

WORKPLACE GRIEVANCE PROCEDURES: SIGNALING FAIRNESS BUT ESCALATING COMMITMENT

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Over the last fifty years, nonunion employers have increasingly adopted formal grievance procedures, which allow employees to challenge a company decision or policy and appeal manager adjudications of the challenge. Employers have adopted these procedures to minimize liability and ensure employee productivity. But while these procedures signal that employees are treated fairly, the psychological theory of escalation of commitment suggests that complaint-and-appeals procedures exacerbate workplace conflict. This Note presents this unintended consequence of formal grievance procedures and discusses its implications for workplace dispute resolution. Part I explains the adoption of formal grievance procedures as employer efforts to signal that employees are treated fairly. Part II applies the psychological theory of escalation to grievance procedures, and Part III argues that escalation undermines the purpose of formal grievance procedures and proposes mediation as an escalation-reducing alternative.

INTRODUCTION

Over the last fifty years, nonunion employers have increasingly adopted formal grievance procedures, which allow employees to challenge a company decision or policy and appeal manager adjudications of the challenge. The growth of the procedures has corresponded with the proliferation of antidiscrimination laws and judicial exceptions to employment at will. Faced with the threat of litigation and pressure to govern fairly, employers have adopted grievance procedures to signal to the courts and employees that employees receive fair treatment.

But while these procedures have been adopted by employers and endorsed by the courts as exemplifying fair workplace dispute resolution, formal grievance procedures may not be effective mechanisms for resolving workplace disputes. The psychological theory of escalation of commitment predicts that when individuals invest resources in a course of action and receive feedback that the course of action is not succeeding, they become more committed to that course and more likely to invest additional resources in it. Consequently, when

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employees grieve and receive feedback that their grievances have been denied, they tend to become more committed to their grievances and more likely to appeal. When employees decide to invest resources in an appeal, they tend to become even more committed to their grievances. Therefore, the two components that define formal grievance procedures as methods of fair dispute resolution—mechanisms for formal complaints and opportunities for appeal—can increase employees' commitment to their complaints and exacerbate workplace conflict.¹

Legal literature has increasingly looked to psychological phenomena in support of or in opposition to legal policies and rules.² However, little attention has been devoted to escalation theory. Legal literature has made no mention of escalation in reference to grievance procedures,³ and most of the literature that does cite escalation in other contexts does so only peripherally, suggesting, for example, that litigants invest more resources in their causes of action than cost-benefit analysis would dictate.⁴ In line with that suggestion, this Note contends that escalation causes grievants to behave suboptimally.

However, this Note goes beyond prior literature and argues that escalation undermines a specific purpose of grievance procedures. Employers adopt grievance procedures to signal that employees are being treated fairly, thereby ensuring workplace productivity and minimizing legal liability. But because of escalation, when employees use

¹ This Note focuses on nonunion grievance procedures. Union workplaces use similar procedures. See *infra* notes 19–20 and accompanying text (describing evolution of nonunion procedures from union procedures). But the effects of escalation in union workplaces may be more attenuated because appeals decisions are made by unions rather than by individual grievants. See *Vaca v. Sipes*, 386 U.S. 171, 191–95 (1967) (holding that unions maintain ultimate discretion over decision to appeal grievances). Although this Note focuses on employees, escalation may also affect employers. For example, higher-level managers may deny grievances in order to justify the actions of lower-level managers. See Bernadine Van Gramberg & Jane Menzies, *Grievance Procedures in Organisations—Why Do They Fail?* 5 (Sch. of Mgmt., Vict. Univ., Melbourne, Working Paper No. 12, 2005), available at http://pandora.nla.gov.au/pan/39844/20060221-0000/www.business.vu.edu.au/mgt/pdf/working_papers/2005/wp12_2005_%20bvg_menzies.pdf (noting that senior manager support of grievance decisions made by lower-level managers is “consistent with ‘escalation of commitment’ theory”).

² See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (introducing behavioral economic theories and applying them to legal issues).

³ The connection between escalation and grievance procedures has been briefly noted in employment scholarship. See Brian Bemmels & Janice R. Foley, *Grievance Procedure Research: A Review and Theoretical Recommendations*, 22 J. MGMT. 359, 375 (1996) (suggesting that escalation is “relevant” to grievance process research); Van Gramberg & Menzies, *supra* note 1, at 5 (proposing that escalation may cause managers to become increasingly committed to opposing employees' grievances).

⁴ See *infra* note 88 and accompanying text.

grievance procedures, they may become more committed to their complaints and less willing to resolve them, decreasing their productivity and encouraging litigation. Therefore, building on psychological literature, which recommends mediation as a method for reducing escalation, and employment literature, which finds mediation to be an effective method for workplace dispute resolution, this Note proposes that employers implement grievance procedures based on mediation rather than complaints and appeals.

Part I provides an overview of the formal grievance procedures used by nonunion employers and explains that employers adopt such procedures to signal to employees and the courts that employees are treated fairly. Part II introduces the theory of escalation, explains escalation's applicability to grievance procedures, and presents support for the presence of escalation in grievance procedures. Part III acknowledges that because they signal fairness, grievance procedures are beneficial for employees and employers and argues that the signaling benefits can be maintained, and the deleterious effects of escalation reduced, if employers design procedures around mediation.

I

SIGNALING FAIRNESS

Section A of this Part provides an overview of formal grievance procedures. Section B explains that employers adopt such procedures to signal fair treatment to employees and courts so as to ensure employee productivity and minimize legal liability.

A. *Overview of Formal Grievance Procedures*

In submitting a grievance, "an employee claim[s] that he or she has been improperly or unfairly treated and wants redress."⁵ Historically, supervisors addressed such concerns on an as-needed basis without set procedures,⁶ but in the latter half of the twentieth century, nonunion employers increasingly adopted formal grievance-processing procedures.⁷ Currently, over half of all nonunion

⁵ Peter Feuille & John T. Delaney, *The Individual Pursuit of Organizational Justice: Grievance Procedures in Nonunion Workplaces*, in 10 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 187, 190 (Gerald R. Ferris & Kendrith M. Rowland eds., 1992).

⁶ David Lewin, *Workplace Dispute Resolution*, in 2 THE HUMAN RESOURCE MANAGEMENT HANDBOOK 197, 198 (David Lewin, Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1997) [hereinafter Lewin, *Workplace Dispute Resolution*].

⁷ See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 95 (2009) ("Only 4 percent of employers added a nonunion grievance procedure between 1964 and 1972, for a total of 16 percent by 1972. Another 35 percent added a procedure between 1973 and 1986."); Feuille & Delaney, *supra* note 5, at 197 (summarizing surveys finding that in early 1960s, 11% of

employers,⁸ and a higher percentage of large employers,⁹ are estimated to have formal procedures.

A defining feature of formal grievance procedures is the presence of multiple levels of review, which provides employees with the opportunity to appeal.¹⁰ At the initial level, an employee presents a complaint to his or her immediate manager, generally concerning “any matter related to the employment relationship.”¹¹ Commonly grieved issues include pay rates, benefits, performance evaluations, and discipline.¹² Some employers allow employees to present their grievances orally. These employees may be able to confront and question witnesses during these presentations, possibly with the assistance of a representative. Other employers require that employees write out, rather than orally argue, their grievances.¹³ In adjudicating a written grievance, a manager may meet individually with the grievant

nonunion firms reported formal procedures; in late 1960s, 30% reported formal procedures; and in late 1970s, 44% reported formal procedures); Casey Ichniowski & David Lewin, *Characteristics of Grievance Procedures: Evidence from Nonunion, Union, and Double-Breasted Businesses*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE FORTIETH ANNUAL MEETING, DEC. 28–30, 1987, at 415, 420–21 (Barbara D. Dennis ed., 1988) (finding that percentage of grievance procedures in given occupational groups “increased by two to two-and-one-half times between 1960 and 1970, and again at about that rate between 1970 and 1980”).

⁸ David Lewin, *Unionism and Employment Conflict Resolution: Rethinking Collective Voice and Its Consequences*, 26 J. LAB. RES. 209, 215–16 (2005) [hereinafter Lewin, *Conflict Resolution*].

⁹ See Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1419, 1422, 1430 (1990) (finding, in survey of organizations with mean size of about 10,000 employees, that more than half of employers adopted formal grievance procedures, and larger employers were significantly more likely to adopt procedures); Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27, 34 (1995) (finding that more than half of surveyed organizations had grievance procedures, organizations with grievance procedures employed average of about 63,000 employees, and organizations without grievance procedures employed average of about 28,000 employees).

¹⁰ See DOUGLAS M. McCABE, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS: A STRATEGIC HUMAN RESOURCES MANAGEMENT ANALYSIS 161 (1988) (describing grievance procedures as “elaborate arrangement[s] for an employee to appeal from his or her immediate supervisor’s decision . . . to higher management in ascending steps”); Edelman, *supra* note 9, at 1406 (“In general, the nonunion grievance procedures . . . provide for multiple levels of review and specify the steps that must be taken to appeal a decision . . .”).

¹¹ Ronald L. Miller, *Grievance Procedures for Nonunion Employees*, 7 PUB. PERSONNEL MGMT. 302, 303 (1978).

¹² See David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 828 (1990) [hereinafter Lewin, *Empirical Analysis*], for a sample of issues grieved at five nonunion firms.

¹³ See Feuille & Chachere, *supra* note 9, at 31 (discussing differing levels of formality in various grievance procedures).

and with the grievant's supervisor, or may decide the merits of a grievance based only on the documentation.¹⁴

The manager will then accept or reject the grievance and decide on a remedy, which could include, for example, back pay, adjustment of a performance review, or lifting of a workplace suspension.¹⁵ Managers may grant partial remedies, for instance, awarding the employee a portion of the pay requested or reducing the number of days in a suspension.¹⁶

If the grievant is dissatisfied with the manager's decision, the grievant may appeal; employers generally provide for three to four levels of appeal,¹⁷ with the highest-level appeal adjudicated by a firm executive.¹⁸

B. Signaling Functions of Formal Grievance Procedures

Grievance procedures are almost universally present in union firms,¹⁹ and nonunion employers initially adopted the procedures with the hope that employees would be less likely to support unionization if they already had access to formal grievance procedures, a significant benefit of unionization.²⁰ However, union avoidance alone cannot explain the continued adoption of grievance procedures by nonunion firms:²¹ The growth of unions occurred before 1960, whereas the

¹⁴ See, e.g., David Lewin, *Dispute Resolution in the Nonunion Firm*, 31 J. CONFLICT RESOL. 465, 470 tbl.1 (1987) [hereinafter Lewin, *Nonunion Firm*] (summarizing grievance procedures in three nonunion firms).

¹⁵ Cf. Miller, *supra* note 11, at 310 (advising employers designing grievance procedures that they may limit remedies available to grievants).

¹⁶ See Lewin, *Workplace Dispute Resolution*, *supra* note 6, at 199 (excerpting grievance policy that instructs supervisors to resolve grievances "as equitably as possible"); Lewin, *Nonunion Firm*, *supra* note 14, at 469 n.3 (finding that some determinations included terms that were favorable to each party).

¹⁷ Feuille & Chachere, *supra* note 9, at 35.

¹⁸ See Lewin, *Workplace Dispute Resolution*, *supra* note 6, at 205 (finding management official adjudicated top-level appeal for four out of five employers studied); Miller, *supra* note 11, at 303 (finding that in most widely used form of grievance procedures, "final decision-making authority remains with top management"). Some firms provide final review by a neutral arbitrator, Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 379 (2003), or a tribunal composed of managers and employees, Feuille & Delaney, *supra* note 5, at 210–11.

¹⁹ BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 33 (14th ed. 1995).

²⁰ See Feuille & Delaney, *supra* note 5, at 198 ("Probably the most widely publicized reason for this growth in grievance procedures is the desire of these nonunion employers to remain nonunion.").

²¹ *Id.* at 199.

growth of nonunion grievance procedures occurred after 1960, when unionization was no longer a significant threat.²²

The growth can also be attributed to legislative and judicial developments constraining employer prerogative. Traditionally, employers had full discretion to terminate or discipline employees for any reason (or for no reason).²³ Today, however, civil rights legislation has exposed employers to potential liability for discriminating against employees on the basis of race, religion, sex, national origin,²⁴ age,²⁵ or disability.²⁶ Judicial exceptions to at-will employment have also exposed employers to liability for wrongful termination. Most states recognize at least one of three exceptions:²⁷ violation of public policy,²⁸ breach of implied contract,²⁹ or violation of good faith and fair dealing.³⁰

Employers, relying on business and personnel literature, believed that they could minimize these new forms of liability through the

²² *Id.*; see also Lauren B. Edelman, Christopher Ugden & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 412–13 (1999) (finding that business and management literature initially proposed grievance procedures as mechanism for union avoidance but then focused on procedures' benefits for reducing legal liability).

²³ See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 273–74 (1975) (Powell, J., dissenting) (“The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management.”); *Adair v. United States*, 208 U.S. 161, 175–76 (1908) (“In the absence, however, of a valid contract . . . it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employé in his personal service . . .”).

²⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000e (2006)). The Act initially prohibited discrimination only by private employers but was amended by the Equal Opportunity Act of 1972 to forbid discrimination by public employers as well. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C. (2006)). The Act has also been amended to define sex discrimination as including discrimination based on pregnancy. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

²⁵ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

²⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

²⁷ David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 648–49 (1996).

²⁸ Terminations can violate public policy when employees are dismissed for refusing an employer's request to break the law, for reporting illegal employer activity, or for claiming benefits, such as workers' compensation, to which they are legally entitled. Joseph E. Slater, *The American Rule That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 96–97 (2007).

²⁹ Terminations can violate an implied contract when employers have made representations to employees concerning job security, such as oral promises and handbook policies. Walsh & Schwarz, *supra* note 27, at 646–47.

³⁰ Terminations can violate good faith and fair dealing when they deprive employees of benefits they have already earned. *Id.* at 647.

adoption of grievance procedures. The procedures would signal to employees that they would receive fair treatment internally. If employees believed they could resolve their complaints by grieving, they would refrain from reporting employers to government agencies or resorting to costly litigation.³¹

Grievance procedures could also minimize employer liability by signaling fair treatment to courts. Employers hoped that courts would view employees who pursued litigation before exhausting internal grievance procedures or who filed suit after having their grievances denied as unreasonably litigious. In contrast, they hoped courts would view employers who voluntarily adopted grievance procedures as having treated employees fairly.³²

In addition to minimizing legal liability, employers adopted grievance procedures to ensure workplace productivity. Civil rights legislation—along with corresponding literature advocating for “fair governance” in the workplace—resulted in public pressure on employers to manage nondiscriminatorily.³³ This served to legitimize, in the eyes of employers, employee demands for fair treatment.³⁴ Employers feared that if they did not respond to employee concerns,

³¹ See Edelman, Uggen & Erlanger, *supra* note 22, at 413–14 (describing articles advising employers to adopt grievance procedures in order to minimize chances employees would pursue redress externally); see also, e.g., Peter M. Panken, *What Every Company Should Have: A Formal Employee Complaint Procedure*, 73 MGMT. REV. 42, 42 (1984) (“A good grievance procedure keeps problems within the company. It encourages fair treatment. But most importantly, it deters employees from seeking representation by outsiders—unions, government agencies (like the [Equal Employment Opportunity Commission] or [Occupational Safety and Health Administration]) or even lawyers.”).

³² See Frank Dobbin & Erin L. Kelly, *How To Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1209–11 (2007) (examining articles advising employers to adopt grievance procedures in order to increase chances of success in litigation); Edelman, Uggen & Erlanger, *supra* note 22, at 413–14 (same); see also, e.g., David W. Ewing, *Due Process: Will Business Default?*, HARV. BUS. REV., NOV. 1, 1982, at 121 (“[A]ttorneys with whom I have talked believe that an in-company hearing procedure can be helpful in case the employee objector takes the company to court; that is, evidence that an objector has been turned down in a fair hearing will be admitted into a legal proceeding.”); Alfred G. Felius, *Legal Consequences of Nonunion Dispute Resolution Systems*, 13 EMP. REL. L.J. 83, 90 (1987) (“An employee who fails to present his or her claim first to the company system for resolution may be viewed by the judge or jury as rash, insincere, or litigious.”).

³³ Edelman, *supra* note 9, at 1410–11.

³⁴ *Id.* at 1410 (“[T]he civil rights movement and legal mandates of the 1960s lent legitimacy to workers’ claims to fair treatment by management. Examples from professional journals depict—and help convey—the business world’s developing perception of societal expectations of fair governance.”).

employees would be less willing to work for them,³⁵ or if they did work, they would be less productive.³⁶

Employers hoped to reduce liability and ensure workplace productivity through the signaling power of grievance procedures.³⁷ As discussed below, the procedures—by providing a formal opportunity to challenge employer actions and appeal manager decisions—signal that employees are treated with procedural justice and without discrimination.

1. Signaling Procedural Justice

Formal grievance procedures signal that employees are treated with procedural justice—given access to fair processes to resolve their complaints³⁸—in part, because the procedures resemble those that are mandated by constitutional due process. The Supreme Court has held that before a public employee with a property interest in his job³⁹ can be terminated, the employee must receive prompt notice, explanation of the reasons, and an opportunity to respond.⁴⁰ An employee who is nonetheless terminated is entitled to a full post-termination hearing,⁴¹

³⁵ DOBBIN, *supra* note 7, at 132.

³⁶ See Edelman, *supra* note 9, at 1411 (“[E]fficiency-wage theorists suggest that employees may work harder if they view fair treatment as a reward or gift for hard work.”).

³⁷ See Edelman, Uggen & Erlanger, *supra* note 22, at 413 (concluding that employers, advised by personnel journals, believed that grievance procedures would “provide a sense of justice to employees” and thereby “improve morale and productivity”).

³⁸ Procedural justice is distinguished from distributive justice, which refers to the fairness of an outcome. See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (introducing theories of procedural justice). Grievance procedures may provide procedural justice by allowing employees to voice their concerns to management. See *infra* note 142.

³⁹ The Court held that public-sector employees could have property interests in their jobs in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). “A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.” *Perry*, 408 U.S. at 601. A public employer may not deprive an employee of such an interest without due process. See U.S. CONST. amend. XIV, § 1. *Roth* and *Perry* concerned state employees, so the Fourteenth Amendment was applicable. The Court applied Fifth Amendment due process protection, U.S. CONST. amend. V, to federal employees in *Arnett v. Kennedy*, 416 U.S. 134 (1974). To determine the extent of due process necessary, courts weigh “the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁴⁰ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

⁴¹ *Id.* at 546–47.

which can necessitate an unbiased decision maker⁴² and an opportunity to confront adverse witnesses.⁴³ Actions short of termination require less process: For a suspension, for example, due process is served by a post-suspension appeal and hearing.⁴⁴ Accordingly, if public employers provide property interests to employees, the employers must also provide employees with formal procedures by which they can challenge and appeal employer determinations.

Congress has also indicated to employers that opportunities to challenge and appeal employer determinations signal procedural justice. The Civil Service Reform Act of 1978 (CSRA)⁴⁵ dictates that before a federal agency can remove, suspend, furlough, or reduce the pay or grade of an employee,⁴⁶ the agency must allow the employee to respond to the proposed action and must rule on the employee's response.⁴⁷ Employees who are dissatisfied with the agency decision may have their case heard by an administrative law judge,⁴⁸ with appeal to the Merit Systems Protection Board (MSPB)⁴⁹ and then to the Federal Circuit.⁵⁰

The multistep processes for public-sector employees required by due process and the CSRA became a model for private-sector employers. Private-sector employers adopted grievance systems with multiple levels of appeal to indicate that, like public-sector employers,

⁴² See *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 491–92 (1976) (finding hearing board was unbiased because employees “did not show . . . that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there [was] nothing in the record to support charges of personal animosity”).

⁴³ See, e.g., *Wells v. Dall. Indep. Sch. Dist.*, 793 F.2d 679, 683 (5th Cir. 1986) (“When an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity.”); *Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984) (“While not necessary in every case, ‘procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.’” (quoting *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103 (1963))).

⁴⁴ *Gilbert v. Homar*, 520 U.S. 924, 934–35 (1997).

⁴⁵ Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5, 10, 28, 31, 38, and 42 U.S.C. (2006)).

⁴⁶ 5 U.S.C. § 7512(1)–(5) (2006) (covering suspensions of more than fourteen days and furloughs of less than thirty days). Federal employees are covered by the law if they work in the competitive service and are either not under a probationary period or have completed one year of service. *Id.* § 7511(a)(1); see also *id.* § 2102 (defining competitive service, which generally consists of civil service positions in executive branch that are not subject to Senate confirmation).

⁴⁷ *Id.* § 7513(b).

⁴⁸ See *id.* § 7701(b)(1) (allowing Merit Systems Protection Board to assign appeals to administrative law judges).

⁴⁹ *Id.* § 7701(e)(1)(A).

⁵⁰ *Id.* § 7701(b)(1).

they too provided employees with fair processes.⁵¹ Some courts have encouraged these conceptions by citing employee use of grievance appeals as indications that an employer did not intentionally inflict emotional distress⁵² and did not terminate in violation of public policy.⁵³

2. Signaling Antidiscrimination

The Supreme Court indicated that formal grievance procedures also signal antidiscrimination in *Burlington Industries, Inc. v. Ellerth*⁵⁴ and *Faragher v. City of Boca Raton*.⁵⁵ The Court held that in cases of “hostile environment” discrimination—in which a supervisor harasses or threatens an employee without a “tangible employment action”⁵⁶—the employer can raise an affirmative defense to vicarious liability by showing that (1) it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.”⁵⁷ To fulfill the first part of the affirmative defense, the *Ellerth* Court suggested that employers adopt “complaint procedure[s].”⁵⁸ The *Faragher* Court found that, as a matter of law, the employer could not argue for the affirmative defense if it had not adopted a “sensible complaint procedure.”⁵⁹

Further demonstrating the signaling power of formal procedures, lower courts sometimes find that the presence of a complaint procedure, along with the implementation of an antiharassment policy, is

⁵¹ Lauren B. Edelman, John Lande & Howard S. Erlanger, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 530 (1993) (“[B]ecause internal complaint-handling procedures formalize the right to appeal—a basic element of due process—they symbolize legality and fairness both to employees and to the external world . . .”).

⁵² *E.g.*, *Lekich v. IBM Corp.*, 469 F. Supp. 485, 488 (E.D. Pa. 1979).

⁵³ *E.g.*, *Rogers v. IBM Corp.*, 500 F. Supp. 867, 869–70 (W.D. Pa. 1980).

⁵⁴ 524 U.S. 742 (1998).

⁵⁵ 524 U.S. 775 (1998). While *Faragher* and *Ellerth* specifically concerned sexual harassment, their holdings have been extended to all forms of workplace harassment. See EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS 1 (1999) (“[T]he Commission has always taken the position that the same basic standards apply to all types of prohibited harassment.”); see also *Ellerth*, 524 U.S. at 761 (analogizing between sex, race, age, and national origin discrimination).

⁵⁶ *Ellerth*, 524 U.S. at 765; see *id.* at 761 (defining “tangible employment action”).

⁵⁷ *Id.* at 765. The affirmative defense is not available to employers who take “tangible employment actions,” such as discharge or demotion. *Id.*

⁵⁸ *Id.* (“While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”).

⁵⁹ *Faragher*, 524 U.S. at 808–09.

sufficient to satisfy the first prong of the affirmative defense.⁶⁰ Courts that do not find the procedure and policy per se sufficient still grant the first prong of the affirmative defense when the policy and procedure are coupled with corrective action by the employer when the harassment is reported.⁶¹ When an employer has such procedures, most courts shift the burden to the employee to show that the procedures are not reasonable or not effective.⁶²

Based on the presumption that complaint procedures are reasonable, many courts also presume that employee failure to use complaint procedures is unreasonable.⁶³ Accordingly, once successful on the first

⁶⁰ Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 508 (2003); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 216–17 (2004); see, e.g., *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1299 (11th Cir. 2000) (“[B]ecause we find no inherent defect in the complaint procedures established by [the employer’s] sexual harassment policy, nor any evidence that the policy was administered in bad faith, we conclude that [the employer] exercised reasonable care to prevent sexual harassment.”); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (“[W]here . . . there is no evidence that an employer adopted or administered an anti-harassment policy [including a complaint procedure] in bad faith or that the policy was otherwise . . . dysfunctional, the existence of such a policy militates strongly in favor of a conclusion that the employer ‘exercised reasonable care to prevent’ and promptly correct sexual harassment.” (quoting *Faragher*, 524 U.S. at 778)); see also *Idusuyi v. Tenn. Dep’t of Children’s Servs.*, 30 F. App’x 398, 403 (6th Cir. 2002) (holding that employer satisfied first prong of affirmative defense with antiharassment policy, grievance procedure, and employee training).

⁶¹ Lawton, *supra* note 60, at 217–18; see, e.g., *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1185–87 (9th Cir. 2005) (finding employer fulfilled first prong of affirmative defense by utilizing antiharassment policy with complaint procedure and promptly responding to complaint); *Harper v. City of Jackson Mun. Sch. Dist.*, 149 F. App’x 295, 301 (5th Cir. 2005) (finding employer fulfilled first prong of affirmative defense when employer’s “harassment policy and response to [Plaintiff’s] complaint were both reasonable and vigorous” (internal quotation omitted)); *Gawley v. Ind. Univ.*, 276 F.3d 301, 311–12 (7th Cir. 2001) (finding employer satisfied first prong of affirmative defense when Plaintiff admitted that employer “had a system in place for employees to report sexual harassment . . . and that as soon as [Plaintiff] used the system, the [employer] took action and the harassment stopped”).

⁶² In a survey of district and circuit court cases decided in the five years following *Ellerth* and *Faragher*, Anne Lawton found that “in seventy-three percent of the cases in which the court discusses the employer’s prevention obligation under prong one, the court [upon finding the employer had antiharassment and complaint policies and procedures] shifts the burden of proof from the defendant employer to the plaintiff employee.” Lawton, *supra* note 60, at 238–39. It is difficult for employees to meet this burden of proof because employers are not required to keep records of harassment complaints. *Id.* at 241.

⁶³ David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1275, 1290 (2001) (finding that in published judicial opinions between June 1998 and January 2000 in which employer asserted affirmative defense and filed motion for summary judgment, employee failure to report was always deemed unreasonable when employer established prong one); see also, e.g., *Taylor v. Solis*, 571 F.3d 1313, 1318 (D.C. Cir. 2009) (“A reasonable employee who believes and tells others she is being sexually harassed

prong, employers often prevail on prong two of the affirmative defense—that an employee acted unreasonably—by showing that the employee did not complain,⁶⁴ delayed in complaining,⁶⁵ or complained to an official within the company who was not specified in the complaint procedure.⁶⁶ Some courts have eliminated the second prong entirely, finding that employers can establish the affirmative defense by showing that once an employee used the procedure to complain, the employer rectified the harassment situation.⁶⁷ In general,

would report it if she knows . . . a complaint procedure has been established for that purpose.”).

⁶⁴ Lawton, *supra* note 60, at 242; *see, e.g.*, *Shabestari v. Utah Non-Profit Hous.*, 377 F. App’x 770, 773–74 (10th Cir. 2010) (“[Plaintiff] did not . . . file a grievance pursuant to company policy. Although [Plaintiff] now claims he feared retaliation, ‘a generalized fear of retaliation simply is not sufficient’ to explain a failure to report harassment. [Plaintiff] unreasonably failed to inform [his employer] about any . . . harassment” (quoting *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009))); *Idusuyi*, 30 F. App’x at 404 (“[I]t is unreasonable for employees to pass their own judgments—absent any supporting facts—about how effectively an employer’s sexual harassment policies operate. The plaintiff knew of the existence of a sexual harassment policy, and her failure to pursue a remedy under that policy was unreasonable.”); *Leopold v. Baccarat Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (“Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures.”).

⁶⁵ Employees who do not immediately report harassment often have the burden of showing that their delay was not unreasonable. Lawton, *supra* note 60, at 262–63; *see, e.g.*, *Pinkerton*, 563 F.3d at 1063 (“We believe that [the employer] carried its burden, given that [the employer] has shown a reporting delay of approximately two or two and a half months . . . for which [Plaintiff] never offered any reason in her briefs on appeal.”). To meet this burden, employees must offer proof beyond subjective fear of retaliation. *See, e.g.*, *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (finding plaintiff’s failure to report harassment until two months after it had occurred because of unsubstantiated fears of retaliation was unreasonable). Some courts even find delays unreasonable as a matter of law. Lawton, *supra* note 60, at 253–54; *see, e.g.*, *McCombs v. Chrysler Corp.*, No. IP 99-0697-C-T/K, 2003 WL 1903352, at *8 (S.D. Ind. Mar. 4, 2003) (“[Plaintiff] waited at least two months before reporting [the supervisor’s] conduct to [the employer]. Thus, the record establishes that [Plaintiff] unreasonably failed to take advantage of the preventive and corrective opportunities provided by the Defendant.”); *Clardy v. Silverleaf Resorts, Inc.*, No. CIV. A. 399CV2893-P, 2001 WL 1295480, at *9 (N.D. Tex. Oct. 10, 2001) (finding delay in reporting from Thanksgiving until mid-January to be unreasonable).

⁶⁶ Lawton, *supra* note 60, at 246; *see, e.g.*, *Dowdy v. North Carolina*, 23 F. App’x 121, 123 (4th Cir. 2001) (finding employee acted unreasonably when employee reported harassment to incorrect supervisor); *Ogden v. Keystone*, 226 F. Supp. 2d 588, 602 (M.D. Pa. 2002) (finding employee actions unreasonable when employee informed supervisors of harassment but did not, as specified in complaint procedure, inform human resources); *Green v. Wills Grp.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) (finding that employee unreasonably failed to take advantage of antiharassment policy when employee complained, but not to human resources, as policy specified).

⁶⁷ In such cases, the employer can prevail on summary judgment by showing a prompt response to complaints of harassment. Lawton, *supra* note 60, at 244–45; *see, e.g.*, *Van Alstyne v. Ackerley Grp., Inc.*, 8 F. App’x 147, 153 (2d Cir. 2001) (“[Alleged harasser’s] actions could not be imputed to the Company because there is no genuine dispute that the

employers who implement antiharassment policies and complaint procedures enjoy a “safe harbor at the summary judgment stage of litigation.”⁶⁸

The *Ellerth* and *Faragher* decisions do not specifically hinge the affirmative defense on the formal grievance procedure providing opportunities to appeal. Yet when *Ellerth* and *Faragher* were decided, personnel journals had already suggested that formal grievance procedures would protect employers from civil rights litigation,⁶⁹ and many employers had already adopted multistep grievance procedures.⁷⁰ Therefore, *Ellerth* and *Faragher* are seen as endorsements of the grievance procedures that employers had already adopted.⁷¹ Accordingly, lower courts analyzing the affirmative defense have favorably cited grievance procedures with multiple levels of appeal.⁷²

Grievance procedures have also signaled fairness to courts that are assessing whether to hold employers liable for punitive damages.⁷³ In *Kolstad v. American Dental Ass’n*, the Supreme Court held that while employers could be liable for punitive damages based on the actions of their agents,⁷⁴ employers could establish a defense by demonstrating “good-faith efforts to comply with Title VII.”⁷⁵ Given the

Company took immediate and effective corrective action when [Plaintiff complained.]; *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265–67 (5th Cir. 1999) (plurality) (finding vicarious liability should not be imposed on employer that took prompt remedial action in response to complaint); *Gulf States Toyota, Inc. v. Morgan*, 89 S.W.3d 766, 772–73 (Tex. App. 2002) (citing *Indest* in finding plaintiff failed to establish claim of sexual harassment because, once claim was reported, employer took corrective action).

⁶⁸ John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 Hous. L. REV. 1401, 1436 (2002); see also Sherwyn, Heise & Eigen, *supra* note 63, at 1280 (finding employers prevail on more than half of summary judgment motions).

⁶⁹ Dobbins & Kelly, *supra* note 32, at 1209–11.

⁷⁰ Edelman, Uggem & Erlanger, *supra* note 22, at 436.

⁷¹ See *id.* (“It would appear, then, that judicial recognition of grievance procedures did not motivate personnel professionals’ claims and organizations’ creation of grievance procedures but rather that *the courts were following institutionalized organizational practices.*”).

⁷² See, e.g., *Idusuyi v. Tenn. Dep’t of Children’s Servs.*, 30 F. App’x 398, 403 (6th Cir. 2002) (“A multi-level grievance procedure was in place within [the company] to allow employees to seek a remedy for harassment.”); *Oleyar v. Cnty. of Durham*, 336 F. Supp. 2d 512, 519 (M.D.N.C. 2004) (“Defendant has policies in place prohibiting discrimination as well as a grievance and appeals process.”); *Madrid v. Amazing Pictures, No. Civ.99-1565(DSD/JMM)*, 2001 WL 837922, at *9 (D. Minn. July 23, 2001) (“There is no dispute that [the employer] promulgated and effectively disseminated a reasonable multi-level complaint procedure as part of its sexual harassment policy.”).

⁷³ In addition to compensatory damages, plaintiffs can receive punitive damages for violations of the Americans with Disabilities Act and certain violations of Title VII of the Civil Rights Act. 42 U.S.C. § 1981a (2006).

⁷⁴ 527 U.S. 526, 542 (1999).

⁷⁵ *Id.* at 545.

Kolstad Court's acknowledgment that a purpose of Title VII was "to encourage the creation of . . . effective grievance mechanisms,"⁷⁶ some lower courts have found that employers can establish a defense to punitive damages, in part, by adopting grievance procedures.⁷⁷

II

ESCALATING COMMITMENT

While grievance procedures may signal fairness to employees, this Part proposes that the adversarial nature of the procedures may also cause grievants to escalate commitment to their complaints. Section A explains the psychological theory of escalation and argues that the structure of formal grievance procedures fosters grievant escalation. Section B presents empirical and anecdotal support for the existence of escalation during workplace grievance procedures.

A. *Application of Escalation Theory to Formal Grievance Procedures*

Rational choice economics dictates that people will allocate resources to a course of action when the expected benefits of the action exceed the expected costs; a previous allocation of resources should therefore be irrelevant in determining whether additional resources should be allocated.⁷⁸ Escalation⁷⁹ research, however, shows

⁷⁶ *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)).

⁷⁷ *Krawiec, supra* note 60, at 505 & n.57; *see, e.g.*, *Bryant v. Aiken Reg'l Med. Ctrs. Inc.*, 333 F.3d 536, 548–49 (4th Cir. 2003) (reversing trial court's award of punitive damages in part because employer had grievance procedure); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (citing grievance procedure as reason why trial court properly refused to instruct jury on punitive damages).

⁷⁸ Barry M. Staw, *Counterforces to Change*, in *CHANGE IN ORGANIZATIONS: NEW PERSPECTIVES ON THEORY, RESEARCH, AND PRACTICE* 87, 91 (Paul S. Goodman & Assocs. ed., 1982) [hereinafter *Staw, Counterforces to Change*].

⁷⁹ When time is invested, this phenomenon may be labeled as entrapment. *See* Michael G. Bowen, *The Escalation Phenomenon Reconsidered: Decision Dilemmas or Decision Errors?*, 12 *ACAD. MGMT. REV.* 52, 53 (1987) ("In contrast to escalation research, subjects in entrapment situations typically incur small continuous losses as they seek or wait to achieve a goal."). But the terms are often used interchangeably. Barry M. Staw & Jerry Ross, *Understanding Behavior in Escalation Situations*, 246 *SCIENCE* 216, 216 (1989).

This is similar to the sunk cost effect, which is the broader phenomenon of past investments affecting future choices. *See generally* Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 124 (1985). Unlike escalation, the sunk cost effect does not just refer to situations in which a person contemplates continued investment toward a specific goal in the face of negative feedback. *Id.* at 137–38. The sunk cost effect could be explained in part by self-justification, *see infra* notes 81–84 and accompanying text, and by a broader desire not to appear wasteful. Hal R. Arkes & Peter Ayton, *The Sunk Cost and Concorde Effects: Are Humans Less Rational than Lower Animals?*, 125 *PSYCHOL. BULL.* 591, 595–97 (1999) (discussing research on explanations of sunk cost effect).

that people are more likely to invest additional resources—such as time and money—if they have previously invested in that decision and received feedback suggesting that the initial investment has not succeeded.⁸⁰

Psychologists traditionally have looked to self-justification, which is based on the theory of cognitive dissonance, to explain escalation behavior.⁸¹ Cognitive dissonance research has found that when people behave in ways that conflict with their previously held beliefs, they experience mental discomfort, which they attempt to reduce by changing their behavior or beliefs.⁸² In the classic forced compliance studies, participants were induced to write essays that conflicted with their beliefs. Because participants could not change their behavior—they could not unwrite the essays—participants tended to change their beliefs to correspond more closely to the positions that they had taken in their essays.⁸³ Analogously, when people invest in a course of

⁸⁰ Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 *ACAD. MGMT. REV.* 39, 39 (1992). In Barry Staw's seminal escalation study, Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 *ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE* 27 (1976), each participant took on the role of a corporate executive. Participants were divided into two groups: a high personal responsibility condition and a low personal responsibility condition. The participants in the high personal responsibility condition were instructed to completely allocate a sum of money to one of two corporate divisions. Half of these participants were then informed that their chosen division had outperformed the other division, whereas half were informed it had underperformed the other division. Participants were then asked to divide a second allocation of money between the divisions as they saw fit.

In the low personal responsibility condition, participants were informed that a previous executive had made an initial monetary allocation. Half were notified that the executive's chosen division had outperformed the other, and half were notified that it underperformed the other. The low personal responsibility participants were then instructed to allocate money between the divisions as they saw fit. Staw found that participants who had personal responsibility for an allocation that lost money invested significantly more money in their previously chosen division than did any of the other three subsets of participants. *Id.*

⁸¹ See Staw, *supra* note 80, at 39–41 (concluding effects of study may be caused by self-justification); see also Brockner, *supra* note 80, at 43–49 (reviewing escalation research and finding support for self-justification hypothesis). Prospect theory, which holds that people are more likely to take risks to avoid a loss than to secure a gain, Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341, 342–44 (1984), has also been proposed as an explanation for escalation: When people receive feedback that their investments have not succeeded, they invest more resources to avoid the loss. Glen Whyte, *Escalating Commitment in Individual and Group Decision Making: A Prospect Theory Approach*, 54 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 430 (1993). Prospect theory could operate in conjunction with self-justification to explain escalation. Staw & Ross, *supra* note 79, at 217.

⁸² See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

⁸³ See Darwyn E. Linder, Joel Cooper & Edward E. Jones, *Decision Freedom as a Determinant of the Role of Incentive Magnitude in Attitude Change*, 6 *J. PERSONALITY & SOC. PSYCHOL.* 245, 245 (1967) (summarizing forced compliance studies).

action believing that it will succeed, feedback that they are not succeeding conflicts with their belief that they are competent decision makers. To maintain their belief in their competence, people self-justify by committing additional resources to the initial decision, hoping that the investment will succeed and thereby confirm the initial decision's rationality.⁸⁴

Pioneered by Professor Barry Staw in 1976,⁸⁵ the theory of escalation of commitment has gained widespread acceptance in the psychological literature.⁸⁶ In the legal literature, escalation has been cited to explain phenomena such as why CEOs continue to pursue losing strategies;⁸⁷ why, after investing in discovery, parties become unwilling to settle even when the case may be worth less than the amount spent pursuing it;⁸⁸ and why prosecutors and police, after forming initial opinions about the guilt of a defendant, may not fully consider evidence that is possibly exculpatory.⁸⁹

This framework can also be applied to formal grievance procedures. When a grievant invests time and credibility in filing a grievance that is denied at the first level of review, the grievant becomes more likely to self-justify by investing further resources in the grievance by appealing. Similarly, if the grievant appeals and the grievance is again denied, the grievant will be even more likely to invest further resources in an appeal.

People are most likely to escalate commitment when they feel responsible for their initial decision and its consequences, a feeling most likely to occur when the decision to invest is volitional, irrevoc-

⁸⁴ See JOEL BROCKNER & JEFFREY Z. RUBIN, *ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS* 5 (1985) (“[E]ntrapped decision makers’ motives shift over time, from the rational to the rationalizing.”); Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 *ACAD. MGMT. REV.* 578, 579 (1981) [hereinafter Staw, *Escalation of Commitment*] (“By committing new and additional resources, an individual who has suffered a setback could attempt to ‘turn the situation around’ or to demonstrate the ultimate rationality of his or her original course of action.”).

⁸⁵ See *supra* note 80 (summarizing Staw’s study).

⁸⁶ See, e.g., Brian C. Gunia, Niro Sivanathan & Adam D. Galinsky, *Vicarious Entrapment: Your Sunk Costs, My Escalation of Commitment*, 45 *J. EXPERIMENTAL SOC. PSYCHOL.* 1238, 1238–39 (2009) (summarizing escalation theory and literature); Gillian Ku, *Learning To De-escalate: The Effects of Regret in Escalation of Commitment*, 105 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 221, 221 (2008) (“Research on escalation of commitment has repeatedly demonstrated that after investing . . . any important resource, many individuals . . . become psychologically committed to and reinvest in their initially-chosen (failing) course of action.” (citations omitted)).

⁸⁷ Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 *FLA. ST. U. L. REV.* 673, 691–92 (2005).

⁸⁸ Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 *HARV. NEGOT. L. REV.* 1, 23–24 (1999).

⁸⁹ Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 *CASE W. RES. L. REV.* 651, 655–56 (2007).

cable, and public.⁹⁰ By filing a grievance, an employee makes a volitional choice to invest time and credibility in a course of action. Although an employee may withdraw it, once filed, a grievance is likely indelibly recorded by the employer. A grievance is often public because an employee must inform management of the grievance and is also likely to inform coworkers.⁹¹ The grievant will therefore feel responsible for the outcome of the action.

Escalation may be even more likely to result from grievance procedures because, in employment contexts, people often feel pressured to justify their decisions. Staw finds that many organizations have “norms for consistency” in which “clear convictions” are valued over “waffl[ing]” and “indecisiveness.”⁹² Therefore, instead of admitting that a decision was wrong, employees will try to “save face” by escalating commitment to prove the wisdom of the decision.⁹³

Escalation is especially likely when employees believe that they lack job security⁹⁴ and that their workplace superiors resist their decisions,⁹⁵ conditions that are often both present when employees grieve.⁹⁶ Competition, which occurs in workplaces to the extent that

⁹⁰ Staw & Ross, *supra* note 79, at 217.

⁹¹ See James P. Swann, *Formal Grievance Procedures in Non-union Plants*, 26 PERSONNEL ADMIN. 66, 68 (1981) (indicating employees ask coworkers for grievance advice).

⁹² Staw, *Escalation of Commitment*, *supra* note 84, at 580–81. Staw only discusses the norms in reference to upper-level management, *id.*, but these norms may also be present for lower-level employees.

⁹³ BROCKNER & RUBIN, *supra* note 84, at 224; see also Staw, *Counterforces to Change*, *supra* note 78, at 96 (“[B]ecause norms for rationality are so dominant in business and government organizations, . . . role occupants in these settings may also find it necessary to justify their actions to constituents within and outside the organization.”).

⁹⁴ Cf. Frederick V. Fox & Barry M. Staw, *The Trapped Administrator: Effects of Job Insecurity and Policy Resistance upon Commitment to a Course of Action*, 24 ADMIN. SCI. Q. 449 (1979) (showing that experimental participants who were informed that they could be demoted based on their previously made decisions committed more resources to those choices than did participants who believed that their jobs were secure).

⁹⁵ Cf. *id.* (showing that experimental participants who were informed that board of directors opposed their decisions invested more resources in those decisions than did participants who were informed that board of directors supported their decisions).

⁹⁶ By filing grievances, employees necessarily come into conflict with management by claiming that management acted improperly. See *supra* note 5 and accompanying text (describing grievances as employee allegations of unfair treatment and requests for redress). Because they believe that they have been treated unfairly regarding an important aspect of their jobs, employees may also believe that their jobs are at risk. See *supra* note 12 and accompanying text (explaining that grievances are commonly filed contesting pay, benefits, performance evaluations, and discipline).

employees compete with coworkers for raises and promotions, may also increase self-justification and escalation.⁹⁷

Michael Bowen's decision dilemma theory also explains why formal grievance procedures are particularly conducive to escalation. Bowen posits that people escalate, not in response to negative feedback, but in response to equivocal feedback—feedback that can be interpreted in multiple ways.⁹⁸ Grievance denials can be conceptualized as equivocal feedback because when a grievance is denied, the grievant can appeal to a higher-level official who is likely more removed from the controversy. Grievants may therefore attribute the initial feedback—the denial of the grievance—not to the grievance's lack of merit, but to the information level or partiality of the decision maker. Grievants may therefore become more committed to their grievances and choose to invest additional resources in appeals.

The grievance appeals procedure is also conducive to escalation because people are more likely to invest additional resources when the costs associated with such investment are not salient when the initial decision is made.⁹⁹ The initial level of a grievance procedure is usually simple and low cost: The grievant notifies a manager of the dispute. At each successive level, the grievant must invest additional resources in appealing, waiting for responses, and bearing the risk of employer retaliation.¹⁰⁰ Employees may be aware of these costs when initially choosing to file, but because people tend to be optimistic about the probability of positive outcomes,¹⁰¹ employees likely overestimate their chances of success and therefore may not fully consider the costs of grievance denials and appeals. Although these costs may become more salient when employees decide whether to appeal, costs presented after initial resources have been allocated are unlikely to have significant effects in reducing escalation.¹⁰² Employees may

⁹⁷ Cf. Jeffrey Z. Rubin et al., *Factors Affecting Entry into Psychological Traps*, 24 J. CONFLICT RESOL. 405, 411–16 (1980) (showing that male participants who competed against others were more likely to escalate than those working individually).

⁹⁸ Bowen, *supra* note 79, at 61. Bowen suggests that the feedback that Barry Staw, *see supra* note 80, characterized as negative was actually equivocal. Bowen, *supra* note 79, at 54–56.

⁹⁹ See Joel Brockner et al., *Factors Affecting Entrapment in Escalating Conflicts: The Importance of Timing*, 16 J. RES. PERSONALITY 247, 250–55 (1982) (showing that experimental participants for whom costs of waiting were embedded in longer explanation spent significantly more time waiting than did participants for whom costs were presented explicitly).

¹⁰⁰ See *infra* notes 111–21 and accompanying text (discussing employer retaliation).

¹⁰¹ Jolls, Sunstein & Thaler, *supra* note 2, at 1524 (describing and explaining “overoptimism”).

¹⁰² Cf. Brockner et al., *supra* note 99, at 250–55 (showing that experimental participants who were presented with costs of waiting after they had begun waiting did not significantly differ in time spent waiting from participants who were not presented with costs at all).

therefore appeal grievance determinations without fully taking account of the additional costs.¹⁰³

B. Anecdotal and Empirical Support for the Presence of Escalation in Grievance Procedures

This Section presents existing grievance procedure research that suggests that grievants escalate commitment. Subsection 1 finds that the predictions of escalation theory for workplace grievance procedures are substantiated: Employee complaints become more difficult to settle when they are grieved and appealed. Subsection 2 describes previous correlational research that found that grievants suffer adverse effects and argues that the explanations offered in the employment literature for these effects—managerial reprisals and grievants’ feelings of inequity—cannot fully explain recent laboratory findings. Escalation can supplement these incomplete explanations to account for the findings.

1. Increasing Difficulty of Grievance Resolution

Escalation theory predicts that employees become more committed to their complaints when they receive negative feedback on formal grievances and appeals.¹⁰⁴ Anecdotal evidence suggests the process of grieving does increase employee commitment. Employment experts warn employers that when employees formally grieve, complaints are “repeatedly discussed and rehashed,” which “intensifies [employees’] feelings about the problem.”¹⁰⁵ Employers similarly report that grievance resolutions are more easily reached during informal oral discussions.¹⁰⁶

More specifically, anecdotal evidence suggests that negative feedback, in the form of grievance denials, increases employee commitment. “[G]eneral wisdom” holds that grievances become more difficult to settle as they progress from lower levels of the grievance

¹⁰³ Cf. BROCKNER & RUBIN, *supra* note 84, at 7 (“Entrapment can and often does lead to irrational decision making . . .”).

¹⁰⁴ See *supra* Part II.A (discussing escalation theory and its application to grievance procedures).

¹⁰⁵ Swann, *supra* note 91, at 68.

¹⁰⁶ Harry Graham & Brian Heshizer, *The Effect of Contract Language on Low Level Settlement of Grievances*, 30 LAB. L.J. 427, 431 (1979) (discussing interviews with union and management officials). These findings may also be due to the sunk cost effect. See *infra* text accompanying note 131 (concluding further research is needed to distinguish effects of escalation and sunk costs on grievants).

procedure,¹⁰⁷ and grievants are more likely to believe that the outcomes of grievances settled at upper levels are inequitable.¹⁰⁸

Additionally, grievance procedures, contrary to employer desires, may not prevent employees from filing complaints with governmental agencies.¹⁰⁹ Researchers analyzing the ratio at which complaints are internalized—brought through grievance procedures rather than to government agencies—concluded that grievance procedures “generally fail” to insulate employers from external complaints.¹¹⁰ Escalation could help to explain this surprising result. Some grievances undoubtedly are settled internally with results that favor the grievants. But for those employees who lose their grievances, the process of grieving and receiving negative feedback increases their commitment to their complaints, and therefore, rather than discouraging external complaints, results in appeals to government agencies.

2. *Adverse Effects on Grievants*

Research has found that when employees grieve, they suffer adverse effects, such as higher turnover, higher rates of absenteeism, and lower performance reviews. These effects have generally been attributed to employer reprisals against grievants and to grievant feelings of inequity caused by the underlying dispute, but neither of these explanations is fully explanatory. Escalation presents an additional theory to account for these documented effects.

Managers may retaliate against grievants because of a belief that grievances undercut managerial authority or because managers fear that they will be punished by upper management for having their decisions grieved.¹¹¹ Suggesting that managers do retaliate, David Lewin found that prior to filing, future grievants did not significantly differ in performance ratings or rates of promotion from nongrievants,¹¹² but after filing, grievants received significantly lower performance ratings

¹⁰⁷ Judith L. Catlett & Edwin L. Brown, *Union Leaders' Perceptions of the Grievance Process*, 15 LAB. STUD. J. 54, 56 (1990). This “wisdom” may also be the product of a selection effect. Employees may be more likely to appeal grievances that they feel strongly about, so managers may believe that grievances become more difficult to settle at higher levels because, at higher levels, managers adjudicate those grievances about which employees care most.

¹⁰⁸ See DAVID LEWIN & RICHARD B. PETERSON, *THE MODERN GRIEVANCE PROCEDURE IN THE UNITED STATES* 91 (1988) (reporting on survey of union employees finding that employees perceived grievances settled at higher levels as less equitable).

¹⁰⁹ See *supra* note 31 and accompanying text (arguing employers adopted grievance procedures so that employees would not pursue complaints externally).

¹¹⁰ Edelman, Uggen & Erlanger, *supra* note 22, at 429–32.

¹¹¹ Mary P. Rowe & Michael Baker, *Are You Hearing Enough Employee Concerns?*, HARV. BUS. REV. May 1, 1984, at 129.

¹¹² Lewin, *Empirical Analysis*, *supra* note 12, at 839–40.

and rates of promotion than did nongrievants.¹¹³ Grievants were also terminated at a significantly higher rate than were nongrievants.¹¹⁴

Lewin also found that prior to filing, grievants tended to have higher attendance rates than did nongrievants, but after filing, grievants tended to have lower attendance rates, perhaps in response to the hypothesized reprisals.¹¹⁵ Possibly also in response, grievants were significantly more likely to quit during the year following the filing of a grievance than were employees who did not grieve.¹¹⁶

Retaliation is also shown by differing effects on grievants depending on their decisions to appeal and on whether their grievances were ultimately granted. Lewin found that, compared with employees whose grievances were settled at the lowest level, employees who appealed the initial decision had significantly lower rates of promotion, significantly higher rates of involuntary turnover, and tended to have lower performance ratings.¹¹⁷ Lewin further found that in the year following a grievance filing, employees who won their grievances had significantly lower promotion rates,¹¹⁸ significantly higher involuntary turnover rates,¹¹⁹ and generally lower performance

¹¹³ *Id.* at 839–41; *see also* Lewin, *Nonunion Firm*, *supra* note 14, at 488–91 (finding similar results for rates of promotion). Similar results were found in research examining union firms. *See* David Lewin & Richard B. Peterson, *Behavioral Outcomes of Grievance Activity*, 38 *INDUS. REL.* 554, 557–59 (1999).

¹¹⁴ Lewin, *Empirical Analysis*, *supra* note 12, at 839–41; *see also* Lewin, *Nonunion Firm*, *supra* note 14, at 488–91 (finding similar results). This result was not found in a study of union firms. *See* Lewin & Peterson, *supra* note 113, at 559 (finding that in one year studied, there were no significant differences, and that in other year studied, employers were significantly more likely to terminate nongrievants than grievants). These results can partially be explained by union contracts, which almost always provide that employees can be terminated only for just cause, thereby limiting employers' ability to retaliate through terminations. *See* BUREAU OF NAT'L AFFAIRS, *supra* note 19, at 7 (finding ninety-seven percent of union contracts contain just-cause provisions or restrict terminations to reasons enumerated).

¹¹⁵ Lewin, *Empirical Analysis*, *supra* note 12, at 839–41; *see also* Lewin, *Nonunion Firm*, *supra* note 14, at 488–91 (finding similar results). *See* Lewin & Peterson, *supra* note 113, at 557–59, for similar results in a study of union firms.

¹¹⁶ Lewin, *Empirical Analysis*, *supra* note 12, at 840–41; *see also* Lewin, *Nonunion Firm*, *supra* note 14, at 488–91 (finding similar results). *See* Lewin & Peterson, *supra* note 113, at 558–59, for similar results in a study of union firms.

¹¹⁷ Lewin, *Nonunion Firm*, *supra* note 14, at 491–93; *see also* Lewin & Peterson, *supra* note 113, at 560–61 (finding similar results in rates of promotion and performance ratings in study of union firms). However, nonunion employees who appealed their grievances tended to have higher attendance than did employees who did not appeal, Lewin, *Nonunion Firm*, *supra* note 14, at 492, while in union firms, Lewin and Peterson found significant effects in the opposite direction, Lewin & Peterson, *supra* note 113, at 560–61.

¹¹⁸ Lewin, *Nonunion Firm*, *supra* note 14, at 493. *See* Lewin & Peterson, *supra* note 113, at 560–61, for similar results in a study of union firms.

¹¹⁹ Lewin, *Nonunion Firm*, *supra* note 14, at 493 (finding significant difference in two of three firms studied).

ratings than did employees whose grievances were denied.¹²⁰ These findings suggest the presence of managerial reprisals because managers likely retaliate against employees who undercut their authority.¹²¹ The employees who most undercut authority—and who suffer the greatest ill effects—are those who challenge initial manager adjudications of their grievances and those who ultimately succeed in their grievances.

In addition to reprisals, the negative effects suffered by grievants have been attributed to the underlying dispute between grievants and management. Employees grieve because they believe that a managerial decision is inequitable.¹²² While grieving constitutes one response to inequity, employees may additionally respond through absences, turnover, and lower productivity.¹²³ Accordingly, the adverse effects found by Lewin may have been symptoms of employee dissatisfaction with management.¹²⁴

Professor Julie Olson-Buchanan tested the inequity and reprisal explanations for these adverse effects in a laboratory study. Olson-Buchanan found that, among those with access to a grievance system, grievance filers had significantly lower job performance than did employees who chose not to grieve.¹²⁵ Because Olson-Buchanan used experimental participants, rather than actual employees, and measured performance objectively, rather than through performance reviews or promotion rates, grievants' lower performance could not

¹²⁰ *Id.* See Lewin & Peterson, *supra* note 113, at 560–61, for similar results in a study of union firms.

¹²¹ See *supra* note 111 and accompanying text.

¹²² Casey Ichniowski, *The Effects of Grievance Activity on Productivity*, 40 *INDUS. & LAB. REL. REV.* 75, 81 (1986).

¹²³ Brian S. Klaas & Angelo S. DeNisi, *Managerial Reactions to Employee Dissent: The Impact of Grievance Activity on Performance Ratings*, 32 *ACAD. MGMT. J.* 705, 706 (1989).

¹²⁴ See David Lewin & Karen E. Boroff, *The Role of Loyalty in Exit and Voice: A Conceptual and Empirical Analysis*, 7 *ADVANCES INDUS. & LAB. REL.* 69, 71 (1996) (arguing that prior research may not have fully accounted for benefits of grievance procedures because it did not distinguish between employees who had and had not perceived unfair treatment).

¹²⁵ Julie B. Olson-Buchanan, *Voicing Discontent: What Happens to the Grievance Filer After the Grievance?*, 81 *J. APPLIED PSYCHOL.* 52, 59 (1996). Olson-Buchanan found no significant difference between filers and non-filers in terms of desire to continue working. *Id.* at 61. Olson-Buchanan's experimental participants' "job" consisted of three editing tasks. After the first task, the participants were given a performance evaluation and were paid in lottery tickets. Half of the participants were given the opportunity to file a grievance contesting the number of tickets they received. After the second task, participants were informed whether they had won their grievance; those who won—half of the grievance filers—were given additional lottery tickets. *Id.* at 56–57.

be attributed to managerial reprisals.¹²⁶ Employee feelings of inequity caused by their underlying complaints also could not explain entirely the problem of decreased performance¹²⁷ because among employees who had cause for dispute with management, the performance of employees who actually grieved was significantly lower than that of employees who did not.¹²⁸ The lower performance also could not be attributed to employee dissatisfaction with the employer resolution: Grievants exhibited lower performance than nongrievants before (as well as after) learning the grievance outcome.¹²⁹

Because Olson-Buchanan did not experimentally manipulate whether a participant filed a grievance, her study does not establish that grievance filing *causes* lower performance.¹³⁰ Also, Olson-Buchanan did not investigate the degree to which grievants' performance decreased after having their grievances denied. Therefore, it is unclear how much of the grievants' lower performance can be attributed to the sunk cost effect,¹³¹ caused by employees' investment in their grievances, and how much can be attributed to escalation, caused by employees' investment in combination with negative feedback. The distinction between the effects of sunk cost and escalation in grievance procedures awaits further empirical research.

Nevertheless, escalation and the sunk cost effect offer explanations for the lower performance found by Olson-Buchanan. By grieving (and having their grievances denied), employees become more committed to and more focused on their complaints.¹³² Grievants consequently became more dissatisfied with management and

¹²⁶ *Id.* at 61. Olson-Buchanan created a performance measure using the number of errors the participants overlooked, identified accurately, attempted to correct, and corrected accurately. *Id.* at 57.

¹²⁷ See *supra* notes 122–24 and accompanying text (summarizing inequity hypothesis).

¹²⁸ Olson-Buchanan, *supra* note 125, at 59–60. Olson-Buchanan manipulated cause-for-dispute by having a confederate sign into the study at the same time as each participant. After the first task, the experimenter—acting as the “manager”—gave the participant and confederate equally positive performance reviews, but paid the participant five lottery tickets and the confederate seven tickets; participants had previously been told that the average number of tickets earned was ten. In the no-cause-for-dispute condition, participants and confederates were both paid ten tickets. *Id.* at 57. This variable significantly affected whether participants believed that they had reason to complain to management. *Id.* at 58. However, it is possible that perceived cause-for-dispute may have been responsible for some difference in performance between grievants and nongrievants because employees who grieved may have believed that they had greater cause to complain than did those who failed to grieve.

¹²⁹ Grievants did not learn the outcome of their complaints until after the second task, but performed worse than nongrievants during the second and third tasks. *Id.* at 59.

¹³⁰ *Id.* at 62.

¹³¹ See *supra* note 79 (explaining sunk cost effect).

¹³² See *supra* Part II.A; see also BROCKNER & RUBIN, *supra* note 84, at 151 (suggesting that entrapped decision makers acquire “tunnel vision,” losing focus on other pursuits).

more likely to perform poorly. Similarly, escalation and the sunk cost effect could supplement employer reprisals in explaining Lewin's findings that, relative to nongrievants, grievants had higher turnover rates and lower performance appraisals, promotion rates, and attendance.¹³³

Escalation, particularly with its focus on negative feedback, can also explain some of Lewin's findings that cannot be attributed to reprisals. Lewin found that employees who lost their grievances, despite better reviews and higher rates of promotion, had significantly lower attendance and were significantly more likely to quit.¹³⁴ Escalation theory suggests that when grievances are denied, employees attempt to justify their behavior by appealing.¹³⁵ When these appeals are denied, employees' only remaining forms of "appeal" are to skip work or quit.

While the finding that employees who lose their grievances suffer worse effects than those who win is unsurprising—lower attendance and performance seem to be natural responses to losing—escalation can also help explain Lewin's more unexpected finding: Courts have suggested that multiple levels of appeal indicate that a system is fair,¹³⁶ but Lewin found that when grievants appeal their grievances to higher levels, they suffer worse effects.¹³⁷ Lewin's reprisal explanation requires that employers, at least subconsciously, track how many times employees appeal and calibrate their reprisals to these appeals. Perhaps more simply, escalation suggests that because of heightened commitment from the denial of grievances at initial levels, employees will be more dissatisfied with the resolution of grievances that are settled at higher levels—an effect documented in the employment literature¹³⁸—and therefore more likely to quit, be absent, or perform poorly.

III

IMPLICATIONS OF ESCALATION

This Part explores the implications of employee escalation of commitment. Section A acknowledges that despite the deleterious effects that escalation has on the relationship between grievants and management, grievance procedures, on the whole, may benefit

¹³³ See *supra* notes 111–17 and accompanying text.

¹³⁴ Lewin, *Nonunion Firm*, *supra* note 14, at 492–93. See Lewin & Peterson, *supra* note 113, at 560–61, for similar results in a study of union firms.

¹³⁵ See *supra* notes 79–89 and accompanying text (explaining escalation effect).

¹³⁶ See *supra* Part I.B.2 (presenting judicial endorsement of grievance procedures).

¹³⁷ See *supra* note 117 and accompanying text.

¹³⁸ See *supra* note 108 and accompanying text.

employees and therefore employers. Section B argues that, regardless of these benefits, escalation cannot be conceptualized as a mere side effect because its effects are in direct opposition to employers' goals. Section C therefore proposes that employers adopt mediation to retain the advantages of complaints-and-appeals procedures while reducing escalation.

A. *Tension Between Signaling Fairness and Escalating Commitment*

Employers adopt grievance procedures to signal fairness to employees and courts, and courts find that procedures that allow employees to formally challenge and appeal employer actions provide fair methods of dispute resolution.¹³⁹ Escalation theory, however, indicates that these features cause employees to increase commitment to their complaints and become less willing to resolve disputes.¹⁴⁰ This likely damages grievants' relationships with management—damage that appears evident in grievants' increased absences, higher turnover, and lower performance.¹⁴¹

The contention that the same features that signal fairness also damage workplace relations does not necessarily imply that all procedures should be eliminated. Surveys indicate that employees desire mechanisms to present complaints,¹⁴² and the employment literature suggests that employees value such systems¹⁴³ and predicts that employees will exhibit lower absenteeism¹⁴⁴ and higher productivity if

¹³⁹ See *supra* Part I.B.

¹⁴⁰ See *supra* Part II.A.

¹⁴¹ See *supra* Part II.B.2 (reporting research showing negative effects of grieving for grievants).

¹⁴² David W. Ewing, *Who Wants Employee Rights?*, HARV. BUS. REV., Nov. 1, 1971, at 155 (finding eighty-eight percent of respondents wanted ability to present complaints to management); see also RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 40–41 (1999) (finding, in national survey, that majority of employees asserted that workplace problems would be solved more effectively if employees had some say in how they were addressed).

¹⁴³ Richard Freeman and James Medoff, building on Albert Hirschman's exit-voice model, see generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970), proposed that when employees believe that they have been treated unfairly, they file grievances as an alternative to exiting the firm. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 105 (1984) (explaining how grievance procedures reduce quit rates). Relatedly, the procedural justice hypothesis, see *supra* note 38, suggests that because grievance procedures allow employees to voice their concerns, employees will perceive these procedures as fair, Olson-Buchanan, *supra* note 125, at 54, and therefore be more accepting of employer decisions resulting from the procedures, Feuille & Delaney, *supra* note 5, at 193.

¹⁴⁴ Brian S. Klaas, *Determinants of Grievance Activity and the Grievance System's Impact on Employee Behavior: An Integrative Perspective*, 14 ACAD. MGMT. REV. 445, 452 (1989).

they have access to them.¹⁴⁵ The benefits to nongrieving employees, derived from the knowledge that a fair dispute resolution system is available, may therefore outweigh the negative effects of escalation on grievants. Furthermore, if employees were to have no grievance system available, the negative effects on potential grievants of having no mechanism to challenge employer actions could be more severe than any negative effects due to escalation.

Suggesting that grievance procedures have a net benefit for employees, Olson-Buchanan's laboratory study found that of employees with a basis for dispute with the "employer," employees who were given the ability to grieve—a group that included employees who chose to file and those who chose not to file—performed significantly better and expressed significantly greater willingness to continue working than did employees who did not have access to a grievance procedure.¹⁴⁶ The benefits of grievance procedures have also been observed outside the laboratory. Field research has found that workplaces with grievance procedures have lower quit rates¹⁴⁷ and higher productivity levels¹⁴⁸ than workplaces without grievance procedures.

B. Escalation Poses Particular Problems for Grievance Procedures

In light of the benefits of grievance procedures, employers could regard the adverse effects on grievants caused by escalation as unfortunate side effects of having a fair system of dispute resolution. After all, dispute resolution procedures composed of formal complaints and appeals are ubiquitous in the U.S. legal system. Such procedures are similar to those required by constitutional due process¹⁴⁹ and are relied upon in civil and criminal lawsuits.

Adversarial litigation, like workplace grievance procedures discussed here, may foster escalation. Scholarship has suggested that when prosecutors and police expend resources in showing that a defendant is guilty but later discover evidence that challenges the defendant's guilt, they may escalate their commitment to their belief

¹⁴⁵ Lewin, *Conflict Resolution*, *supra* note 8, at 217; Panken, *supra* note 31, at 43; Richard B. Peterson & David Lewin, *The Nonunion Grievance Procedure: A Viable System of Due Process?*, 13 EMP. RESPS. & RTS. J. 1, 3 (1990).

¹⁴⁶ Olson-Buchanan, *supra* note 125, at 58–59.

¹⁴⁷ See Casey Ichniowski & David Lewin, *Grievance Procedures and Firm Performance*, in HUMAN RESOURCES & PERFORMANCE OF THE FIRM 159, 177–79 (Morris M. Kleiner et al. eds., 1987) (finding union and nonunion hospitals with grievance procedures had significantly lower turnover than nonunion hospitals without grievance procedures).

¹⁴⁸ Ichniowski, *supra* note 122, at 86.

¹⁴⁹ See *supra* notes 39–44 and accompanying text (explaining how due process necessitates opportunity to challenge and appeal government actions).

in the defendant's guilt, rather than modify their opinions.¹⁵⁰ Similarly, scholarship has argued that litigants' investment in discovery can lead to escalating commitment to, and an increased cost of, causes of action.¹⁵¹ More generally, legal literature has recognized that adversarial systems of dispute resolution tend to intensify conflict between parties,¹⁵² asserting that litigation "encourages parties to become entrenched in their positions."¹⁵³

Although grievance procedures resemble litigation, the intensification of conflict they cause poses a particular concern. The purpose of litigation is to adjudicate which party is right and which party is wrong by determining what occurred in the past.¹⁵⁴ Employers, however, do not primarily institute grievance procedures based on genuine interest in adjudicating factual disputes; employers institute grievance procedures to ensure employee productivity and protect themselves from legal liability.¹⁵⁵ Judicial deference to grievance procedures reduces the probability that courts will find employers legally

¹⁵⁰ See McMunigal, *supra* note 89, at 655 ("[R]ush to judgment and escalation of commitment can turn witnesses, police officers, and prosecutors into unwitting contributors to a wrongful conviction when they form an early opinion about a person's guilt and then refuse to look for or consider later evidence inconsistent with that opinion.").

¹⁵¹ Birke & Fox, *supra* note 88, at 23–24.

¹⁵² See, e.g., Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 34 (2005) ("[The] adversarial route [to dispute resolution] . . . can cause severely strained relationships to deteriorate further, perhaps irreparably."); Margaret S. Herrman, Patrick C. McKenry & Ruth E. Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17, 18 (1979) ("The use of an adversarial model to reach a settlement usually increases trauma and escalates conflict."). Not all of the conflict can be attributed to escalation: The mere conceptualization of a party as an adversary likely increases hostility toward that party. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 641 (1981) ("[L]itigation may intensify the disputant's moral judgment and focus blame.").

¹⁵³ Susan N. Gary, *Mediation and the Elderly: Using Mediation To Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 428 (1997). This entrenchment could also be attributed to the sunk cost effect, a phenomenon related to escalation. See *supra* note 79 (describing sunk cost effect); see also Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 431 (2005) ("[T]he sunk-cost effect could trigger irrational bidding wars for favorable outcomes, as adversaries seek to protect sums they have already invested to win the case.").

¹⁵⁴ See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) ("Trials occur because there are questions of fact. In principle, the paramount objective is the truth."); Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11 (1990) ("Adjudication works best when the object is to determine past conduct and to make a judgment concerned only with the present consequences of past behavior.").

¹⁵⁵ See *supra* notes 32–37 and accompanying text (explaining employer goals in implementing grievance procedures).

liable,¹⁵⁶ but employee escalation of commitment suggests grievance procedures may otherwise undermine employer goals. Escalation increases the probability that employees will appeal grievance determinations and pursue costly legal action,¹⁵⁷ despite the low likelihood of success. Further, escalation may decrease employee productivity, increase turnover, and produce other adverse effects for grievants.¹⁵⁸ Therefore, while escalation may be dismissed as an unfortunate side effect in litigation, by increasing employee commitment to their complaints, escalation directly contravenes employers' goals in grievance procedures.

C. *Adopting Mediation To Resolve Workplace Disputes*

This Section recommends that employers adopt mediation to resolve workplace complaints. Subsection 1 argues, based on legal, employment, and psychological literature, that mediation will reduce escalation. Subsection 2 demonstrates that mediation, like procedures of complaints and appeals, signals fairness to the courts.

1. *Reducing Escalation Through Mediation*

While not explicitly referencing escalation, legal literature has recognized that for ongoing relationships, such as those between employers and employees, litigation, with its resulting intensification of conflict, is counterproductive.¹⁵⁹ The literature advocates mediation, which does not focus on "right or wrong" but instead on "establishing a workable resolution"¹⁶⁰ and "repair[ing], maintain[ing], or improv[ing] ongoing relationships."¹⁶¹ Accordingly, scholars recommend mediation for a variety of situations in which adverse parties are likely to desire that their relationship be maintained: familial dis-

¹⁵⁶ See *supra* Part I.B.2 (presenting *Faragher* and *Ellerth* affirmative defense and employer defense to punitive damages); *supra* notes 52–53 and accompanying text (citing favorable judicial citations of grievance procedures in wrongful termination actions).

¹⁵⁷ See *supra* note 105 and accompanying text (reporting that grieving intensifies employees' feelings about their grievances); *supra* note 110 and accompanying text (finding grievance procedures generally fail to insulate employers from external complaints).

¹⁵⁸ See *supra* Part II.B.2 (describing research showing negative effects of grieving for grievants).

¹⁵⁹ See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1294 (1998) ("The adversarial system implicitly presumes that the contestants deal at arm's length, or at least that they will not resume an intimate relationship.").

¹⁶⁰ Gerber, *supra* note 154, at 15.

¹⁶¹ Gary, *supra* note 153, at 428.

putes—such as divorce,¹⁶² probate proceedings,¹⁶³ and disputes over removal from life support¹⁶⁴—landlord-tenant disputes,¹⁶⁵ disputes in which parties want to preserve a business relationship,¹⁶⁶ and disputes in ongoing employment relationships.¹⁶⁷

Literature within the field of psychology has discussed the idea that mediation can reduce escalation. Because of their need to justify past actions,¹⁶⁸ parties, such as grievants, may perceive concessions as “produc[ing] face loss” and as “sign[s] of weakness.”¹⁶⁹ During mediation, however, the mediator can indicate that compromises are appropriate.¹⁷⁰ Grievants (and managers) can thereby attribute responsibility for concessions to the mediator, avoiding the perception of face-loss¹⁷¹ and minimizing escalation of commitment.¹⁷²

Alternative dispute resolution literature specifically recommends transformative mediation for workplace disputes.¹⁷³ This Note adds to that recommendation: Transformative mediation, which allows the parties to control the structure of the mediation,¹⁷⁴ may be especially effective in reducing escalation. In transformative mediation, mediators do not evaluate the merits of parties’ claims, but instead

¹⁶² Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1981).

¹⁶³ Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 176–77 (1999); Gary, *supra* note 153.

¹⁶⁴ Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821 (1994).

¹⁶⁵ Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53 (1997).

¹⁶⁶ See Thomas C. Galligan, Jr., *Extra Work in Construction Cases: Restitution, Relationship, and Revision*, 63 TUL. L. REV. 799, 871 (1989) (advocating for mediation in construction contractor disputes).

¹⁶⁷ See Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996) (recommending mediation in employer/employee disputes under Americans with Disabilities Act).

¹⁶⁸ See *supra* notes 81–84 and accompanying text for a discussion of self-justification.

¹⁶⁹ BROCKNER & RUBIN, *supra* note 84, at 217.

¹⁷⁰ *Id.*

¹⁷¹ See Dean G. Pruitt & Douglas F. Johnson, *Mediation as an Aid to Face Saving in Negotiation*, 14 J. PERSONALITY & SOC. PSYCHOL. 239, 239 (1970) (“[M]any people see concessions in negotiation as a sign of their own personal weakness But if a mediator suggests that a concession be made, . . . a negotiator can rationalize a concession by telling himself that he is not being weak but rather intelligent [T]he mediator helps him save face with himself.”).

¹⁷² BROCKNER & RUBIN, *supra* note 84, at 217.

¹⁷³ E.g., Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 23 (2009).

¹⁷⁴ *Id.* at 13.

foster interaction and communication¹⁷⁵ and encourage each party to conceptualize the dispute from the other party's perspective.¹⁷⁶

By doing so, transformative mediation may prevent escalation. The self-justification explanation for escalation posits that people invest additional resources to reverse a failing course of action in order to reduce the mental discomfort that comes from having chosen such a course.¹⁷⁷ Because this discomfort comes from a threat to people's self-conceptions as capable decision makers, the discomfort can also be reduced by boosting people's self-conceptions.¹⁷⁸ Research suggests that when decision makers have the opportunity to affirm values that they hold important, their self-conceptions can be boosted and escalation reduced.¹⁷⁹

Transformative mediation can offer an opportunity for affirmation through its twin goals of empowerment and recognition.¹⁸⁰ When they are empowered in transformative mediation, parties appreciate their own skills and resources.¹⁸¹ This appreciation is heightened when their situations and perspectives are recognized by the opposing party.¹⁸² Suggesting that this empowerment and recognition affirm parties' self-conceptions, Professor Robert Baruch Bush, the co-developer of transformative mediation, asserts that transformative mediation aims to "shift [parties] back to a restored sense of strength/confidence in self."¹⁸³

Field research suggests that these measures can reduce employee escalation in grievance procedures. Unlike formal grievance procedures, which generally do not decrease complaints by employees to

¹⁷⁵ *Id.* at 23.

¹⁷⁶ *Id.* at 13–14.

¹⁷⁷ See *supra* notes 81–84 and accompanying text.

¹⁷⁸ Niro Sivanathan et al., *The Promise and Peril of Self-Affirmation in De-escalation of Commitment*, 107 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 3 (2008). The affirmations should not be related to people's ability as decision makers because such affirmations may increase the perceived self-threat of choosing a losing course of action. See *id.* at 8–11 (finding that relative to participants who did not engage in affirmations, participants who affirmed their ability as decision makers exhibited significantly more escalation, and participants who affirmed attribute unrelated to decision making, such as creativity, exhibited significantly less escalation).

¹⁷⁹ *Id.* at 6–8.

¹⁸⁰ For an overview of transformative mediation, see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

¹⁸¹ *Id.* at 85–89.

¹⁸² *Id.* at 89–94, 97.

¹⁸³ Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 369 (2001).

government agencies,¹⁸⁴ a program of transformative mediation by the United States Postal Service decreased formal employee Equal Employment Opportunity Commission (EEOC) complaints by forty percent.¹⁸⁵

2. *Signaling Fairness Through Mediation*

Mediation is likely to signal fairness to employees. In both mediation and traditional grievance procedures, employees are able to challenge employer actions. In mediation, employees may not have the benefit of multiple levels of appeal as they would in a grievance procedure; however, they are able to take a more active role in the reconciliation process. This is especially true in transformative mediation, where employees, along with employers, control the structure of mediation. Research has suggested that employees find these procedures fair. For instance, researchers evaluating the Postal Service transformative mediation program found that on a five-point Likert scale—with five being “highly satisfied”—employees rated the mediation process with a mean that exceeded four and one half.¹⁸⁶

Mediation can also signal to courts that employers are treating employees fairly. Like formal grievance appeals procedures,¹⁸⁷ mediation has been endorsed in the public sector. The Administrative Dispute Resolution Act of 1990 authorized alternative dispute resolution in federal agencies,¹⁸⁸ and mediation is widely used as the “preferred” choice of alternative dispute resolution in federal departments and agencies.¹⁸⁹ Mediation of private employment disputes is also

¹⁸⁴ See *supra* note 110 and accompanying text (finding grievance procedures generally fail to insulate employers from external complaints).

¹⁸⁵ Bingham et al., *supra* note 173, at 46 (finding decrease from 14,000 complaints in 1997 to 8500 in 2003 after implementation of program of transformative mediation and concluding decrease could not be attributed to any exogenous factors).

¹⁸⁶ Lisa Blomgren Bingham, Cynthia J. Hallberlin & Denise A. Walker, *Mediation of Discrimination Complaints at the USPS: Purpose Drives Practice*, in *ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT* 269, 289 (Stephen F. Befort & Patrick Halter eds., 2008); see also Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 *J. DISP. RESOL.* 101, 110–11 (reviewing field research finding that employees who participated in grievance mediation “reported higher satisfaction on measures of procedural justice, control over outcome and third party fairness” than those who participated in grievance arbitration).

¹⁸⁷ See *supra* Part I.B.1 (discussing systems of complaints and appeals for public sector employees).

¹⁸⁸ Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 571–584 (2006)).

¹⁸⁹ Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 *J. PUB. ADMIN. RES. & THEORY* 383, 393–94 (1996).

encouraged by the federal government:¹⁹⁰ Employees who come to the EEOC are asked, before the EEOC investigates any harassment charges, if they are willing to participate in mediation.¹⁹¹

Although it looks different from classic due process procedures,¹⁹² given governmental endorsement, mediation can signal fairness in wrongful termination litigation. Of the three categories of causes of action in wrongful termination litigation,¹⁹³ implied-contract claims most restrict employer conduct because employers can be found liable without any finding of bad faith.¹⁹⁴ Like complaint-and-appeals procedures, mediation can signal fair treatment in this context while minimizing employer liability. Implied-contract claims require only that employers provide the procedures that they promise employees; when employers have grievance procedures composed of formal complaints and appeals, employees are entitled to only the procedures specified in employer statements or handbooks.¹⁹⁵ Analogously, if employers adopt mediation, as long as employers provide the mediation as specified in the implied contracts, employees will not have viable claims.

Grievance procedures focused on mediation can also signal antidiscrimination. *Ellerth*, *Faragher*, and *Kolstad* do not require a specific type of grievance procedure, and given EEOC endorsement

¹⁹⁰ See DAVID RAUMA & DONNA STIENSTRA, *THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK* 285–98 tbl.13 (1995) (showing mediation and other alternative dispute resolution methods implemented by federal district courts for civil disputes); cf. SARAH R. COLE, CRAIG A. McEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY AND PRACTICE* app. B (Supp. 2010) (listing mediation statutes by state).

¹⁹¹ E. PATRICK McDERMOTT ET AL., *AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM: EEOC ORDER NO. 9/0900/7632/2* (2000), available at <http://www.eeoc.gov/eeoc/mediation/report/index.html> (follow “IV. Background” hyperlink).

¹⁹² See *supra* Part I.B.1 (describing due process procedures of formal complaints and appeals).

¹⁹³ See *supra* notes 28–30 and accompanying text (summarizing categories).

¹⁹⁴ Lauren B. Edelman, Stephen E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *LAW & SOC’Y REV.* 47, 52 (1992).

¹⁹⁵ See, e.g., *Carnes v. Parker*, 922 F.2d 1506, 1512 (10th Cir. 1991) (“We are convinced the Hospital gave [Plaintiff] all the process to which she was entitled based on the personnel manual [T]he Hospital’s employment manual [does not offer Plaintiff] any more procedural protection before or after termination than she received.”); *Meleen v. Hazelden Found.*, 740 F. Supp. 687, 692 (D. Minn. 1990), *aff’d*, 928 F.2d 795 (8th Cir. 1991) (“Plaintiff got all the procedure she was due under the employment contract. She, perhaps understandably, would like something more. But, this was a private contract; no right to constitutional due process or proof beyond a reasonable doubt existed.”); *Plummer v. Humana of Kan., Inc.*, 715 F. Supp. 302, 304 (D. Kan. 1988) (“The Handbook provided that if an employee felt [the employer] had violated its own policies, the employee’s sole recourse was to use the grievance procedure.”).

of mediation, courts are likely to find that mediation procedures satisfy the first prong of the *Ellerth* and *Faragher* affirmative defense and contribute to a defense against punitive damages.¹⁹⁶ Judicial deference is especially likely because courts generally do not engage in extensive analyses of employers' complaint procedures, but instead look to whether formal procedures were in place.¹⁹⁷

Third-party mediators will introduce new costs for employers, and further research is necessary to determine how mediation can best be implemented. For instance, it seems impractical, and perhaps undesirable, to proceed directly to mediation every time an employee presents a complaint. Additionally, some scholars oppose the use of mediation for employment disputes, arguing that it will lead to unfair grievance resolutions because of power imbalances inherent in employer-employee negotiations.¹⁹⁸ An examination of these issues and a comprehensive analysis of the costs and benefits of mediation relative to formal grievance appeals procedures are beyond the scope of this Note. Nonetheless, given the substantial legal literature advocating the use of workplace mediation,¹⁹⁹ this Note argues that mediation, and specifically transformative mediation, can function similarly to grievance appeals procedures in signaling that employees are treated fairly, while avoiding the pitfalls of escalation associated with more traditional adversarial procedures.

CONCLUSION

Nonunion employers have increasingly adopted formal grievance procedures to signal to employees and the courts that employees are treated fairly. This Note has argued that the defining components of these grievance procedures—opportunities to formally complain and

¹⁹⁶ See *supra* notes 54–59 and accompanying text (discussing affirmative defense to harassment litigation). As with a formal procedure of complaints and appeals, employers would need an antiharassment policy to satisfy the defense. See *supra* note 60 and accompanying text (discussing affirmative defense in harassment cases for employers that have antiharassment policies in place).

¹⁹⁷ See Lawton, *supra* note 60, at 212–13 (“[T]he lower federal courts have interpreted the employer’s obligations [for the *Faragher* and *Ellerth* affirmative defense] . . . so that employers have little incentive to do anything besides promulgate policies and procedures that look good on paper. The courts concentrate on simple, quantifiable standards . . .”); *supra* notes 60–61 and accompanying text (showing courts focus on presence of procedures, and whether they were administered in good faith, as opposed to scrutinizing details of procedures).

¹⁹⁸ See, e.g., Karyn A. Doi, *Title VII’s Retaliation Jurisprudence: Litigation Despite Faragher and Ellerth*, 68 DEF. COUNS. J. 83, 88–89 (2001).

¹⁹⁹ See, e.g., Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCHOL. PUB. POL’Y & L. 693 (1999); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156 (1999).

appeal—cause employees to escalate commitment to their complaints. This escalating commitment can increase the rate at which employees appeal grievance determinations, both within the workplace and externally, and increase conflict between grievants and management. Employers should not dismiss this increased conflict as an unfortunate side effect of judicially-endorsed grievance procedures. Unlike litigation, where the central purpose is the adjudication of past conduct, employers institute grievance procedures to resolve complaints and preserve employee productivity. Consequently, this Note advocates that instead of a litigation-like model of grievance processing by complaints and appeals, employers should implement grievance procedures structured around mediation, ideally transformative mediation. Mediation will signal fair treatment while minimizing employee escalation of commitment.

