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COLLECTIVE COMPLAINT

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Interest in collective action is gathering steam in the United States, from engagement in social movements such as #MeToo and Black Lives Matter to a dramatic increase in public support for unions.[1] And it's not just that the public is getting interested; scholars and advocates are also calling for collective drives for broadscale change in everything from how we imagine public safety, health, and education to the fundamental precepts of our political economy.[2] These calls for collective action come on the heels of a decades-long shift toward neoliberalism and individualizing, a narrowing in view of our connections with others and the ways that we are affected by the institutional contexts in which we interact. These calls for collective action are calls for people to see themselves together and to act together for broad, systemic change.

In a sense, everyone who responds to the call for collective action is complaining about a current state of affairs and seeking a better one. When people complain, they open doors to change; they bring light to experiences and seek assessments and resolutions that can right the way forward for themselves and sometimes for others as well. In the legal field, we use the term "complaint" to refer to the initial document filed in a court action, a

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1 In a 2023 Gallup Poll, labor union support stood at sixty-seven percent, up from forty-eight percent in 2009. Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx.

2 *See*, *e.g.*, Sunita Patel, *Transinstitutional Policing*, 137 HARV. L. REV. 808 (2024) (across institutions); Fanna Gamal, *The Miseducation of Carceral Reform*, 29 UCLA L. REV. 928 (2022) (education); Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90 (2020) (advocating for "non-reformist reforms" that seek to undermine and upend existing systems and noting that "[c]ollective processes—whether in organizations, unions, or assemblies—become schools of democratic governance in action").

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document that lays out a person's demand for relief under the law. But complaints asserting legal violations are not limited to legal filings, nor are they always first generated in court. Rather, complaints are often initiated within institutions (e.g., schools, workplaces, prisons) for the same reasons that they are initiated in courts: to seek redress—and to demand change. And through these complaints people can tell stories about what is going wrong within institutions in addition to (or instead of) stories about individualized, relational moments of harm.

In this essay, I put the popular idea of collective action together with the law of complaint to tell a cautionary tale: There is a certain mythic, even poetic, resonance to calls for collective action in modern progressive circles. This often lies in a specific understanding of collective that is deeply embedded in a vision of group-based activity, of people physically and emotionally gathering, working together, reaching out for each other, linking arms, carrying each other's voices, nurturing and sustaining each other, en masse. As captivating as this vision is, it misses that individuals can act for collective good even when they are not acting through group-based action.

The essay seeks to tilt collective complaint as group-based activity off its pedestal, ever so slightly. Using the realm of employment discrimination as example, I explore how our imaginations can be cabined by language and by past practice, as well as by our own preferences and experiences. I show that calls for collective complaint in progressive advocacy around antidiscrimination law currently tend to focus on just one piece of the problem of individualizing, the piece that isolates individuals who complain from others, leaving another key piece, the piece that atomizes or narrows peoples' stories and solutions, to merely follow along. This overemphasis on collective as group-based activity is not merely rhetorical. Current efforts at policy change tend to target class action procedures and arbitration laws that prevent people from suing as a group. That we assume that group-based activity is necessary for broader stories and solutions is not surprising, given our history of collective action as group-based action in employment generally and also in civil rights litigation, but in so assuming we miss a key opportunity to directly contest an independent and crucial piece of the problem of individualizing. Unpacking the two pieces of individualizing allows us to interrogate what we mean by collective, to disentangle our solutions, and to forge new—and collective—avenues for complaint and change.

This work is increasingly important as part of a project of fostering research-based interventions for reducing discrimination, interventions that must be aimed at organizational and institutional sources of discrimination—structures, systems, practices, and cultures—as much as individual ones. Sociologists Frank Dobbin and Alexandra Kalev recently synthesized much of a growing body of research on discrimination-reducing measures in their book *Getting to Diversity: What Works and What Doesn't Work*.[3] They note,

3 Frank Dobbin & Alexandra Kalev, Getting to Diversity: What Works and What Doesn't Work (2022).

in short, "It turns out to be more effective to focus on bias and discrimination in systems than in people."[4] Empowering people to target these systems—and not merely the occasional "bad actor" manager or coworker—is crucial for making meaningful progress toward equality and nondiscrimination in work.

The essay is organized in three parts. In the first, I unpack what I call the "individualizing" of discrimination and complaint in and through antidiscrimination law. When someone complains about discrimination in work, they are typically sent into an internal grievance process (which later sometimes turns into an external, private arbitration or courts-based process) where they are expected to articulate specific, often micro-relational stories of discrimination: "This person did this to me on this date." Two things happen with this process of individualizing that limit complainants' capacity to effect institutional change: the complainant is isolated away from others who may have similar stories and concerns, and the complainant is constrained in the framing of their stories and in their requests for assessment and resolution. We might say complainants and their complaints are "isolated" from others, and the stories that they tell are also "atomized." To atomize is to "reduce to minute particles or to a fine spray."[5] In atomizing complaints, the law presses individuals to tell narrow stories about discrimination and thereby to seek narrow solutions.

In part II, I then turn to the idea of collective. A preference for group-based action displays, in writings about complaint and also in current on-the-ground efforts to combat individualizing, efforts that focus primarily on facilitating procedures to allow individuals to sue together in groups. An exclusive focus on group-based complaint in litigation is problematic practically because of the limited scope of its efforts; it risks missing meaningful avenues for change. But the problem goes even deeper. Overemphasizing collective as group-based activity risks disempowering individuals who seek to raise questions about systemic practices and who seek to effect more systemic institutional change. It portrays individuals as weak and without voice, perpetuates a narrative that undermines individuals' credibility, and plays into common derisive characterizations of individuals who complain. It also disregards practical difficulties of group-based work, including the extensive time involved and social dynamics that can isolate along racial and other status lines as well as dampen energies for fighting for change.

In part III, I begin the project of resituating collective on broader footing. What would it look like to realize the full potential of collective as response to individualizing? Efforts would be aimed at the problem of isolating complainants and their complaints, reversing the strict rails on group complaints and class actions. These efforts would also directly

4 *Id.* at 11.

5 *Atomize*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/atomize. Merriam-Webster also defines "atomize" as "to treat as made up of many discrete units" and to "divide, fragment" in a social sense, "to deprive of meaningful ties to others." *Id.*

address the problem of atomizing, seeking to empower people who are not necessarily acting *in* groups to tell their own broader stories and to demand broad (collective) assessments and solutions *for* groups. Collective can—and often does—mean something well beyond group-based activity, and this broader sense of collective can be used to expand how we think about complaint and the stories we tell within it. Practical efforts aimed at atomizing should follow, including efforts across levels of complaint, from formal procedures in courts to agency intake and prefigurative practices within work organizations themselves.

I. THE INDIVIDUALIZING OF COMPLAINT

We know something—a lot actually—about how complaint processes work in the discrimination context. Organizations and legal systems individualize complaints by demanding that complaints present portrayals of discrete, isolated, individualized relational moments calling for narrow relief (e.g, punishment of a "bad" actor)—and by generally treating them as such—rather than as multilayered, contextual accounts calling for broader structural assessment and change. This process is prevalent across institutions, from workplaces to prisons to schools, and it is driven and backed up in various ways by law.[6] This part briefly unpacks the ways that individualizing of complaint in the employment discrimination context both *isolates* complainants from others and *atomizes* complainants' stories, picking them apart into micro-relational encounters with limited capacity to generate meaningful change.

It is worth noting that the emphasis on complaint in employment discrimination law both rests on individualized notions of discrimination and serves as a tool of individualizing. Title VII of the Civil Rights Act[7] has always required a filing of a "charge" of discrimination with the Equal Employment Opportunity Commission (EEOC) before a private individual can proceed with a claim in court.[8] The idea was that complaints would be subject to inquiry by the administrative body and possibly resolved through EEOC conciliation without need for a lawsuit. There is nothing inherently individualizing about this. But as Lauren Edelman's work on the endogeneity of law and organizations demonstrates, in the 1980s, as sexual harassment was emerging as an antidiscrimination concern, complaint (or "grievance") systems within work organizations proliferated.[9] By 1998, when the

6 For important sociological work on the institutional process and experience of complaint in prisons, see Kitty Calavita & Valerie Jenness, Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic (2015), and in a university, see Sara Ahmed, Complaint! (2021).

7 42 U.S.C. § 2000(e).

8 42 U.S.C. § 2000e-5(e)(1).

9 Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Socio. 406 (1999).

Supreme Court set up a new Title VII legal regime under which providing an internal system of complaint became a legally sanctioned method of avoiding liability in at least some cases,[10] over ninety percent of medium and large firms had adopted harassment grievance procedures and seventy percent had adopted similar procedures for all complaints of discrimination.[11] This move built on individualized stories about what discrimination is and especially about organizations' role in it.[12]

There are numerous problems with the law of complaint and how it operates within work organizations and beyond.[13] Retaliation, for example, is pervasive and not well addressed by law; retaliation both punishes those who complain and has a chilling effect on would-be complainants.[14] Individualizing is another problem, a problem that impedes structural change (the kind of change that research suggests we most need) by reducing the likelihood that organizational actors will see discrimination at all and by channeling solutions toward punishing individual "bad actors" if it is seen. Systemic theories in the employment discrimination context—specifically systemic disparate-treatment (pattern or practice) theory, which relies on statistics, among other evidence, to prove widespread discrimination within an organization,[15] and disparate-impact theory, which challenges an employer's use of a practice as having a disparate impact[16]—can facilitate a structural lens, but they have been limited by courts in various ways as part of the project of individualizing.[17]

In their book *Rights on Trial*, sociologists Ellen Berrey, Robert Nelson, and Laura Beth Nielsen present mixed-methods research that includes in-depth interviews with plaintiffs, internal human resources (HR) officers, and inside and outside counsel, all of whom were

10 Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

11 Frank Dobbin & Alexandra Kalev, *Making Discrimination and Harassment Complaint Systems Better*, in What Works: Evidence-based Ideas to Increase Diversity, Equity, and Inclusion in the Workplace 24, 25 (2020), https://www.umass.edu/employmentequity/sites/default/files/ What_Works.pdf.

12 Tristin K. Green, Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law 50–59 (2017).

13 Importantly, by the "law of complaint," I refer to internal complaint processes within work organizations as well as to EEOC charge processes and complaint systems for legal cases filed in courts.

14 *See* Deborah Brake, *Retaliation in an EEO World*, 89 Ind. L.J. 115 (2014).

15 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

16 42 U.S.C. § 2000e-2(k) (1991) (making it unlawful for an employer to use an employment practice that has a disparate impact on a protected group if the employer cannot show that its use of the practice is job related and consistent with business necessity).

17 Pattern-or-practice cases were originally assigned to the Department of Justice, but authority to bring these suits shifted to the EEOC with the 1972 amendments. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Private litigants are also permitted to bring suits seeking structural reform. *But see infra* notes 36–37 and accompanying text (noting decisions that limit pattern-or-practice claims to cases in which a class has been certified).

involved in investigating internally (within work organizations) and litigating externally (in courts) employment discrimination complaints.[18] The authors find in these interviews a consistent push, especially from HR professionals and lawyers for employers, for an individualized frame, a narrowing of inquiry to specific micro-relations or decision moments involving discrete decision-makers with no effort to make connections to other complaints or institutional action more broadly. Indeed, a common thread is of defendant HR professionals seeking to reshape complainants' understanding of discrimination so that, beyond its being individualized, the story also vindicates organizations. Complainants are described as being engaged in personality conflicts and ignorant or malicious and in need of education so that management will no longer be bothered by their complaints.[19] The authors conclude that employment discrimination law "reinscribes hierarchies by challenging and containing discrimination claims."[20]

A. Isolating Complainants and Their Complaints

The complaints Berrey and colleagues studied were almost all brought by individuals, not by groups. One likely reason for this feature of their work is that internal processes at most institutions do not envision or in some cases even allow for group-generated complaints.[21] Complainants and their complaints, in other words, are often isolated from each other within organizations by the system of complaint itself. That said, several of the plaintiffs they interviewed did report coworker support, and one case involved a plaintiff

18 Ellen Berrey et al., Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality 189, 199 (2017).

19 *See*, *e.g.*, *id.* at 189, 199; *see also* Lauren B. Edelman, Working Law: Courts, Corporations, and Symbolic Civil Rights 125–33 (2016) (discussing framing of organizational obligation as one of "fairness," with goal of keeping complaints out of courts, and "managerialized" remedies focused on individualized solutions of training, counseling, moving someone away from someone else, and sometimes punishment).

20 Berrey et al., *supra* note 18, at 13; *see also id.* at 261–69 (describing this process). Further, HR professionals frequently discourage women who inquire about filing a complaint from framing their complaints as sexual harassment, instead suggesting that the behavior is not sufficiently severe or pervasive to constitute sexual harassment or that it is simply an instance of poor management or of interpersonal conflict. *See* Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993); Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 Law & Soc. Inq. 659 (2003); *see also* Dobbin & Kalev, *supra* note 3, at 51–57. The problems that flow from these processes are multifaceted and include, among other things, shifting financial and emotional costs to individuals.

21 *See*, *e.g.*, Ahmed, *supra* note 6, at 5 (describing institutional demand for individual complaints). Group-based claims in courts are also rare. *See* Berrey et al., *supra* note 18, at 58 (noting that a class action was certified in just one percent of all cases). In their research, Berrey et al. found that "collective legal mobilization," which they define as "cases involving multiple plaintiffs, certified class actions, and representation by a public-interest law firm (or the EEOC)" "is an important predictor of case outcomes," meaning those cases in their dataset were less likely to be dismissed, were less likely to lose on summary judgment, and had a better chance than an individually filed case of winning at trial. *Id.* at 69.

who had taken on a role of spokesperson for a group of employees complaining of unfair practices.[22]

Calls for confidentiality in internal processes may also keep people from talking with each other and formulating group-based complaints.[23] Of course, there are often good reasons for keeping complaints confidential, but confidentiality concerns can be used to silence complainants, to keep them from talking to others who may have experienced or be interested in similar issues within the institution, or outside of it.[24] Nondisclosure agreements in settlements serve a similar function by keeping people from joining together or speaking about events or experiences underlying a settlement.[25]

Complainants and their complaints are also increasingly isolated in the judicial system, where narrow views of discrimination have cabined class actions, the principal group-based avenue for seeking change in courts. In *Wal-Mart v. Dukes*, the plaintiffs alleged systemic theories of sex-based discrimination, both disparate treatment and disparate impact, not individualized claims.[26] They introduced evidence that women were paid substantially less than men and promoted less often despite equal qualifications and interest, as well as evidence that Wal-Mart had an overarching culture of bias against and stereotyping of women.[27] Yet the Court described the women's claims as involving allegations solely of biased decisions by low-level managers with respect to each individual complainant and importantly said that to meet the commonality requirement for class certification, the plaintiffs would need to establish that they shared a single supervisor[28] or provide "significant proof"

22 Berrey et al., *supra* note 18, at 91. Berrey and colleagues report that of the forty plaintiffs interviewed, thirty-five proceeded alone, "but many spoke of their efforts—often disappointing—to gain support from others in the course of their workplace dispute." *Id.* at 92.

23 *See* Dobbin & Kalev, *supra* note 11 (mentioning confidentiality as a possible reason for their findings that formal grievance procedures slow workforce integration).

24 *See* Ahmed, *supra* note 6, at 98 (describing the experience of one woman who was considering taking her story of bullying and harassment to the media; someone "she trusted and who was himself outraged by the institution's response to her complaint" told her, in her words, "it is bringing your institution into disrepute; they can get you on that").

25 *See* Minna J. Kotkin, *Reconsidering Confidential Settlement Agreements in the #MeToo Era*, 54 U.S.F. L. Rev. 517 (2020); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. Rev. 927 (2006).

26 Plaintiff's Third Amended Complaint, at 24, Dukes v. Wal-Mart Stores, Inc., No. C01-2252 (N.D. Cal. Sept. 12, 2002) (No. 64), 2002 WL 33645690 (alleging that "Wal-Mart discriminates against its female employees by advancing male employees more quickly than female employees, by denying female employees equal job assignments, promotions, training and compensation, and by retaliating against those who oppose its unlawful practices"). The plaintiffs did not seek individualized damages for emotional distress; instead they sought equitable relief that would flow from liability for a pattern or practice of discrimination and punitive damages. *See id.*

27 *See generally* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 Berkeley J. Emp. & Lab. L. 395, 407–08 (2011) (describing the case and noting evidence introduced by plaintiffs).

28 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.").

that the company "operated under a general policy of discrimination."[29] The Court relied on Wal-Mart's formal nondiscrimination policy in holding that no such evidence had been provided.[30] As a practical matter, *Wal-Mart* serves as a hurdle that keeps plaintiffs from suing together, forcing them away from each other into individual lawsuits.[31]

Judicial decisions involving arbitration clauses in employment contracts further limit the ability of individuals to come together to complain about discrimination and other workplace wrongs. The Supreme Court has held arbitration clauses preventing group-based actions in court and in arbitration enforceable.[32] It has also found such agreements implied, even when the language of the agreement does not specifically address class treatment.[33]

B. Atomizing Complaints

Some of the same sociolegal work that exposes *isolating* of complainants and their complaints also reveals *atomizing* of complaints. As I noted above, this atomizing

29 *Id.* at 353.

30 *See id.* at 354–58 (relying on Wal-Mart's nondiscrimination policy as evidence of nondiscrimination and rejecting plaintiffs' statistical evidence, expert evidence regarding organizations and stereotyping, and anecdotal evidence as insufficient). For discussion of the individualized view of discrimination that the *Wal-Mart* Court adopted, see Green, *supra* note 27, and Green, *supra* note 12. For further discussion of evidence presented in *Wal-Mart* and why the Court was wrong, see Ramona L. Paetzold & W. Stephen Rholes, Wal-Mart v. Dukes*: Justice Scalia and Systemic Disparate Treatment Theory*, 21 Emp. Rts. & Emp. Pol'y J. 115 (2017).

31 Class actions in employment discrimination suits have still been certified, but certification is inconsistent across courts. *See*, *e.g.*, Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After* Wal-Mart v. Dukes, 50 Harv. C.R.-C.L. L. Rev. 153 (2015) (relaying mixed results after *Wal-Mart*). The law of hostile work environment has also erected a barrier to class action, at least in some circuits. The law as created by the Supreme Court in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), requires that a plaintiff prove that they "subjectively" perceived an environment as hostile or abusive, and some courts have relied on this requirement to frame harassment lawsuits as inherently individualized and unsuitable for class treatment. *See*, *e.g.*, Elkins v. Am. Showa, Inc., 219 F.R.D. 414, 424 (S.D. Ohio 2002) (denying class certification on the ground of no commonality because of individualized variation among plaintiffs' complaints of harassment); *id.* at 425 (denying certification for lack of predominance, noting that even if plaintiffs were able to establish a plant-wide hostile environment, "[i]ssues as to whether a given individual perceived the environment to be hostile would remain").

32 Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013). The Supreme Court has not ruled that *Gilmer* extends to Title VII claims, though it did say so in dicta in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2008), and lower courts have consistently so held. *See* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748–49 (9th Cir. 2003) (collecting cases). For description of the Court's Federal Arbitration Act decisions concerning statutory rights and class and collective actions, see Ryan H. Nelson, *An Employment Discrimination Class Action by Any Other Name*, 91 Fordham L. Rev. 1425, 1431–36 (2023); Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 Minn. L. Rev. 811, 836–51 (2019).

33 *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (holding that the FAA bars an order compelling class arbitration when an agreement is ambiguous regarding class arbitration); Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 687 (2010) (holding that the FAA bars an order compelling class arbitration when an agreement is silent regarding class arbitration).

primarily involves constraints on the stories that complainants tell about their experiences of discrimination, the sources of that discrimination, and possible solutions. Lauren Edelman surfaces a form of atomizing in her work on organizations and internal dispute-resolution processes. She describes the process of handling complaints about discrimination as one of "managerializing" complaints: complainants are expected to describe incidents between themselves and specific individuals, incidents that managers then explain away as nondiscrimination, merely managerial, or personnel (or personal) relational moments.[34] And even when discrimination is detected, individuals' stories are often narrowed through the processes of complaint to individualized, relational solutions: punishing a specific person, moving someone away to another department, or asking for apology or some other "let's talk" moment—and then moving on.[35]

Courts, too, have atomized complaints structurally by limiting the legal theories that individuals can rely on and the relief that they can seek. Some courts, for example, have held that individuals cannot bring claims using systemic legal theories.[36] Others have insisted that only limited relief focusing closely on the individual, such as back pay or a targeted promotion, is available for individual plaintiffs, not relief that would require change in how the organization operates.[37]

Other courts have used strict pleading requirements to prevent individuals (and groups) from using systemic theories. In two cases decided in the late 2000s, the Supreme Court held that dismissal on the pleadings is warranted unless plaintiffs assert allegations that are "plausible,"[38] which some courts have read to require that plaintiffs plead specifics

34 *See* Edelman et al., *supra* note 20. Berrey and colleagues' work is also relevant here. *See supra* note 18.

35 Individuals are seen as the problem, if there is one. *See generally* Green, *supra* note 12; Ellen Berrey, The Enigma of Diversity 238–40 (2015). On problems with a "let's talk" approach, see Sarita Srivastava, *Tears, Fears and Careers: Racism and Emotion in Social Movement Organizations*, 31 Canadian J. Socio. 55 (2006).

36 *See* Christine Tsang, Comment, *Uncovering Systemic Discrimination: Allowing Individual Challenges to a "Pattern or Practice,"* 32 Yale L. & Pol'y Rev. 319 (2021) (collecting cases); *see also* Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 632 (10th Cir. 2012) (collecting cases from the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits).

37 In some areas of law, statutes specifically cabin power of individuals to obtain anything more than the most narrow relief. *See*, *e.g.*, Prison Litigation Reform Act of 1995 § 802(a)(1)(A), amending 18 U.S.C. § 3626 (1996); *see generally* Calavita & Jenness, *supra* note 6 (on use of grievance practices to limit prisoner-rights claims). Title VII is not such a statute.

38 Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Justice Stevens in dissent in *Twombly* pointed out that the Court's standard would limit private enforcement of public law and was especially problematic for statutes like the Sherman Act, where Congress's decision to allow for treble damages and attorneys' fees showed "inten[t] to encourage . . . private enforcement of the law." *Twombly*, 550 U.S. at 587 (Stevens, J., dissenting). Title VII with its provision of attorneys' fees for prevailing plaintiffs reflects similar congressional intent.

of any discrimination and cite to evidence to back those pleadings up. This requirement becomes especially problematic in systemic discrimination cases, where discovery is often needed to access statistical data held by the employer.[39] For example, in one recent case, plaintiff Thomas Liu alleged that Uber's practice of terminating driver contracts based on star ratings by customers had a disparate impact on non-white drivers. Liu cited to social science sources suggesting that racial bias is common in customer ratings generally and to Uber's own stated earlier view that allowing tips through an app would discriminate against non-white drivers.[40] The district court dismissed Liu's complaint on the ground that Liu needed to allege facts supported by statistical evidence showing a racial disparity in terminated contracts by Uber. Liu appealed to the Ninth Circuit Court of Appeals, where he and also the EEOC, as amicus, argued that it was error to require this statistical data and that it is sufficient at the pleading stage for a plaintiff to "point to real-world conditions suggesting that the practice will result in a disparity" or that an impact is "plausibly happening as a result of the confluence of real-world conditions and the challenged policy."[41]

The complex law around filing requirements further pushes individuals to pinpoint specific, relational moments over more systemic sources of discrimination. Title VII requires that complainants file a "charge" of discrimination with the EEOC before filing a claim in court; in most states this must be done within 300 days after "the alleged unlawful employment practice occurred."[42] The official requirements for a charge are minimal—a charge is typically understood to be sufficient if it is in writing, names the alleged violator, and "generally allege[s] the discriminatory act[s]"—but the law of when a discriminatory act occurs emphasizes "discrete" acts of discrimination.[43] Some courts have held that even claimants who allege systemic discrimination must identify a "discrete" act of

39 *See* Bornstein, *supra* note 32, at 853–54 (noting that "while the overall picture may be inconclusive, one data point is clear: private lawsuits in which there is information asymmetry between plaintiffs and defendants—such as an employee's discrimination lawsuit against an employer or a consumer's antitrust lawsuit against a corporation—are the most likely to be impeded by the intensified pleading standard").

40 Liu v. Uber Techs., Inc., 551 F. Supp. 3d 988 (N.D. Cal. 2021) (describing Liu's complaint), *aff'd* Liu v. Uber Techs, Inc., No. 22-16507 (9th Cir. 2024).

41 Plaintiff-Appellant's Opening Brief, Liu v. Uber Techs., Inc., 9th Cir., No. 22-16507 (9th Cir. Mar. 27, 2023); Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, Liu v. Uber Techs., Inc., No. 22-16507 (9th Cir. Apr. 3, 2023).

42 42 U.S.C. § 2000e-5(e)(1). For states with a state fair employment practices agency, the "person aggrieved" must file both with the EEOC and the state agency, extending the period to 300 days from the 180 in a state without such an agency.

43 *See generally* Del. State Coll. v. Ricks, 449 U.S. 250 (1980) (involving allegation of discrimination in discharge); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (distinguishing *Ricks* as a case involving a "discrete" act of discrimination in contrast to a hostile work environment claim, where multiple acts contribute to an environment).

discrimination that occurred within the charge filing period and cannot obtain relief for acts that occurred outside the period.[44]

Even beyond these structural constraints, courts regularly reframe complainants' stories to emphasize specific individuals as exclusive causal sources of discrimination.[45] In *Ledbetter v. Goodyear*, for example, Lilly Ledbetter sued for pay discrimination under Title VII. She presented evidence of a number of sex-based incidents at Goodyear, including comments by a plant manager that the "plant did not need women, that [women] didn't help it" and "caused problems" and statistical evidence reflecting a pay disparity between her own pay and male managers with comparable records as well as testimony by other women regarding their discriminatory treatment at Goodyear.[46] The Supreme Court majority opinion, in contrast, zeroed in on actions of a single supervisor of Ledbetter's as the sole source of any discrimination.[47]

Indeed, employers and their advocates have long sought to reframe plaintiffs' systemic, pattern-or-practice claims as individualized ones, including through what is known as a "specific act requirement."[48] This requirement was firmly rejected by the Supreme Court in two early cases, *Teamsters* and *Hazelwood*, but it has lived on.[49] It reemerged in the

44 *See* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 157 (2d Cir. 2012) ("Discrete acts of this sort, which fall outside the limitations period, cannot be brought within it, even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period."); Lewis v. City of Chi., 560 U.S. 205, 214–15 (2010) (stating that "for disparate-treatment claims—and others for which discriminatory intent is required—that means the plaintiff must demonstrate deliberate discrimination within the limitations period"). *Cf.* Bazemore v. Friday, 478 U.S. 385 (1986) (holding that each paycheck received was an actionable wrong); *see generally* Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 363, 381 (2008) (discussing *Bazemore* and the Court's interpretation in *Ledbetter*). An employer's application of a specific practice that has a disparate impact on a complainant can fall within the filing period even if the employer's adoption of the practice falls outside that period. *Lewis*, 560 U.S. 205.

45 *See* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152 (2018) (describing the Court's narrowing of plaintiffs' stories in the area of harassment and discrimination). For another example of judicial reframing in a plaintiff's attempt to bring systemic claims, see Tristin K. Green, *The Juxtaposition Turn:* Watson v. Fort Worth Bank & Trust, 50 SETON HALL L. REV. 1445 (2020).

46 *See* Green, *supra* note 44, at 360–62 (describing the case and evidence presented).

47 *See id.* at 362–65 (describing several ways in which the opinion narrows the story of discrimination to a specific decision-maker).

48 *See*, *e.g.*, Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 508 (E.D. Va. 1968) ("But the plaintiffs have not shown any instance of a qualified Negro being denied employment or promotion to a supervisory position."); *see* Note, *Beyond the Prima Facie Case in Employment Discrimination Law*, 89 HARV. L. REV. 387, 392–93 (1974) (noting the "specific act requirement" in the lower courts and stating that the trend toward such a requirement was "waning"). *See generally* Green, *The Juxtaposition Turn, supra* note 45, at 1454–55 (discussing this argument and the Court's rejection of it).

49 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977) (describing testimony of individual instances of discrimination as "bolster[ing]" the statistical evidence); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

1980s in argument that disparate-impact theory could not be used to challenge employers' use of subjective decision-making practices.[50] This time, although the Supreme Court rejected the proposed limit on disparate-impact theory, it did so only as it simultaneously embraced the underlying line of thinking, which has continued on into other cases.[51]

II. COLLECTIVE AS RESPONSE TO INDIVIDUALIZING: THE PERILS OF ROMANTICIZING GROUP-BASED WORK

Much of the literature and advocacy pushing back on problems associated with individualizing turns to the collective as solution, and this collective is often framed as group-based activity. On the one hand, this is neither surprising nor alarming. People working together have been and will continue to be important, even crucial, for major reform movements. But romanticizing collective as working together, portraying working together as without costs or as the exclusive means of making change, may end up hindering the antidiscrimination project as a whole by undermining those individuals who want or feel they have to seek change on their own.

A. Collective as Group Activity

Understanding collective as group-based activity has a long and solid history in the United States, especially although not exclusively in the area of employment. This is, after all, the collective of union activity, where union members organize and act in solidarity. And it is also the language used in some federal statutes protecting workers' rights. When an individual brings a "collective action" under the Fair Labor Standards Act, for example, they trigger a notice and opt-in procedure, allowing other individuals to join in the group action.[52]

50 *See* Brief for Respondent at *6, Watson v. Fort Worth Bank & Tr., 487 U.S 977 (Nov. 27, 1987) (No. 86-6139) ("When the employment practices challenged are subjective, the basis of the complaint is that the subjective criteria have been applied in a discriminatory fashion."); Watson v. Fort Worth Bank & Tr., Transcript of Oral Argument (defendant arguing that "key to the distinction between *McDonnell Douglas* and *Griggs* is that, on the one hand, you have these objective artificial rules which disqualify large groups of people, regardless of consideration of their individual qualifications, where, with *McDonnell Douglas*, you have a consideration of qualifications"), https://www.oyez.org/cases/1987/86-6139. *See generally* Green, *The Juxtaposition Turn, supra* note 45, at 1454–58 (describing defendants' arguments regarding a "specific incident" requirement in systemic cases and efforts to turn disparate impact cases into individualized disparate treatment cases).

51 *See generally* Green, *The Juxtaposition Turn, supra* note 45 (discussing the problems with juxtaposing systemic disparate treatment and disparate impact theories around intent).

52 Fair Labor Standards Act, 29 U.S.C. § 216(b) (permitting a plaintiff to bring suit on behalf of themself and "other employees similarly situated").

Class actions, too, are often understood as group-based in the sense that several named plaintiffs work actively together with lead attorneys to represent members of a broader class.[53]

Indeed, when we think of "collective" actions, we tend to assume that the two aspects of the problem of individualizing—isolating and atomizing—always go hand in hand and that measures to bring people together solve both aspects of the problem. This makes sense because class actions and government actions, at least in the civil rights context, have historically asked for broader institutional reform.[54] When it comes to employment discrimination, claims brought as class actions and government actions have also often involved systemic theories; they have been cases asserting patterns or practices of discrimination, alleging that discrimination is "the regular rather than the unusual practice"[55] within an organization, or cases challenging employers' use of specific practices as having a disparate impact on members of certain groups.

There is no question that collective as group activity has been of longstanding importance in advocating for change both in the United States and abroad.[56] Indeed, a view of collective as group activity has led to important scholarship and advocacy in the legal field aimed at reversing isolating so that individuals can come together to agitate for redress and change. Some of this recent advocacy, for example, has involved efforts to amend class action rules and to provide other collective action group-based possibilities.[57] Recent

53 Class actions require named representative plaintiffs. In theory, a single representative plaintiff can be sufficient as a named representative, but for typicality and other strategic reasons, several representative plaintiffs usually lead litigation together on behalf of class members. For more on the softer line between class actions and collective as group-based activity, see *infra* notes 101–102.

54 *See* David Marcus, *Public Interest Class Action*, 104 Geo. L.J. 777 (2016); *see also* Abram Chayes, *Foreword, Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4 (1982); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 576 (1997) (noting the "critical role" that class action procedure plays "in civil rights litigation"). Public interest groups have also been intimately involved in these cases historically. Nancy Maclean, Freedom Is Not Enough: The Opening of the American Workplace 85 (2006); Karen O'Connor & Lee Epstein, *The Importance of Interest Group Involvement in Employment Discrimination Litigation*, 25 How. L.J. 709, 717–18, 724–25 (1982).

55 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

56 Research on social movements further stresses working together as key to movements' power. On social movements and working together, see Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Oraganizing in an Era of Political Inequality*, 130 Yale L.J. 546 (2020) (emphasizing this importance).

57 Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. Rev. 2403 (2022) (arguing in favor of federal legislation that would overturn several Supreme Court decisions, including those limiting class actions and forcing arbitration); Arthur Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293 (2014). On class actions and working as a group, see, e.g., Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 338 (arguing that class actions delegate "to private individuals the power to lead a diffuse group in a collective endeavor"); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 921 (1998) (analogizing class actions to trade unions and congregations coming together to problem solve).

efforts also include combatting the use of nondisclosure agreements[58] and arbitration agreements, which isolate and stifle voices, and specifically combatting the Court's arbitration decisions that allow employment agreements to squelch class action participation by employees entirely.[59]

To say that it is understandable that group-based activity is often seen as intertwined with broader stories and change is not to say, however, that seeing it exclusively in that way is unproblematic. Just as one can overemphasize individual heroes in understanding historical movements for change, so too can one overemphasize group-based action. Indeed, there is a danger in championing collective as group-based activity, in suggesting that group-based activity is the best-course or exclusive option for seeking collective change.

Sara Ahmed's recent book *Complaint!* is one example of what I see as putting collective as group-based activity on something of a pedestal.[60] Her book, which focuses on complaint in a university setting, is an invaluable resource, especially for thinking about complaints as relational, contextual efforts and as real-world experiences rather than simply as papers filed in judicial or other proceedings. What's more, she perceptively and powerfully captures the many ways that complaints can be (and are) contained by institutions, what she calls "institutional mechanics."[61] I rely on her descriptions of experiences of complaint throughout this essay and will continue to return to her work as a resource in thinking about complaint.[62] Nonetheless, Ahmed emphasizes the importance of working in groups (against isolating), while paying little attention to the importance of allowing individuals to tell broader stories (against atomizing). In an early passage in the book, for example, Ahmed describes a group of students who had tried to put forward to their university a "collective complaint" of harassment. She notes that the university insisted that the students "individually make formal written complaints."[63] Ahmed highlights her concerns

58 On NDAs and secrecy, see Kotkin, *supra* note 25. These efforts aimed at confidentiality in settlements and arbitration reach beyond collective as group-based activity by recognizing that even just learning about others' experiences and concerns can generate increased agitation for change (in addition to contributing to credibility). But even as these efforts work to remove a barrier to seeing each other in collective by amplifying voices and stories, they largely target isolation and not atomization of the stories themselves.

59 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amends the FAA to bar pre-dispute arbitration agreements and joint action waivers in cases involving sexual assault and sexual harassment claims. Pub. L. No. 90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401–402); *see also* Michael Z. Green, *Expanding the Ban on Forced Arbitration to Race Claims*, 72 U. Kan. L. Rev. 455 (2024).

60 Ahmed, *supra* note 6.

61 *Id.* at 6.

62 I am indebted to Ahmed's work well beyond this essay. I draw more extensively from *Complaint!* and Ahmed's other work in a forthcoming project on people's experiences in agitating for change and the phenomenon of institutional muffling of complaint.

63 Ahmed, *supra* note 6, at 5.

about forcing individuals to isolate from a group by explaining that the university was "asking them to give up their anonymity, to make themselves even more vulnerable than they had already made themselves."[64] This point importantly shows how working in a group can be useful and protective for individuals, who might feel (and be) vulnerable on their own. But one might also be concerned about making space for the stories that would be told within those individualized complaints. Proceeding as a group may in this instance have allowed the women to more easily capture the institutional environment and structural causes of disadvantage and discrimination. By forcing the women to file individual complaints, the institution was depriving them of protection *and also* constraining the stories they were allowed to tell. And yet this latter is a point Ahmed does not make.

Ahmed comes back to collective as a powerful response to the many difficulties of complaint in the third part of the book. Although at times Ahmed here describes collective more broadly than group-based activity (as knowing that others are working on a similar cause, for example), she regularly returns to physical getting together and working together. She describes one woman of color who submitted a "collective complaint" within her institution, a complaint "about the impact of sexism and racism on the research culture of her department."[65] Ahmed emphasizes, however, not the broader story that was told through this complaint but the working together that was done to build and sustain it.[66] She says: "To create a document that can be recognized as a complaint is laborious: it requires considerable time as well as effort. You need to combine your experiences but also render that combination legible in a form that is not your own. You need to communicate with each other, swinging back and forth."[67] Even as she acknowledges the exhaustion of working together, she holds up the working together as a sustaining enterprise for all. She quotes a woman who worked in a "three-women collective":

> It was exhausting and there were three of us doing it collectively, sharing out the emotional load, supporting each other. I was doing quite a lot of the emails and things, then, when I was flagging a bit, [another woman] took that on, and [the third woman] was in the background bolstering and supporting.[68]

64 *Id.*

65 *Id.* at 277.

66 *Id.*; *see also id.* at 278 (quoting a woman who worked closely with others in drafting a complaint); *id.* at 280 (describing a "three-women collective" who "together submit[ted] a formal grievance"); *id.* at 281 (describing a collective of "four women postgraduates"); *id.* at 281 (describing her own experience of "being part of a complaint collective").

67 *Id.* at 278.

68 *Id.* at 280.

Ahmed says that "by working together, you share the load. You give each other support. And each of you can do the work that is attuned to the skills you have, coming to foreground or being in the background, depending on what is being asked of you."[69]

In addition to her own chapter on collective complaints and complaint collectives, Ahmed includes a co-authored chapter titled "Collective Conclusions."[70] The authors of this chapter are some of the students who came to Ahmed having already formed their collective group; Ahmed became part of that group and cites its members as her inspiration for the project and the book. They explain in this chapter, "There is no single turning point which marked the shift from working alongside one another as peers and fellow students, toward friendship, toward collectivity."[71] They write, "Collectivity was a way to share the cost of complaint. Rather than each of us being on her own, we could stand together."[72] "[W]e gathered around each other. Care was always prioritized over complaint work."[73] "[T]urning toward each other," they "started having meetings," "started writing together."[74]

It is easy to come away from *Complaint!* with a strong desire for group-based activity, with a feeling that having others to work *with* and not just *for* is essential to making change. To be clear, Ahmed is up front about why she is drawn to collective as group-based activity (the students' collective complaint inspired her project, after all), and she does not always define collective so narrowly. Indeed, my concern is not with Ahmed's personal attraction to group-based activity as response to the problems with institutional response to complaints, but rather with a lauding of collective as group-based activity that is woven together into our histories of social movements across fields, into our advocacies, and also into media and our own desires for social connection and support. This emphasis risks turning group-based activity from an option (often a wise option strategically) to something of a strong preference, even a requirement. And lauding collective as group-based activity (and not merely personally preferring it) may serve to limit our efforts and our efficacy in those efforts at change.

B. Collective Complaint: Problems with Romanticizing Collective as Group Activity

Collective as group activity is not itself problematic, but confining our understanding of collective complaint to group-based activity is. How so? In this section, I explore some

69 *Id.* at 280–81.

70 *Id.* at 261.

71 *Id.*

72 *Id.* at 266.

73 *Id.* at 267.

74 *Id.* at 263–64. The authors of the chapter do also emphasize the larger story that they wanted to tell. They explain, for example, "[O]ur collective was formed around a shared desire to build an understanding of the structures of sexualized abuses of power in our department and an insistence on naming and making visible the systematic harm that it caused." *Id.* at 264.

of the reasons that overemphasizing collective complaint as group-based activity can hinder our (collective) efforts at meaningful change, both narratively in what it says about complainants and their complaints and practically in downplaying or ignoring the downsides to group complaint.

1. Narrative, Identity, and Epistemology: Undermining Individuals Who Seek to Make Collective Change—Too much emphasis on collective as group activity can affect how we see individuals who do not act within groups and also how we see their stories. The authors of the collective complaint in Ahmed's *Complaint!*, for example, contrast their collective, group-based work with resisting "quietly, each of us on her own."[75] In doing so, they present themselves as having little voice and little impact without the group to support them. They describe themselves before coming together as learning to "study alongside it, to quietly try to avoid the invasive reaches."[76] They "withdrew." Or they "participated," but without effort to make substantial, if any, change. And they describe the origin of their collective—and implicit here their power and voice—"in this turning toward each other, in this gathering together not only with one another but for one another."[77]

Yet individuals regularly do complain on their own, whether by choice or by necessity, and these individuals sometimes seek to tell stories that capture broader environments and that demand change for those beyond themselves. The plaintiffs in many of the cases that led to the Supreme Court decisions on harassment and discrimination went it alone and sought to tell broad stories for change. Lilly Ledbetter, in her book *Grace and Grit*, describes her hope when she brought suit against Goodyear Tire that her case would mean that "the women working at Goodyear and other places would be safe from being harassed and underpaid."[78] Clara Watson also sought to hold the bank at which she worked responsible for race-based hiring and promotion practices that applied to other Black employees as well as herself.[79] The list goes on.[80]

Romanticizing group-based work leaves these complainants out in the cold and can also play into neoliberal narratives that undermine complainants. Individuals who seek

75 *Id.* at 262–63.

76 *Id.*

77 *Id.* at 263–64.

78 Lilly Ledbetter with Lanier Scott Isom, Grace and Grit: My Fight for Equal Pay and Fairness at Goodyear and Beyond 200 (2012).

79 Watson v. Fort Worth Bank & Tr., 487 U.S. 977 (1998). Indeed, Watson sought to prove a pattern or practice of discrimination as well as disparate impact, but she was not permitted to proceed with her pattern-or-practice claim. *See generally* Green, *The Juxtaposition Turn, supra* note 45 (describing the lower courts' treatment of Watson's systemic disparate treatment claims).

80 *See* Green, *Was Sexual Harassment Law a Mistake, supra* note 45 (providing additional cases where plaintiffs framed their cases more broadly than the Supreme Court did).

institutional change often face derision when they do.[81] As Ahmed so deftly captures, they are labeled "whiners" and characterized as people who are privileged, seeking advantage from their position, neoliberal, pushing for themselves alone rather than for others, and in that way fundamentally self-interested.[82] They are described as seeking to bring someone down, sometimes an entire institution, to make space for themselves. They are trouble-makers, not team players.

Indeed, there is an increasingly hostile overlay of suspicion around individuals bringing complaints and a corresponding push by the courts (and sometimes Congress) to limit what individual complainants can accomplish. In legal cases involving employment discrimination, plaintiffs are frequently characterized as bringing suit for "mere trifles," and courts have built up legal doctrines to protect employers from liability for proven discrimination when the harm is perceived as not sufficiently material or severe.[83]

Holding group work up as an idealistically favored if not essential mode of "collective" response risks undermining individuals in their efforts to act for change to institutional practices, norms, cultures, and structures rather than merely for their own individualized relief.[84] One way of thinking about this narrative downside of romanticizing collective as group-based activity is through the lens of epistemology.[85] We risk sending a message that individuals who experience discrimination are not credible when it comes to structural and system-wide sources of discrimination within work organizations, that they must be part of a group in order to be effective seers and advocates for change. In this context, people who experience discrimination and have concerns about structural sources of that discrimination are ignored when they do speak ("testimonial quieting") and may self-censor so that their voices are never heard ("testimonial smothering").[86]

81 Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining!: Derogating the Victim*, 27 Person. & Soc. Psychol. Bull. 254 (2001); Brenda Major & Cherly Kaiser, *Perceiving and Claiming Discrimination, in* Handbook of Employment Discrimination Research: Rights and Realities 285 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); *see also* Berrey et al., *supra* note 18, at 265 (referring to behavior denigrating plaintiffs while claiming to respect rights as "the right right; the wrong plaintiff" and noting that "[i]n virtually none of the cases we examined through interviews did defendants acknowledge that a specific plaintiff had a valid claim").

82 Ahmed, *supra* note 6 (examples throughout); Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 279 (2009) (noting that Black women who complain can be easily dismissed as "complainers who want special, unearned favors"); Berrey et al., *supra* note 18.

83 The Supreme Court recently rejected one such doctrine that had developed broad favor in the lower courts. *See* Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024).

84 Deborah Dinner, *Beyond "Best Practices:" Employment Discrimination Law in the Neoliberal Era*, 92 Ind. L.J. 1059, 1067 (2017) (describing "[n]eoliberalism's celebration of individual agency in the market" and its effect on Title VII as an "efficiency-maximizing statute").

85 Patricia Hill Collins, Intersectionality as Critical Social Theory 120–54 (2019) (drawing on epistemology and considering epistemological authority and resistance).

86 *Id.* at 133–34 ("Silencing and self-censorship go hand in hand—people who are repeatedly ignored learn the protections of seeming acquiescence.").

2. Practically: Missing Difficulties of Group-Based Complaint—What makes this undermining of individual efforts at collective change even more pernicious is that working within groups can be difficult. Just finding and talking with others can be time consuming. One student who submitted a complaint with others explained this to Ahmed:

> I think the laborious part of it was trying to translate our individual and collective experience into something that institutionally made sense and [could] be recognizable as a complaint. In terms of what we did, we Skyped a lot and we emailed a lot and we swung back and forth between sharing our stories or being like, this awful thing happened and this awful thing happened and this awful thing happened, and then have to come back and work out how to put that on paper.

This is work, work that can be burdensome in time and personally in emotion and connection.[87]

The perceived threat to the institution may also heighten with a group, which may ratchet up derision and risk of being seen as a troublemaker.[88] For the same reasons that groups can wield more power, they can also be targeted as trying to take the institution down.

Joining in solidarity groups can also operate to temper voices and not always to energize and amplify them. Individuals in groups can talk each other out of complaining outside of the group just as they can embolden each other to file formal complaints. Sometimes this dynamic is subtle. Coming together and talking through complaints can be cathartic, so much so that promises to take action may wither over time. This possibility should not surprise us; group-based action has long been used as a method of tempering radical calls for change.[89]

And race and other aspects of identity are also relevant in group activity. Working in groups can result in othering, just as members of some groups have historically been

87 Ahmed, *supra* note 6, at 278; *see also* Combahee River Collective, The Combahee River Collective Statement (1977), https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/ (describing the difficult internal work of the collective).

88 Although admittedly this seems to work both ways: Individuals risk derision if they are not part of group that shows greater power and yet participating as part of group can be perceived as having power and risks derision precisely because that power heightens fear on the part of institutional players.

89 Diana S. Reddy, *After the Law of Apolitical Economy*, 132 Yale L.J. 1391, 1396 (2023) (noting that "liberal policymakers argued that a rationalized, legal process for collective bargaining would promote industrial peace, channeling the worker radicalism that had so recently halted production in factories across the country"); *id.* at 1399–1416 (describing this history).

excluded from formal organizing.[90] Berrey and colleagues relay that many of the complainants with whom they spoke expressed disappointment about how little support they received from coworkers.[91] Heroes may see themselves as outsiders (even as they identify collectively in their understanding of problems and solutions); indeed, they may *be* outsiders—oddballs, lone wolves, and misanthropes—making them more willing to disrupt systems and structures than those who see themselves as insiders, as part of a group within the institution.[92] Moreover, research suggests that distancing (holding oneself away from others, being hesitant to trust) is more common than many might like to think.[93]

What all this means is that individuals who are willing to agitate for change are crucial to the larger project of reimagining systems, cultures, and practices that discriminate, just as groups are. Individuals can present an alternative way of opening eyes to structural problems and solutions, and we make a mistake if we laud collective as group-based action to their detriment.

III. SITUATING COLLECTIVE ON BROADER FOOTING

It is possible to imagine collective broadly. Merriam-Webster defines "collective" simply: "of, relating to, or being a group of individuals."[94] In social psychology, collective action is defined as "action taken on behalf of a group or groups in order to influence their status, conditions, and/or identity."[95] As these and other definitions suggest, seeing oneself within

90 Collins, *supra* note 82, at 204–25 (describing activism beyond formal organized action).

91 Berrey et al., *supra* note 18, at 186 (describing plaintiffs feeling "betrayed by their colleagues' lies").

92 Indeed, agitation for change is relational. For discussion at the level of movements, see, e.g., Ellen Berrey, *Making a Civil Rights Claim for Affirmative Action: BAMN's Legal Mobilization and the Legacy of Race Conscious Policies*, 12 Du Bois Rev. 375, 382 (2015) ("Those in power impose certain interpretations, constructs, forms of knowledge, and terminology as common sense."). A similar problem comes up in the context of using community organizations to reach marginalized groups. Community organizations tend to work with savvy people who are already connected to resources, and these are often not the most vulnerable individuals.

93 Monica C. Bell, *Safety, Friendship, and Dreams*, 54 Harv. C.R.-C.L. L. Rev. 703, 722–24 (2019) (citing some of the research indicating that "interpersonal trust is weakened in the context of segregation and disadvantage").

94 *Collective*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/collective (last visited May 31, 2024).

95 Stephen T. La Macchia & Winnifred R. Louis, *Crowd Behavior and Collective Action*, in Understanding Peace and Conflict Through Social Identity Theory 89–104 (Shelley McKeown et al. eds., 2016). The term "collective" is used across a variety of fields and in varying ways. It has gained special prominence in research and scholarship on social movements, where group-based activity is also highlighted. My goal here is not to pinpoint a specific meaning but rather to show that collective is not limited to group-based activity that involves physically working together.

a broader institutional context, including as a member of a group, and seeking change that benefits others can be collective even if one is not actively working in or as a group.[96] I have described the #MeToo movement's power as collective in the force of its shared experience (allowing women to see themselves in a group and others to see them that way as well) and in its calls for change, calls for dismantling systems, practices, and cultures that are sexist and that favor men over women and certain men and women over others.[97] Patricia Hill Collins, in her book *Black Feminist Thought*, deliberately includes within her understanding of collective those individuals who act from their experience within a group for the social justice of a group, even as their individual experiences of that collectivity may vary considerably.[98] And sociologists Joanne Martin and Debra Meyerson describe "individual acts of nonconformity" to masculinized behavioral norms as a collective of "disorganized coaction."[99] These broader visions are not new or groundbreaking; my point is that collective is not limited to group-based activity—it never has been—even if it is sometimes portrayed as such. How we see ourselves, what we see as problematic,

96 Social movement research and theory similarly uses a broader frame. *See* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Ann. Rev. Soc. 611, 614 (2000) (defining "collective action frames" as "action-oriented sets of beliefs and meanings that inspire and legitimate the activities and campaigns of social movement organizations"). This work increasingly draws on social identity theory and is situated across fields of action and resistance. *See*, *e.g.*, Torsten Masson & Immo Fritsche, *We Need Climate Change Mitigation and Climate Change Mitigation Needs the "We": A State-of-the-Art Review of Social Identity Effects Motivating Climate Change Action*, 42 Curr. Op. in Behav. Sci. 89 (2021) (outlining a "social identity model pro-environmental action"); S. Alexander Haslam & Stephen D. Reicher, *When Prisoners Take Over the Prison: A Social Psychology of Resistance*, 16 Personality & Soc. Psych. Rev. 154 (2012) (developing a "social identity model of resistance dynamics").

97 Tristin K. Green, *Feminism and #MeToo: The Power of the Collective, in* The Oxford Handbook of Feminism and Law in the U.S. (Deborah Brake et al. eds., 2023).

98 Collins, *supra* note 82, at 31.

99 Joanne Martin & Debra Meyerson, *Women and Power: Conformity, Resistance, and Disorganized Coaction, in* Power and Influence in Organizations 311 (Roderick M. Kramer & Margaret A. Neale eds., 1998). Martin and Meyerson describe the collective aspect of the women's behavior this way:

> These women did not, to any significant extent, coordinate these acts of confrontation. . . . [They] did engage in individual acts of nonconformity, however, and these acts stemmed from a shared problem: being not men in a masculine working environment. Therefore, to some extent, their uncoordinated efforts had a common effect of raising gender awareness. It was as if they were, each working separately, trying to kill sex discrimination with a thousand pin pricks. This uncoordinated reaction by a group of individuals who share a social identity is an example of what we term disorganized coaction.

Id. at 342.

what we seek as change can be collective as much as individual; we need not be tied to stories that remove individuals from broader context.[100]

With both aspects of individualizing—isolating and atomizing—in mind, collective as response might thereby be seen as a project of facilitating group-based activity *and* of supporting individuals in telling broader stories and seeking broader assessments and change. Some recent efforts aimed at the legal system to build and preserve capacity of individuals to bring suits enforcing statutory and public law rights can be understood in this latter vein. Myriam Gilles and Gary Friedman argue, for example, that the new *qui tam*, a trend across several states, pushes rightly in this direction.[101] David Marcus's work exploring group rights in institutional reform litigation is also aligned with efforts aimed at the atomizing aspect of individualizing, even as it also illustrates how and when class treatment is warranted.[102] Thinking specifically about collective action as a response to atomizing in the law of complaint under Title VII, we might consider targeting many of the ways that law currently atomizes complaints through class and pleading requirements, enforcement of arbitration clauses, evidentiary rulings, and retelling of stories in judicial opinions.

Once we see atomizing as an independent aspect of the problem of individualizing, we may see fresh means of intervening in how stories are told and even in how situations are experienced or perceived. Seeing the problem of atomizing can open our minds to broader sources of discrimination as we go about our daily lives, and it can affect our reflections on these experiences, our conversations with others, and our complaints. In line with the sociolegal tradition of understanding law to operate both at the level of legal system—substantive law and enforcement systems—and also in on-the-ground perceptions and interactions, I highlight space where we know atomizing occurs and where collective response holds promise, but where that promise has yet gone largely untapped: in the relational telling of stories of discrimination within work organizations and the EEOC.

A. The EEOC as Guide

The EEOC holds substantial power in its interaction with complainants about their experiences of discrimination, from a complainant's first moment with the intake process

100 Nor am I alone in cautioning against romanticizing movements or actions, group based or otherwise. Historian Barbara Ransby cautions against romanticizing in her comments on the Combahee River Collective Statement, noting that when we talk "empowering, important historical moments," we can often be looking for "blueprints" or "roadmaps" when we "have our own work to do." Keeanga Yamahtta-Taylor, How We Get Free: Black Feminism and the Combahee River Collective (2017).

101 Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for Enforcement of Group Rights in a Hostile Era*, 98 Tex. L. Rev. 489 (2020). There is a vast literature on private enforcement and hybrid systems where both the government and private citizens have a statutorily provided role to play in enforcement. *See* Bornstein, *supra* note 32 (surveying some of this literature).

102 David Marcus, *Group Rights in Institutional Reform Litigation*, 97 Notre Dame L. Rev. 619 (2022).

through to the formal filing of a charge with the agency that then triggers an agency investigation, and then through that investigation. One way to reduce atomizing would be for the EEOC to better signal at the intake/charge stage that discrimination in organizational policies and practices is included in the statutory prohibition of unlawful employment practices by employers under Title VII. Currently, the discrimination charge form asks only for a description of discrimination through prompting language: "The particulars are."[103] The EEOC might amend this form to allow complainants to indicate concerns about systemic discrimination. A box to check after describing discrimination experienced would easily serve this signaling function: for example, "Do you have reason to believe that the discrimination that you experienced relates to systems, structures, practices, or cultures within your work organization, or otherwise is part of a pattern or practice of discrimination?"[104] And then allowing someone to elaborate if they desire.

This openness to more structural sources of discrimination (which could translate into systemic legal claims) should extend to the intake process more generally. For those who file complaints through the EEOC website, an initial "inquiry" currently involves a series of questions about the employer that leads complainants to think narrowly about acts of discrimination. The form asks:

> On what day did the discriminatory action occur? For example, if you claim you were denied a promotion on April 19, 2017, because of your gender, then enter "4/19/2017."
>
> If you allege more than one discriminatory action, please enter the most recent date. For example, if you claim you are being continually harassed at work because of your race, enter the date of the most recent act of harassment.[105]

An inquiry that expands the frame would include systemic discrimination as well as harassment: for example, "If you claim you are otherwise experiencing ongoing discrimination that is systemic within your workplace or the organization, then enter your most recent day of work."

103 *Charge of Discrimination*, EEOC, https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf (modified from uppercase in original).

104 Similar efforts to open initial conversations to structural causes and broader frames are under way in the clinical legal education setting at some schools. *See*, *e.g.*, Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 Cal. L. Rev. 201, 217–19 (2016) (describing an openness to structural sources as "deep critique" in the educational setting). Of course, practicing lawyers talking with clients can do the same.

105 *File a Complaint* ("Timeliness" section), U.S. Equal Emp. Opportunity Comm'n, https://publicportal.eeoc.gov/Portal/Forms/NewEditForm.aspx?templateId=160&userKey= (last visited May 31, 2024).

Changes like these at the EEOC charge stage would provide the EEOC with more information about possible systemic discrimination (furthering the stated EEOC goal of focusing on systemic discrimination[106]) at the same time that it reframes how people see themselves and their experiences of discrimination within work organizations. The openness could continue into the intake interview, where EEOC officers talk with a complainant about what they experienced and how and whether it amounts to discrimination in violation of the law.

B. Within Organizations and Beyond: Prefigurative Practice in the Law of Complaint

Resistance to atomizing can also emerge well before a charge with the EEOC and can involve action both by individuals who complain and by those receiving complaints within organizations. Individuals, in short, might insist on broader stories, and human resources officers and others who work with people experiencing discrimination might undertake broader assessments and devise structural solutions, not just individualized ones. In thinking about this possibility, I urge imagining a law of complaint in practice that builds from complaint as collective (at least in some cases), a process of what is sometimes called "slow law" even with its upending-systems goals.[107] Prefigurative practices in this area may have substantial potential precisely because the law itself remains ambiguous and ultimately endogenous, as law and organization scholars have long pointed out.[108]

Prefigurative practices are understood as efforts at social change through reimagining practices in people's lives rather than through transforming law and other institutions through legislation, litigation, or electoral politics. Prefigurative practices reorder and open

106 Press Release, *EEOC Adopts New Strategic Plan*, EEOC (Aug. 22, 2023), https://www.eeoc.gov/newsroom/eeoc-adopts-new-strategic-plan.

107 *See* Davina Cooper, *Prefigurative Law Reform: Creating a New Research Methodology of Radical Change*, CLT (Mar. 3, 2023), https://criticallegalthinking.com/2023/03/03/prefigurative-law-reform-creating-a-new-research-methodology-of-radical-change.

108 *See* Edelman, *supra* note 19, at 12 (developing a theory of "legal endogeneity," understood as a "process through which the meaning of law is shaped by widely accepted ideas within the social arena that law seeks to regulate"); Frank Dobbin, Inventing Equal Opportunity (2009); *see also* Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 Ann. Rev. L. & Soc. Sci. 653 (2010). Much of this work has focused on understanding ineffectiveness of law in addressing discrimination and the role of courts and lawyers "who accept ideas about compliance and rational governance that evolve within regulated organizations," Edelman, *supra* note 19, at 13, but the same theory could operate the other way, with ambiguity of law allowing people to develop more effective processes within organizations that transform law and its expectations for organizations. Edelman acknowledges this. *Id.* at 25. *See also* Calvin Morrill et al., *Covert Political Conflict in Organizations: Challenges from Below*, 29 Ann. Rev. Socio. 391, 396 (2003) (citing "noncooperation with respect to organizational rules and/or superiors as a common technique of sabotage by circumvention"); *id.* at 400 (discussing collective dimensions of covert political conflict even as the efforts are often described by others as "the work of isolated misfits").

possibilities through the act of experiencing "as if."[109] Often the state is described as outside the movement rather than as the target of the movement. Recent work, however, notes that some actors practicing prefiguration today are "using legally-inflected tools" to enact their own desired understanding of legality.[110] Legal scholars and sociologists Amy Cohen and Bronwen Morgan offer the term "prefigurative legality" to describe what they call "efforts to use the language, form, and legitimacy of law to imagine law otherwise—and through various kinds of direct actions rather than primarily through appeals to courts, legislators, or other state officials."[111]

It is worth pausing to acknowledge that much of the early theorizing about prefigurative practices envisions people working together, much as collective has been envisioned in response to the individualizing of the law of complaint. The term "prefiguration" is often attributed to Carl Boggs, who in his work in the late 1970s drew on structural reformism to argue against instrumental rationality and hierarchical forms of authority.[112] He described "local, collective small-scale organs of socialist democracy (e.g., workers' councils, soviets, action committees, neighborhood associations) that can give expression to the spontaneous and total energy of popular struggles."[113] And prefiguration continues today to be featured in collective organizing activity as an example of horizontally facilitated, grassroots social action.[114]

But the idea of prefigurative practices is not limited to group-based activity. Cohen and Morgan reflect on PARK(ing) Day, a practice of people taking over parking spaces for a variety of public offerings and uses, as prefigurative practice that involves reimagining property relationships without requiring group-based activity.[115] In their review of Amelia Thorpe's book on PARK(ing) Day, they explain: "Thorpe argues, when people come

109 *See* Davina Cooper, Everyday Utopias: The Conceptual Life of Promising Spaces 32 (2014) ("Epistemologies of the margins are not simply intended as perspectives from which to critique mainstream, hegemonic forms; they also open up possibilities for exploring what other kinds of forms could be like.").

110 Amy J. Cohen & Bronwen Morgan, *Prefigurative Legality*, 48 Law & Soc. Inq. 1053, 1054 (2023) (reviewing Amelia Thorpe, Owning the Street: The Everyday Life of Property (2020)).

111 *Id.* Although Cohen and Morgan do not focus on understandings of collective, their discussion of Thorpe's work and prefigurative practices more broadly illustrate the possibility of individually driven yet nonetheless prefigurative practices.

112 *Id.* at 1055–58 (describing Boggs's and others' work).

113 *Id.* at 1056.

114 *See*, *e.g.*, Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 Yale L.J. F. 869, 878 (2023). The term "prefiguratism" often appears in movement scholarship, especially on grassroots movements. *See* Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 Fordham Urb. L.J. 295, 323–24 (2016); Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. Rev. 80 (2022).

115 Cohen & Morgan, *supra* note 110. For more detailed analysis and rich description of PARK(ing) Day beyond prefigurative legality, see Amelia Thorpe, Owning the Street: The Everyday Life of Property (2020).

together on the street even without 'a clear or unified message,' they advance a collective claim about 'the kinds of activities for which the street should be used, and the kinds of processes through which these should be decided.'"[116] The actions and goals of those participating are collective, even as the individuals act on their own.[117]

What would prefigurative practices of this sort look like in the context of complaint? A complaint of discrimination is understood as a legal process, albeit one that is often today experienced most powerfully within the work organization itself through grievance procedures. The law does not require people to complain within their work organization before filing an administrative charge, and yet this is a space where prefigurative work may be most effective because it is the place where stories are often first aired and therefore first meet the pressure of atomizing. One prefigurative practice might involve people insisting on telling bigger stories in this moment. Complainant employees who supect they are experiencing sex-based discrimination at work, for example, might probe for ways the organization keeps women down, demanding structural and cultural change within the organization and beyond rather than (or in addition to, depending on the circumstances) calling for punishment of specific individuals. Insisting that one is "complaining" every time they seek structural or even cultural solutions, in other words, "plays" with the idea of complaint in a way that can affect how complaint is understood.[118] It can serve, as one commentator recently put it, as "counter-design" to existing systems.[119]

Insisting on broader stories might also push against use of confidentiality as an institutional means of cabining complaint. By framing complaints more broadly to involve organizational influences and assessments, and by strategizing for change at the level of the organization, complainants can insist on more open conversation about the problems they see, seeking not punishment of one or several but change in how things are done at

116 Cohen & Morgan, *supra* note 110, at 1059.

117 Davina Cooper similarly undertook prefigurative work in her the Future of Legal Gender project in the United Kingdom. Cooper explains prefigurative practices outside grassroots, group-based organizing to involve "rehearsing or anticipating a sought-after future by enacting it in the present, usually on a small scale." *See* Davina Cooper et al., Abolishing Legal Sex Status: The Challenge and Consequences of Gender-Related Law Reform (Future of Legal Gender Project [2018–2022]: Final Report), https://www.kcl.ac.uk/law/research/future-of-legal-gender-abolishing-legal-sex-status-full-report.pdf. In this project, Cooper and colleagues presented decertification of gender as a legal proposal rather than as hypothetical, generating debate about its consequences, benefits, and drawbacks in real time rather than as future possibility.

118 Cohen & Morgan, *supra* note 110, at 1054 (noting that "actors practicing prefiguration today are experimenting with state forms and institutions, including by playing with legal concepts such as property and ownership"); *see id.* at 1054 (describing Amelia Thorpe's book *Owning the Street* as about "how temporary, bounded moments can reveal long-standing efforts to reimagine a social order (and here its rules of property) in common—and in ways that confound conventional categories for legal action").

119 Andrew Mamo, Dispute System Counter-Design 55 (unpublished manuscript) (on file with author) (noting that counter-design "is not a process of construction directed toward the implementation of a new dispute resolution system; it is a steady drip, drip, drip that has the potential to etch new pathways through the conflict terrain").

the institution.[120] They can call for more public conversations about structural problems, leaving individual actors and their identities to the margins. What is often framed as a micro-relational, "personal" problem in this way becomes an institutional one for which confidentiality concerns are less legitimate.

Prefigurative practices, like complaint, are relational and should therefore also involve people who are understood to be taking in and "resolving" complaints in addition to the complainants themselves. People who go into the field of anti-racism and diversity, equity, and inclusion often profess they do so to make change, to help institutions see problems and reorient themselves toward better practices, and research suggests that "compliance professionals" generally have some influence in how the law is interpreted and experienced within organizations, ultimately with influence on court decisions as well.[121] A vision of their own action as problem solving at the institutional level would help them resist their own disempowerment through individualizing. Complaints need not be seen as a sign of failure in doing their job but as an opportunity for ongoing efforts to improve, to consider what the organization can do better to further equality and nondiscrimination and to take meaningful action to that end.

We could also think about physical (including virtual) spaces of complaint. Where does complaint occur and why does it occur in that space? Building spaces where people might tell broader stories could facilitate the kinds of group-based activity that are key to social movements, especially linking across not just identities but mechanisms of injustice.[122] Indeed, building power for individuals to envision and agitate for structural change is consistent with views that challenge monolithic notions of groups.[123] The project for the individual in this view is to challenge systemic sources of inequality, not to imagine the individual as occupying the same footprint as other members of a group.

Of course, isolating and atomizing are deeply interrelated, and class actions require individuals to act as class representatives. Targeting atomizing can come full circle to enable more individuals to consider undertaking work involving systemic discrimination as well as work aimed at upending subordinating systems and practices beyond discrimination. Berrey and colleagues tell a story of one plaintiff in their study who served as class representative in a case against a large retail chain. Upon hearing of a discrimination lawsuit concerning the store's trucking unit, she contacted the lawyer to pass along her own experience when she asked about a trucking job (and was told that she could "become a

120 On problems of turning to punishment, see Aya Gruber, *A Tale of Two Me Toos*, 2023 U. OF ILL. L. REV. 1675.

121 EDELMAN, *supra* note 19, at 77–99 (on varying roles and influence of compliance professionals).

122 In critiquing romanticization of collective as group-based activity, I do not reject calls for crossing boundaries to allow for more integrated justice efforts. *See* Dinner, *supra* note 84, at 1117 (calling for feminist scholars to "look beyond antidiscrimination theory to meet the needs of low-income workers whose work lives conflict with their family lives").

123 *See* COLLINS, *supra* note 85.

Chain Stores driver when [she] learn[ed] how to use a men's urinal"); she suggested they look into the retail arm of Chain Stores as well.[124] And targeting atomizing can also empower individuals to decide to organize and work together in groups. The idea is not to discourage group-based activity but to normalize even individual efforts at collective, structural change, which may in turn create greater solidarity across efforts.

CONCLUSION

I, too, am captivated by histories revealing people "gathering" together to make change.[125] A critique of overemphasizing collective as group-based activity should not distract us from seeking to work together in complaint, just as it should not distract us from the important work of coalition building and group-based activity more generally.[126] But we undermine our efforts at change if we turn to gathering to the detriment of other forms of collective agitation for change.

To support individuals in their efforts toward collective change is not to buy into an individualistic view of the world; we can be "social" in our goals, in solidarity, without necessarily being social in the ways in which we generate and carry through with complaint.[127] To support and encourage individuals to tell their broader stories embraces a view of individuals as relationally situated and necessarily acting within social context.[128] And it expands the field of change agents, allows more people the space and support to "act out democracy," as Lani Guinier and Gerald Torres might put it.[129] We can and should envision new (collective) avenues for the structural change that we most need.

124 *See* Berrey et al., *supra* note 18, at 133–35.

125 *See*, *e.g.*, Dorothy Sue Cobble, For the Many: American Feminists and the Global Fight for Democratic Equality (2021) (describing women working together).

126 For some of this recent work on the importance of organizing and social movements, see Andrias & Sachs, *supra* note 56.

127 *See* Bell, *supra* note 93, at 708 (articulating a vision of justice "in which the state recognizes collective and individual humanity and thus, through various means, aims to promote social inclusion and social solidarity").

128 See Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 227–66 (1990) (describing the difficulty of progressive-era efforts to overcome individualism in favor of relational, collective views of the human condition).

129 Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2740 n.45 (2014) ("One of the ways people act out democracy is through the process of reflecting upon and learning from shared experiences. That self-reflective practice is stimulated by and often culminates in the making of new stories. These stories systematize the knowledge created by collective engagement, collective risk-taking, and collective action. These stories transform people's willingness to act when they nurture relationships, highlight the contingencies of past choices, and illuminate future possibilities.").