been more effective than others requires going beyond the empirical results presented in the previous Part. Thinking back to the differences between the laws discussed in Part III, the jurisdictions with the most successful laws, Madison and Urbana, are also the only two jurisdictions whose laws do not create a private right of action. Individuals seeking a remedy for weight discrimination in Madison and Urbana must go through local commission processes; they

108. Triple-difference estimates help to address the concern that these ten jurisdictions were already systematically different from their surrounding states before they passed weight/personal appearance laws. If heavier workers in these ten jurisdictions already had different labor market outcomes than heavier workers in surrounding states, then the double-difference estimates would pick up these pre-existing systematic differences. But by differencing out observations from before passage of a weight/personal appearance law, the triple-difference analysis allows us to compare labor market outcomes of the obese to the non-obese both before and after passage of a weight/personal appearance law within a jurisdiction of interest. Since here the triple-difference estimates in Table 5 for San Francisco and Binghamton are quite similar to the double-difference estimates in Table 4, the triple-difference estimates assure us that the double-difference estimates are picking up the labor market effects of the weight/personal appearance law (as opposed to some pre-existing, systematic difference).

cannot sue their employer directly in court.¹⁰⁹ Although it might be tempting to conclude from this evidence that commission processes are always more effective than the court system, such reasoning fails to explain why other jurisdictions with commission processes fail to achieve the same positive results as Madison and Urbana.

Looking beyond the obvious differences, four key elements stand out about the most successful commissions. First, the most effective commissions require respondent employers to sit down and discuss the alleged discriminatory act(s) with the complainant in mediation. Second, the most effective commissions make it easy for a complainant to pursue her discrimination claim without the assistance of an attorney. Third, the most effective commissions provide for swift administration and quick resolution of discrimination disputes. Fourth, the most effective commissions work to promote awareness of the laws they administer among local residents and employers. Each element is reviewed in turn.

A. *Mandatory Mediation*

With the exception of Binghamton,¹¹⁰ nine jurisdictions offer mediation programs, which all have the goal of achieving a mutually satisfactory resolution of discrimination disputes between complainants and respondent employers in an expedient and cost-effective manner.¹¹¹ The local human rights commissions cover the costs of mediation in eight of the nine jurisdictions; only one jurisdiction, Santa Cruz, requires the parties to the dispute to share the costs of mediation.¹¹² Yet, the majority of these local mediation programs are optional; as long as one party refuses to participate in mediation, the parties are never forced to sit down and attempt to resolve their dispute.

Nonetheless, Madison, Urbana, Washington, D.C., and Santa Cruz all require the parties to go to mediation as part of their commission processes.¹¹³ Of course, either party can refuse to cooperate at mediation and make it a complete waste of time for everyone involved. But it appears that, on balance, forcing the parties to sit down with each other increases a local antidiscrimination law's efficacy, given that all four jurisdictions with mandatory mediation programs have seen some improvement in labor market outcomes of the obese. Madison and Urbana, of course, have seen

109. *See supra* Part III.A.

110. Binghamton may begin offering a mediation program in the near future, but for now, the city is still in the process of ramping up its new Human Rights Commission.

111. *See infra* Table 1.

112. *See infra* Table 1.

113. *See infra* Table 1.

improvement in labor market outcomes for heavier workers of both genders, while Washington, D.C. and Santa Cruz have seen improvements for heavier men.

The idea that mandatory mediation may be a more effective policy than optional mediation is not a revolutionary one.¹¹⁴ Over the past decade, several legal commentators have noted that “[h]istorically, voluntary mediation programs have not been well attended.”¹¹⁵ Of course, the same commentators worry about the costs associated with mandating mediation when one or more parties refuse to compromise or even to discuss the dispute.¹¹⁶ Still, the observed value of having adversarial parties sit down with each other towards the beginning of a dispute has recently led a New York judicial task force to recommend a mandatory mediation program for the Manhattan Supreme Court.¹¹⁷ Although it remains unclear whether mandatory mediation is advisable for all types of disputes, for employment discrimination disputes, at least, mandatory mediation appears to be an important tool in increasing a law’s efficacy.

B. *Facilitating Self-Representation*

It is no secret that bringing an employment discrimination claim in the court system can be quite complex, both procedurally and substantively, and thus not very conducive to proceeding pro se.¹¹⁸ As a result, the most successful local commission processes are the ones that facilitate self-representation. Enabling plaintiffs to proceed pro se mitigates the common concern that “[l]ack of legal representation may inhibit discriminatees’ success in pursuing meritorious claims, particularly when the employer is represented.”¹¹⁹ Four of the ten jurisdictions—Madison, Urbana,

114. See, e.g., Green, *supra* note 2 (arguing that the current EEOC enforcement scheme should be replaced by requiring the parties to an employment discrimination charge to attend mandatory mediation).

115. Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 329 (2003); see also Ari Davis, *Moving from Mandatory: Making ADR Voluntary in New York Commercial Division Cases*, 8 CARDOZO J. CONFLICT RESOL. 283, 295 (2006); Regina A. Schuller & Patricia A. Hastings, *What Do Disputants Want? Preferences for Third Party Resolution Procedures*, 28 CANADIAN J. BEHAV. SCI. 130, 130 (1996); Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 675 (2014); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 69, 79 (2001).

116. Zylstra, *supra* note 115, at 80.

117. Jacob Gershman, *A Manhattan Experiment in Mandatory Mediation*, WALL ST. J.: L BLOG (Jan. 30, 2014, 4:19 PM), <http://blogs.wsj.com/law/2014/01/30/a-manhattan-experiment-in-mandatory-mediation/>.

118. See, e.g., Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. OF MICH. J.L. REFORM 789, 801, 830–31 (2013).

119. *Id.* at 801.

Washington, D.C., and Prince George's County—excel in empowering plaintiffs to proceed through their commission processes without representation by a private attorney.

In Madison, the local commission does everything possible to help complainants represent themselves effectively. On its website, the Madison commission maintains a thorough and easily searchable decision digest so that complainants can look up previous cases similar to their own.¹²⁰ The commission also provides complainants with extensive instructions on every step of the commission process, including how to gather evidence, prepare witnesses, and present their cases at a hearing.¹²¹ If at any point in the process, the complainant decides that she wants assistance in the pre-hearing negotiations and the actual hearing, the Madison commission allows the complainant to bring *anyone* to help represent her—including a non-lawyer. Moreover, if the complainant prefers to have a private attorney, the Madison commission provides a list of attorneys who have litigation experience with the Madison antidiscrimination ordinance.¹²²

Washington, D.C., like Madison, offers complainants a great deal of free support throughout its commission process. The D.C. Office of Human Rights does not require—or even expect—that complainants utilizing the commission process be represented by an attorney. As a result, the Office of Human Rights similarly provides extensive instructions for complainants on the hearing process (although, unlike Madison, Washington, D.C. does not provide complainants with a digest of previous decisions).¹²³ Moreover, the D.C. Office of Human Rights will appoint an attorney for complainants without private representation who reach a full commission hearing.¹²⁴

In Washington, D.C. and Madison, the local commissions have sought to bolster complainants' ability to proceed without private representation by giving them the tools to present their own cases in an effective manner. In contrast, Urbana's commission process is structured so that the need for private representation never arises. The Urbana Human Relations Officer and one other staff member investigate all discrimination claims filed with the local commission. If the human relations officer finds that a claim has probable cause, the case proceeds to conciliation, where the human relations officer's role transforms from neutral investigator into that of a

120. See *Equal Opportunities Commission, CITY OF MADISON*, <http://www.cityofmadison.com/dcr/commeoc.cfm> (last visited Sept. 15, 2016).

121. *Id.*

122. E-mail from Madison Equal Opportunities Commission to author (Jan. 4, 2012) (on file with author).

123. D.C. OFFICE OF HUMAN RIGHTS, *A GUIDE TO THE D.C. COMMISSION ON HUMAN RIGHTS' ADJUDICATION PROCESS* (2015), http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/Commission%20Litigation%20Manual_0.pdf.

124. *Id.*

“law enforcement” officer.¹²⁵ Although the human relations officer officially acts as an advocate for the people of Urbana, he also acts as an inadvertent advocate for the complainant once probable cause is found. During conciliation, the human relations officer seeks full relief for the complainant.¹²⁶ If conciliation fails and the case proceeds to a commission hearing, the human relations officer becomes the prosecutor—presenting the entire case against the respondent employer. Because the human relations officer is responsible for gathering and presenting all the evidence against the respondent employer, there is never any need for the complainant to have a private attorney.¹²⁷

Prince George’s County has a very similar process to the Urbana process. Once the executive director issues a decision of “cause” after investigating a discrimination complaint, he assumes the role of direct advocate for the people of Prince George’s County and the role of indirect advocate for the complainant. Moreover, if the case proceeds to a commission hearing, the executive director is solely responsible for prosecuting the case.¹²⁸ Even when the executive director issues a decision of “no cause” after investigating a discrimination complaint, and the complainant decides to appeal the decision, the complainant can easily represent herself. According to the current executive director, the “Commissioners go out of their way to allow the Complainant to present [her] case.”¹²⁹

Even though the remaining jurisdictions offer local enforcement commission processes as alternatives to the courtroom, none of these jurisdictions offer the same level of support for pro se litigants that Madison, Washington, D.C., Urbana, and Prince George’s County offer. Recall that the commissions in Santa Cruz and Harford County only provide mediation and conciliation assistance.¹³⁰ They do not provide a public hearing before appointed commissioners if conciliation fails. As a result, discrimination victims in these cities may still have to file a lawsuit in order to gain relief under the local weight/personal appearance laws. Any complainants who have to file a lawsuit will miss out on the cost savings (not to mention the ease of proceeding pro se) that a full commission process can provide.

125. Telephone Interview with Todd Rent, *supra* note 87.

126. *Id.*

127. *Id.*

128. E-mail from Michael Lyles to author, *supra* note 75.

129. *Id.*

130. *See infra* Appendix Subparts E, H.

In Michigan, although the Department of Civil Rights provides complainants with a brochure outlining the complaint process,¹³¹ the department does nothing to help complainants who make it to a full commission hearing—despite the fact that a full hearing operates much like a courtroom trial (with the complainant responsible for presenting evidence, examining witnesses, and adhering to the rules of evidence in the presentation of her case).¹³² The limited support offered to pro se complainants by the Michigan department is particularly striking given that, according to the former director of the department's Office of Legal Affairs, "the majority of people using the Department process do not retain counsel due to financial concerns."¹³³

Like Michigan, San Francisco fails to provide complainants utilizing its commission process with much support along the way. San Francisco offers little guidance for complainants beyond the probable cause determination stage, even though the final stage of the commission process is conducted in a manner similar to a trial (with the complainant responsible for presenting her own case).¹³⁴ As a result, complainants often decide to retain private counsel as they navigate the commission process. To illustrate, the San Francisco Human Rights Commission has records of three settlements resulting from complaints filed with the commission under the city's weight discrimination law. In two of these three cases, the complainants were represented by a private attorney.¹³⁵

Like in San Francisco and Michigan, complainants proceeding through the commission process in Howard County do not fare well without the assistance of an attorney. According to the Compliance Officer for the Howard County Office of Human Rights, "it's pretty difficult" for a complainant to represent herself, especially once the case proceeds to a full

131. MICH. DEP'T OF CIVIL RIGHTS, COMPLAINT INVESTIGATION PROCESS (2011), http://www.michigan.gov/documents/mdcr/complaintprocessbroc04-12-10_1_317648_7.pdf.

132. E-mail from Sylvia J. Elliott, Former Dir., Office of Legal Affairs, Mich. Dep't of Civil Rights, to author (Jan. 10, 2012) (on file with author).

133. *Id.*

134. See San Francisco Human Rights Commission, *How to File a Complaint in Employment, Housing, and Public Accommodation*, CITY & COUNTY OF S.F., <http://www.sf-hrc.org/index.aspx?page=85> (last visited Sept. 16, 2016).

135. E-mail from Mullane Ahern, Contract Compliance Officer, S.F. Human Rights Comm'n, to author (Jan. 12, 2012) (on file with author). Both cases in which the complainants hired counsel received national attention. The first complaint was filed by Krissy Keefer, a dancer whose eight-year-old daughter was rejected by the San Francisco Ballet School for "not hav[ing] the right body type." Jon Carroll, *Just Like a Ballerina*, S.F. CHRON., Dec. 8, 2000, at C24. The second complaint was filed by Jennifer Portnick, an aerobics instructor who was rejected from teaching Jazzercise because of her weight. Elizabeth Fernandez, *Teacher Says Fat, Fitness Can Mix: S.F. Mediates Complaint Jazzercise Showed Bias*, S.F. CHRON., Feb. 24, 2002, at A21. Both Portnick and Keefer were represented by the same local employment discrimination attorney, Sondra Solovay. Telephone Interview with Sondra Solovay, Weight Discrimination Attorney, S.F. (Aug. 17, 2011).

commission hearing.¹³⁶ Not only must complainants adhere to the rules of evidence at a full commission hearing, but they are also responsible for “pre-hearing filing requirements that would be difficult to satisfy without the help of an attorney.”¹³⁷ In sum, not all commission processes are supportive of complainants who wish to proceed pro se; indeed, some processes are quite *unsupportive*. The original purpose for establishing many of these commissions was to enable discrimination victims to avoid the long wait times and high costs often associated with federal employment discrimination lawsuits.¹³⁸ Commissions that make self-representation too difficult for discrimination victims defeat this original purpose.

C. *Swift Adjudication*

Commissions that take too long to administer and to adjudicate discrimination claims also defeat the original purpose for their establishment. And yet long wait times plague some local commissions. Prince George’s County averages approximately 200 days to investigate a claim and to make a reasonable cause determination.¹³⁹ Although this average is shorter than the federal EEOC average,¹⁴⁰ further delays await complainants who continue the commission process in Prince George’s County. Complainants whose cases go to a full commission hearing may wait up to six months for a decision—so by the time that a complainant completes the investigation, conciliation, and hearing processes, years have likely passed.¹⁴¹ In nearby Howard County, the Office of Human Rights is mandated by law to complete its investigation and cause determination within 180 days.¹⁴² But no such time limits bind the Human Rights Commission; as a result, “the cases age and get very, very old” waiting for their public hearings.¹⁴³ Thus, if conciliation fails, and a case is set for public hearing, complainants face a long delay until final resolution.

136. Telephone Interview with Mary Campbell, Compliance Officer, Howard Cty., Md. Office of Human Rights (Oct. 11, 2013).

137. *Id.*

138. See, e.g., *infra* Appendix Subpart E (citing the EEOC’s long wait times and the high costs of federal employment discrimination litigation as principal legislative motivations behind the Harford County ordinance); see also Maurice E. R. Munroe, *supra* note 2, at 260–61 (discussing how the EEOC has had a problematic “backlog” of cases since its inception).

139. E-mail from Michael Lyles to author, *supra* note 75.

140. According to one district director, EEOC complaint investigation time averages about a year. Telephone Interview with Katharine Kores, Dist. Dir. of Memphis Office, Equal Emp’t Opportunity Commission (Jan. 9, 2012).

141. E-mail from Michael Lyles to author, *supra* note 75.

142. Telephone Interview with Mary Campbell, *supra* note 136.

143. *Id.*

Perhaps the local commission with the longest delays, however, is Michigan. Michigan's statute does not place any time limits on the Department of Civil Rights to administer discrimination complaints.¹⁴⁴ As a result, complainants pursuing the Michigan commission process face waiting times that rival the federal process. Interestingly, the delays in Michigan are not the result of too many complaints going through the entire process to full commission hearing—the Civil Rights Commission has only decided seventeen cases since 2000.¹⁴⁵ Nonetheless, in the last case decided by the commission, the complainant had started the commission process *eight years before*.¹⁴⁶ For the previous four cases decided by the commission, the complainant had started the commission process two to four years prior.¹⁴⁷

In sharp contrast, the commissions with the shortest wait times are often the ones bound by law to adhere to a strict time frame. The Urbana Human Relations Commission is bound by the strictest time constraints. There, the executive director has forty-two days to issue a probable cause decision;¹⁴⁸ the parties then have another forty-two days to reach a conciliation agreement.¹⁴⁹ If the parties do not reach an agreement, then a public hearing is scheduled before the full Commission within 105 days.¹⁵⁰ Similarly, in Washington, D.C., the Office of Human Rights must schedule mediation within two weeks of a complaint filing; the office must issue a probable cause determination within five weeks.¹⁵¹

The Madison Equal Opportunities Commission also processes complaints quickly, although its process times are not legally mandated. Instead, the quick processing times of the Madison Commission are due to how well the office is staffed. Unlike many other local commission offices, which have sufficient resources to employ only one or two people to investigate and administer complaints, the Madison Commission has over a

144. MICH. COMP. LAWS § 37.2605 (2013).

145. E-mail from Sylvia J. Elliott to author, *supra* note 132.

146. See Mich. Dep't of Civil Rights *ex rel* Barash v. Suburban Mobility Auth. for Reg'l Transp., Case No. 325610 (Mich. Civil Rights Comm'n May 21, 2012) (final order), http://www.michigan.gov/documents/mdcr/DECISIONpkt_387246_7.pdf.

147. See Mich. Dep't of Civil Rights, *Commission Decisions*, MICHIGAN.GOV, http://www.michigan.gov/mdcr/0,1607,7-138-47782_47828_48067--,00.html (last visited Sept. 15, 2016).

148. URBANA, ILL., CODE OF ORDINANCES § 12-82(b) (LEXIS through Ordinance No. 2016-03-025).

149. *Id.* § 12-83(d).

150. *Id.*

151. D.C. Office of Human Rights, *Employment, Education and Public Accommodation Complaints: What to Expect*, DC.GOV, <http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/EmploymentFlowChart.pdf> (last visited Sept. 15, 2016).

\$1,000,000 budget,¹⁵² allowing it to employ fourteen people.¹⁵³ As a result, even Madison Commission decisions that are appealed all the way up to the Wisconsin Court of Appeals are generally resolved within three years from the date the complaint was first filed.¹⁵⁴ The speed with which Madison, Washington, D.C., and Urbana adjudicate discrimination claims provides yet another reason why these jurisdictions have all seen some positive impact from their antidiscrimination laws.

D. Awareness

A final element—general awareness of the law by the local community—may help explain why the laws in Madison and Urbana have been the most successful, while the laws in other jurisdictions have had mixed results at best. The relatively well-staffed and well-funded Madison Equal Opportunities Commission provides extensive education and outreach services to the local community, including free literature for employees about their legal rights, free diversity training seminars for both employees and employers, and free consultations with employers regarding compliance with Madison antidiscrimination laws.¹⁵⁵ In turn, the Madison commission receives approximately seventy employment discrimination complaints each year.¹⁵⁶

Although the Urbana Human Relations Commission does not enjoy the same level of funding seen in Madison—Urbana’s administrative office has only a director, a human relations officer, and another part-time staff member—the Urbana commission does enjoy a similar general awareness of its presence in the community. According to the current human relations officer, his office has “a very active enforcement mechanism and [a] reputation of being thorough.”¹⁵⁷ This reputation combines with a “level of awareness [that is] greater than in most communities” about the city’s strong human rights law, resulting in employers who take the Urbana

152. City of Madison Fin. Dep’t, *Adopted 2014 Operating Budget: Civil Rights*, CITY OF MADISON, <http://www.cityofmadison.com/finance/documents/2014OpBud/Adopted/022-oper04.pdf> (last visited Sept. 15, 2016).

153. City of Madison Dep’t of Civil Rights, *Staff Directory*, CITY OF MADISON, <https://www.cityofmadison.com/dcr/aboutStaff.cfm> (last visited Sept. 15, 2016); see also E-mail from Lucia Nunez, Madison Dep’t of Civil Rights Dir., to author (Jan. 4, 2012) (on file with author).

154. City of Madison Dep’t of Civil Rights, *Decision Digest*, CITY OF MADISON, <http://www.cityofmadison.com/dcr/DecisionDigest/index.cfm> (last visited Sept. 15, 2016).

155. See City of Madison Dep’t of Civil Rights, *Brochures*, CITY OF MADISON, <http://www.cityofmadison.com/dcr/resourcesBrochures.cfm#DRbro> (last visited Sept. 15, 2016).

156. Madison received seventy-six employment complaints in 2011 and seventy complaints in 2010. Of course, not all of these complaints were based on personal appearance. E-mail from Rachel Campbell, Admin. Clerk for the Madison Equal Opportunities Comm’n, to author (Jan. 4, 2012) (on file with author).

157. Telephone Interview with Todd Rent, *surpa* note 87.

ordinance very seriously.¹⁵⁸ Interestingly, the human relations officer points to the fact that the commission has not had a public hearing on a complaint in five years despite receiving five to six new complaints per month as evidence of how seriously employers take their office.¹⁵⁹ Once his office makes a determination of probable cause, employers know it is in their best interest to resolve the dispute.¹⁶⁰

Similarly, Binghamton appears to enjoy a great deal of community awareness regarding its weight-discrimination law—despite only recently establishing its Human Rights Commission. Much of this awareness likely stems from the strong legislative support for human rights legislation in the city since 2008. The measure to establish the new Human Rights Commission, for instance, unanimously passed the Binghamton City Council in late 2011.¹⁶¹ Once all seven voting members had been appointed in January 2013, the new commission almost immediately started its public advocacy. In March of 2013, for example, after CVS Caremark issued a new policy requiring employees to begin reporting and monitoring their weight,¹⁶² the commission sent a notice to the corporation to rescind its policy with respect to employees in Binghamton, as the policy violated the local human rights law.¹⁶³ The Commission also actively maintains a Facebook page, where it posts updates on its current activities and human rights interest stories from around the globe.¹⁶⁴

In contrast, lack of awareness about local human rights protection stands in the way of efficacy for many jurisdictions. In Santa Cruz, which requires that individuals file a complaint with Santa Cruz Human Resources before filing suit,¹⁶⁵ the local human rights ordinance appears to have been completely forgotten by residents. An interview with Joe McMullen, the Chief Human Resources Officer of Santa Cruz, revealed that only two complaints have ever been filed since the human rights ordinance was passed in 1992.¹⁶⁶ Neither complaint involved weight or personal appearance discrimination. One of the complaints was immediately dropped; the other complaint involved a homosexual couple

158. *Id.*

159. *Id.*

160. *Id.*

161. *City Approves Human Rights Commission*, WBNG NEWS, (Dec. 7, 2011), <http://www.wbng.com/news/local/City-Approves-Human-Rights-Commission-135217813.html>.

162. Amy Langfield, *CVS to Workers: Tell Us How Much You Weigh or It'll Cost You \$600 a Year*, NBC NEWS, (Mar. 20, 2013), <http://www.cnbc.com/id/100573805>.

163. E-mail from Sean G. Massey to author, *supra* note 84.

164. See Greater Binghamton Human Rights, FACEBOOK, <http://www.facebook.com/BinghamtonHRC> (last visited Sept. 15, 2016).

165. See *infra* Part H of the Appendix.

166. Telephone Interview with Joe McMullen, Chief Human Res. Officer of Santa Cruz, Cal. (Jan. 9, 2011).

who was refused a room at a local motel.¹⁶⁷ Once Santa Cruz Human Resources notified the motel owner of the complaint, the motel owner agreed to attend sensitivity training, and the couple dropped their complaint.¹⁶⁸

In other jurisdictions, lack of awareness about personal appearance and weight protections specifically stands in the way of efficacy. Given the publicity surrounding the passage of San Francisco's weight-discrimination law, awareness does not seem like it should be a problem there. But a 2006 study commissioned by the San Francisco Human Rights Commission concluded otherwise. After conducting a survey of local residents and employers, the study concluded that the Human Rights Commission failed to promote public awareness of the weight-discrimination ordinance and actively failed to enforce the ordinance.¹⁶⁹ As a result, the study concluded—much as this Article has concluded—that “San Francisco’s public policy to prohibit weight discrimination is not effective in preventing weight based discrimination.”¹⁷⁰

In Washington, D.C. and Prince George’s County, the lack of awareness about weight and personal appearance protections appears to extend all the way to the local enforcement offices. When contacted, the General Counsel of the Washington, D.C. Office of Human Rights knew almost nothing about its personal appearance law, including when or why the law was passed. The general counsel also did not know of any complaints that had ever been filed under the law.¹⁷¹ Thus, while the Washington, D.C. commission process may be effective for some forms of discrimination, personal appearance discrimination seems to have been forgotten by its Office of Human Rights.¹⁷² In Prince George’s County, the Executive Director of the Human Relations Commission was aware of the personal appearance statute, but he believed that the protections against

167. *Id.*

168. *Id.*

169. CATHERINE M. WIPPEL, SAN FRANCISCO ADMINISTRATIVE CODE CHAPTERS 12A, 12B AND 12C AND SAN FRANCISCO MUNICIPAL/POLICE CODE ARTICLE 33: AN EVALUATION OF SAN FRANCISCO’S PUBLIC POLICY TO PROHIBIT WEIGHT DISCRIMINATION 4 (Dec. 21, 2006), 2000 Human Rights Ordinance Folder (on file with San Francisco, Cal., Human Rights Commission Office).

170. *Id.* at 16–17.

171. Telephone Interview with Alexis P. Taylor, Gen. Counsel, D.C. Office of Human Rights (Aug. 14, 2011).

172. After I contacted the General Counsel, the General Counsel assigned a staff member to research the law because she knew so little about it. The staff member was unable to find anything about the law in the Office of Human Rights records. *Id.*; E-mail from Jewell Little, Staff Attorney, D.C. Office of Human Rights, to author (Sep. 7, 2011) (on file with author); E-mail from Jewell Little, Staff Attorney, D.C. Office of Human Rights, to author (Jan. 3, 2012) (on file with author). The legislative history presented in Part F of the Appendix is solely the result of independent research from newspaper articles and from an interview with Sterling Tucker, the Chairman of the DC Council that passed the 1977 Human Rights Ordinance.

personal appearance discrimination should be applied only to hairstyle and clothing, and not weight, given the legislative history of the statute.¹⁷³ He did admit, however, that the statute had been extended past its original legislative intent to cover transgendered individuals. Moreover, the office had previously handled a complaint that included weight as part of a personal appearance discrimination claim.¹⁷⁴

In sum, the success of a local antidiscrimination law at improving employment outcomes of the obese is no accident. Without swift administration and an active enforcement commission, obese workers who experience discrimination are left with a remedy that feels unsatisfactory and not worth the wait. Over time, such unsatisfactory remedies lead these local antidiscrimination laws to be ignored and forgotten—by both employers and protected individuals.

V. CONCLUSION

Broadening from the local to the federal level, employment discrimination law faces a difficult predicament. Advocacy groups clamor to expand civil rights protections beyond race, color, national origin, sex, religion, age, and disability. Yet the law is having a difficult time aiding these seven, already protected classes due to the realities of enforcement (or lack thereof). In the end, no one is satisfied with the state of federal employment discrimination law. And as this study has shown, the same predicament can exist at the state and local level as well. Even in jurisdictions with expansive discrimination protections—so expansive that they protect weight and personal appearance—the law on the books may not match the law in action.

The goal of this study was to identify the enforcement mechanisms that could end this mismatch in employment discrimination law. By taking advantage of variations in state and local laws' protections of weight and personal appearance discrimination, a combination of quantitative and qualitative methods allowed for a natural experiment to identify the critical mechanisms. Some of the mechanisms identified here were not surprising: the importance of equipping enforcement agencies with resources, monetary or otherwise, is already well-known.¹⁷⁵ But this study also pointed to requiring party mediation, facilitating self-representation, and

173. E-mail from Michael Lyles to author, *supra* note 75. Recall from Part III.A that the ordinance was originally passed to protect African-Americans who wore natural hairstyles and traditional African clothing.

174. *Id.*

175. *See, e.g.,* Koppel, *supra* note 1; Vogel, *supra* note 1.

raising public awareness as critical components of an effective discrimination enforcement regime.

Yet other mechanisms identified here were surprising. For instance, the two most effective local laws came from jurisdictions that did not provide aggrieved parties with private rights of action. This result suggests that in the context of employment discrimination, it may not matter whether the enforcement is administrative or adjudicative in nature, as long as it is swift, cheap, and easy to access. Equally surprising is that a law's efficacy seems to bear little relation to its underlying motivations for passage and legislative purpose. At the outset, it would have been natural to predict that San Francisco's or Michigan's law would have resulted in the greatest impact on obese individuals, given that these laws were specifically passed to protect their rights. And yet, we see the most effective laws coming from jurisdictions where weight was an add-on to a law that was initially motivated by concern for the rights of racial minorities and the LGBT community. The failure of the San Francisco and Michigan laws further reinforces how much administrative mechanisms matter.

In the employment discrimination context, two laws that protect the same personal characteristic—whether that characteristic be race, sex, or something else like weight—are not always created equal. Certainly, each law's statutory language and legislative history can influence how successfully the law advances civil rights. But statutory language and legislative history do not appear to be as crucial as enforcement, whether that enforcement is directed towards extending the law's original purpose or towards a broader purpose not originally considered by the drafters. Moreover, effective administration of discrimination laws does not require providing plaintiffs with more than one method of enforcing their rights; as the Madison and Urbana cases demonstrate, it does not even require providing plaintiffs with an adjudicative remedy. Administrative remedies can actually be more plaintiff-friendly, and as a result, more effective in bringing about the intended legislative effect of combatting labor market discrimination. In other words, in the employment discrimination context, less can be more.

Although the principal focus of this study has been obese workers, the lessons learned in this Article seem particularly salient for LGBT advocates. Almost half of U.S. states now ban discrimination on the basis of sexual orientation and/or gender identity, and most of these bans have passed within the last decade.¹⁷⁶ In light of these legislative successes—not

176. Washington, D.C. and seventeen states ban discrimination on the basis of sexual orientation and sexual identity. See *Non-Discrimination Map*, *supra* note 17. Four other states ban discrimination on the basis of sexual orientation only. *Id.*

to mention the recent Supreme Court decision, *Obergefell v. Hodges*¹⁷⁷—it may be tempting for leaders of the LGBT movement to claim victory and focus entirely on passing new laws in the remaining states without employment discrimination bans. But the story of weight discrimination laws provides a cautionary tale against such tactics. Without strong enforcement mechanisms that allow victims to seek a remedy for discrimination in a swift and cost-effective manner, antidiscrimination laws on the books carry little weight, and the law in action becomes little more than law inaction.

177. 135 S. Ct. 2584 (2015).

Table 1. Comparison of Ten Local Laws Prohibiting Weight and Personal Appearance Discrimination									
Jurisdiction	Year Passed	Type of Discrimination Prohibited	Oversight Commission	Does Employee Have a Private Right of Action?	Must Employee File Complaint with Oversight Commission Before Private Action?	Mediation	Remedies Available to Complainant	Maximum Civil Fine for Violation	Attorney Fees
Prince George's County, MD	1972	Personal appearance	Human Relations Commission	Yes, but may choose to go through the commission instead	No	Optional through commission	Injunctive and equitable relief, damages, back pay, humiliation damages (limited to \$100,000)	\$5,000	No
Howard County, MD	1975	Personal appearance	Office of Human Rights	Yes, but may choose to go through the Office of Human Rights process instead	Yes, with Office of Human Rights forty-five days before filing suit	Optional through Office of Human Rights	Injunctive and equitable relief, compensatory damages, back pay	No civil fine	Yes
Madison, WI	1975	Physical appearance	Equal Opportunities Commission	No, administered by commission	Yes, with Equal Opportunities Commission	Required	Economic damages, noneconomic damages, front and back pay (limited to two years)	No civil fine	No

Table 1 (continued)

Jurisdiction	Year Passed	Type of Discrimination Prohibited	Oversight Commission	Does Employee Have a Private Right of Action?	Must Employee File Complaint with Oversight Commission Before Private Action?	Mediation	Remedies Available to Complainant	Maximum Civil Fine for Violation	Attorney Fees
Michigan	1976	Weight	Civil Rights Department	Yes, but may choose to go through department instead	No	Optional through department	Injunctive and equitable relief, compensatory damages, back pay	First Infraction: \$10,000 Second in Five Years: \$25,000 Third in Seven Years: \$50,000	Yes
Harford County, MD	1976	Personal appearance	Office of Human Relations	Yes, but may choose to go through Office of Human Relations instead	No	Optional through Office of Human Relations	Injunctive and equitable relief, compensatory damages	\$1,000	Yes
Washington, D.C.	1977	Personal appearance	Office of Human Rights	Yes, but may choose to go through commission instead	No	Required in commission process	Injunctive and equitable relief, compensatory damages, back pay	First Infraction: \$10,000 Second in Five Years: \$25,000 Third in Seven Years: \$50,000	Yes

Table 1 (continued)

Jurisdiction	Year Passed	Type of Discrimination Prohibited	Oversight Commission	Does Employee Have a Private Right of Action?	Must Employee File Complaint with Oversight Commission Before Private Action?	Mediation	Remedies Available to Complainant	Maximum Civil Fine for Violation	Attorney Fees
Urbana, IL	1979	Personal appearance	Human Relations Commission	No, administered by Commission	Yes, with Human Relations Commission	Required	Injunctive and equitable relief, compensatory damages, back pay	\$500	No
Santa Cruz, CA	1992	Weight	Santa Cruz Human Resources	Yes	Yes, with Santa Cruz Human Resources	Required (Both parties share costs)	Injunctive and equitable relief, compensatory damages	First Infraction in One Year: \$100 Second: \$200 Third: \$500	Yes
San Francisco, CA	2000	Weight	Human Rights Commission	Yes, but may choose to go through commission in addition	No	Encouraged during commission process	Treble special and general damages, \$200-\$400 additional damages, punitive damages	None	Yes
Binghamton, NY	2008	Weight	Binghamton Human Rights Commission	Yes	No	No	Injunctive and equitable relief, compensatory damages	None	Yes

Table 2. Percent Employed for Wages in Ten Jurisdictions and Their Surrounding Areas, by BMI Classification						
	Men			Women		
	Underweight/ Normal Weight	Overweight	Obese	Underweight/ Normal Weight	Overweight	Obese
Michigan	49.34	50.68*	46.95*	44.22	40.22*	40.07*
Bordering States	52.76	54.27*	51.40*	47.38	43.60*	43.51*
Washington, D.C.	57.27	57.53	52.39*	53.59	49.67*	46.07*
Bordering States	57.03	58.90*	57.17	50.73	47.72*	47.98*
Madison	58.97	61.94	59.16	59.37	57.74	60.58
Rest of Wisconsin	54.92	55.91	54.04	52.07	48.18*	48.39*
Urbana	56.25	58.17	61.21	41.43	47.03	47.71
Rest of Illinois	57.06	57.82	56.74	49.59	45.93*	46.29*
Binghamton	46.67	51.70	47.14	40.88	37.07	46.39
Rest of New York	51.14	53.59*	51.99	48.44	45.05*	44.17*
Santa Cruz	39.86	47.98	60.00*	39.86	32.64	38.60
San Francisco	49.13	47.51	48.95	43.92	40.41	38.30
Rest of California	49.04	52.19*	50.88*	41.43	38.65*	38.35*
Howard County	66.01	67.14	67.73	58.86	53.54	57.44
Harford County	57.85	61.66	62.61	52.81	49.42	49.21
Prince George's County	61.30	64.76	62.75	57.65	58.95	59.12
Rest of Maryland	56.75	58.21*	56.27	51.08	47.88*	47.92*

Notes: Reported estimates use respondents ages 18 to 65 from the 1985–2012 BRFSS data. Santa Cruz estimates use only the 1993–2012 data, San Francisco estimates use only the 2001–2012 data, and Binghamton estimates use only the 2009–2012 data. The number of observations for each cell are reported in Appendix Table 1. The employed for wages variable counts respondents who are employed for wages as employed, and all other respondents as unemployed. An asterisk (*) indicates a significant difference in the sample mean at the 5% level between the normal-weight group and the BMI classification group of interest. Sample excludes pregnant women.

Table 3. Percent in the Labor Market in Ten Jurisdictions and Their Surrounding Areas, by BMI Classification

	Men			Women		
	Underweight/ Normal Weight	Overweight	Obese	Underweight/ Normal Weight	Overweight	Obese
Michigan	65.46	66.31	63.22*	55.19	50.19*	50.72*
Bordering States	68.83	70.02*	67.51*	57.70	53.34*	53.78*
Washington, D.C.	73.40	73.90	69.88*	66.99	62.45*	59.50*
Bordering States	70.90	73.16*	71.40	60.65	57.25*	57.87*
Madison	73.40	78.22	79.10	68.82	67.55	72.02
Rest of Wisconsin	71.53	72.73	71.14	62.71	58.31*	59.01*
Urbana	67.61	66.35	68.97	51.71	58.42	54.25
Rest of Illinois	72.43	73.97*	72.52	59.73	55.40*	56.77*
Binghamton	61.33	63.63	58.57	49.64	45.69	57.83
Rest of New York	70.96	72.10	69.59	61.26	55.75*	55.06*
Santa Cruz	68.84	72.25	78.67	57.73	54.17	57.89
San Francisco	72.32	72.95	72.63	61.00	56.27	50.64*
Rest of California	69.82	73.19*	71.46*	56.34	52.92*	52.41*
Howard County	78.66	80.50	79.80	69.54	64.90	69.34
Harford County	69.68	73.65	74.77	61.84	58.48	61.71
Prince George's County	74.15	76.93	76.89	66.83	68.24	69.13
Rest of Maryland	71.19	73.19*	71.33	61.56	57.86*	58.40*

Notes: See notes to Table 2. The labor market variable counts respondents who are employed for wages, self-employed, and out of work as in the labor market, and all other respondents as not in the labor market. An asterisk (*) indicates a significant difference in the sample mean at the 5% level between the normal-weight group and the BMI classification group of interest. Sample excludes pregnant women.

Table 4. Double-Difference Regressions Comparing Labor Market Outcomes of Overweight and Obese Workers in Ten Jurisdictions to Surrounding States				
	Men		Women	
	In the Labor Market	Employed for Wages	In the Labor Market	Employed for Wages
	(1)	(2)	(3)	(4)
Michigan				
MI*Overweight	-0.005 (0.008)	0.009 (0.010)	-0.023* (0.009)	-0.006 (0.008)
MI*Obese	-0.026** (0.008)	-0.025* (0.011)	-0.007 (0.010)	-0.002 (0.010)
Washington, D.C.				
D.C.*Overweight	0.013 (0.009)	0.035** (0.013)	-0.021+ (0.012)	-0.005 (0.014)
D.C.*Obese	0.014 (0.010)	0.018 (0.013)	-0.029* (0.013)	-0.038** (0.014)
Madison				
Madison*Overweight	0.083** (0.029)	0.078+ (0.039)	0.017 (0.021)	0.029 (0.026)
Madison*Obese	0.105** (0.034)	0.060 (0.044)	0.094** (0.027)	0.095** (0.030)
Urbana				
Urbana*Overweight	0.066 (0.054)	0.085 (0.063)	0.082* (0.038)	0.035 (0.041)
Urbana*Obese	0.167** (0.052)	0.201** (0.054)	0.050 (0.058)	0.128* (0.059)
Binghamton				
Binghamton*Overweight	0.140** (0.045)	0.080* (0.039)	0.025 (0.070)	-0.043 (0.181)
Binghamton*Obese	0.239* (0.103)	0.209** (0.048)	-0.031 (0.090)	0.077 (0.109)
Santa Cruz				
SC*Overweight	0.080 (0.070)	-0.024 (0.067)	-0.010 (0.078)	0.028 (0.113)
SC*Obese	0.105+ (0.058)	0.176** (0.062)	-0.109+ (0.068)	-0.171** (0.065)
San Francisco				
SF*Overweight	0.039 (0.034)	0.036 (0.050)	0.002 (0.030)	-0.046 (0.045)
SF*Obese	0.072+ (0.038)	0.122 (0.083)	-0.011 (0.056)	0.001 (0.076)
Howard County				
Howard*Overweight	0.028+ (0.017)	0.009 (0.024)	-0.019 (0.024)	-0.036 (0.029)

Howard*Obese	0.009 (0.021)	0.032 (0.026)	0.014 (0.033)	-0.063 (0.055)
Harford County				
Harford*Overweight	0.009 (0.029)	0.011 (0.034)	-0.030 (0.020)	-0.010 (0.022)
Harford*Obese	-0.010 (0.037)	0.021 (0.044)	0.069* (0.027)	0.028 (0.045)
Prince George's County				
PG*Overweight	0.019 (0.017)	0.060* (0.027)	0.013 (0.020)	0.031 (0.023)
PG*Obese	0.026 (0.017)	0.035 (0.025)	0.016 (0.017)	0.004 (0.018)

** p<0.01, * p<0.05, + p<0.1

Notes: Reported estimates are from a linear probability regression using respondents in the labor market ages 18 to 65 from the 1985–2012 BRFSS data. Santa Cruz estimates use only the 1993–2012 data, San Francisco estimates use only the 2001–2012 data, and Binghamton estimates use only the 2009–2012 data. The number of observations for each cell are reported in Appendix Table 1. Heteroskedasticity-robust standard errors clustered by state and year are below in parentheses. All estimates are weighted using the BRFSS sample weights. Column headings are the dependent variable for each regression. The employed for wages dependent variable counts respondents who are employed for wages as employed, and all other respondents as unemployed. The labor market dependent variable counts respondents who are employed for wages, self-employed, and out of work as in the labor market, and all other respondents as not in the labor market. Underweight/normal weight individuals are the omitted category in these estimates. All regressions include year dummies as well as controls for education level, age, age squared, marital status, African-American, Hispanic, and other races. Sample excludes pregnant women.

Table 5. Triple-Difference Regressions Comparing Labor Market Outcomes of Overweight and Obese Workers in Binghamton and San Francisco to Surrounding States, Before and After Passage of a Weight/Personal Appearance Law				
	Men		Women	
	In the Labor Market	Employed for Wages	In the Labor Market	Employed for Wages
	(1)	(2)	(3)	(4)
San Francisco				
SF*Overweight	-0.066 (0.058)	0.006 (0.075)	0.010 (0.069)	0.001 (0.071)
SF*Obese	0.089 (0.074)	0.199 (0.126)	-0.165* (0.077)	-0.081 (0.142)
Binghamton				
Binghamton*Overweight	0.192* (0.081)	0.111 (0.072)	0.023 (0.126)	-0.071 (0.192)
Binghamton*Obese	0.465** (0.110)	0.381** (0.075)	0.036 (0.141)	0.130 (0.159)
** p<0.01, * p<0.05, + p<0.1				
Notes: Reported estimates are from a linear probability regression using respondents in the labor market ages 18 to 65 from the 1985-2012 BRFSS data. Heteroskedasticity-robust standard errors clustered by state and year are below in parentheses. All estimates are weighted using the BRFSS sample weights. Column headings are the dependent variable for each regression. The employed for wages dependent variable counts respondents who are employed for wages as employed, and all other respondents as unemployed. The labor market dependent variable counts respondents who are employed for wages, self-employed, and out of work as in the labor market, and all other respondents as not in the labor market. Underweight/normal weight individuals are the omitted category in these estimates. All regressions include year dummies as well as controls for education level, age, age squared, marital status, African-American, Hispanic, and other races. Sample excludes pregnant women.				

APPENDIX: WEIGHT-BASED DISCRIMINATION AND THE LAWS THAT PROHIBIT IT

A brief account of the unique legislative histories, methods of administration, and enforcement mechanisms of all ten weight and personal appearance discrimination laws is detailed below.

A. Prince George's County, Maryland

The first wave of these laws emerged in the 1970s, long before obesity rates began to rise nationwide. Prince George's County, Maryland was the first mover, passing its law that prohibits personal appearance discrimination in 1972. Understanding why Prince George's County was the first jurisdiction in the United States to pass such a law requires understanding the changing nature of this area during the early 1970s. The early 1970s marked a period of substantial migration out of urban Washington, D.C., and into the nearby suburbs. Migrants of all races moved out of the city, although, where the migrants settled was generally segregated by race. Prince George's County soon became a popular choice among African-American families because of its affordability and its proximity to the African-American neighborhoods of D.C.¹⁷⁸

As a result, the racial composition of the county changed rapidly. During the period from 1970 to 1980, Prince George's African-American population grew by 188.7%; in just a decade, African-Americans went from only 14% of the county's population to 37% of the population.¹⁷⁹ At the same time, the county's white population declined by 30% due to white flight.¹⁸⁰ The rapidly changing racial composition soon led to clashes between whites and African-Americans in the county. In 1971, a group of African-American residents together with the National Association for the Advancement of Colored People (NAACP) filed suit in federal court to end the de facto segregation that still endured in the Prince George's County schools¹⁸¹ almost twenty years after *Brown v. Board of Education*.¹⁸²

At the same time, disputes escalated between whites and African-Americans regarding discrimination in employment and housing. The most frequent complaints were from African-Americans who wore their hair in natural styles, cornrows, or dreadlocks, as well as from those who wore

178. See VALERIE C. JOHNSON, BLACK POWER IN THE SUBURBS: THE MYTH OR REALITY OF AFRICAN-AMERICAN SUBURBAN POLITICAL INCORPORATION 37–42 (2002) (discussing migration patterns into Prince George's County during the 1970s).

179. *Id.* at 39.

180. *Id.*

181. *Id.* at 3–4, 109. This lawsuit resulted in a federal court order to desegregate in 1972.

182. 347 U.S. 483 (1954).

traditional African garments.¹⁸³ As a result, “personal appearance” was included in the first bill of the 1972 Prince George’s County Council session as part of a sweeping human rights ordinance.¹⁸⁴ Sponsored by two white Prince George’s County Councilmen, Ronald Reeder (a Republican) and Francis Francois (a Democrat), the bill had the express intent that “all persons should exercise and enjoy all civil, economic, political and housing rights without interference and without discrimination because of . . . personal appearance; . . .”¹⁸⁵

Codified today as Prince George’s County Code § 2-185 *et seq.*, the ordinance does not specifically mention weight in its definition of personal appearance.¹⁸⁶ Still, claimants seeking relief for any type of personal appearance discrimination have the option of pursuing a private action or going through a local commission process.¹⁸⁷ If the claimant chooses to pursue a private action, then she may file her complaint directly in the Prince George’s County Circuit Court. There is no exhaustion of administrative remedies requirement.¹⁸⁸

Because filing a private action generally necessitates the assistance of an attorney, however, many claimants instead choose to file a claim with the Prince George’s Human Relations Commission.¹⁸⁹ After a complaint is filed with the commission, assigned investigators look into the allegations and turn over their findings to the Executive Director. The Executive Director then issues a decision of “cause” or “no cause.”¹⁹⁰ If the Executive Director finds no cause, the complainant can appeal the finding to the full commission (comprised of thirteen members appointed by the County Executive).¹⁹¹ If the Executive Director finds cause, however, the case proceeds to mandatory conciliation, and if conciliation fails, the case proceeds to a *de novo* hearing before the full commission.¹⁹²

At the hearing, the Executive Director prosecutes the case on behalf of the people of Prince George’s County, and the complainant serves as the Director’s chief witness.¹⁹³ Once the commission renders a decision, the

183. E-mail from Michael Lyles, *supra* note 75.

184. A Bill Entitled: Human Relations Commission, CB-1-1972, Prince George’s Cty. Council (Feb. 15, 1972).

185. *Id.*

186. PRINCE GEORGE’S COUNTY, MD., CODE OF ORDINANCES § 2-186(14) (LEXIS through CB-29-2016).

187. *Id.* § 2-200.

188. *Id.*

189. Note that complainants must choose either a private action or the commission process; they cannot pursue both processes simultaneously. E-mail from Michael Lyles to author, *supra* note 81.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

decision is appealable by both the complainant and the respondent employer to the Prince George's County Circuit Court.¹⁹⁴ Successful claimants may be awarded injunctive and equitable relief, compensatory damages, back pay, and "humiliation and embarrassment" damages of up to \$200,000.¹⁹⁵ Unsuccessful respondents may also face a civil fine of up to \$10,000.¹⁹⁶ The procedures and remedies available under the Prince George's County ordinance, along with the procedures and remedies available under the other nine local laws, are summarized in Table 1.

B. Howard County, Maryland

Two additional laws passed in 1975, one of which came from another Maryland county. Howard County, which borders Baltimore County, was a largely agricultural area until the late 1960s, when it too was reshaped by the suburban migration movement.¹⁹⁷ Beginning in 1962, real estate developer James Rouse began buying parcels of land with the hopes of creating a "new city"—which would later become Columbia, Maryland (now the seat of Howard County government).¹⁹⁸ Together with a team of urban planners, Rouse assembled a detailed strategy to build an "economically diverse, polycultural, multi-faith and inter-racial" city between Baltimore and Washington, D.C.¹⁹⁹ As soon as the first residential complex was completed in 1967,²⁰⁰ liberally minded migrants began flocking to the new city, which soon created tension with the county's preexisting, more conservative residents.²⁰¹ By 1974, Columbia residents comprised most of the Howard County population, leading to the election of five progressive Democrats to fill the county council seats.²⁰²

Concern over "a backlog of civil rights cases on the state and federal level" led the newly elected council members to consider expanding local human rights protections.²⁰³ The goal of the ordinance, proposed by Councilman Richard L. Anderson, was (1) to create a local commission

194. PRINCE GEORGE'S COUNTY, MD., CODE OF ORDINANCES § 2-197 (LEXIS through CB-29-2016).

195. *Id.* §§ 2-195, 2-195.01.

196. *Id.*

197. *Howard County's History*, HOWARD COUNTY, MD., <https://www.howardcountymd.gov/About-HoCo/History> (last visited Sept. 13, 2016).

198. *History of Columbia*, COLUMBIA ASS'N, <https://www.columbiaassociation.org/facilities/columbia-archives/digital-resources/history-of-columbia/> (last visited Sept. 13, 2015).

199. *Id.*; see also Nate Sandstrom, *Is Rouse Still Right?*, COLUMBIA FLIER, Nov. 29, 2007.

200. *Id.*

201. Telephone Interview with C. Vernon Gray, *supra* note 99.

202. *Id.*

203. Michael J. Clark, *Howard Rights Commission Campaigns for More Power*, THE SUN, Apr. 16, 1975, at C2.

that had similar authority to state and federal agencies, and (2) to provide protection for individuals not covered by state and federal laws, including those who faced discrimination because of their personal appearance.²⁰⁴ Like the Prince George's County Council members, Howard County Council members were concerned that discrimination on the basis of personal appearance constituted another form of racial discrimination. But Howard County Council members were also concerned about discrimination against men with long hair,²⁰⁵ which had been the subject of a well-publicized, local dispute between A&P Supermarket and one of its former employees in 1971.²⁰⁶

The ordinance eventually passed in 1975 and is codified today as Howard County Code § 12.200 *et seq.* It states that “[d]iscrimination practices based upon . . . [p]ersonal appearance . . . are contrary to the public policy of Howard County.”²⁰⁷ Personal appearance, according to the statutory definition, includes “outward appearance of a person with regard to hair style, facial hair, physical characteristics or manner of dress.”²⁰⁸ All claimants seeking relief for personal appearance discrimination must file a charge with the Howard County Office of Human Rights, which initiates a local administrative action. After a forty-five day waiting period, complainants are also free to file a private action in Howard County Circuit Court; complainants who choose to file a civil suit need not drop their Office of Human Rights administrative action.²⁰⁹

After a charge is filed, the administrative action begins with an investigation by the assigned Office of Human Rights staff member, culminating in the staff member's determination of whether “reasonable cause to believe the existence of a pattern or practice of discrimination” exists.²¹⁰ If the staff member finds no reasonable cause, the Office of Human Rights dismisses the complaint; the complainant then has the right to appeal the dismissal to the Howard County Human Rights Commission, a twelve-member volunteer panel appointed by the County council.²¹¹ If the staff member finds reasonable cause, the case proceeds to mandatory

204. *Id.*

205. Telephone Interview with C. Vernon Gray, *supra* note 99.

206. The former produce clerk for A&P claimed that the supermarket chain suspended him when he refused to cut his hair. See Michael J. Clark, *Rights Panel Hears A.&P. Ex-Clerk Argue Hair Length*, BALT. SUN, Sept. 22, 1971, at C14.

207. HOWARD COUNTY, MD., CODE OF ORDINANCES § 12.200(II) (LEXIS through Ordinance No. 20-2016).

208. *Id.* § 12.201(XV).

209. *Id.* § 12.202(IX)(i); Telephone Interview with Mary Campbell, *supra* note 136.

210. HOWARD COUNTY, MD., CODE OF ORDINANCES § 12.202(IX)(c) (LEXIS).

211. Telephone Interview with Mary Campbell, *supra* note 136.

conciliation, and if conciliation fails, then the case proceeds to a de novo hearing before the Human Rights Commission.²¹²

In this hearing, the assigned Office of Human Rights staff member, the complainant, and the respondent all put on a case. Among the remedies that the Commission (and the Circuit Court) can grant to the complainant are injunctive and equitable relief, compensatory damages, back pay, and attorney fees.²¹³ Both the complainant and the respondent have thirty days to appeal the final administrative decision of the Human Rights Commission to the Howard County Circuit Court.²¹⁴

C. Madison, Wisconsin

In the same year that the Howard County personal appearance law passed, a similar local ordinance prohibiting discrimination on the basis of physical appearance passed in Madison, Wisconsin. Although Madison was hundreds of miles away from Howard County, similar concerns convinced the city's Common Council members to adopt the ordinance in 1975. In particular, council members were concerned about "[e]mployers' and landlords' biases concerning hair length and facial hair, married versus unmarried persons, styles of dress and sexual orientation."²¹⁵ As a result, when the council passed the ordinance on March 13, 1975, a local newspaper article praised it as "one of the strongest ordinances in the country."²¹⁶

Codified today as Madison General Ordinances § 39.03(1), the law mandates the "practice of providing equal opportunities in housing, employment, public accommodations and City facilities . . . to persons without regard to . . . physical appearance."²¹⁷ Moreover, the ordinance specifically defines physical appearance to include "weight."²¹⁸ To seek relief under the ordinance, discrimination victims must file a complaint with the Madison Equal Opportunities Commission, which administers and adjudicates the claim. The ordinance does not provide complainants with a private right of action; they must seek relief through the local administrative process.²¹⁹

For each complaint, the commission assigns an investigator to the case, whose task is to look into the evidence and, eventually, to issue a decision

212. *Id.*

213. HOWARD COUNTY, MD., CODE OF ORDINANCES § 12.212(IV)(j) (LEXIS).

214. *Id.* § 12.212(V)(a).

215. *Equal Opportunity Report*, CAP. TIMES, Sept. 24, 1975, at 24.

216. *Id.*

217. MADISON, WIS., GEN. ORDINANCES § 39.03(1) (2015).

218. *Id.* § 39.03(2).

219. *Id.* § 39.02(9)(i).

as to whether probable cause exists.²²⁰ A determination of no probable cause is appealable to the commission. A determination of probable cause, however, sends the case to conciliation. If conciliation fails, the case then proceeds to a hearing on the merits in front of a hearing examiner.²²¹ The complainant and respondent both present evidence at this hearing; the investigator does not participate. After this hearing, the examiner issues an order containing findings of fact and conclusions of law. If the investigator finds that discrimination occurred, the order will also mandate remedies,²²² which can include economic damages, noneconomic damages, front pay, and back pay.²²³ Both the complainant and the respondent have a right of appeal to the full five-member commission, which reviews only the hearing record.²²⁴ After the commission appeal, either party may further appeal the decision to the Dane County Circuit Court, and afterward, to the Wisconsin Court of Appeals.²²⁵

D. Michigan

Only a year after the Madison and Howard County laws came the law in the state of Michigan. Unlike its predecessors, the Michigan law was the first local law explicitly concerned with weight-based discrimination. The Elliott-Larsen Civil Rights Act guarantees the “opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of . . . weight.”²²⁶ Weight was added to Michigan’s civil rights legislation through the efforts of an innovative legislator, State Representative Thomas Mathieu. Mathieu, a former grassroots organizer, was somewhat ahead of his time in recognizing that weight could present a problem in the workplace, particularly for women. According to Mathieu, he pushed for the addition of weight

220. See City of Madison Dep’t of Civil Rights, Equal Opportunities Division, *Outline of Complaint Process*, CITY OF MADISON (Aug. 22, 2012), <http://www.cityofmadison.com/dcr/documents/Outline.pdf> (providing a thorough overview of the MEOC administrative process).

221. *Id.*

222. *Id.*

223. MADISON, WIS., GEN. ORDINANCES § 39.03(10)(c)(2)(b).

224. Equal Opportunities Division, Madison Dep’t of Civil Rights, *supra* note 118, at 2.

225. *Id.* For examples of Madison Equal Opportunities Commission cases that have been appealed, see *Sam’s Club, Inc. v. Madison Equal Opportunities Comm’n*, No. 02-2024, 2013 WL 21707207 (Wis. Ct. App. July 4, 2003); *State ex rel. McDonald’s v. Equal Opportunities Comm’n of Madison*, No. 830157, 1984 WL 180623 (Wis. Ct. App. Aug. 28, 1984); *Federated Rural Electric Ins. Corp. v. Madison Equal Opportunities Comm’n*, No. 79-538, 1981 WL 138689 (Wis. Ct. App. Apr. 27, 1981).

226. MICH. COMP. LAWS. § 37.2102(1) (2013).

because of my personal observations while working for the Community Action program in Grand Rapids. I saw with my own eyes how people lost out on job opportunities, just because of the way they looked. [To] be blunt—too fat or too short.

In that work, before running and being elected to Michigan Legislature, I was deeply moved by the persons who had suffered such job rejections, simply because of the way they looked. Mostly it was overweight females, women with superb clerical and secretarial skills, clearly well qualified for the position but rejected out of hand because they didn't fit the employer's desire of a Playboy Centerfold body to parade around the office.²²⁷

In order to seek a remedy under the Michigan Act today, weight-discrimination complainants have a choice: they can file a private action in state court, or they can instead utilize the administrative process of the Michigan Civil Rights Department.²²⁸ Complainants who choose the administrative process must file a complaint within 180 days of the alleged discriminatory act (in contrast, complainants who choose to file a private lawsuit have three years).²²⁹ The complaint then proceeds to the investigation phase, which terminates once the department determines whether sufficient evidence exists to issue a charge of discrimination.²³⁰ If the department does not issue a charge, the complainant may file a written reconsideration request. If the department does issue a charge, the case proceeds to conciliation. If the parties do not settle during conciliation, the final step is an administrative hearing before the Michigan Civil Rights Commission, comprised of eight appointed members.²³¹

If successful, claimants under the Michigan law are entitled to injunctive and equitable relief, compensatory damages, back pay, and attorney fees (regardless of whether they choose to pursue a private lawsuit or the department process). Furthermore, the respondent employer is subject to a civil fine of up to \$50,000.²³² Claimants who bring a private action can appeal a lower court's decision, of course, through the Michigan state court system. Claimants who choose the Department process can

227. E-mail from Thomas C. Mathieu, *supra* note 74.

228. There is no exhaustion of administrative remedies requirement before a weight-discrimination plaintiff can file in state court. *MDCR Jurisdiction*, 2014, MICH. DEP'T OF C.R., http://www.michigan.gov/mdcr/0,4613,7-138-42240_43561-153172--,00.html (last visited Sept. 13, 2016).

229. *Id.*

230. MICH. DEP'T OF CIVIL RIGHTS, RULES GOVERNING ORGANIZATION, PRACTICE AND PROCEDURE (2011), http://www.michigan.gov/documents/pamphlet_commission_rules_7786_7.pdf.

231. *Id.*

232. MICH. COMP. LAWS §§ 37.2603–2605 (2013).

appeal the commission's hearing decision to the Ingham County Circuit Court and then up through the Michigan state court appellate system.²³³

E. Harford County, Maryland

Like Howard County, Harford County borders Baltimore County and also experienced significant inward migration during the 1970s. In fact, from 1970 to 1980, Harford's total population increased by more than 20%.²³⁴ With the changing population came changes in the political landscape, resulting in the election of the first African-American to the Harford County Council in 1974.²³⁵ Dr. Leham Spry, a local dentist, beat the incumbent councilman by more than 2,000 votes, despite the fact that only 8% of the county was African-American.²³⁶ As the former president of the Harford County Chapter of the NAACP,²³⁷ Spry was quick to sponsor a comprehensive bill to strengthen the civil rights protections within the county.

In 1976, Councilman Spry sponsored Bill 76-81, which established a new administrative process through the city's volunteer Human Relations Commission and extended antidiscrimination protections to eleven characteristics—including six characteristics beyond the five already protected by Title VII.²³⁸ Among these additional six characteristics was personal appearance.²³⁹ At the hearing on the bill, testimony emphasized the two-year backlog of discrimination cases at the Maryland Commission on Civil Rights and at the federal Equal Employment Opportunity Commission (EEOC), concluding that it was "more practical and economical to have local agencies handle these cases."²⁴⁰ Testimony further praised the proposed bill as "all encompassing."²⁴¹ The bill passed five-to-two later that evening.²⁴²

233. *Id.* § 37.2606.

234. *Maryland Population of Counties by Decennial Census: 1900 to 1990*, U.S. CENSUS BUREAU (Mar. 27, 1995), <http://www.census.gov/population/cencounts/md190090.txt>.

235. *Dr. Leham Spry Wins Harford County Seat*, BALT. AFRO-AMERICAN, Dec. 7, 1974, at 28.

236. *Id.*

237. *Id.*

238. Harford Cty. Council, Bill No. 76-81, 1976 Council, Legis. Day No. 76-30 (Md. 1976) (an act to repeal Section 229 of the Code of Public Local Laws of Harford County), <http://www5.harfordcountymd.gov/WebLink8/0/doc/9575/Page3.aspx>.

239. *Id.*

240. *Proceedings of Public Hearings: Hearing on Bill No. 76-81*, Harford Cty. Council, Legis. Day No. 76-33, at 46 (Md. 1976) (statement of Freida Mauldin, Md. Ass'n of Human Rights Agency) (on file with Harford Cty., Md., Council), <http://www5.harfordcountymd.gov/WebLink8/0/doc/3312/Page29.aspx>.

241. *Id.* at 47 (statement of Thomas Barranger, Chairman on the Human Relations Comm'n).

242. *Id.* at 51.

Since the enactment of Bill 76-81, Harford County Code § 95-1 has “assured equal protection of the law . . . and due process of the law with respect to education, housing, administration of justice, employment, public accommodations, government services and other related fields . . . without discrimination because of . . . personal appearance.”²⁴³ In order to seek a remedy for personal appearance discrimination, complainants have the option of filing a private action directly in Harford County Circuit Court or filing a complaint with the Harford County Office of Human Relations.²⁴⁴ Currently, the Harford County Office has only one paid manager; the rest of the staff is comprised of a voluntary advisory board.²⁴⁵ As a result, the administrative process is more limited. If the office determines that there is reasonable cause to believe that discrimination occurred, the claimant and respondent are invited to conciliate. But if conciliation fails, the complainant’s only option is to file suit in Harford County Circuit Court—there is no administrative hearing process.²⁴⁶ Remedies available under the ordinance for successful complainants include injunctive and equitable relief, compensatory damages, and attorney fees.²⁴⁷ In addition, respondents who have violated the ordinance are subject to a \$1,000 civil penalty.²⁴⁸

F. Washington, District of Columbia

The next law came a year later in Washington, D.C., although the story had begun almost four years previously. Since World War II, the city had unsuccessfully fought Congress for home rule. At last, in the 1967 Reorganization Act, Congress granted D.C. limited home rule, with a nine-member council and a commissioner all appointed by the U.S. President.²⁴⁹ Even though the council was not popularly elected, by August of 1973, it had passed a revolutionary law banning discrimination on the basis of personal appearance in employment, housing, and public accommodation.²⁵⁰ The council was concerned that groups like “single

243. HARFORD COUNTY, MD., CODE § 95-1 (1978).

244. A complainant can directly file a complaint in circuit court; there is no exhaustion of administrative remedies requirement. E-mail from Sylvia W. Bryant, Manager, Harford Cty., Md. Office of Human Relations, to author (Dec. 3, 2013) (on file with author).

245. *Id.* The office did not have a paid manager until fiscal year 2012; beginning fiscal year 2013, the office also retained an administrative assistant. *See, e.g.,* DAVID R. CRAIG, HARFORD COUNTY, MARYLAND APPROVED ANNUAL OPERATING BUDGET, FISCAL YEAR 2013–2014 (2013), <http://www.harfordcountymd.gov/ArchiveCenter/ViewFile/Item/360>.

246. E-mail from Sylvia W. Bryant to author, *supra* note 244.

247. HARFORD COUNTY, MD., CODE § 95-13.

248. *Id.* § 95-14.

249. *See* 40 U.S.C. § 8303 (2012).

250. Editorial, *The City's Moves to Protect Human Rights*, WASH. POST, Aug. 14, 1973, at A20.

people, students and longhairs . . . ha[d] encountered barriers that have no real bearing on their character, reliability or public behavior.”²⁵¹ The council was also concerned that in this “Northern town with Southern exposure,” discriminating on the basis of personal appearance might serve as a clever excuse for Southerners in D.C. to discriminate on the basis of race.²⁵²

The law was short-lived, however; on December 24, 1973, Congress passed the District of Columbia Home Rule Act, granting D.C. full home rule.²⁵³ An elected mayor and a thirteen-member, “very activist” council took office for the first time on January 1, 1975, ready to start from scratch and “to correct the wrongs of many years.”²⁵⁴ Under the leadership of Chairman Sterling Tucker, the council passed a new Human Rights Ordinance in 1977. The new ordinance was intended to be an “expansion of the 1973 Act,” protecting everything from “dashikis” to “bushes, . . . long beards, [and] long hair.”²⁵⁵ Like the 1973 ordinance, the 1977 ordinance barred all discrimination on the basis of personal appearance.

The definition of personal appearance in D.C. Code § 2-1401.02(22) does not specifically include “weight,” but it broadly includes the “outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards.”²⁵⁶ In order to seek relief under the D.C. ordinance today, complainants have a choice of pursuing a private lawsuit or an administrative action through the D.C. Office of Human Rights.²⁵⁷ Individuals pursuing the former avenue of relief can directly file a lawsuit (D.C. has no exhaustion of administrative remedies requirement).²⁵⁸ Individuals pursuing the latter avenue must file a complaint with the D.C. Office of Human Rights. After investigating the complaint, the D.C. Office—like many of the other local offices—makes a determination whether there is probable cause to believe that the respondent has violated the Human Rights Ordinance. If the Office makes a determination of no

251. Editorial, *Improvement of Local Human Rights Protections*, WASH. POST, May 28, 1973, at A26.

252. Telephone Interview with Sterling Tucker, *supra* note 75.

253. See District Court of Columbia Home Rule Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (1973).

254. Telephone Interview with Sterling Tucker, *supra* note 75.

255. *Id.*

256. D.C. CODE § 2-1401.02(22) (2001).

257. See *id.* § 2-1403.16. For a recent weight discrimination case filed under the D.C. Act, see *Ivey v. District of Columbia*, 949 A.2d 607 (D.C. 2008); *Ivey v. District of Columbia*, 46 A.3d 1101 (D.C. 2012).

258. See D.C. CODE § 2-1403.16.

probable cause, the complaint is dismissed, and the complainant has fifteen days to appeal to the Office of Human Rights.²⁵⁹

If the office makes a determination of probable cause, however, the case proceeds to conciliation and, whenever conciliation fails, onto a commission hearing. A commission hearing in D.C. takes place before an Administrative Law Judge (ALJ) and a panel of three appointed Human Rights Commissioners (D.C. has thirteen Commissioners total). Commission review at the hearing is *de novo* (i.e., the Office of Human Rights' findings are not given any weight), and both complainants and respondents must present evidence in support of their positions as in any trial.²⁶⁰ After the hearing, the ALJ compiles the record and issues a recommended decision to the three commissioners, which they can either accept or reject. The panel of commissioners issues a final decision and remedies (if appropriate), which can include injunctive and equitable relief, compensatory damages, back pay, attorney fees, and a civil fine of up to \$50,000.²⁶¹ Either party can appeal the panel's decision to the D.C. Court of Appeals.²⁶²

G. Urbana, Illinois

The final law of the 1970s came at the end of the decade from Urbana, Illinois. Urbana Code of Ordinances § 12-37 prohibits “discrimination by reason of . . . personal appearance . . . or any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity in housing, employment, credit or access to public accommodations.”²⁶³ The ordinance specifically defines personal appearance to include “weight.”²⁶⁴ Urbana's Human Rights Law came after almost a decade of wrangling among the mayor and city council members.

The history of the provision prohibiting discrimination on the basis of personal appearance is intertwined with the history of another provision in the 1979 Urbana ordinance that prohibited discrimination on the basis of sexual orientation. The Gay Liberation Front (GLF) was very active in the area throughout the 1970s, staging protests in both Urbana and its sister

259. See Office of Human Rights, *Complaint Process & Timeline*, DC.GOV, <http://ohr.dc.gov/complaints/process> (last visited Sept. 13, 2016).

260. See Office of Human Rights, *DC Commission on Human Rights*, DC.GOV, <http://ohr.dc.gov/commission> (last visited Sept. 13, 2016).

261. See D.C. CODE § 2-1403.13.

262. See *id.*

263. URBANA, ILL., CODE OF ORDINANCES § 12-37 (LEXIS through Ordinance No. 2016-03-025).

264. See *id.* § 12-39.

city, Champaign. Perhaps the GLF's best known local leader was University of Illinois student, Jeff Graubart. Graubart's appeals to local politicians led to the repeal of both Champaign and Urbana's anti-cross-dressing laws in 1971 and 1972, respectively.

Desiring additional civil rights protections, however, Graubart and the other members of the GLF continued their activism after the repeal of these laws. On April 15, 1972, while Graubart and other GLF members were staging a protest of an Urbana bar that was openly hostile to the LGBT community, they were assaulted by individuals unsympathetic to their cause.²⁶⁵ Even though the Urbana police failed to apprehend the assailants, a GLF member spotted one of them on campus on April 25, 1972.²⁶⁶ Graubart called the police, and the police arrested the individual. Nevertheless, when Graubart and another GLF member went into the police station to give a statement, the arresting officer accused them of lying to the police. The police officer held the two in custody for over an hour, threatening them for "defaming" an "All-American Boy" and subjecting them to a series of homophobic slurs.²⁶⁷

Graubart contacted the District Attorney's office about the incident, but the office refused to launch an investigation. Emotionally distraught, Graubart dropped out of school and moved to Chicago and later to California. But Graubart continued to be haunted by "the horrors of April 15th, 1972" and the subsequent denial of justice.²⁶⁸ Thus, in 1976, Graubart determined to return to Urbana and seek recompense for the 1972 events. On March 2, 1976, Graubart began a sit-in at Urbana City Hall.²⁶⁹ At the same time, he issued a press release demanding one million dollars in damages, full funding for him to finish his education, and reimbursement for the psychiatric and medical bills he had accrued as a result of the incident.²⁷⁰

The protest ended unsuccessfully—police arrested Graubart after seventeen days of camping out in City Hall. Even though Graubart did not receive the personal damages he sought, he did succeed in bringing public attention to his situation and to the situation of the entire LGBT community in Urbana. He also caught the attention of an Urbana city councilman. In 1973, Dr. John Peterson, a well-known community organizer, became the first independent elected to the Urbana City Council. As the "outsider" on

265. See *Student Life and Culture Archives*, UNIV. OF ILL. ARCHIVES, <http://archives.library.illinois.edu/slc/files/2014/08/SLC-panels-1870s-2010s3.pdf> [hereinafter UNIV. OF ILL. ARCHIVES] (last visited Sept. 13, 2016).

266. See Press Release, Jeffrey Graubart, *supra* note 77.

267. *Id.* at 2.

268. *Id.* at 5.

269. See UNIV. OF ILL. ARCHIVES, *supra* note 265.

270. See Press Release, Jeffrey Graubart, *supra* note 77.

the council, Peterson had successfully sponsored a human rights ordinance in 1975 that gave limited protections to the LGBT community.²⁷¹ However, the 1975 ordinance did not provide protection against housing discrimination, which was an important issue in a university town. The compromise required to avoid a mayoral veto of the 1975 ordinance also resulted in provisions of limited investigatory powers if a complaint was filed and mild remedies if a complaint was successful.²⁷²

Peterson seized the opportunity to take advantage of the public discontent after Graubart's sit-in as well as the fact that, as of 1977, Democrats held a ten-to-four majority on the Urbana City Council, making the council veto-proof. Over the next year and a half, Peterson worked with members of the Urbana Human Rights Commission, Graubart, and other members of the LGBT community to draft a new ordinance. This ordinance would prohibit discrimination on the basis of sexual orientation in all facets of life with stronger enforcement powers and stiffer penalties. Still, some Democrats on the council were wary of voting for a purely LGBT rights bill. According to Graubart,

personal appearance was added as a way to make the bill more palatable to the homophobes. We were against inclusion, not because we supported such discrimination, but because their motive was to hide the fact that it was an LGBT ordinance. . . . [We were] disturbed when they move[d] to add a laundry list of people who should not be discriminated against.²⁷³

Such a laundry list was necessary, however, to get the ordinance passed. Over two years after Graubart's sit-in, the Urbana Human Rights Law was signed into law on May 10, 1979.²⁷⁴

In order to recover for personal appearance discrimination under the Urbana act, discrimination victims must file a complaint with the local administrative authority, the Human Relations Commission. The Urbana Human Relations Officer and one other staff member investigate all claims. If they find that the claim has probable cause, the claim proceeds to conciliation, and if conciliation has been unsuccessful after a 42-day period, the claim is slated for a public hearing in front of the entire eight-

271. Telephone Interview with Dr. John Peterson, *supra* note 77.

272. Marilyn Upah-Bant, *Urbana Commission Eyes Champaign's Rights Law*, URBANA COURIER, Nov. 16, 1977, at 3; *Commission Seeks New Human Rights Ordinance*, URBANA COURIER, Jan. 19, 1978, at 4.

273. E-mail from Jeffrey Graubart to author (Feb. 17, 2012) (on file with author).

274. E-mail from Todd Rent, Urbana, Ill. Human Relations Officer, to author (Nov. 14, 2011) (on file with author).

member Human Relations Commission within the next 105-day period.²⁷⁵ No private right of action exists under the Urbana Human Rights Ordinance.²⁷⁶ Successful claimants may obtain injunctive and equitable relief, compensatory damages, and back pay. The Human Relations Commission may additionally order an employer respondent to pay up to a \$500 civil fine.²⁷⁷ At the conclusion of the commission hearing, either party may appeal the commission's decision to the Sixth Judicial Circuit of Illinois.²⁷⁸

H. Santa Cruz, California

After the passage of the Urbana ordinance, the passage of weight and personal-appearance discrimination ordinances ceased for over a decade. Indeed, the next ordinance did not emerge until 1992 in Santa Cruz, California. Santa Cruz Municipal Code § 9.83.010 "safeguard[s] the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on . . . weight or physical characteristic."²⁷⁹ Sponsored by Councilman Neal Coonerty,²⁸⁰ the 1992 ordinance had origins similar to the 1979 Urbana ordinance. Weight and physical characteristics became add-ons to what began as an LGBT discrimination ordinance.

The initial push for the ordinance came after former California Governor Pete Wilson vetoed a law that would have prohibited discrimination on the basis of sexual orientation throughout the state.²⁸¹ Enraged by the veto, local LGBT activists knew that they would need a broader base of support to get an ordinance successfully passed in Santa Cruz. As a result, they formed a coalition with local women's rights and fat rights advocates to push for a new law "to protect more of the non-mainstream."²⁸² As in Urbana, public support for a strictly LGBT ordinance was not universal; many outraged citizens wrote letters to the Santa Cruz

275. Telephone Interview with Todd Rent, *supra* note 87.

276. *Id.*

277. *See* URBANA, ILL., CODE OF ORDINANCES § 12-101 (LEXIS through Ordinance No. 2016-03-025).

278. *See id.* §§ 12-84, 12-102.

279. SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.010 (1995).

280. E-mail from Ryan Coonerty, Former Mayor, Santa Cruz, Cal., to author (July 30, 2011) (on file with author).

281. Myers, *supra* note 81.

282. *Id.* The most prominent organizations joining LGBT advocates included the Body Image Task Force, the National Organization of Women, and the Woman's International League for Peace and Freedom. *See* Correspondence Folder for Ordinance 92-11 (1992) (on file with Santa Cruz, Cal. City Clerk Office).

Council in opposition.²⁸³ Weight and physical characteristics became successful distractions from the principal issue, LGBT rights. These distractions rallied support from council members who initially opposed the ordinance, and the revised ordinance passed the council on February 11, 1992.²⁸⁴

In order to recover under the Santa Cruz ordinance, weight discrimination victims must first file a claim with the Santa Cruz Human Resources Department. The Chief Human Resources Officer conducts a preliminary investigation of the complaint, contacts the accused party for a response, and requests that the accused party attend mediation with the complainant.²⁸⁵ If the accused party accepts the mediation proposal, the officer turns over the results of the preliminary investigation to the mediator, and the parties attempt to settle.²⁸⁶ If the parties do not settle, then the complainant can file a private action. Similarly, if the accused party refuses to go to mediation, the complainant can file a private action.²⁸⁷ Courts can award injunctive relief, equitable relief, compensatory damages, and attorney fees to weight discrimination victims under this ordinance.²⁸⁸ Courts may also order employers found in violation of the ordinance to pay a civil fine of up to \$500.²⁸⁹

I. *San Francisco, California*

The next ordinance came from the state of California as well. For San Francisco, a self-described “city of tolerance,”²⁹⁰ it all started in 1999 with a billboard. A California-based chain of health clubs, 24 Hour Fitness, unveiled its new “sci-fi” advertising campaign in mid-February of 1999 with a prominent South of Market billboard depicting an alien and the message, “When they come, they’ll eat the fat ones first.”²⁹¹ Within days, local fat rights activists had organized a protest. About thirty protestors dressed as aliens stood outside one 24 Hour Fitness location on a Sunday

283. *Id.*

284. *See Myers, supra* note 81.

285. Telephone Interview with Joe McMullen, Chief Human Res. Officer, Santa Cruz, Cal. (Jan. 9, 2011).

286. *Id.*

287. *Id.*

288. SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.120 (1995).

289. *Id.*

290. *See* Edward Epstein, *Fat People Get a Positive Hearing in S.F.: Supervisors Set Vote on Protected Status*, S.F. CHRON., May 4, 2000, at A1.

291. Ulysses Torassa, *Persons of Heft Protest Health Club’s Ad Saying Space Aliens Would Gobble Up Fat Folks*, S.F. EXAMINER, Feb. 16, 1999, at A1; Edward Epstein & Ken Hoover, *Ammiano Takes Aim at Fat Bias: Supervisor Wants Laws to Cover Hefty Individuals*, S.F. CHRON., Feb. 18, 1999, at A16.

morning doing aerobics as they held signs saying “Eat me,” “I’m Yummy,” and “Bite My Fat Alien Butt.”²⁹²

Even though the protest was small, it caught the attention of local newspapers, and more importantly, the San Francisco Board of Supervisors. Within a week, Supervisor Tom Ammiano had addressed the Board, the city attorney, and the San Francisco Human Rights Commission about adding “weight and body size” to the city’s human rights ordinance.²⁹³ By the end of February, the Human Rights Commission had sent a letter to 24 Hour Fitness asking the health club chain to remove the billboard because it “target[ed] people for their appearance,” and “similar jokes about minorities or gays would not be tolerated” in the city of San Francisco.²⁹⁴

Although the Board’s letter was unsuccessful—24 Hour Fitness refused to remove the billboard—the issue of body size discrimination remained in the spotlight. One staff member of the Commission noted that the publicity surrounding the Board’s letter drew “a lot of support” because “[p]eople really responded on this issue as one of fairness to all people.”²⁹⁵ Consequently, the Human Rights Commission approved a resolution on body size discrimination at their meeting on June 10, 1999 that encouraged “the Board of Supervisors and the Mayor to enact legislation adding ‘body size’ or a comparable phrase to San Francisco’s antidiscrimination ordinances” and encouraged “all City contractors, and all businesses and agencies in San Francisco, to eliminate body size discrimination from their programs and policies.”²⁹⁶

After receiving the commission’s resolution, the Board of Supervisors spent almost a year considering the possibility of adding body size language to the city’s Human Rights Ordinance. On March 20, 2000, Supervisor Tom Ammiano introduced an ordinance that banned “the practice of discrimination on the . . . grounds of . . . weight” in employment, city contracts, public accommodations, and housing.²⁹⁷ The

292. Torassa, *supra* note 82.

293. See Epstein & Hoover, *supra* note 82; Telephone Interview with Sondra Solovay, Weight Discrimination Attorney, S.F. (Aug. 17, 2011).

294. Jason B. Johnson, *supra* note 83. The San Francisco Human Rights Ordinance had already begun protecting against discrimination on the basis of race and sexual orientation in 1999. See Epstein & Hoover, *supra* note 82.

295. City and Cty. of S.F., *Minutes, Meeting of the Human Rights Commission* (June 10, 1999), <http://sf-hrc.org/ftp/archive/sfarchive.org/index73dd.html?dept=1028&sub=2153&dtype=2156&year=2194&file=12582>.

296. S.F. Human Rights Comm’n, Resolution on Body Size Discrimination (June 10, 1999), in 2000 Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office).

297. S.F., CAL., ADMINISTRATIVE CODE § 12A.1 (LEXIS through Ordinance 13-11); City and County of San Francisco, *Minutes, Meeting of the Board of Supervisors* (Mar. 20, 2000), in 2000

board requested a report on the ordinance from the Finance and Labor Committee as well as an opinion from the city attorney's office.

On May 3, 2000—almost a year after the 24 Hour Fitness protest—local fat rights advocates finally got their long-awaited public hearing at the Finance and Labor Committee meeting. Although the ordinance sponsor, Supervisor Ammiano, was a “rail-thin” man, the rest of the fat rights advocates testifying at the hearing were almost exclusively large women.²⁹⁸ The “true superstar” of the hearing, however, was Margarita Rossi, a sixteen-year-old student at the San Francisco School of the Arts.²⁹⁹ Rossi recounted an emotional tale of being denied care for a gynecological problem by a local nurse practitioner. The nurse practitioner was so busy making “repeated remarks about [Rossi’s] weight” that she “never got around to conducting an exam.”³⁰⁰

Rossi’s emotional testimony led to a unanimous approval of the ordinance by the three Finance and Labor Committee members, and the ordinance was scheduled for a vote in front of the full board on May 8, 2000. Without any debate, all eleven supervisors voted to pass the ordinance after the first reading on May 8, 2000.³⁰¹ This unanimous board support continued with the vote for final passage on May 15, 2000.³⁰² Less than two weeks later, the ordinance became the official law of San Francisco with the signature of Mayor Willie L. Brown on May 26, 2000.³⁰³

Over a year later, the Human Rights Commission issued compliance guidelines for the ordinance, which carry the force of law in San Francisco. The guidelines state that weight discrimination is more than just

Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office), http://sfbos.org/ftp/meetingarchive/full_board/index.aspx-page=2657.html.

298. Epstein, *supra* note 83; City and County of San Francisco, *Minutes, Meeting of the Board of Supervisors Finance and Labor Committee* (May 3, 2000), 2000 Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office). Other speakers included Debby Burgard, a local psychologist who ran a movement class for women over two hundred pounds; Carole Cullum, a member of San Francisco’s Board of Appeals, who testified about her personal experiences with the lack of plus-size seating accommodations in San Francisco; and Marilyn Wann, the organizer of the 24 Hour Fitness protest that had initially piqued the Board’s interest in weight discrimination back in February 1999. *Id.*; see Epstein, *supra* note 83.

299. Telephone Interview with Sondra Solovay, *supra* note 135.

300. Epstein, *supra* note 83.

301. City and Cty. of S.F., *Minutes, Meeting of the Board of Supervisors* (May 8, 2000), in 2000 Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office), http://sfbos.org/ftp/meetingarchive/full_board/index.aspx-page=2664.html.

302. City and Cty. of S.F., *Minutes, Meeting of the Board of Supervisors* (May 15, 2000), in 2000 Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office), http://sfbos.org/ftp/meetingarchive/full_board/index.aspx-page=2665.html.

303. S.F., Cal., Ordinance 101-00 (May 26, 2000) (codified as amended in scattered sections of S.F., CAL. ADMINISTRATIVE CODE, Chapters 12, 12A, 12B, 12C), in 2000 Human Rights Ordinance Folder (on file with San Francisco Human Rights Commission Office).

discrimination on the basis of “a numerical measurement of total body weight.”³⁰⁴ Weight discrimination also includes discrimination on the basis of “the ratio of a person’s weight in relation to height,” “an individual’s unique physical composition of weight through body size, shape, and proportions,” and “an impression of a person as fat or thin regardless of the numerical measurement.”³⁰⁵

Under the ordinance, weight discrimination victims can pursue a remedy through the Human Rights Commission and through a private action simultaneously.³⁰⁶ Victims who choose the private action route may file their lawsuits directly—there is no exhaustion of administrative remedies requirement.³⁰⁷ Victims who choose the commission route must first file a complaint. After the commission investigates the complaint, the director issues a finding as to whether there is probable cause that discrimination occurred. If the director fails to find probable cause, the complainant may appeal the finding; otherwise, the commission closes the case.³⁰⁸

If the director finds probable cause, however, the case proceeds to a hearing in front of an appointed hearing officer (the officer cannot be a member of the commission). The hearing is conducted like any other trial, with both parties—complainant and respondent—responsible for presenting their own evidence and putting on their own cases. At the conclusion of the hearing, the hearing officer has thirty days to issue written findings of fact, a decision, and remedies (if applicable).³⁰⁹ The remedies available are among the most generous of all the local laws: treble, special, and general damages; up to \$400 in additional damages; attorney fees; and even punitive damages.³¹⁰ Either party may appeal the hearing officer’s findings and request a new hearing in front of the full eight-member Human Rights Commission.³¹¹ If the commission rejects the appeal request, the parties must turn to the court system if they wish to pursue the matter further.

304. S.F. HUMAN RIGHTS COMM’N, COMPLIANCE GUIDELINES TO PROHIBIT WEIGHT AND HEIGHT DISCRIMINATION § IIA (2001), 2000 Human Rights Ordinance Folder (on file with San Francisco, Cal., Human Rights Commission Office).

305. *Id.*

306. Note, however, the Human Rights Commission has discretion whether to hold the Commission proceedings in abeyance until the lawsuit has concluded. S.F. HUMAN RIGHTS COMM’N, RULES AND REGULATIONS FOR DISCRIMINATION AND RETALIATION COMPLAINTS, Rule III(B)(3) (2002).

307. S.F., CAL., POLICE CODE § 3307(c) (LEXIS through Ord. 59-11). Discrimination victims need only exhaust any remedies available through their workplaces.

308. S.F. HUMAN RIGHTS COMM’N, *supra* note 306, at Rules XIV–XV.

309. S.F., CAL., POLICE CODE § 3307(b).

310. *Id.* §§ 3306–07.

311. *Id.* § 3307(b).

J. Binghamton, New York

The final and most recent weight-discrimination law came from the other side of the country in Binghamton, New York. The law was Binghamton Councilman Sean G. Massey's "first major legislative endeavor" after his election in 2008.³¹² Much like the earlier Urbana and Santa Cruz ordinances, the Binghamton ordinance began as one principally concerned with LGBT rights. In June of 2008, the Gender Equality Non-Discrimination Act, which would have prohibited discrimination on the basis of sexual orientation and gender identity, passed the New York State Assembly.³¹³ The New York State Senate, however, had a slight Republican majority that narrowly defeated the bill.³¹⁴ The defeat enraged LGBT activists statewide. Soon afterwards, a group of transgendered activists approached Councilmember Massey, who then brought the idea to the rest of the Binghamton Council.

Fortunately for Massey, the composition of Binghamton politicians in 2008 was overwhelmingly liberal. Massey, his six fellow council members, and the mayor were all Democrats. During the 2008 election, Massey and the mayor had even been endorsed by the Working Families Party, a New York-based, progressive grassroots organization that advocates equal rights for all.³¹⁵ With the support of his fellow councilmembers, Massey began the research necessary to draft the ordinance.

Interestingly, what distinguishes Binghamton from the two previous LGBT laws in Urbana and Santa Cruz is the reason for including personal appearance and weight in the Binghamton ordinance. In Urbana and Santa Cruz, weight and personal appearance were added to distract council members who were wary to pass a law that exclusively concerned LGBT rights. In Binghamton, however, weight and personal appearance protections were actually suggested by LGBT groups. According to Massey:

Research on the legislation put me in contact with Lisa Mottet at the National Lesbian and Gay Task Force. She helped me find model legislation that included protections based on gender expression and identity. But we both agreed, however, that since we were creating a new law, we might as well create as comprehensive [a] law as possible.³¹⁶

312. E-mail from Sean G. Massey, *supra* note 84.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

As a result, Massey contacted two San Francisco fat rights activists, Sondra Solovay and Marilyn Wann, who had helped draft that city's ordinance and compliance guidelines. With their help, Massey drafted an ordinance that "protect[s] and safeguard[s] the right and opportunity of all persons to be free from discrimination based on . . . weight."³¹⁷ Like the San Francisco ordinance, the definition of weight is extremely broad, including "an impression of a person as fat or thin regardless of the numerical measurement" and "[a]n individual's body size, shape, proportions, and composition . . . [that] make[s] them appear fat or thin regardless of numerical weight."³¹⁸

The ordinance passed the Binghamton Council successfully on December 15, 2008.³¹⁹ Unlike the other nine jurisdictions, Binghamton did not initially have a commission that oversaw the administration of its Human Rights Law, forcing early complainants to file a private lawsuit. In late 2011, however, the Binghamton City Council established a new Human Rights Commission, with the hopes of eventually creating an alternative administrative procedure for discrimination victims to seek relief.³²⁰ By 2014, all seven members of the new Commission had been appointed, and the Commission had posted a discrimination complaint intake form to its website.³²¹ Regardless of how future discrimination complainants in Binghamton will choose to proceed—via commission process or via private lawsuit—they can seek injunctive relief, equitable relief, compensatory damages, and attorney fees.³²²

317. BINGHAMTON, N.Y., MUNICIPAL CODE § 45-2 (2009).

318. *Id.* § 45-3.

319. *Id.* § 45.

320. Bob Joseph, *Volunteers Sought for Binghamton Human Rights Panel*, WNBK NEWS RADIO 1290 (Dec. 31, 2012), <http://wnbf.com/volunteers-sought-for-binghamton-human-rights-panel/>.

321. Human Rights Comm'n, *Binghamton Human Rights Commission Intake Form*, CITY OF BINGHAMTON, N.Y., <http://www.binghamton-ny.gov/binghamton-human-rights-commission-intake-form> (last visited Sept. 14, 2016).

322. BINGHAMTON, N.Y., MUNICIPAL CODE § 45-9 (2008).

Appendix Table 1. Number of Observations in Ten Jurisdictions and Their Surrounding Areas, by BMI Classification

	Men			Women		
	Underweight / Normal Weight	Overweight	Obese/ Morbidly Obese	Underweight / Normal Weight	Overweight	Obese/ Morbidly Obese
Michigan	14,014	20,862	12,391	29,436	20,837	18,832
Bordering States	37,981	55,888	32,247	77,848	53,148	46,513
D.C.	10,514	9,264	3,499	17,064	9,130	7,612
Bordering States	23,359	35,381	18,369	54,027	33,594	26,562
Madison	658	854	311	1,174	601	411
Rest of Wisconsin	10,010	15,618	8,570	19,895	13,321	10,804
Urbana	176	208	116	350	202	153
Rest of Illinois	12,375	16,779	8,162	26,449	15,790	12,009
Binghamton	150	176	140	274	232	166
Rest of New York	14,774	18,461	8,735	30,396	17,491	12,333
Santa Cruz	138	173	75	291	144	114
San Francisco	690	562	190	1,077	391	235
Rest of California	22,848	28,775	13,175	44,804	25,038	18,098
Howard County	656	846	406	1,405	678	437
Harford County	465	759	436	1,085	684	504
Prince George's County	1,354	1,972	1,047	2,602	2,251	2,057
Rest of Maryland	10,012	30,699	19,100	14,893	10,012	30,699

Notes: This table includes the number of respondents ages 18 to 65 in the 1985–2012 BRFSS data, by jurisdiction and BMI classification. Santa Cruz observations are from only the 1993–2012 data, San Francisco observations are from only the 2001–2012 data, and Binghamton observations are from only the 2009–2012 data. Sample excludes pregnant women.

