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**Article**

**That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law**

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### INTRODUCTION

Empirical studies have shown that discrimination litigants face difficult odds.<sup>1</sup> Indeed, less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief.<sup>2</sup> In contrast, dismissals (on motions to dismiss or at summary judgment) are extremely common in discrimination litigation, accounting for a full 86% of litigated outcomes.<sup>3</sup> These dismal odds are far more extreme than those faced by any other category of federal litigant, with the sole exception of (notoriously unsuccessful) prisoner plaintiffs.<sup>4</sup> Moreover, they extend to vir-

1. See *infra* notes 27–33 and accompanying text.

2. Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 17 (Am. B. Found., Research Paper No. 08-04, 2008) [hereinafter Nielsen et al., *Uncertain Justice*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1093313](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313); see also Katharine W. Hannaford, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary U.S.*, RESEARCHING L., Spring 2008 at 1, 3, available at <http://www.americanbarfoundation.org/uploads/cms/documents/rlspring08.pdf> (summarizing findings from *Uncertain Justice* research project). Note that the above figures reflect only litigated (i.e., non-settlement) outcomes. As set forth at greater length *infra*, those plaintiffs whose cases are resolved through settlement outcomes also achieve very limited levels of success, with the effective recovery (after attorneys' fees and costs) for most plaintiffs ranging from approximately \$7,000 at the EEOC level to \$15,000 for cases filed in federal court. See *infra* note 49 and accompanying text.

3. See Hannaford, *supra* note 2 at 3; see also Nielsen et al., *Uncertain Justice*, *supra* note 2 at 17.

4. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 890 (2006).

tually every conceivable procedural juncture, from motions to dismiss to postverdict appeals.<sup>5</sup> So what explains these results?

Surprisingly, there have been few robust attempts to answer this core question. Thus, while we have extensive data demonstrating that discrimination litigants fare poorly in the courts, we know very little about *why*. This Article—drawing on a heretofore underexplored area of the psychological literature—attempts to begin the process of filling this gap.<sup>6</sup> Specifi-

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5. See Nielsen et al., *Uncertain Justice*, *supra* note 2; see also *infra* notes 44–45 and accompanying text.

6. In contrast to the overwhelming attention that has been paid in the legal literature to psychological findings regarding the phenomenon of implicit bias (also referred to as subconscious or subtle bias), very few legal scholars appear to even be aware of the psychological literature regarding attributions to discrimination. Thus, only a few legal scholars have discussed the studies described herein in any form, and none have fully addressed the profound implications of these studies for understanding the difficult odds that discrimination litigants face. For the most extensive exploration to date of the psychology literature discussed herein and its potential implications for discrimination litigation in the context of a fascinating account of majority/minority gaps in perceptions of discrimination, see generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008). For other articles relying on some of the studies described herein, see, for example, Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679–711 (2007) (relying on several of the studies discussed herein to help explain why people who have experienced subtle sex discrimination may not even perceive their experience as discriminatory); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 900–05 (2008) (relying on several of the studies described herein in documenting the social costs of complaining about discrimination); Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 841–42 (2009) (briefly summarizing certain of the studies described herein, and noting that the available evidence suggests that the tendency to “overlook or minimize discrimination” is more prevalent than the tendency to over-perceive discrimination); Elizabeth Hirsh & Christopher J. Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 LAW & SOC’Y REV. 269, 271–74 (2010) (relying in part on some of the studies described herein in discussing the factors that influence the extent to which individuals interpret actions as discriminatory); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 19–24 (2011) (discussing certain portions of the literature described herein as well as related bodies of social psychological research in discussing factors that may influence decision-making in discrimination cases). Compare Dhammika Dharmapala et al., *Belief in a Just World, Blaming the Victim, and Hate Crime Statutes*, 5 REV. L. & ECON. 311, 333–36 (2009) (drawing on a related literature to articulate a theory of why hate crime statutes may be necessary in order to achieve optimal deterrence of crimes against minorities).

cally, this Article develops a new theoretical framework for understanding the difficulties that discrimination litigants face, based on the extensive findings of psychology scholars regarding attributions to discrimination.<sup>7</sup> As set forth below, these findings—which address in detail the circumstances in which individuals are willing (or, critically, are *not* willing) to characterize a particular set of events as discrimination—have profound implications for understanding the breadth and the nature of the challenges that discrimination litigants face.<sup>8</sup>

So what are the fundamental findings of this understudied area of psychological research? While the research hypotheses have been complex and varied, the core findings of psychology scholars have been remarkably simple: most people, in most factual circumstances, are unwilling to make robust attributions to discrimination.<sup>9</sup> Indeed, even when there is substantial evidence of traditional invidious discriminatory intent (including so-called direct evidence) most people will decline to make attributions to discrimination.<sup>10</sup> This effect, moreover, is further accentuated outside of the context of stereotypical disparate treatment fact patterns (including, for example, circumstances where claims are based on disparate impact and/or involve nonstereotypical actors, such as minority-on-minority discrimination).<sup>11</sup> Thus, across a wide array of factual circumstances—ranging from traditional disparate treatment to more complex forms of bias—psychology scholars have documented that most people do not “see” discrimination, except where there is effectively no plausible alternative.<sup>12</sup>

This resistance to “seeing” discrimination appears to derive, moreover, not—as some prior scholars have theorized—from the specifics of discrimination doctrine, but instead from

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7. “Attributions to discrimination” is the term of art used by psychology scholars to describe whether people characterize the cause of a particular negative outcome (e.g., termination, failure to hire, etc.) as being based on discrimination (or conversely, as based on some other cause). See generally Brenda Major & Pamela J. Sawyer, *Attributions to Discrimination: Antecedents and Consequences*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 89 (Todd D. Nelson ed., 2009) (providing an overview of the social psychological literature regarding attributions to discrimination).

8. See *infra* notes 9–23 and accompanying text.

9. See *infra* notes 53–81 and accompanying text.

10. See *infra* notes 58–81 and accompanying text.

11. See *infra* notes 83–96 and accompanying text.

12. See *infra* notes 53–96 and accompanying text.

widely shared and deeply intractable background beliefs regarding discrimination and meritocracy in America.<sup>13</sup> Thus, psychology scholars have documented that most individuals think of discrimination as a phenomenon that is explicit, restricted in its manifestations, and generally unlikely to occur in America's meritocratic society.<sup>14</sup> These views, in turn, have been shown to significantly influence (and limit) most people's willingness to make attributions to discrimination.<sup>15</sup> As a result, in all but the most compelling factual circumstances, most people believe that some measure of merit—such as effort or ability—is a more likely explanation for why minorities fail than the possibility of discrimination.<sup>16</sup>

There are profound reasons to believe that these prevalent background beliefs account, at least in part, for the dismal odds that discrimination litigants face in litigating actual cases in the courts.<sup>17</sup> Indeed, the findings of psychology scholars—which strikingly parallel numerous aspects of the outcomes faced by discrimination litigants in the courts—are otherwise very difficult to explain.<sup>18</sup> Moreover, recent experimental findings by law and psychology scholars provide strong reasons for believing that judges and jurors are, as a general matter, far from immune from the influence of the types of background beliefs documented by psychology scholars.<sup>19</sup> Thus, while further research is required to confirm the role of background beliefs in real-world discrimination adjudications, there are significant reasons to—at a minimum—take seriously the work of psychology scholars in assessing contemporary recommendations for reform.

Doing so suggests a profound need to rethink existing scholarly recommendations for remedying the limitations of anti-discrimination law. Most notably, the majority of contempo-

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13. See *infra* notes 98–152 and accompanying text.

14. See *infra* notes 98–152 and accompanying text.

15. See *infra* notes 98–152 and accompanying text.

16. See *infra* notes 98–152 and accompanying text; see also *infra* notes 58–82 and accompanying text.

17. See *infra* notes 153–76 and accompanying text.

18. See *infra* Table 1 (summarizing the overlaps between the findings of psychology scholars and anti-discrimination case law / legal literature).

19. See *infra* notes 162–74 and accompanying text. Indeed, as set forth at greater length in Part III, judges appear to be surprisingly similar to lay populations in terms of the impact of background beliefs and other psychological factors on their decision-making approaches. See *infra* notes 171–74 and accompanying text.

rary scholarly proposals—most of which are focused on doctrinal reform of the anti-discrimination laws—seem likely to only exacerbate the documented tensions between prevailing public views and available claims, by further expanding the capaciousness of contemporary discrimination doctrine.<sup>20</sup> Indeed, to the extent that broadening doctrine encourages putative victims of discrimination to bring claims that diverge even further from common understandings of discrimination, these reform recommendations may result in increased *losses* for discrimination litigants, not greater victories.<sup>21</sup>

Similarly, scholarly proposals focused on internal institutional reform of private actors such as employers (an alternative that contemporary legal scholars have increasingly embraced), seem highly unlikely to result in improved outcomes for putative victims of discrimination if one credits this psychological account.<sup>22</sup> Simply put, such institutional models—which rely on the willingness of employers and other institutional actors to “see” discrimination—have as their fundamental premise an assumption which the psychological literature tells us is very likely untrue.<sup>23</sup>

The findings of psychology scholars thus suggest that—to the extent there is a desire to improve outcomes for putative victims of discrimination—there may be a need to cast the net more broadly, outside of the usual recommendations for reform. In this Article, I provide an initial discussion of one such alternative: increasing the use of litigation-based approaches that do not focus on group-based discrimination claims (i.e., approaches that do not focus on claims of discrimination based on race, sex, age, disability, etc.). I refer to these approaches—which may include a diverse array of litigation-based claims ranging from “just cause” or “wrongful discharge” claims to the Family and Medical Leave Act—as “extra-discrimination remedies” or “EDRs.” As set forth below, such EDRs, by decoupling the inquiry from highly charged views regarding the nature and extent of discrimination, seem uniquely poised to avoid

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20. See *infra* notes 180–94 and accompanying text (discussing the limitations of doctrinal reform approaches).

21. See *infra* notes 191–93 and accompanying text.

22. See *infra* notes 195–209 and accompanying text.

23. See *infra* note 201 and accompanying text; see also *infra* notes 51–152 and accompanying text (describing the findings of psychology scholars).

many of the obstacles that currently confront litigants in bringing discrimination claims.

This Article is organized as follows. In Part I, I provide an overview of the empirical findings of legal scholars regarding the low success rates of contemporary discrimination litigants, and discuss some of the most common explanations that have been posited for those low success rates. Part II examines the findings of psychology scholars regarding the pervasiveness of resistance to robust attributions to discrimination, and the causes of that resistance. Part III discusses the reasons why it is plausible to believe that the psychological phenomena discussed in Part II are at least partially responsible for the difficulties that discrimination litigants currently face. Finally, Part IV discusses the implications of the foregoing for the leading reform recommendations among legal scholars of discrimination, and discusses the potential alternative of making increased use of EDRs.

A final note is in order, before proceeding to the substance of the discussion. While the psychological literature I describe herein provides an intuitively powerful model for understanding why discrimination claims are so hard to win, it is not based on direct studies of judges or jurors in real-world litigation (and thus cannot directly address questions of causation in case outcomes).<sup>24</sup> In addition, there are no doubt other factors that play a role in determining case outcomes (such as case merits) which this Article does not attempt to systematically address, except to explain the reasons why they cannot plausi-

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24. Relatedly, the psychological research I describe herein cannot fully answer why it is that discrimination litigants (and attorneys) continue to bring a category of cases that are so overwhelmingly unsuccessful. Whether or not the current success rates of discrimination litigants are caused by frivolous lawsuits, the influence of background beliefs of the type I describe here, or, most likely, some combination of factors, one would expect rational litigants and attorneys to respond to such profoundly low success rates by bringing fewer claims. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17–20 (1984) (setting out theory of litigant behavior whereby litigated success rates should approach 50%, assuming rational actors and low litigant error rates in predicting success). A partial explanation to this question may exist insofar as there are—unlike many other areas of the law—very few categories of discrimination cases that can safely be assured of success. See *infra* notes 40–46 and accompanying text (discussing the fact that many cases with significant indicia of merit are nonetheless dismissed). Thus, the only economically rational response may well be not to bring discrimination claims at all, a response that may be morally and personally unacceptable to many discrimination litigators and plaintiffs.

bly explain the full breadth of adverse outcomes that we see.<sup>25</sup> Thus, this project represents an initial attempt to provide a theoretical framework for understanding the difficult odds faced by discrimination litigants (and to explore the potential implications of this framework), not an attempt to conclusively establish the scope of the influence of the phenomena discussed herein. Further research will be required in order to validate the extent to which this framework in fact explains the difficult challenges faced by contemporary discrimination litigants, as well as to flesh out the role of other factors that are contributing to the extremely adverse outcomes that discrimination litigants currently face.<sup>26</sup>

### I. EMPIRICAL STUDIES OF OUTCOMES FOR DISCRIMINATION LITIGANTS

As the work of numerous empirical scholars has demonstrated, anti-discrimination litigants have a “tough row to hoe.”<sup>27</sup> Indeed, of every 100 discrimination plaintiffs who liti-

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25. As described in Part I, existing data strongly suggest that neither merit—nor any of the other common explanations posited in the literature—can provide a full explanation for the range of adverse outcomes that discrimination litigants face. *See infra* notes 36–50 and accompanying text.

26. Specific areas that could benefit from further empirical research include: (1) the role of merit in discrimination litigation outcomes (and the extent to which merit can be quantified through objective measures in the discrimination context); (2) the extent to which EDRs are in fact more likely to succeed than discrimination causes of action (either in an experimental setting or in real-world contexts); and (3) the tendency of judges to show results similar to those described herein in lay populations.

27. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) [hereinafter Clermont & Schwab, *How Plaintiffs Fare in Federal Court*]. A number of scholars have made important contributions to the burgeoning empirical research regarding the success rates of discrimination litigants in the courts. *See generally, e.g.*, Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45 (2005); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 103 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*]; Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 556–60 (2003) [hereinafter Clermont et al., *How Plaintiffs Fare on Appeal*]; Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra*; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 [hereinafter Clermont & Eisenberg, *Plaintiphobia*]; Ruth

gate their claims to conclusion (i.e., do not settle or voluntarily dismiss their claims), only 4 achieve any form (*de minimis* or not) of relief.<sup>28</sup> The other 96 of 100 see their claims rejected in their entirety: 45 of 100 have their claims dismissed on motions to dismiss, 41 of 100 are dismissed at summary judgment, and 10 of 100 lose at trial.<sup>29</sup> These odds can properly be characterized as shockingly bad, and extend (with minor differences) to every category of discrimination plaintiff, including race, sex, age, and disability.<sup>30</sup>

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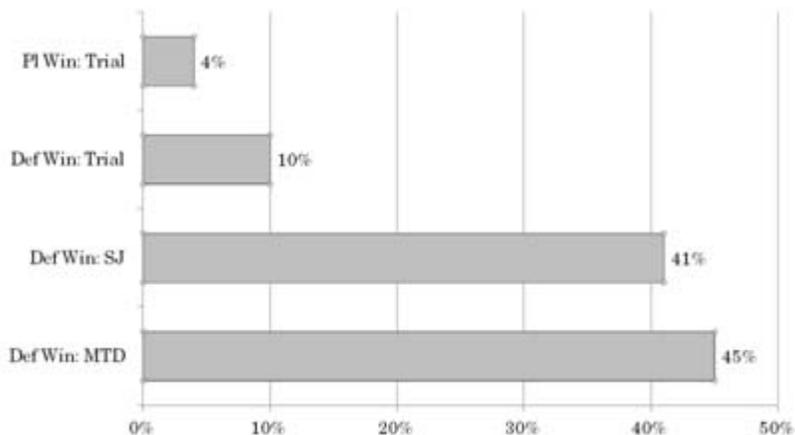
Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010) [hereinafter Nielsen et al., *Individual Justice*]; Nielsen et al., *Uncertain Justice*, *supra* note 2; Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell L. Sch., Research Paper No. 08-022, 2008) [hereinafter Eisenberg & Lanvers, *Summary Judgment Rates*], available at <http://ssrn.com/abstract=1138373>. Most of these studies are focused on employment discrimination claims, by far the most common form of discrimination litigation. The few studies that have looked at other forms of discrimination claims have shown that those claims fare comparably to employment claims in terms of litigation outcomes. See, e.g., Clermont et al., *How Plaintiffs Fare on Appeal*, *supra*, at 556–60, 562 (demonstrating that both jobs and non-jobs civil rights cases have very high rates of reversals of plaintiff victories on appeal, and that both categories of cases also have among the highest disparities between reversal rates for plaintiff and defendant victories of any doctrinal area); Clermont & Eisenberg, *Plaintiphobia*, *supra*, at 954, 967 (demonstrating that jobs and “other civil rights” cases have very similar rates of reversal of plaintiff victories on appeal, and also both have much lower rates of reversal of Defendant victories on appeal); Eisenberg & Lanvers, *Summary Judgment Rates*, *supra*, at 17–18 (finding that summary judgment rates for both employment discrimination cases and other civil rights cases are consistently higher than summary judgment rates in contracts and torts cases).

28. See Hannaford, *supra* note 2, at 3; see also Nielsen et al., *Uncertain Justice*, *supra* note 2, at 14, 17 (discussing results and noting that cases were coded as “dismissals” only where involuntarily dismissed).

29. See Hannaford, *supra* note 2, at 3; see also Nielsen et al., *Uncertain Justice*, *supra* note 2, at 17.

30. While scholars have shown that some classes of litigants—including African Americans and disability litigants—fare particularly poorly at certain junctures, including summary judgment, the overall win rates under different statutes are in fact remarkably similar. See Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 117 (Display 6). Notably, age discrimination claims—

**Figure 1**  
**Litigated Outcomes, Federal Employment Discrimination Cases**  
**1988–2003**



Data from Hannaford, *supra* note 2

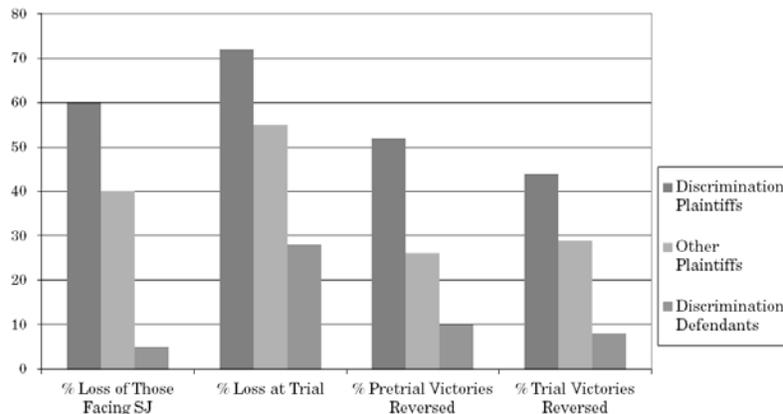
These abysmal results are bad not only in an absolute sense but also in comparative perspective. Discrimination plaintiffs fare far worse than virtually every other category of federal litigants, including even many categories of plaintiffs who face notoriously difficult legal standards (such as ERISA plaintiffs and habeas corpus litigants).<sup>31</sup> The disparity in out-

which are often thought of as the easiest type of discrimination claims to win—are only marginally more likely to succeed than other classes of discrimination claims. *Id.*; see also Nielsen et al., *Individual Justice*, *supra* note 27, at 189–92 (finding relatively little difference among success rates for different types of discrimination claims).

31. See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 127–31 (demonstrating that employment discrimination litigants fare worse than other federal litigants across an array of contexts); Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 441–42 (finding that employment discrimination plaintiffs win less frequently than other plaintiffs); Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 954–55 (showing that both employment discrimination plaintiffs and other civil rights plaintiffs have their victories reversed considerably more often than other classes of litigants, including habeas corpus litigants and ERISA plaintiffs). The fact that discrimination litigants fare worse—on average—than habeas corpus litigants is quite striking in view of the very difficult procedural and substantive hurdles to success that habeas litigants face.

comes between discrimination plaintiffs and other categories of federal litigants is also remarkably consistent, extending from the early stages of litigation through posttrial appeals.<sup>32</sup> Thus, the extensive adverse outcomes faced by discrimination litigants are virtually unique in the world of federal litigation, exceeding the negative outcomes faced by other litigants in both scope and degree.<sup>33</sup>

**Figure 2**  
**Litigation Losses, Federal Court**



Data from Kevin M. Clermont & Stewart J. Schwab, *How Emp. Discr. Plaintiffs Fare in Federal Court* (2004) and Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts* (2002). Summary judgment figures est. based on multiple sources.

What explains these negative results for discrimination plaintiffs? There have been—perhaps surprisingly—relatively few attempts to develop a robust response to this question. Thus, while there is a proliferation of scholarship richly addressing virtually every conceivable feature of anti-discrimination law (from the narrow and doctrinal to the broad

32. See Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 127–31; Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 441–42, 451; Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 954–55; see also *infra* Figure 2.

33. See Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 127–31; Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 441–42, 451; Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 954–55; see also *infra* Figure 2. As noted above, only prisoner litigants fare worse as a class than discrimination litigants. See *supra* note 4 and accompanying text.

and theoretical), there are perplexingly few articles that make serious attempts to address this core concern. Indeed, the overwhelming majority of scholarly attempts to posit a cause for the difficult odds that discrimination litigants face are based on a loose, intuitive approach to understanding the phenomenon, with little or no empirical foundation.<sup>34</sup>

Perhaps unsurprisingly, many<sup>35</sup> of these existing explanations are a poor match for the actual experiences of discrimination litigants. For example, the explanation that has attracted the most attention among contemporary anti-discrimination

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34. For example, some of the scholars who have done very sophisticated empirical work addressing the nature of outcomes for discrimination plaintiffs have tended to rely on a much more speculative approach to addressing the causation question. See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 112–14; Clermont et al., *How Plaintiffs Fare on Appeal*, *supra* note 27, at 563–66. *But cf.* Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case In Point!*, 80 WASH. U. L.Q. 1275, 1281–84 (2002) [hereinafter Clermont & Eisenberg, *Judge Harry Edwards*] (taking a somewhat more systematic approach); Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27 (same). For some works that have taken a more systematic approach to the question of why discrimination claims succeed or fail see, for example, Colker, *supra* note 27; Nielsen et al., *Individual Justice*, *supra* note 27; Nielsen et al., *Uncertain Justice*, *supra* note 2; Robinson, *supra* note 6.

35. Many, but not all. Perhaps most strikingly, many anti-discrimination scholars have argued—albeit without systematic empirical support—that factors like the background beliefs discussed *infra* Part II may be partially responsible for the low success rates that discrimination plaintiffs face. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 45 (2006); Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1489–90 (1997); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378–81 (1988); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 789–90 (2005); Linda Hamilton Krieger, *Sociolegal Backlash*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 340, 358–61 (Linda Hamilton Krieger ed., 2003); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1160–61 (1992); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1665–66 (2011); Charles A. Sullivan, *The Phoenix From The Ash: Proving Discrimination By Comparators*, 60 ALA. L. REV. 191, 224–26 (2009) [hereinafter Sullivan, *The Phoenix*]; Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 39 (2000). The work of psychology scholars that I describe herein can therefore be seen as complementary, and potentially confirming of the intuitions that have been expressed by a number of other discrimination scholars.

scholars—that we increasingly live in a world in which forms of bias are predominantly subtle or structural in nature—has significant limitations as a global explanation for the difficulties that discrimination litigants face.<sup>36</sup> For, while it is no doubt true that claims of structural and subtle bias are challenging to prove under contemporary anti-discrimination law, it is *also* true that even traditional disparate treatment claims face significant difficulties in the courts.<sup>37</sup> Indeed, scholars have shown by both quantitative and qualitative measures that even where there is significant evidence of traditional discriminatory animus, discrimination litigants continue to face extremely difficult odds.<sup>38</sup>

Moreover, the premise of much scholarly work in this area—that the adverse outcomes experienced by discrimination litigants arise from the relatively recent demise of old-fashioned discriminatory animus—suffers from another significant limitation. Specifically, its assumption that the outcomes faced by discrimination litigants are the result of recent change is inconsistent with the long-standing nature of the difficulties that discrimination litigants face. Indeed, discrimination litigants have encountered difficult odds since at least the late 1970s (when comprehensive data is first available), prior to the theorized rise in structural and “subtle” forms of bias.<sup>39</sup> Thus,

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36. See, e.g., Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854–64 (2007); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1241 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–64 (2001); see also Bagenstos, *supra* note 35, at 1–3 (describing the contemporary trend); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Biases*, 50 WM. & MARY L. REV. 1439, 1444–46 (2009) (same); Nielsen et al., *Individual Justice*, *supra* note 27, at 176 (same).

37. See *infra* note 42 and accompanying text.

38. See, e.g., Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 540–41, 546 (2001); Nielsen et al., *Individual Justice*, *supra* note 27, at 192; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 737–53 (2007); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 39 (2000); see also *infra* note 42 and accompanying text.

39. See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 106; see also Nielsen et al., *Uncertain Justice*, *supra* note 2, at 24 (noting that despite the common perception that discrimination cases have been subject to

while the challenges of proving structural and subtle discrimination no doubt play a role in the adverse outcomes faced by discrimination litigants, they provide a fundamentally incomplete explanation for the globally negative results that have been documented by empirical scholars.

Another common explanation—based principally on theoretical work from the law and economics wing of the legal academy—has been to theorize that the overwhelmingly negative outcomes that discrimination litigants face must arise from a concomitant lack of merit in discrimination claims.<sup>40</sup> But, this explanation too is a poor “fit” for the actual results that we see in the courts. For example:

- Empirical scholars have shown that objective measures of case merit (including for example, whether or not the Equal Employment Opportunity Commission (EEOC) made a “cause” finding, and the EEOC’s initial assessment of the case’s merits) are *not* correlated to case outcomes (including, for example, the likelihood of dismissal on motions to dismiss or summary judgment). Thus, even those cases that meet objective indicia of merit are subjected to dismissal at very high rates.<sup>41</sup>
- Qualitative research addressing the nature of the cases that are dismissed at summary judgment and on judg-

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increasing dismissals in recent years as a result of changes in the political tenor of the judiciary, the data do not support the existence of such a trend).

40. See, e.g., Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC’s Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 41 n.146 (2008); cf. Selmi, *supra* note 27, at 569–71 (considering, and ultimately rejecting, the possibility that the difficulties that discrimination litigants face may arise primarily from a surfeit of frivolous claims, but also noting that “it does seem, for whatever reason, that there are a fair number . . . of . . . discrimination cases that should never have been filed”). See generally Priest & Klein, *supra* note 24, at 4–5 (initial articulation of model often relied on by contemporary scholars in arguing that discrimination litigants must fare worse because of lack of merit). In addition to the literature cited herein, this assumption—that discrimination claims must be predominantly non-meritorious—is by far the most common response that I have informally received while discussing the profoundly low success rates of discrimination plaintiffs with other academics.

41. Nielsen et al., *Individual Justice*, *supra* note 27, at 191, 193; see also Clermont & Eisenberg, *Judge Harry Edwards*, *supra* note 34, at 1282–83 (responding to Harry T. Edwards & Linda Elliott, *Beware of Numbers (And Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002)) (conducting an initial assessment of one measure of merit on appeal and finding that it did not explain case outcomes).

ment as a matter of law has shown that many such cases are far from frivolous. Indeed, even those cases that have so-called direct evidence of discriminatory animus (for example explicit use of racial or gender-based epithets) are quite routinely dismissed at summary judgment and on judgment as a matter of law.<sup>42</sup>

- Discrimination plaintiffs have far fewer trial victories (28%) than other categories of federal plaintiffs (45%), despite the fact that judges regularly grant motions to dismiss and motions for summary judgment in discrimination cases, thus presumably leaving only the strongest cases for trial.<sup>43</sup>
- Even those few discrimination plaintiffs who win trial victories face a startlingly high rate of reversals during posttrial appeals (41%).<sup>44</sup> This rate far exceeds the com-

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42. See, e.g., *Kelly v. Moser, Patterson & Sheridan, LLP*, 348 F. App'x 746, 751 (3d Cir. 2009); *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 877 (8th Cir. 2008); *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1152–53 (8th Cir. 2007); *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 933–34 (8th Cir. 2006); *Arraleh v. County of Ramsey*, 461 F.3d 967, 976–78 (8th Cir. 2006); *Mateu-Anderegg v. School Dist.*, 304 F.3d 618, 625 (7th Cir. 2002); *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 224 (5th Cir. 2001); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1210 (10th Cir. 1999), *abrogated on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–102 (2003); *Heim v. Utah*, 8 F.3d 1541, 1546–47 (10th Cir. 1993). Most of the cases cited herein were located through a quick search for “stray remarks” since this is often the rubric under which courts reject explicit evidence of discriminatory intent at summary judgment. While it is clear that summary judgment and judgment as a matter of law are not infrequently granted even in the presence of comments indicative of traditional invidious discriminatory intent, further research is required in order to systematically assess the extent to which this is true. For existing studies examining the circumstances under which summary judgment is granted in discrimination litigation, see *supra* note 38 and accompanying text. See also Letter from Stephen B. Burbank, David Berger Professor for the Admin. of Justice, Univ. of Pa., to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts 10–12 (Jan. 28, 2009) [hereinafter Burbank Letter] (on file with the author) (discussing concerns regarding the possibility that judges in employment discrimination cases are engaging in a form of “cognitive illiberalism” in adjudicating cases at summary judgment).

43. See Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 129; see also Parker, *supra* note 27, at 894, 921–24.

44. See Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 109; see also Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 450 (finding slightly different, but comparable numbers); Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 954–55 (same); Colker, *supra* note 27, at 259–61, 271 (finding even worse post-trial odds for ADA plaintiffs, but based on a more limited sample).

parable reversal rate for discrimination defendants who have prevailed at trial (9%) and also very significantly exceeds the reversal rate for other classes of successful federal plaintiffs (28%).<sup>45</sup>

Thus, while merit undoubtedly does play *some* role in the adverse outcomes that discrimination litigants face,<sup>46</sup> it cannot provide a plausible explanation for the full range of adverse outcomes that discrimination litigants face. The adverse outcomes are simply too broad—in both scope and depth—to be wholly attributed to a surfeit of frivolous claims.

Finally, related to the “merit” hypothesis, it has sometimes been posited that the adverse litigation outcomes faced by discrimination litigants must be the result of the settlement of meritorious claims, leaving only the worst cases for litigation.<sup>47</sup> But, in addition to the data discussed above (which show that it is not only nonmeritorious cases that face adverse outcomes), direct studies of discrimination settlements are fundamentally inconsistent with the premise that settlements represent the strongest subset of discrimination claims. Indeed, the only article to have addressed this issue from an empirical (as opposed to theoretical) perspective found no consistent relationship between case merits and settlement.<sup>48</sup>

Moreover, data regarding the average size of discrimination settlements reflects an average settlement recovery of only

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45. Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 109 (reversal rate for discrimination defendants who prevailed at trial); Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 948 (reversal rate for federal plaintiffs in all cases); *see also* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 27, at 954–55 (showing that employment discrimination and other civil rights cases have the highest reversal rates of plaintiff victories of any category of federal cases).

46. There are two areas, in particular, where it seems likely that non-meritorious cases play a significant role in the adverse outcomes that discrimination litigants face: (1) early stage dismissals and (2) pro se claims. *See, e.g.*, Nielsen et al., *Individual Justice*, *supra* note 27, at 188–89. As noted previously, the role of merits in discrimination outcomes—and the extent to which merits can be objectively quantified in discrimination litigation—are both areas that are ripe for further scholarly inquiry. *See supra* note 26.

47. *See* Selmi, *supra* note 27, at 569; *see also* Harris, *supra* note 40, at 41 n.146 (hypothesizing that discrimination plaintiffs may be systematically worse than discrimination Defendants at predicting litigation success and that this may lead to non-meritorious cases failing to settle). This is an explanation which has, again, been raised very frequently in my informal discussions with other legal scholars of the difficult odds that discrimination litigants face.

48. Nielsen et al., *Individual Justice*, *supra* note 27, at 191.

\$14,000 at the EEOC level and \$30,000 in litigation—hardly what one would expect if settlements were among the most meritorious claims.<sup>49</sup> In contrast, tried cases—while they also tend to result in relatively modest awards—have, on average, individual awards that are at least three to five times the size of the average settlement (and that are exclusive of attorneys’ fees and costs).<sup>50</sup> Thus, the hypothesis of settlement drain of meritorious cases—while again perhaps a partial explanation—is largely inconsistent with existing data regarding the nature of discrimination settlements.

So if none of the foregoing explanations fit the data, what does explain the pervasiveness of unfavorable results for discrimination plaintiffs? In the following two Parts, I explore at length another possible explanation: that the difficulties that discrimination litigants face arise—at least in part—from a much broader and deeper resistance among the American public to making attributions to discrimination. As set forth in Part II, the findings of psychology scholars strongly support this explanation, with experimental results showing again and again that most people are reluctant to make attributions to discrimination, even where they are presented with quite explicit or objective evidence. In Part II, I detail the work of psychology scholars, followed by a discussion in Part III of the reasons why that work provides a compelling explanation for the very difficult odds that discrimination litigants face.

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49. See, e.g., Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 144 (2007); Nielsen et al., *Individual Justice*, *supra* note 27, at 187; Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 3, 22–23 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); Nielsen et al., *Uncertain Justice*, *supra* note 2, at 17. These figures probably reflect an *actual* recovery for discrimination litigants of roughly \$7000 (at the EEOC) to \$15,000 (in litigation), given that they are inclusive of attorneys’ fees and costs. Interestingly, Professor Kotkin characterizes these results as showing a relatively high level of success for employment discrimination litigants, see Kotkin, *supra*, at 117, whereas Professor Nielsen does not, see Nielsen et al., *Uncertain Justice*, *supra* note 2, at 17, 32–33.

50. Nielsen et al., *Individual Justice*, *supra* note 27, at 188; Nielsen & Nelson, *supra* note 49, at 28. This figure may significantly understate the disparity between awards at settlement and at trial, as trial victors are also entitled to a separate award of attorneys’ fees and costs, an award that can often significantly exceed the amount of damages awarded to the plaintiff.

## II. FINDINGS OF PSYCHOLOGY SCHOLARS REGARDING ATTRIBUTIONS TO DISCRIMINATION

Psychologists entered the research field of attributions to discrimination concerned primarily with the views of minority group members.<sup>51</sup> Under what circumstances do minority group members attribute a particular set of events to discrimination? Based on the presumed psychological benefits of attributing negative outcomes to discrimination (as opposed, for example, to attributing a negative outcome to one's own skill) and minority group members' presumed repeated experience with discrimination (leading to a heightened sensitivity to cues of discrimination), scholars hypothesized a "hypervigilance" vis-à-vis discrimination, i.e., a tendency to make attributions to discrimination where there is any plausible basis for doing so.<sup>52</sup>

Ironically, the field of research that started out with a hypothesis of hypervigilance has led to a vast array of findings of precisely the opposite phenomenon.<sup>53</sup> While scholars have found support for the notion that members of minority groups are sometimes willing to make attributions to discrimination in situations of ambiguity, they have also found that they are even more likely to downplay and underestimate the likelihood that discrimination has occurred.<sup>54</sup> These tendencies are, moreover, even more pronounced among nonminority observers of discrimination (e.g., white male bystanders or jurors), who show an even lesser willingness to make attributions to discrimination when they are asked to assess whether discrimination has occurred.<sup>55</sup> Across all groups, the likelihood of making

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51. See, e.g., Brenda Major et al., *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, 34 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 251, 258 (2002).

52. See, e.g., *id.* at 253–61, 266–68; see also GORDON ALLPORT, *THE NATURE OF PREJUDICE* 144–45 (1979); Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 *PSYCHOL. REV.* 608, 612–13 (1989).

53. See, e.g., Major & Sawyer, *supra* note 7, at 91 (noting that the tendency to minimize discrimination is by now the "prevailing view among scholars"). See generally *infra* notes 59–96 and accompanying text for the specific findings of scholars in this regard.

54. See *infra* notes 59–96 and accompanying text.

55. See e.g., Mary L. Inman, *Do You See What I See?: Similarities and Differences in Victims' and Observers' Perceptions of Discrimination*, 19 *SOC. COGNITION* 521, 543 (2001); Mary L. Inman & Robert S. Baron, *Influence of Prototypes on Perceptions of Prejudice*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 727, 728, 732, 736 (1996). See generally Robinson, *supra* note 6 (providing a

attributions to discrimination decreases even further under factual circumstances that do not closely resemble the stereotypical disparate treatment paradigm (e.g., no clear evidence of intent, minority on minority discrimination).<sup>56</sup>

What accounts for these counterintuitive findings? Psychologists have hypothesized a number of possibilities, but leading among them are two basic theories: (1) that there is a tension between making attributions to discrimination and widely held American value systems, such as the belief that hard work gets you ahead in life; and (2) that due to cognitive factors, people's preexisting prototypes of discrimination (typically narrow disparate treatment) and their beliefs about the commonality of discrimination (typically rare) have a significant effect on the extent to which they make attributions to discrimination.<sup>57</sup> Both of these theories have accumulated considerable experimental support, and appear to be at least partially responsible for the widespread reluctance to make attributions to discrimination that scholars have observed. Below, the basic "minimization" phenomenon is described, followed by a discussion of the principal causal factors for which there is substantial support in the literature.

#### A. THE BASIC PHENOMENON: RESISTANCE TO ROBUST ATTRIBUTIONS TO DISCRIMINATION

Across a wide variety of contexts, psychology scholars have found a pronounced unwillingness to make attributions to discrimination, even in the presence of quite compelling facts. Consider, for example, the following experiment conducted by law and psychology scholars Tess Wilkenson-Ryan and Catherine Struve. Study participants were given a description of the facts underlying a hypothetical lawsuit alleging discriminatory failure to promote, and were asked to assess whether or not they would find discrimination. *Inter alia* study participants were told that<sup>58</sup>:

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fascinating account of majority/minority gaps in perceptions of discrimination).

56. See *infra* notes 82–96 and accompanying text.

57. See *infra* notes 97–153 and accompanying text.

58. All facts and results are drawn from Tess Wilkinson-Ryan & Catherine Struve, Abstract and Study Format (on file with author). The results discussed here are based on a preliminary analysis by the study authors, and are subject to further revision/analysis.

- The Plaintiff (Anita) was explicitly told by her boss prior to the contested promotion decision that he wanted to replace the women in the workplace with men.
- The Plaintiff was also told by her boss that “women should only be in subservient positions.”
- The Plaintiff’s boss told a co-worker directly that he would never promote Anita to the contested position.
- A man who did not meet the posted qualifications for the job received the position, despite the fact that Anita (who did not receive the position) was qualified.

Despite these overwhelming facts, when given a standard disparate treatment instruction,<sup>59</sup> only roughly half (i.e., 51.4%) of mock jurors found in Anita’s favor. That is, close to 50% of all mock jurors did not consider this evidence to warrant a finding of liability.<sup>60</sup>

Other experiments have found similar results. Thus, for example in a 1999 study,<sup>61</sup> Teri Elkins and her colleague James Phillips found that—on average—study participants were not persuaded to make affirmative findings of discrimination, even in the presence of evidence demonstrating *inter alia* that:

- The unsuccessful female promotion candidate was asked blatantly discriminatory questions during the job interview such as “How do you intend to balance family obli-

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59. The full instruction given was as follows:

To win on her claim of sex discrimination, Pace must prove by a preponderance of the evidence that her sex was a determinative factor in PennDOT’s decision not to promote her to Contract Compliance Investigator. ‘Determinative factor’ means that if not for Pace’s sex, she would have been promoted. Proof by a preponderance of the evidence means proof that shows that something is more likely true than not true.

*Id.*

60. *Id.* The results set out in the text above are for the study condition in which study participants were given this instruction after the presentation of evidence (as opposed to both prior to and following the presentation of evidence).

61. Teri J. Elkins & James S. Phillips, *Evaluating Sex Discrimination Claims: The Mediating Role of Attributions*, 84 J. APPLIED PSYCHOL. 186, 194–97 (1999) [hereinafter Elkins & Phillips, *Evaluating Sex Discrimination Claims*] (explaining and reporting results from the second of two studies); see also Teri J. Elkins & James S. Phillips, Global Air Corporation: Promotion Scenario #12 [hereinafter Elkins & Phillips, Study Promotion Scenario, Moderate Evidence Condition] (unpublished promotion scenario providing a moderate strength-of-evidence condition, used for Study 2 in Elkins & Phillips, *Evaluating Sex Discrimination Claims*, *supra*, at 194–97) (on file with author).

gations with the demands of the Chief Pilot position” and “Why would an attractive woman like you want to be a Chief Pilot anyway?”<sup>62</sup>

- The HR manager who made the final decision to promote a man over the Plaintiff had previously made remarks to the effect that he preferred the “good old days when the men flew the planes and women smiled at the customers and served them lunch.”<sup>63</sup>
- The HR manager who made the final decision to promote a man over the Plaintiff rejected the ranking of the job-search committee (which had voted 2-1 in favor of the female candidate) after having a private meeting with the only member of the committee who had voted in favor of the successful male candidate.<sup>64</sup>
- The only other time the HR manager had ever overruled the search committee’s recommendation in the past also resulted in a less highly ranked man being promoted to the position, in place of a woman.<sup>65</sup>

Despite these compelling facts, study participants did not perceive discrimination as a particularly likely explanation for the non-selection of the female candidate. Indeed, the mean responses to the study questions assessing judgments of discrimination were at exactly the scale mid-point used by the authors, indicating that—on average—study participants did not perceive the conduct as affirmatively discriminatory.<sup>66</sup>

In another study, Elkins and Phillips evaluated the willingness of study participants to make attributions to discrimination under circumstances designed to more closely track the type of evidence typically available to the average discrimination claimant.<sup>67</sup> Thus, they presented the Plaintiff as having

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62. Elkins & Phillips, Study Promotion Scenario, Moderate Evidence Condition, *supra* note 61, at 10.

63. *Id.* at 8–9.

64. *Id.* at 5–6.

65. *Id.* at 9.

66. *Id.*; Elkins & Phillips, *Evaluating Sex Discrimination Claims*, *supra* note 61, at 195 tbl.4.

67. Teri J. Elkins et al., *Gender-Related Biases in Evaluations of Sex Discrimination Allegations: Is Perceived Threat the Key?*, 87 *J. APPLIED PSYCHOL.* 280, 283 (2002) [hereinafter Elkins et al., *Gender-Related Biases*] (explaining and reporting results from the first of three studies); *see also* Teri J. Elkins et al., *Dorothy Patterson (Plaintiff) v. Global Airlines (Defendant): Promotion Scenario #12* [hereinafter Elkins et al., Study Promotion Scenario, Female Pi-

made out a prima facie case (as part of which, the Plaintiff presented some evidence of more favorable treatment of non-minorities), and also as having presented moderately strong evidence that the reason given for the adverse employment decision was pretextual.<sup>68</sup> This evidence is technically sufficient to make out a discrimination case under the *McDonnell Douglas*<sup>69</sup>/*Burdine*<sup>70</sup> framework, and given the legal incentives not to make blatantly biased statements, may be the only evidence that is available to a victim of discrimination.<sup>71</sup> Nevertheless, it is apparently unpersuasive to many observers—Elkins and Phillips found that the mean study participant assessed discrimination at only a 3.10 on a 7-point scale (reflecting a judgment that discrimination had not occurred).<sup>72</sup>

A number of other scholars, instead of asking study participants to evaluate whether they would find discrimination in a hypothetical scenario, have experimentally manipulated participants' environments to include information that might cause a reasonable observer to conclude that there was discrimination. Although these experiments have taken a variety of forms, the

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lot Condition] (unpublished study promotion scenario wherein a female candidate for chief pilot is passed over for promotion, used in Study 1 in Elkins et al., *Gender-Related Biases*, *supra*, at 283) (on file with author).

68. Elkins et al., Study Promotion Scenario, Female Pilot Condition, *supra* note 67, at 1–5.

69. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

70. *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981).

71. Under the *McDonnell Douglas/Burdine* framework, a jury can find discrimination, although they need not do so, where a plaintiff has come forward with a prima facie case, coupled with evidence of pretext (i.e., evidence showing that the employer's stated reason is false). See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43 (2000). While the elements of an employment discrimination prima facie case differ depending on the context of the case, they commonly center on a showing that one or more nonminorities were treated more favorably (either because they got the contested position, or, in the case of a termination or demotion, because they were not terminated or demoted in similar circumstances). Evidence of pretext can also vary widely, but often focuses on inconsistencies in the employer's explanation or a showing that the reason put forward is factually false.

72. Elkins et al., *Gender-Related Biases*, *supra* note 67, at 283. The results of this study highlight the extent of the mismatch between how the public perceives discrimination and what is legally sufficient to make out a case of discrimination based on the Supreme Court's precedents. It may be that this mismatch is part of what is driving high rates of summary judgment grants in circumstances where it seems unwarranted given existing law. Cf. Krieger, *supra* note 35, at 341 (making a similar argument in relation to the judicial backlash against the ADA).

most common design involves a variation on the following set of facts (hereinafter “biased testing” design):

Experiment participants are asked to take a test with the possibility of subjective scoring (often a creativity test). They are told that the test is a predictor of future success and that the person who scores best on the test will receive some benefit (typically an opportunity to win a sum of money). After the tests have been submitted for grading, a confederate (who appears to the other participants to be just another participant) makes a statement to the effect that she knows the person who will be grading the exams to be biased against a particular group (typically women or African Americans), and that she doesn't believe he'll say a (woman/minority) got the best score. The (female/minority) participants then receive negative feedback on their exams, and a (man/white student) is audibly told that he or she received the highest score and hence the prize.<sup>73</sup>

These scenarios, like the studies described *supra*, contain significantly more explicit evidence of discrimination than exists in many real-life contexts. Nevertheless, most scholars have found that many “observers” and “victims” are unwilling to make attributions to discrimination on this basic set of facts, and instead attribute the failure of the women and minority participants primarily to factors internal to the victims (such as ability, effort, etc.).<sup>74</sup>

Perhaps the most intriguing evidence that scholars have found of a “minimization” effect has come from experiments giving subjects an objective measure of the likelihood that they

73. The following articles, among others, rely on some version of this experimental scenario: Wayne H. Bylsma et al., *The Influence of Legitimacy Appraisals on the Determinants of Entitlement Beliefs*, 17 *BASIC & APPLIED SOC. PSYCHOL.* 223, 228–29 (1995); Brenda Major et al., *Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity*, 39 *J. EXPERIMENTAL SOC. PSYCHOL.* 220, 224 (2003); Robin E. Roy et al., *If She's a Feminist It Must Not Be Discrimination: The Power of the Feminist Label on Observers' Attributions About a Sexist Event*, 60 *SEX ROLES* 422, 424–25 (2009); Anna Berlin, *The Effects of Differential Discrimination Cues on Attributions for Failure: Implications for Subsequent Performance* 35–39 (Aug. 2006) (unpublished M.S. thesis, Ohio University), available at <http://etd.ohiolink.edu/send-pdf.cgi/Berlin%20Anna.pdf?ohiou1156451468>.

74. See, e.g., Bylsma et al., *supra* note 73, at 229–30 (finding that the average participant attributed to discrimination at less than the scale midpoint, indicating belief that discrimination had not occurred); Roy et al., *supra* note 73, at 429 (discussing low levels of attributions to discrimination across study conditions); Berlin, *supra* note 73, at 40 tbl.1 (reporting that study participants attributed a larger proportion of outcome to effort and ability than to discrimination in most experimental conditions, and that across all conditions, subjects reported on average that they disagreed that discrimination had occurred).

have been subjected to discrimination.<sup>75</sup> Following a similar procedure to the “biased testing” design, study participants (women or racial minorities) take an exam or write an essay with the potential for subjective grading, that they believe to be predictive of ability.<sup>76</sup> They are then told by a confederate (who they believe to be the experimenter’s assistant) that all of the judges are majority group members (men or whites, depending on the study design) and that either all, none, or some proportion of them (depending on the study, 25%, 50% or 75%) discriminate against minorities.<sup>77</sup> The minority participants then are given their test with a failing grade marked on it.<sup>78</sup>

Despite the seeming objectivity of the information that subjects receive regarding the likelihood of discrimination, scholars have consistently found that subjects attribute their failure significantly less to discrimination than would be expected based on the data that they have been given. For example, Karen Ruggiero and Donald Taylor found that subjects made attributions to discrimination at very low levels (roughly averaging a three on a ten-point scale), in *any* context where the certainty of discrimination was less than 100% (but greater

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75. Much of the pertinent research relating to objective measures of the probability of discrimination was conducted by Karen Ruggiero, then a leading scholar in the field of perception of discrimination. Karen Ruggiero was subsequently forced to resign from her position as a professor at University of Texas at Austin, as a result of the falsification of data in certain studies that she conducted, which led to the retraction of a number of her publications. The two pieces that are relied on herein were not retracted and continue to be regularly relied on in the social psychology literature. In addition, Ruggiero’s co-author (Donald Taylor), who has never been the subject of any accusations of misconduct, has verified the genuineness of the data that was relied on in the analyses discussed herein. See Robinson, *supra* note 6, at 1142 n.227.

76. Karen M. Ruggiero & Donald M. Taylor, *Coping With Discrimination: How Disadvantaged Group Members Perceive the Discrimination That Confronts Them*, 68 J. PERSONALITY & SOC. PSYCHOL. 826, 828, 832–833 (1995) [hereinafter Ruggiero & Taylor, *Coping With Discrimination*] (leading article to employ this methodology); see also Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. PERSONALITY & SOC. PSYCHOL. 373, 377, 381 (1997) [hereinafter Ruggiero & Taylor, *Why Minority Group Members Perceive Discrimination*] (employing a similar study design).

77. See Ruggiero & Taylor, *Coping With Discrimination*, *supra* note 76, at 828–29, 832–34; Ruggiero & Taylor, *Why Minority Group Members Perceive Discrimination*, *supra* note 76, at 377–78, 381–82.

78. See sources cited *supra* note 77.

than 0%).<sup>79</sup> Moreover, most subjects significantly attributed their failure to the quality of their answers (roughly a seven on a ten-point scale), even in circumstances where they were told it was highly likely that they had been subjected to discrimination.<sup>80</sup> Indeed, even in the circumstance where participants were told it was a certainty (100%) that their test was graded by a person who discriminates, they continued to significantly attribute their grade to the quality of their answers, and rated the likelihood of discrimination only slightly to somewhat above the scale midpoint.<sup>81</sup>

Collectively, then, psychology scholars have found extensive support for the conclusion that people are reluctant to make attributions to discrimination, even in the presence of compelling “direct” evidence, and even when given objective measures of the likelihood that discrimination has occurred.<sup>82</sup>

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79. See sources cited *supra* note 77.

80. See sources cited *supra* note 77.

81. See sources cited *supra* note 77; accord Cheryl R. Kaiser & Carol T. Miller, *Reacting to Impending Discrimination: Compensation for Prejudice & Attributions to Discrimination*, 27 PERSONALITY SOC. PSYCHOL. BULL. 1357, 1364 (2001). Although Kaiser and Miller’s data showed a substantial minimization effect for the 100% condition, they did not show a substantial minimization effect for the 50% condition. *Id.*

82. In addition to the literature specifically discussed above, a significant number of other studies have found substantial tendencies to discount or downplay the likelihood of discrimination, even where there are significant objective indicators that discrimination has occurred. See Christia Spears Brown & Rebecca S. Bigler, *Children’s Perceptions of Gender Discrimination*, 40 DEVELOPMENTAL PSYCHOL. 714, 722 (2004); Don Operario & Susan T. Fiske, *Ethnic Identity Moderates Perceptions of Prejudice: Judgments of Personal Versus Group Discrimination and Subtle Versus Blatant Bias*, 27 PERSONALITY SOC. PSYCHOL. BULL. 550, 557 (2001); Gretchen Sechrist et al., *When Do the Stigmatized Make Attributions to Discrimination Occurring to the Self and Others? The Roles of Self-Presentation and the Need for Control*, 87 J. PERSONALITY & SOC. PSYCHOL. 111, 117 (2004); Janet K. Swim et al., *The Role of Intent and Harm in Judgments of Prejudice and Discrimination*, 84 J. PERSONALITY & SOC. PSYCHOL. 944, 954 (2003) [hereinafter Swim et al., *Judgments of Prejudice*]; see also Faye Crosby, *The Denial of Personal Discrimination*, 27 AM. BEHAV. SCIENTIST 371, 376 (1984) (noting that although working women are likely to be victims of discrimination “they showed few signs of feeling personally discriminated against”); Yumiko Nishimuta, *The Interpretation of Racial Encounters: Japanese Students in Britain*, 34 J. ETHNIC & MIGRATION STUD. 133, 143–47 (2008) (analyzing the responses of study participants who reported experiencing discrimination, but failed to characterize the experience as such); Jacquie D. Vorauer & Sandra M. Kumhyr, *Is This About You or Me? Self-Versus Other-Directed Judgments and Feelings in Response to Intergroup Interaction*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 706, 713

This general tendency to discount the possibility of discrimination becomes even more pronounced outside of the stereotypical disparate treatment context.<sup>83</sup> Indeed, it appears that a variety of contextual factors, including the perceived intent of the actor, the good faith nature of stereotype-driven behavior, and the identity of the actors play a critical role in moderating attributions to discrimination.<sup>84</sup>

Perhaps the most striking finding of psychology scholars in this regard is that the intent of the perpetrator is a critical determinant of observers' willingness to make attributions to discrimination. For example, a 2003 study by Janet K. Swim and colleagues presented participants with a series of vignettes in which both the intent of the actor and the harm to the victim were varied across conditions.<sup>85</sup> They found that people were consistently more reluctant to label as discrimination scenarios in which the actor was portrayed as lacking intent to harm minority group members, or having acted in a thoughtless or stereotyped (but not deliberately malicious) way.<sup>86</sup> This effect, moreover, extended to those circumstances where minority group members were significantly harmed as a result of the actor's treatment.<sup>87</sup>

Other scholars have found similar results, showing that people are extremely reluctant to make findings of discrimination in what might be thought of as classic "disparate impact" contexts. Thus, for example, Foster and Dion found that people were very reluctant to make attributions to discrimination in a context where they were told that women fared worse than men on a particular test, but there was no clear evidence of intent.<sup>88</sup> Similarly, Kappen and Branscombe found that exclusion based on inadequate height and weight—factors that the Supreme

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(2001) (experimentally finding that members of minority groups did not assess high prejudice and low prejudice conversation partners differently, despite the fact that those exposed to high prejudice partners experienced significantly greater discomfort and self-directed negativity).

83. See *infra* notes 85–94 and accompanying text.

84. See *infra* notes 85–96 and accompanying text.

85. See Swim et al., *Judgments of Prejudice*, *supra* note 82, at 958–59 (appendix containing the study vignettes used).

86. *Id.* at 951–52.

87. *Id.*

88. See Mindi D. Foster & Kenneth L. Dion, *The Role of Hardiness in Moderating the Relationship Between Global/Specific Attributions and Actions Against Discrimination*, 51 *SEX ROLES* 161, 164–66 (2004).

Court has acknowledged have a disparate impact against women—are generally not perceived by subjects as discriminatory.<sup>89</sup> Thus, it appears that most subjects simply do not perceive non-intended acts as discriminatory, even where they adversely impact minority groups.<sup>90</sup>

The extent of harm to the victim has also been found to have a significant impact on willingness to make judgments of discrimination, particularly under circumstances of ambiguous intent. Thus, where subjects are told that a particular incident resulted in no concrete harm to the victim—and are given no information about intent—they are much less likely to make attributions to discrimination.<sup>91</sup> Similarly, subjects much more rarely characterize forms of disparate treatment with mixed harm implications for victims—such as “benevolent” sexism or paternalism—as discrimination.<sup>92</sup>

The identities of the actor and the victim have also been found to have substantial effects on the frequency with which people make attributions to discrimination. Thus, people are significantly more likely to make attributions to discrimination where the scenario described involves a “classic” disparate treatment dyad (e.g., a man discriminating against a woman or

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89. See Diane M. Kappen & Nyla R. Branscombe, *The Effects of Reasons Given for Ineligibility on Perceived Gender Discrimination and Feelings of Injustice*, 40 BRIT. J. SOC. PSYCHOL. 295, 300, 302 (2001); see also *Dothard v. Rawlinson*, 433 U.S. 321, 328–31 (1977) (recognizing that height and weight qualifications can have a disparate impact on women).

90. Indeed, one scholar found that subjects expressed confusion and difficulty in following instructions when they were instructed to make attributions to discrimination based on a disparate impact paradigm. See E-mail from Laurie T. O'Brien, Assistant Professor, Tulane Univ. to Katie R. Eyer, Research Scholar, Univ. of Pa. (Sept. 11, 2009, 15:04:21 EST) (on file with author).

91. E.g., Swim et al., *Judgments of Prejudice*, *supra* note 82, at 951 fig.2 (finding study subjects rated the attribution to discrimination at only 2.08 on a seven-point scale in no-harm condition, whereas the mean attribution for high-harm condition was 3.92).

92. E.g., Lisa Feldman Barrett & Janet K. Swim, *Appraisals of Prejudice and Discrimination*, in PREJUDICE: THE TARGET'S PERSPECTIVE 11, 22 (1998) (“[T]he positive aspects of benevolent forms of discrimination such as paternalism may make it difficult for people to recognize this . . . as indicative of prejudice.” (citations omitted)); Janet K. Swim et al., *Judgments of Sexism: A Comparison of the Subtlety of Sexism Measures and Sources of Variability in Judgments of Sexism*, 29 PSYCHOL. WOMEN Q. 406, 409 (2005) [hereinafter Swim et al., *Judgments of Sexism*] (reporting that respondents were unlikely to perceive benevolent sexist attitudes as sexist).

a white person discriminating against a racial minority).<sup>93</sup> Outside of these “classic” discrimination scenarios (for example in the minority on minority discrimination context), observers are far less likely to make attributions to discrimination.<sup>94</sup>

Finally, the perceived controllability of the victim’s stigmatized status appears to have a significant effect on people’s willingness to make attributions to discrimination, and the extent to which differential treatment is perceived as legitimate. Thus, people make fewer attributions to discrimination (and are more likely to characterize differential treatment as legitimate) where the basis for stigmatization is perceived to be within the victim’s control.<sup>95</sup> As a result, differential treatment of certain groups (such as the overweight, those with certain mental and physical disabilities, and gays and lesbians) is less likely to be interpreted as discriminatory, and more likely to be viewed as justified, than discrimination against groups whose statuses are perceived as immutable (e.g., women, African Americans).<sup>96</sup>

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93. *E.g.*, Derek R. Avery et al., *What Are the Odds? How Demographic Similarity Affects the Prevalence of Perceived Employment Discrimination*, 93 J. APPLIED PSYCHOL. 235, 236 (2008); Inman & Baron, *supra* note 55, at 732; Angela J. Krumm & Alexandra F. Corning, *Perceived Control as a Moderator of the Prototype Effect in the Perception of Discrimination*, 38 J. APPLIED SOC. PSYCHOL. 1109, 1110–12 (2008); Major & Sawyer, *supra* note 7, at 94–95.

94. *E.g.*, Inman & Baron, *supra* note 55, at 732.

95. *E.g.*, Major et al., *supra* note 51, at 288–89; Major & Sawyer, *supra* note 7, at 98; *see also* Bruce Blaine & Zoe Williams, *Belief in the Controllability of Weight and Attributions to Prejudice Among Heavyweight Women*, 51 SEX ROLES 79, 83 (2004) (finding that priming participants with materials emphasizing the controllability of weight decreased overweight individuals’ tendency to characterize their rejection as based on prejudice); Jennifer Crocker et al., *The Stigma of Overweight: Affective Consequences of Attributional Ambiguity*, 64 J. PERSONALITY & SOC. PSYCHOL. 60, 66 (1993) (finding overweight women—while attributing their rejection to their weight—did not characterize this rejection as discriminatory).

96. *See, e.g.*, Crocker et al., *supra* note 95, at 66; Major et al., *supra* note 51, at 288–89; Bernard Weiner et al., *An Attributional Analysis of Reactions to Stigmas*, 55 J. PERSONALITY & SOC. PSYCHOL. 738, 740–41, 745–46 (1988) (reporting that study participants had more positive reactions to individuals with disabilities that were perceived as being outside of the individual’s control); *see also* Donald P. Haider-Markel & Mark R. Joslyn, *Attributions and the Regulation of Marriage: Considering the Parallels Between Race and Homosexuality*, 38 PS. POL. SCI. & POL. 233, 236 (2005) (finding that opposition to a ban on gay marriage correlates with the belief that sexual orientation is attributable to biological origins); Donald P. Haider-Markel & Mark R. Joslyn, *Beliefs About the Origins of Homosexuality and Support for Gay Rights*, 72 PUB. OPINION Q. 291, 300 tbl.2 (2008) (same); Ryan M. Quist & Douglas M. Wiegand, *Attributions of Hate: The Media’s Causal Attributions of a Homo-*

## B. REASONS FOR THE BASIC PHENOMENON

Why do people resist making attributions to discrimination, particularly outside of the classic disparate treatment context? Research by psychology scholars suggests a major role for two key psychological factors: (1) the tension between widespread American belief systems regarding meritocracy and making attributions to discrimination; and (2) the influence of widespread views regarding the nature and commonality of discrimination on how potentially discriminatory events are perceived. As detailed below, psychologists have found considerable support for the conclusion that each of these factors plays a substantial role in influencing (and minimizing) the extent to which individual observers make attributions to discrimination.<sup>97</sup>

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*phobic Murder*, 46 AM. BEHAV. SCIENTIST 93, 103–04 (2002) (in survey of articles discussing the Matthew Shepard murder finding that “[a]rticles that were more likely to attribute homosexuality to controllable causes also were coded as less likely to have favorable attitudes towards homosexuals or antigay hate crime legislation”).

97. Victims of discrimination, while subject to some extent to the same psychological constraints described herein, are also subject to a much more complicated array of motivational and cognitive influences on their willingness to make attributions to discrimination. *See, e.g.*, Major et al., *supra* note 51, at 270–72, 279–86 (summarizing research regarding perceptions and reporting of discrimination by victims); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES, *supra* note 49, at 285, 286–89, 291–92 (same); J. Nicole Shelton & Rebecca E. Stewart, *Confronting Perpetrators of Prejudice: The Inhibitory Effects of Social Costs*, 28 PSYCHOL. WOMEN Q. 215, 220–21 (2004) (describing how perceived personal costs can influence the likelihood of confronting discrimination); *see also* Cheryl R. Kaiser, *Dominant Ideology Threat & the Interpersonal Consequences of Attributions to Discrimination*, in STIGMA & GROUP INEQUALITY: SOCIAL PSYCHOLOGICAL PERSPECTIVES 45, 47–50 (Shana Levin & Colette van Laar, eds. 2006) [hereinafter Kaiser, *Dominant Ideology Threat*] (describing research showing that complaining of discrimination leads to increased derogation of victims of discrimination, even where there is strong corroborative evidence of discrimination). Because the factors affecting victims’ attributions (insofar as those factors are unique to victims) are not relevant to the central issue here (when judges and jurors are willing to make attributions to discrimination), they are not discussed in this Article. In addition, I have omitted a discussion of a few factors that have been shown to influence perceptions of discrimination, but which are impossible to interpret in terms of their practical significance for judge and juror decision-making. *See, e.g.*, Gretchen B. Sechrist et al., *Mood as Information in Making Attributions to Discrimination*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 524, 528–29 (2003) (finding mood appears to moderate both observers’ and victims’ tendency to make attributions to discrimination, with attributions to discrimination being less likely when mood is elevated than when it is depressed).

### 1. Meritocracy Beliefs and Attributions to Discrimination

It is well-established that the overwhelming majority of Americans—of all groups and races—subscribe to some extent to meritocracy beliefs.<sup>98</sup> Indeed, meritocracy beliefs are so widespread in the United States that they are frequently referred to as the dominant or national American ideology.<sup>99</sup> Meritocracy beliefs can take a variety of forms, but typically center around a cluster of related beliefs that: (1) hard work gets you ahead in life; (2) advancement is possible for all individuals in American society; and (3) people usually get what they deserve based on their effort and skill.<sup>100</sup>

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98. See, e.g., JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 44, 49, 287–89 (1986) (documenting American meritocracy beliefs and referring to such beliefs as the “dominant ideology” in America); John T. Jost et al., *Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced System Justification Among the Disadvantaged*, 33 EUR. J. SOC. PSYCHOL. 13, 26 (2003) (finding that all groups surveyed, including minority groups, “endorsed meritocratic ideology to a relatively strong extent” and describing survey results); Sheri R. Levy et al., *Hurricane Katrina's Impact on African Americans' and European Americans Endorsement of the Protestant Work Ethic*, 6 ANALYSES SOC. ISSUES & PUB. POL'Y 75, 75–76 (2006) (noting that the Protestant Work Ethic—a type of meritocracy belief—“is widely endorsed by Americans of all ages and backgrounds, and thought to be a stable, deeply ingrained cultural belief”); Brenda Major & Toni Schmader, *Legitimacy and the Construal of Social Disadvantage*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 176, 182 (John T. Jost & Brenda Major eds., 2001) (describing meritocracy beliefs as the “dominant ideology” in the United States and noting that such beliefs are widely ascribed to even by those who are disadvantaged in society). The literature in this area has used a variety of terms and constructs to address this issue, including “Belief in a Just World” (BJW) and “Protestant Work Ethic” (PWE). For linguistic and analytical ease, I use here the single term “meritocracy beliefs” to describe these various constructs, with the caveat that using that single term somewhat simplifies the experimental picture.

99. See e.g., KLUEGEL & SMITH, *supra* note 98, at 23, 287–89; see also Major & Schmader, *supra* note 98, at 182; cf. Lindsay E. Rankin et al., *System Justification and the Meaning of Life: Are the Existential Benefits of Ideology Distributed Unequally Across Racial Groups?*, 22 SOC. JUST. RES. 312, 324–26 (2009) (finding that subscribing to meritocracy beliefs has significant positive psychological effects, but that these effects are lesser—and sometimes even reversed—in racial minorities).

100. See, e.g., KLUEGEL & SMITH, *supra* note 98, at 23, 44; Jost et al., *supra* note 98, at 25–26; Levy et al., *supra* note 98, at 75–76; Major & Schmader, *supra* note 98, at 182; see also Eric Luis Uhlmann et al., *American Moral Exceptionalism*, in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYS-

Given the overwhelming pervasiveness of meritocracy beliefs in American society, it would be surprising if these beliefs did not have some effect on Americans' perceptions of events in the world around them. And indeed, the psychological literature (led by a vein of research called System Justification Theory or SJT) has made clear that world-view beliefs like meritocracy can have a profound effect on people's interpretations of particular events, and the extent to which they perceive them as unfair or justified.<sup>101</sup> Psychology scholars have demonstrated, for example, that people often develop meritocracy-consistent explanations for why a particular group is more successful than another (often by blaming or negatively stereotyping the relatively unsuccessful group).<sup>102</sup> Similarly, studies have shown that people often ignore relevant data that suggest that meritocratic principles are being violated (including by—at times—misremembering nonmeritocratic explanations as being more legitimate than they in fact were).<sup>103</sup>

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TEM JUSTIFICATION 27, 32–37 (John T. Jost et al. eds., 2009) (describing the origins and contemporary manifestations of American meritocracy beliefs).

101. SJT scholars' principal premise is that people are psychologically motivated to defend the status quo. As a byproduct of this hypothesis they have argued that meritocracy beliefs (and other similar constructs) are often developed in order to justify current inequalities. These beliefs, in turn, play a substantial role in the process whereby individuals perceive a particular set of events as fair and justified. *See, e.g.*, John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 260, 262–63 (2005). For a good general overview of the SJT literature and findings, see generally Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 *CALIF. L. REV.* 1119 (2006); John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 *POL. PSYCHOL.* 881 (2004).

102. For example, SJT scholars have found that depending on which of two groups is experimentally manipulated to be characterized as more successful, people will characterize the “successful” group as more intelligent, hard working, etc., and the less “successful” group as less intelligent, lazier, etc. *See, e.g.*, Blasi & Jost, *supra* note 101, at 1134–35; John T. Jost & Diana Burgess, *Attitudinal Ambivalence and the Conflict Between Group and System Justification Motives in Low Status Groups*, 26 *PERSONALITY & SOC. PSYCHOL. BULL.* 293, 297–300 (2000). This result holds even where people are themselves a part of the experimentally designated “unsuccessful” group, showing the ability of “unsuccessful” or subordinated groups to internalize the assumption that meritocracy-based explanations (rather than discrimination or simple unfairness) are responsible. Blasi & Jost, *supra* note 101, at 1134–35; Jost & Burgess, *supra*, at 297–300.

103. For example, SJT scholars have shown that people misremember a meritocracy-violating explanation as more legitimate or meritocratic than it

All this has led scholars of the perception of discrimination to hypothesize that one of the factors leading to resistance to making attributions to discrimination may be the psychological tension between meritocracy beliefs and recognizing particular events as discrimination.<sup>104</sup> For obvious reasons, discrimination—particularly if it is perceived to be common or systematic—calls into question the veracity of meritocratic belief systems.<sup>105</sup> Simply put, if minorities, women, and other disadvantaged groups are regularly denied opportunities on the basis of reasons other than their effort and abilities, then we do not live in a meritocracy. Moreover, unlike isolated and individualistic meritocracy-violating events (such as a particular person being an unfair and arbitrary distributor of rewards), discrimination has the potential to pose a much more substantial challenge to meritocratic beliefs, insofar as it suggests a systematic disadvantaging of particular classes of individu-

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actually was at a rate of roughly 33%. See Elizabeth L. Haines & John T. Jost, *Placating the Powerless: Effects of Legitimate and Illegitimate Explanation on Affect, Memory, and Stereotyping*, 13 SOC. JUST. RES. 219, 231 (2000). In contrast, people given a meritocracy-affirming explanation misremembered getting a meritocracy-violating explanation at a rate of only 3%. *Id.*

104. See, e.g., Carolyn L. Hafer & Becky L. Choma, *Belief in a Just World, Perceived Fairness, and Justification of the Status Quo*, in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION, *supra* note 100, at 107, 108–13; Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 806–12 (2006); Sharon K. McCoy & Brenda Major, *Priming Meritocracy and the Psychological Justification of Inequality*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 341, 341–42 (2007); Laurie T. O'Brien et al., *Understanding White Americans' Perceptions of Racism in Hurricane Katrina-Related Events*, 12 GROUP PROCESSES & INTERGROUP REL. 431, 432–33 (2009). It may also be that meritocracy beliefs directly lead to fewer attributions to discrimination because they cause people to be more likely to perceive events as based on merit, rather than unfair outcomes. See, e.g., Brenda Major et al., *Perceived Discrimination as Worldview Threat or Worldview Confirmation: Implications for Self-Esteem*, 92 J. PERSONALITY & SOC. PSYCHOL. 1068, 1081 (2007) [hereinafter Major et al., *Perceived Discrimination as Worldview Threat*]; Brenda Major et al., *Perceiving Personal Discrimination: The Role of Group Status and Legitimizing Ideology*, 82 J. PERSONALITY & SOC. PSYCHOL. 269, 270–71 (2002) [hereinafter Major et al., *Perceiving Personal Discrimination*].

105. O'Brien et al., *supra* note 104, at 432; see also Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 53–54; Cheryl R. Kaiser et al., *Post-Hurricane Katrina Racialized Explanations as a System Threat: Implications for Whites' and Blacks' Racial Attitudes*, 21 SOC. JUST. RES. 192, 193–94 (2008) [hereinafter Kaiser et al., *Post-Hurricane Katrina*].

als.<sup>106</sup> Thus, there are significant reasons to believe that accusations of discrimination should trigger the types of responses (such as denial and victim blame) that have been well-documented in the context of other threats to meritocratic principles, and that these responses will translate into fewer attributions to discrimination.<sup>107</sup>

Considerable experimental support has been gathered for this theoretical perspective over the last decade. Most strikingly, a series of studies have directly tested the theory that meritocratic beliefs are inversely related to attributions to discrimination, and have found that such beliefs do in fact lead people to make significantly fewer attributions to discrimination.<sup>108</sup> While some of these studies have employed correlational methods that are causally hard to interpret (showing only that those with higher meritocracy beliefs make fewer attributions to discrimination), others have employed much more nuanced psychological methods to tease out the causal influence of meritocracy beliefs. For example, a number of scholars have demonstrated that even when people are primed<sup>109</sup> subcon-

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106. Kaiser et al., *Post-Hurricane Katrina*, *supra* note 105, at 193–94; Cheryl R. Kaiser et al., *Why Are Attributions to Discrimination Interpersonally Costly? A Test of System- and Group-Justifying Motivations*, 32 *PERSONALITY & SOC. PSYCHOL. BULL.* 1523, 1528 (2006) [hereinafter Kaiser et al., *Why Are Attributions to Discrimination Costly*].

107. See, e.g., Hafer & Choma, *supra* note 104, at 108–13; Kaiser & Major, *supra* note 104, at 808–12; O'Brien et al., *supra* note 104, at 432–33; see also Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 55–56; Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1524.

108. See, e.g., Hafer & Choma, *supra* note 104; Kaiser & Major, *supra* note 104, at 808–12; Major & Schmader, *supra* note 98, at 185–89; Major et al., *Perceiving Personal Discrimination*, *supra* note 104, at 275, 278, 281; McCoy & Major, *supra* note 104, at 346, 350–51; see also Isaac M. Lipkus & Ilene C. Siegler, *The Belief in a Just World and Perceptions of Discrimination*, 127 *J. PSYCHOL.* 465, 473 (1993) (finding that higher scores on the “Belief in a Just World” scale correlated with lower perceptions of individual discrimination). Interestingly, research has shown that members of high status groups (such as white men) who are rejected in favor of a minority group member are *more* likely to believe they have been subject to discrimination where they have high meritocracy beliefs. See, e.g., Major et al., *Perceiving Personal Discrimination*, *supra* note 104, at 275, 278, 281. This result makes sense, as strong meritocracy beliefs may lead individuals to believe that minority groups are genuinely inferior, and thus that outcomes favoring such groups must not be based on merit principles.

109. For those not familiar with priming, it is a technique often used in the psychological literature to subconsciously activate a particular psychological construct, which *inter alia* allows a more direct evaluation of its causal effects.

sciously to think about meritocratic ideals, they make fewer attributions to discrimination than a control group.<sup>110</sup> Thus, even a task as simple as unscrambling words to form meritocracy-related sentences<sup>111</sup> in advance of making assessments of whether discrimination has occurred causes people to make significantly fewer attributions to discrimination.<sup>112</sup>

Further support for the hypothesized causal influence of a conflict between meritocracy beliefs and attributions to discrimination has come from an array of studies that have looked at the extent to which observers display classic psychological threat response signs (e.g., signs of agitation or anxiety) when exposed to allegations of discrimination.<sup>113</sup> In effect, psychology scholars have tested the theory that attributions to discrimination are perceived as a threat to many individuals' core beliefs by examining the existence of well-known manifestations of psychological threat conditions—such as negative feelings (including anxiety and distress), victim blame, and “in-group”<sup>114</sup> bolstering—upon exposure to accusations of discrimination.<sup>115</sup>

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110. See, e.g., Kaiser & Major, *supra* note 104, at 811; McCoy & Major, *supra* note 104, at 346.

111. For example, the words presented to a subject might be “Life Work Gets Hard You in Ahead,” which unscrambles to “Hard Work Gets You Ahead in Life.”

112. See, e.g., Kaiser & Major, *supra* note 104, at 811; McCoy & Major, *supra* note 104, at 346.

113. See *infra* notes 114, 117–26 and accompanying text. For additional studies with results supportive of the meritocracy-threat hypothesis, see, for example, Cheryl R. Kaiser & Jennifer S. Pratt-Hyatt, *Distributing Prejudice Unequally: Do Whites Direct Their Prejudice Towards Strongly Identified Minorities?*, 96 J. PERSONALITY & SOC. PSYCHOL. 432, 442 (2009) (showing that strongly identified racial minorities are derogated more by individuals who strongly endorse meritocracy beliefs, apparently because they are assumed to lack shared beliefs in meritocracy ideals); Levy et al., *supra* note 98, at 79, 81 (showing that although African Americans' endorsement of meritocracy beliefs declined in the wake of Hurricane Katrina, apparently partially in response to perceptions of discrimination, they rebounded relatively quickly). There is also an interesting body of research from the affirmative action context that is supportive of the meritocracy-threat hypothesis. See, e.g., Faye J. Crosby et al., *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 599–600 (2006); Donna M. Garcia et al., *Opposition to Redistributive Employment Policies for Women: The Role of Policy Experience and Group Interest*, 44 BRIT. J. OF SOC. PSYCHOL. 583, 595–96 (2005).

114. The term “in-group” is used in psychology and sociology to refer to social groups that one identifies with as a member. The term “out-group” is used to refer to groups that one does not belong to and does not identify with.

115. See *infra* notes 117–26 and accompanying text.

As set forth below, the results have been striking—attributions to discrimination do in fact trigger psychological threat responses—particularly among those who are high endorsers of meritocracy beliefs or who have been experimentally primed with such beliefs.<sup>116</sup>

Among the most striking findings in this area are that meritocracy beliefs lead to increased victim blame and derogation in the discrimination context, both phenomena that are frequently observed when someone experiences a psychological “threat.”<sup>117</sup> Indeed, Cheryl Kaiser and her colleagues have demonstrated that people routinely ascribe negative qualities to individuals who attribute their failure to discrimination (as compared to some other cause), even in circumstances where discrimination appears to be a virtual certainty.<sup>118</sup> These results, moreover, have been found to be moderated by meritocracy beliefs—those with high meritocracy beliefs are significantly more likely to engage in victim blame than those with low meritocracy beliefs.<sup>119</sup> Similarly, scholars have found that subtle priming with meritocracy constructs (via a word scramble or other method) leads to increased endorsement of negative stereotypes regarding African Americans and other groups that have traditionally been subjected to discrimination.<sup>120</sup>

116. See *infra* notes 117–26 and accompanying text.

117. See *infra* notes 118–19 and accompanying text. See generally Aaron C. Kay et al., *Victim Derogation and Victim Enhancement as Alternate Routes to System Justification*, 16 *PSYCHOL. SCI.* 240 (2005) (describing the role of victim derogation in managing responses to psychological threats).

118. See, e.g., Donna M. Garcia et al., *Perceivers' Responses to In-Group and Out-Group Members Who Blame a Negative Outcome on Discrimination*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 769, 774–77 (2005); Kaiser & Major, *supra* note 104, at 818–19; Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 *GROUP PROCESSES & INTERGROUP REL.* 227, 233–36 (2003); Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 47–50; Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 *PERSONALITY & SOC. PSYCHOL. BULL.* 254, 258, 261–62 (2001) [hereinafter Kaiser & Miller, *Stop Complaining*].

119. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 56–57; Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1527, 1531; Major et al., *Perceived Discrimination as Worldview Threat*, *supra* note 104, at 1076.

120. See, e.g., Irwin Katz & R. Glen Hass, *Racial Ambivalence and American Value Conflict: Correlational and Priming Studies of Dual Cognitive Structures*, 55 *J. PERSONALITY & SOC. PSYCHOL.* 893, 899–902 (1988); McCoy & Major, *supra* note 104, at 349–50.

In the converse of this victim-blame phenomenon, scholars have found that attributions to discrimination against out-group members lead to a defensive reaction, causing people to more strongly embrace their own in-group.<sup>121</sup> Thus, for example, whites who were shown a video attributing the problems in the aftermath of Hurricane Katrina to discrimination expressed significantly more positive feelings towards other whites than a group shown a video attributing Katrina's problems to simple incompetence.<sup>122</sup> Relatedly, scholars have found that receiving an affirmation treatment, designed to lessen anxieties and increase self-esteem, significantly increases white observers' willingness to describe a particular set of facts as discrimination.<sup>123</sup> Both of these findings suggest that defensive reactions may play some role in majority group resistance to making attributions to discrimination, a conclusion that is buttressed by research showing that individuals are much less likely to characterize behaviors as discriminatory in circumstances that might be self-implicating (i.e., where they themselves have engaged in similar behaviors).<sup>124</sup>

A final key piece of evidence that attributions to discrimination are perceived as psychologically threatening to meritocracy beliefs comes from experiments evaluating the emotional response of observers who are exposed to a minority group member making an attribution to discrimination. Along a significant array of affect-related criteria—including anxiousness, nervousness, and distress—the extent of endorsement of meritocracy beliefs has been found to moderate the extent of psychological discomfort or distress that observers experience when faced with an attribution to discrimination (or, put another way, those who are higher endorsers of meritocracy beliefs experience significantly greater psychological distress when faced with attributions to discrimination).<sup>125</sup> Moreover, priming studies have demonstrated that even where a subject is simply

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121. See *supra* note 118.

122. Kaiser et al., *Post-Hurricane Katrina*, *supra* note 105, at 199 tbl.1.

123. See, e.g., Glenn Adams et al., *The Effect of Self-Affirmation on Perception of Racism*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 616, 621–22 (2006).

124. See, e.g., Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 133 (2006).

125. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 54–55; Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1533–34.

primed with meritocracy beliefs, and is not *a fortiori* a strong endorser of such beliefs, they experience significantly greater psychological distress when faced with accusations of discrimination than their nonprimed counterparts.<sup>126</sup>

There is, then, substantial support for the conclusion that attributions to discrimination are in tension with meritocracy beliefs, and that this dynamic contributes to many people's reluctance to make robust attributions to discrimination. In the following Section, I turn to a discussion of how cognitive factors influence attributions to discrimination.

## 2. The Influence of Cognitive Factors on Attributions to Discrimination<sup>127</sup>

Although the precise theories differ in their terminology and specifics, it is well-established in the field of psychology that the human process of making judgments is shortcut-laden, and is not comprehensively rational in its analysis of potentially relevant information.<sup>128</sup> We simply do not have the cognitive

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126. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 54–55; Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1534.

127. I have omitted here a discussion of one of the cognitive factors that undoubtedly plays a large role in people's failure to detect discrimination in individual circumstances prior to litigation. Specifically, psychology scholars have found very substantial evidence to support the conclusion that people have much greater difficulties discerning discrimination in disorganized information than in information that provides systematic comparisons. Thus, people are much less likely to make attributions to discrimination where they are presented with information in a format that does not make it easy to compare outcomes across groups (for example, information presented in the disordered multi-page form it would likely be maintained in an employers' files, as opposed to in a compiled chart). See, e.g., Faye J. Crosby & Alison M. Konrad, *Affirmative Action in Employment*, 10 *DIVERSITY FACTOR* 3, 5 (2002); Faye Crosby et al., *Cognitive Biases in the Perception of Discrimination: The Importance of Format*, 14 *SEX ROLES* 637, 642, 644–46 (1986); see also Christel G. Rutte, *Organization of Information and the Detection of Gender Discrimination*, 5 *PSYCHOL. SCI.* 226, 229–30 (1994). Given that the prelitigation presentation of information is likely to be highly unorganized (if indeed comparator information is even available), this phenomenon undoubtedly plays a significant role in causing much discrimination to go undetected in our society. I have omitted a full discussion of this phenomenon here, as it is difficult to know what if any causal valence it has in relation to actual litigation outcomes, without having a better understanding of whether plaintiffs' attorneys do or do not typically do a good job of obtaining and organizing information as part of the litigation process.

128. For an excellent and accessible overview of many of the pertinent concepts, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive*

capacity to undergo a full evaluation of all information we have ever received *de novo* each time we are presented with a new judgment-demanding situation.<sup>129</sup> One feature of this necessary cognitive conservativeness is that our existing understandings of the world have a substantial influence on how we interpret incoming information, particularly in ambiguous circumstances.<sup>130</sup>

There are a number of specific ways that established understandings can impact the interpretation of information in a particular factual scenario. Among the most well-documented is the tendency for people to rely on their existing mental prototypes as a basis for making judgments in a new factual context.<sup>131</sup> In essence, people will compare incoming data against their existing cognitive template to see if they are a match—if there are too many dissimilarities, that template will be rejected as a potential explanation, and the search for another will begin.<sup>132</sup> For example, a person may assess whether or not a particular object is a table by comparing it to his or her mental template of “table”: legs, flat surface, etc. More complexly, a person may make initial judgments about whether a person is an authority figure by accessing his or her mental template for “authority figure”; a template that may include tone of voice, posture, and for some people, race and sex. The process of making judgments thus becomes one of comparing salient features of an existing template and the situation currently demanding interpretation, and judging the extent of similarity.<sup>133</sup>

A similar, but distinct, phenomenon has been found in people’s reliance on what is referred to in the psychology field as “cognitive accessibility” as an indicator of the likelihood that a particular causal explanation is correct. For all of us, differing explanations for particular outcomes are more or less “cognitively accessible,” i.e., more or less likely to come to mind when faced with a particular situation.<sup>134</sup> This depends on a

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*Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188–90, 1199–1211 (1995).

129. *Id.*

130. *Id.*

131. David E. Rumelhart, *Schemata and the Cognitive System*, in 1 HANDBOOK OF SOCIAL COGNITION 161, 163, 166 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984).

132. *Id.* at 166–71.

133. *Id.*

134. See, e.g., JONATHAN BARON, THINKING AND DECIDING 153–55 (4th ed. 2008).

host of factors, including the extent to which particular explanations are generally perceived to be common occurrences (e.g., a general belief that discrimination is relatively common) or have been recently accessed mentally (e.g., a recent experience with a set of events that were perceived as discriminatory).<sup>135</sup> Accessibility is in turn interpreted by most people as an indicator of the actual likelihood that the explanation is correct, such that cognitively accessible explanations are perceived to be more likely to be correct, whereas cognitively inaccessible explanations are perceived as less likely to be correct.<sup>136</sup>

Both of these well-established cognitive phenomena have obvious potential implications for the perception of discrimination. To the extent that most people have preexisting cognitive prototypes for what constitutes “discrimination,” cognitive psychology research suggests that these prototypes should have a substantial influence on the extent to which particular events are judged to be discrimination. Similarly, research on cognitive accessibility suggests that the extent to which discrimination is a more (or less) cognitively accessible explanation for negative outcomes than other potential causes (such as a lack of effort or ability on the part of the victim) may have a significant impact on whether people make judgments of discrimination in particular contexts.

The first of these concepts—the notion that cognitive prototypes play a role in how people make judgments of discrimination—is by now well-accepted among scholars of the perception of discrimination. Across a wide variety of contexts, psychology scholars have demonstrated that people do in fact have cognitive templates of what constitutes discrimination (although these templates may vary from person to person), and that these templates profoundly influence the interpretation of a particular set of events as discriminatory or nondiscriminatory.<sup>137</sup> Thus, if significant features of an evaluator’s cognitive proto-

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135. *Id.*

136. *Id.*

137. See, e.g., Major & Sawyer, *supra* note 7, at 94–98; Laurie T. O’Brien et al., *How Status and Stereotypes Impact Attributions to Discrimination: The Stereotype-Asymmetry Hypothesis*, 44 *J. EXPERIMENTAL PSYCH.* 405, 405–06 (2008); O’Brien et al., *supra* note 104, at 439; see also Barrett & Swim, *supra* note 92 (providing an excellent overview of the ways in which cognitive factors may influence attributions to discrimination); *infra* notes 139–43 and accompanying text.

type of discrimination are missing or incongruent in the factual scenario presented to them, the evaluator generally will not make attributions to discrimination.<sup>138</sup>

So what are the features of most people's cognitive templates of discrimination? Although any number of cognitive prototypes undoubtedly exist across the population, the cognitive prototype that appears to be commonly applied by most people is a relatively narrow one of fairly explicit classic disparate treatment.<sup>139</sup> Thus, psychologists have found, for example, that:

- People's cognitive prototype of discrimination, and hence their willingness to make attributions to discrimination, is dependent on the existence of very strong and explicit evidence of invidious intent. Thus, even where victims are significantly harmed, if there is no intent (or even ambiguous intent) people are very reluctant to make attributions to discrimination.<sup>140</sup>
- People generally also consider harm to be a prototypical element of discrimination, and are far less likely to make attributions to discrimination in circumstances where there is ambiguous harm to the victim (e.g., "benevolent sexism") or in which the actor's intentions are unambiguously invidious but there is no obvious tangible harm.<sup>141</sup>
- Stereotypical perpetrator/victim dyads feature prominently in many people's prototypes of discrimination, such that unequal treatment perpetrated by a member of the same minority group, or by a minority group member

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138. See, e.g., Major & Sawyer, *supra* note 7, at 94–98; see also *infra* notes 138–43 and accompanying text.

139. See, e.g., O'Brien et al., *supra* note 104, at 437; Sommers & Norton, *supra* note 124, at 132.

140. See, e.g., Major & Sawyer, *supra* note 7, at 94, 98; Swim et al., *Judgments of Prejudice*, *supra* note 82, at 958–59; see also Foster & Dion, *supra* note 88 (showing that individuals generally did not perceive discrimination in a disparate impact context); Kappen & Branscombe, *supra* note 89, at 300, 302 (same).

141. See, e.g., Major & Sawyer, *supra* note 7, at 94, 98; Swim et al., *Judgments of Prejudice*, *supra* note 82, at 951; see also Swim et al., *Judgments of Sexism*, *supra* note 92, at 408–10; Barrett & Swim, *supra* note 92, at 22.

against a majority group member, is generally less likely to be attributed to discrimination.<sup>142</sup>

- The prototype of a victim of discrimination is one who does not have control over his or her stigmatized status, such that victims who are perceived as having control are significantly less likely to be found to have been subjected to discrimination.<sup>143</sup>

There is also developing (albeit less fully matured) evidence for the conclusion that the cognitive accessibility of discrimination as compared to other explanations also plays a role in judgments of discrimination. Specifically, several scholars have found that people's background understandings of how common or rare discrimination is significantly influences whether or not they make attributions to discrimination in particular factual contexts (with those who have higher preexisting expectancies of the incidence of discrimination being more likely to find discrimination in any given context).<sup>144</sup> This finding is consistent with the conclusion that the explanation of discrimination is relatively cognitively accessible for those who believe discrimination to be relatively widespread, and that, conversely, discrimination is relatively cognitively inaccessible for those who believe discrimination to be rare.<sup>145</sup> Whether or not one subscribes to a cognitive accessibility interpretation, it is clear that background understandings of the commonality of discrim-

142. See, e.g., Avery et al., *supra* note 93, at 236; Inman & Baron, *supra* note 55, at 732; Krumm & Corning, *supra* note 93, at 1110–11 (2008); Major & Sawyer, *supra* note 7, at 94, 98.

143. See, e.g., Blaine & Williams, *supra* note 95, at 83; Crocker et al., *supra* note 95, at 66; Major et al., *supra* note 51, at 288–89; Major & Sawyer, *supra* note 7, at 98; see also sources cited *supra* notes 95–96.

144. See, e.g., Avery et al., *supra* note 93, at 237; Barrett & Swim, *supra* note 92, at 24; James D. Johnson et al., *Predicting Perceived Racism and Acceptance of Negative Behavioral Intergroup Responses: Validating the JLS in a College and Community Sample of Blacks*, 40 PERSONALITY & INDIV. DIFFERENCES 421, 427 (2006); Major & Sawyer, *supra* note 7, at 96–97; see also Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762, 764–65 (2005) (showing that racial divides in the perceived fairness of the criminal justice system have a large impact on the interpretation of ambiguously discriminatory incidents).

145. For example, it is reasonable to assume that discrimination will be a cognitively more accessible explanation for negative outcomes if discrimination is perceived as a common phenomenon in today's society.

ination significantly influence attributions to discrimination in individual circumstances.<sup>146</sup>

So do most people believe discrimination to be relatively rare or common? The answer varies significantly across groups, with majority group members (i.e., white males) being highly likely to subscribe to a “discrimination is rare” view.<sup>147</sup> African Americans are more likely to subscribe to a “discrimination is common” view, as are (to a somewhat lesser extent) members of other historically disadvantaged groups (such as women and people with disabilities).<sup>148</sup> Thus, there are reasons to believe that different groups may respond differently to particular factual scenarios when asked to assess whether or not discrimination has occurred (a phenomenon that has considerable empirical support), and that the groups that predominate on the federal judiciary are among the least likely to make attributions to discrimination.<sup>149</sup>

Interestingly, both of the foregoing cognitive phenomena are *a fortiori* content-neutral vis-à-vis whether or not they are likely to be helpful or harmful to discrimination claimants. One can envision, for example, reliance on cognitive prototypes being helpful to discrimination claimants if the prevailing prototype of discrimination was one that embraced (as so many legal scholars do) anti-subordination principles, or presumed that

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146. See sources cited *supra* note 141.

147. See, e.g., KLUEGEL & SMITH, *supra* note 98, at 49, 63, 185–200; Hurwitz & Peffley, *supra* note 144, at 763; O'Brien et al., *supra* note 104, at 441; David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rate for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 561–62 (2003); Robinson, *supra* note 6, at 1107–17.

148. See, e.g., KLUEGEL & SMITH, *supra* note 98, at 190, 200; Hurwitz & Peffley, *supra* note 144, at 763; Robinson, *supra* note 6, at 1107–17; see also Avery et al., *supra* note 93, at 237.

149. A number of studies have found that judges of different groups respond differently in making assessments of discrimination, and that white male judges are less likely to make such attributions as compared to other groups. See, e.g., Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 367–71 (2011); Pat K. Chew & Robert E. Kelley, *Myth of the Colorblind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161 (2009); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1787 (2005); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 343–44 (2012).

any individual who has fulfilled the *McDonnell Douglas* requirements has proven discrimination. Similarly, if popular opinion (particularly of those on the bench) widely subscribed to the view that discrimination remains common in our society, the relative cognitive accessibility of discrimination as a potential causal explanation would undoubtedly favor plaintiffs.

So what explains the content of widely held prototypes and beliefs about discrimination? No doubt the media, family, colleagues, and other social networks play a significant role. Psychologists have also developed some support for the conclusion, however, that meritocracy beliefs (discussed above for their influence on the frequency with which people make attributions to discrimination in individualized circumstances) also play a role in the broader views of discrimination that people adopt.<sup>150</sup> The most interesting work in this area has been performed by Laurie O'Brien, who has shown that meritocracy beliefs significantly influence the extent to which people adopt narrow, disparate treatment models of discrimination (people are much more likely to do so where they are high endorsers of meritocracy beliefs) as well as the extent to which people believe discrimination is generally widespread (people are more likely to believe discrimination is rare if they are high endorsers of meritocracy beliefs).<sup>151</sup> While work in this area is still in the developmental stages and many questions remain unanswered, existing research suggests that the various causal factors that scholars have observed may have significant interrelationships that have yet to be fully explored.<sup>152</sup>

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In sum, the psychological literature on the perception of discrimination shows an across-the-board tendency for people to decline to make attributions to discrimination; a tendency that is further accentuated outside of the context of explicit traditional disparate treatment. Psychological scholars have

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150. See, e.g., Lipkus & Siegler, *supra* note 108, at 470; O'Brien et al., *supra* note 104, at 437–39; see also Glenn Adams et al., *Perceptions of Racism in Hurricane Katrina: A Liberation Psychology Analysis*, 6 ANALYSES SOC. ISSUES & PUB. POL'Y 215, 219–20, 221–26 (2006) (discussing an array of factors that may influence prototypes and beliefs about discrimination).

151. See, e.g., O'Brien et al., *supra* note 104, at 437–39; see also Lipkus & Siegler, *supra* note 108, at 470.

152. See *supra* notes 150–51 and accompanying text.

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found, moreover, considerable experimental support for the conclusion that this phenomenon is driven by a tension between commonly held beliefs about discrimination and meritocracy and the recognition of discrimination claims. In the following Part, I turn to a discussion of the reasons why these phenomena provide a likely explanation for the pervasive difficulties that discrimination litigants face in the courts.

### III. APPLYING THE FINDINGS OF PSYCHOLOGY SCHOLARS TO REAL-WORLD DISCRIMINATION OUTCOMES

As discussed in Part I, many existing theories for why discrimination litigants face adverse outcomes do not fit well with the actual experiences of discrimination litigants.<sup>153</sup> So how do the findings of psychology scholars (discussed in Part II) fare? A side-by-side comparison of the findings of psychology scholars and the experiences of discrimination litigants suggests that extensive and striking overlaps exist between the two arenas.<sup>154</sup> Indeed, psychology scholars have repeatedly documented phenomena in lay subjects that closely replicate the full range of experiences of discrimination litigants, even down to the level of relative doctrinal minutiae.<sup>155</sup>

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153. See *supra* notes 34–50 and accompanying text.

154. See *infra* Table 1.

155. *Id.*

Table 1

**Summary: Psychology Studies and Anti-Discrimination Literature**

Phenomenon Observed	Psychology Study	Anti-Discrimination Literature / Case Law
Attributions to discrimination rare, even in cases of classic disparate treatment.	<i>See</i> sources cited <i>supra</i> notes 58–82 and accompanying text.	<i>See</i> sources cited <i>supra</i> notes 37, 41–42 and accompanying text.
Attributions to discrimination even less likely where no clear indicia of traditional invidious intent.	Swim et al. (2003); Foster & Dion (2004); Kappen & Branscombe (2001)	Bagenstos (2006); Bell (1985); Siegel (1997); Flagg (1993)
Differential treatment based on statuses that are perceived of as controllable (e.g., sexual orientation, obesity) unlikely to be perceived as discriminatory.	Major & Sawyer (2009); Major (2002); Crocker (1993); Blaine & Williams (2004); Weiner (1988); Quist & Weigand (2003); Haider-Markel & Joslyn (2008)	YOSHINO (2006); Yoshino (2002); Halley (1994)
Fact patterns that deviate from stereotypical discrimination “stories” (e.g., minority-on-minority discrimination, discrimination in which the same actor hires and fires an employee) less likely to be perceived as discrimination.	Inman & Baron (1996); Krumm & Corning (2008); Major & Sawyer (2009); Avery et al. (2008)	<i>Oncale v. Sundowner Offshore Services</i> , 523 U.S. 75, 79 (1998) (describing the reluctance of lower courts to recognize same-sex harassment as discrimination); <i>Brown v. CSC Logic, Inc.</i> , 82 F.3d 651, 658 (5th Cir. 1995) (describing same-actor inference which views with skepticism claims of dis-

Phenomenon Observed	Psychology Study	Anti-Discrimination Literature / Case Law
		crimination where the hiring and firing manager was the same)
Findings of discrimination rare where the alleged discriminator has a good faith belief that did not discriminate (even where actual basis for actions factually false and based on stereotypes).	Swim et al. (2003)	Krieger (2004); Krieger & Fiske (2006)
No finding of sex harassment where harassment at issue is non-sexual (but nonetheless sex-based) in nature.	Magley et al. (1999)	Schultz (2006); Schultz (1998); Juliano & Schwab (2001)
Requirement of actual harm to the victim in order to find discrimination.	Swim et al. (2003)	<i>Singeltary v. Missouri Dep't of Corrections</i> , 423 F.3d 886, 891–92 (8th Cir. 2005) (describing adverse employment action requirement)

These extensive parallel findings make perfect sense if—as the findings of psychology scholars suggest—most people are driven by common background views in making assessments of whether or not to characterize a particular set of facts as discrimination. Thus, for example, if both judges and lay people share a common view of discrimination—as a very rare, narrow, and generally explicit phenomena—it is unsurprising that both in the lab and in the courts, findings of discrimination are

rare, even where there is relatively strong evidence of invidious discriminatory intent.<sup>156</sup> Similarly, it makes sense that—if people’s shared “template” of discrimination is an act done by majority group members to minorities—both psychology subjects and judges would be more resistant to making findings of discrimination where the roles are not filled by stereotypical actors (e.g., minority on minority discrimination).<sup>157</sup>

In contrast, the striking similarities between the findings of psychology scholars and legal scholars are very difficult to explain if one assumes that judges and jurors—unlike the lay people studied in psychology studies—do not draw upon common background views in adjudicating discrimination claims. Indeed, what else *except* a common shared conception of “sex harassment” could explain the strikingly similar reluctance of both judges and lay people to characterize nonsexual (but sex-based) harassment as sex harassment?<sup>158</sup> Similarly, it is hard—if not impossible—to explain why lay subjects in psychology studies would show a pattern of results comparable to the real-world “good faith, honest belief rule” (developed by judges and typically applied at summary judgment) unless both derive from a common shared conception of discrimination as a phenomenon that derives from conscious invidious intent (instead

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156. Compare *supra* notes 58–82 and accompanying text (outlining the extensive support in the psychology literature for the conclusion that people resist making attributions to discrimination), with *supra* notes 38, 41–42 and accompanying text (demonstrating that even cases with comparatively strong evidence of discrimination are often dismissed in litigation).

157. Compare *supra* notes 93–94 and accompanying text (describing psychological literature demonstrating that research subjects are less likely to make attributions to discrimination where the perpetrator and victim do not fit the “classic” discrimination scenario, e.g., majority on minority discrimination), with *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (describing the resistance of the lower courts to characterizing same-sex harassment as discriminatory, and noting that some of the lower courts had categorically concluded that such harassment was non-actionable).

158. Compare Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 391–92 (1999) (describing this phenomenon in the psychology study context), with Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 THOMAS JEFFERSON L. REV. 101, 111–28 (2006) (describing this phenomenon in the courts), and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–738 (1998) (same), and Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 580–82 (2001) (same).

of from subconscious stereotypes).<sup>159</sup>

Thus, the extensive parallels between the findings of psychology scholars and the phenomena observed by legal scholars in the courts, strongly suggest that common background views—like those documented by psychology scholars—are playing a role in the contemporary adjudication of discrimination claims. Indeed, as other leading law and psychology scholars have observed—in the absence of (rarely available) direct studies on judges or jurors—there are few more persuasive indicators of a common underlying cause than this type of phenomenological overlap between the findings of psychology scholars and the pattern of decisions in the courts.<sup>160</sup> As a result, there are significant reasons to believe that real-world judges and jurors are—like the lay subjects studied by psychology scholars—influenced by their background views regarding meritocracy and discrimination in determining what *is* discrimination.

This conclusion is buttressed by a wealth of law and psychology studies demonstrating that the findings of psychology scholars may, in general, provide a helpful indicator of what types of dynamics are animating judge and juror behavior in real cases.<sup>161</sup> There are two similar but distinct ways that scholars have explored the likelihood that background beliefs and other common psychological phenomena are generally influencing real-world cases: (1) in relation to jurors, by comparing results across a wide array of experimental conditions to see if the study format or population appears to affect the results; and (2) in relation to judges, by testing real-world judges to see if they behave in a similar manner to lay populations.

The first of these approaches—used predominantly in the context of jury research—has focused on attempting to replicate

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159. Compare Swim et al., *Judgments of Prejudice*, *supra* note 82, at 951, 959 (showing pattern of results among lay subjects that is comparable to the real-world “good faith, honest belief” rule), with Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 839 (2004) (describing and critiquing the use of the “good faith, honest belief” rule by judges in discrimination litigation), and Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034–38 (2006) (same).

160. See, e.g., Dan Simon, *A Psychological Model of Judicial Decision-Making*, 30 RUTGERS L.J. 1, 34 (1998).

161. See *infra* notes 162–74 and accompanying text.

experimental results across an array of experimental conditions.<sup>162</sup> Thus, scholars have sought to replicate their findings with differing populations (typically students vs. a realistic “jury pool” population or real jurors) and across an array of study designs (ranging from a pencil and paper study design to real-world trial conditions).<sup>163</sup> These various studies—and a number of recent works that have compiled prior individualized findings—have thus attempted to examine whether the common (and unrealistic) conditions in which most mock juror studies are conducted may undermine their “ecological validity”<sup>164</sup> vis-à-vis real-world jury behavior.<sup>165</sup>

While the results of the foregoing “varied methodology”

162. See *infra* notes 162–68 and accompanying text.

163. See Robert M. Bray et al., *The Effects of Defendant Status on the Decisions of Student and Community Jurors*, 41 *SOC. PSYCHOL.* 256, 258 (1978); Michael J. Crowley et al., *The Juridical Impact of Psychological Expert Testimony in a Simulated Child Sexual Abuse Trial*, 18 *LAW & HUM. BEHAV.* 89, 93 (1994); Rogers Elliott & Robert J. Robinson, *Death Penalty Attitudes and the Tendency to Convict or Acquit: Some Data*, 15 *LAW & HUM. BEHAV.* 389, 395–97 (1991); Norman J. Finkel & Sharon F. Handel, *How Jurors Construe “Insanity,”* 13 *LAW & HUM. BEHAV.* 41, 48 (1989); Norman J. Finkel et al., *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, 12 *BEHAV. SCI. & L.* 5, 13–14 (1994) [hereinafter Finkel et al., *Killing Kids*]; Norman J. Finkel et al., *Right to Die, Euthanasia and Community Sentiment: Crossing the Public/Private Boundary*, 17 *LAW & HUM. BEHAV.* 487, 495 (1993) [hereinafter Finkel et al., *Right to Die*]; Solomon M. Fulero & Norman J. Finkel, *Barring Ultimate Issue Testimony: An “Insane” Rule?*, 15 *LAW & HUM. BEHAV.* 495, 500 (1991); Geoffrey Kramer et al., *Pretrial Publicity, Judicial Remedies and Jury Bias*, 14 *LAW & HUM. BEHAV.* 409, 423 (1990); Douglas J. Narby & Brian L. Cutler, *Effectiveness of Voir Dire as a Safeguard in Eyewitness Cases*, 79 *J. APPLIED PSYCHOL.* 724, 726–27 (1994); Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 *LAW & HUM. BEHAV.* 349, 358 (1991); Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 *LAW & HUM. BEHAV.* 469, 488 (2006); Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 *LAW & HUM. BEHAV.* 577, 588 (1999); see also Vicki L. Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention, and Level of Emotionality*, 20 *LAW & HUM. BEHAV.* 565, 570–71 (1996) (examining the effect of different presentation modes for a different purpose, but also finding no material differences in outcomes). See generally Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 *LAW & HUM. BEHAV.* 75 (1999) (collecting the findings of prior studies).

164. In the psychology field, “ecological validity” refers to the extent to which unrealistic study conditions may influence outcomes, thus rendering results unreliable in real-world conditions.

165. See sources cited *supra* note 163.

studies have not been entirely uniform, they have overwhelmingly produced results supportive of the conclusion that psychology studies, in general, provide a valuable indicator of real-world jury decision-making.<sup>166</sup> Indeed, in the overwhelming majority of studies, scholars have replicated findings with remarkable consistency across a wide array of conditions, ranging from the very unrealistic (students in a lab) to real-world trials.<sup>167</sup> Thus, while there may be some circumstances in which psychology studies are unlikely to provide a valid indicator of real-world juror behavior (for example, student populations appear to be more sympathetic to criminal defendants than age-differentiated populations, and thus moderately less likely to make guilty findings in criminal cases), it appears that psychological studies can often provide a useful starting point for understanding juror behavior.<sup>168</sup>

A similar—but somewhat distinct—approach has been taken by scholars towards assessing whether psychology studies may provide a helpful way of understanding the behavior of real-world judges. Led by the work of Jeffrey Rachlinski, Andrew Wistrich, and Chris Guthrie, an array of recent studies have tested populations of real judges for the influence of particular psychological factors, and have compared those results to pre-existing data involving lay populations.<sup>169</sup> Thus, like the “varied

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166. See *infra* note 167 and accompanying text.

167. See Bornstein, *supra* note 163, at 76–84; Bray et al., *supra* note 163, at 258–59; Crowley et al., *supra* note 163, at 93; Elliott & Robinson, *supra* note 163, at 395–97; Finkel & Handel, *supra* note 163, at 48; Finkel et al., *Killing Kids*, *supra* note 163, at 13–14; Finkel et al., *Right to Die*, *supra* note 163, at 495; Fulero & Finkel, *supra* note 163, at 500; Kramer et al., *supra* note 163, at 423; Narby & Cutler, *supra* note 163, at 726–27; Roberts & Golding, *supra* note 163, at 358; Steblay et al., *supra* note 163, at 488; Zickafoose & Bornstein, *supra* note 163, at 586.

168. See, e.g., Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170, 173–74 (1996); Bornstein, *supra* note 163, at 78–79; Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 322 (1971). See generally *supra* note 167 and accompanying text (demonstrating that remarkably similar results are achieved across an array of study conditions, from the realistic to the non-realistic).

169. See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*]; Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009) [hereinafter Guthrie et al., *The Hidden Judiciary*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias*

methodology” studies described above (used in the context of assessing jury behavior), the work of Rachlinski and his colleagues has attempted to provide a mechanism for gaining insight into whether real-world judges are typically subject to the same types of influences that have been documented by psychology scholars in lay subjects.<sup>170</sup>

While research assessing real-world judges is newer—and thus less complete—than the research that has been conducted in the jury context, existing findings from the judge context also strikingly support the conclusion that most of the time psychology studies will provide a helpful basis for understanding real-world adjudicative behavior.<sup>171</sup> Indeed, Rachlinski and his colleagues have identified a wide array of areas of overlap—and very few areas of divergence—between the factors that influence real-world judges and those that have been previously found to influence lay populations.<sup>172</sup> Even in contexts where it seems likely that judges would be highly motivated to *avoid* behaving like lay populations (for example, studies of racial stereotypes or biases), judges quite regularly (albeit not uniformly) show very similar behavior to the behavior documented in lay populations of psychology subjects.<sup>173</sup> It appears, then,

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*Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) [hereinafter Rachlinski et al., *Unconscious Racial Bias*]; Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006) [hereinafter Rachlinski et al., *Bankruptcy Judge's Mind*]; Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); see also Abram Rosenblatt et al., *Evidence for Terror Management Theory: 1. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCH. 681, 682–83, 688 (1989) (finding that both judges and lay populations responded in accordance with “terror management theory” and thus recommended higher penalties for a moral transgressor when reminded of their own mortality).

170. See *supra* note 169.

171. See *infra* notes 172–74 and accompanying text.

172. See, e.g., Guthrie et al., *Inside the Judicial Mind*, *supra* note 169, at 787–805; Guthrie et al., *The Hidden Judiciary*, *supra* note 169, at 1501–09, 1512–16; Rachlinski et al., *Unconscious Racial Bias*, *supra* note 169, at 1210–11; Rachlinski et al., *Bankruptcy Judge's Mind*, *supra* note 169, at 1233–37, 1240–41; Rosenblatt et al., *supra* note 169, at 682–83; Wistrich et al., *supra* note 169, at 1251–52, 1286–93; see also Jennifer K. Robbenolt, *Evaluating Juries By Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 502 (2005) (finding that judges typically behave similarly to lay jurors across an array of contexts).

173. The most striking example of this is found in a study that Jeffrey Rachlinski and his colleagues conducted testing a population of judges for sub-

that judges—like the rest of us—are significantly influenced by their background beliefs and other common psychological factors in making adjudicative assessments.<sup>174</sup>

Thus, the work of law and psychology scholars provides significant reasons to believe that psychology studies will often provide a quite accurate indicator of the type of dynamics that are influencing real-world judges and jurors. While real-world judges and jurors do sometimes diverge in the extent to which they are influenced by factors that have been previously experimentally demonstrated in lay populations, they more common-

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conscious racial biases (often referred to as “implicit biases”). It is clear that many of the judicial participants in the study were aware that the study was likely to be subjected to public scrutiny, as many participants were unwilling to even disclose the jurisdiction in which they adjudicated cases (presumably out of a fear of identification or backlash). Nevertheless, Rachlinski and his colleagues found that judges displayed implicit racial biases at roughly the same rates as the general population. See Rachlinski et al., *Unconscious Racial Bias*, *supra* note 169, at 1205, 1210–11.

174. Notably, one need not believe that judges are consciously abandoning their obligation towards neutral law-based adjudication in order to credit the results found by Rachlinski and his colleagues. Background views—and most other psychological phenomena—typically exercise their influence outside of the framework of conscious awareness. Thus, even a painstakingly conscientious judge may be unaware of the role that background beliefs and other psychological factors are playing in his or her decision-making. Moreover, even if a judge is aware of the possible influence of his or her background beliefs in a particular case, he or she will have no way of knowing how to adjust his or her approach, other than perhaps by taking a painstaking approach to consideration of the facts and/or law (an approach that psychology scholars have documented does appear to make some difference in limiting the influence of mental templates and other background beliefs). See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31–43 (2007) [hereinafter Guthrie et al., *Blinking on the Bench*] (discussing methods of inducing deliberation and reducing the influence of psychological biases in judging); see also Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 897–902 (2009) (discussing ways that judges may be able to reduce the effects of cognitive illiberalism); cf. Paul M. Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. (forthcoming 2012) (manuscript at 17–46), available at <http://ssrn.com/abstract=1777104> (suggesting strategies that might reduce the influence of background beliefs on the adjudication of labor and employment claims). In contrast, a judge cannot simply attempt to “correct” for the possible influence of background beliefs, since the fact that a judge may be predisposed to make defendant-favorable (or conversely plaintiff-favorable) findings, does not mean that in the particular case being adjudicated that the judge should deviate from his or her predisposition. Cf. Guthrie et al., *Blinking on the Bench*, *supra*, at 29–30 (noting that intuitive decision-making can sometimes produce more efficient while equally accurate decisions).

ly show a striking overlap with existing findings.<sup>175</sup> Moreover, the unrealistic format in which psychology studies are conducted appears to have surprisingly little influence on outcomes, at least among mock juror populations (this feature has not—perhaps because of the relative newness of studies on judges—been studied in judges to date).<sup>176</sup>

Thus, it appears that, as a general matter, psychology studies can provide a helpful starting point for understanding the results that we see in the courts. When coupled with the extensive overlap between the findings of psychology scholars and real-world outcomes in the courts in the discrimination area these findings provide a strong basis for believing that the types of background beliefs discussed in Part II are likely influencing real-world discrimination outcomes.

#### IV. REFORM BY OTHER MEANS? IMPLICATIONS OF A PSYCHOLOGICAL ACCOUNT FOR EFFORTS TO EFFECTIVELY ADDRESS DISCRIMINATION

There are, then, substantial reasons to believe that the difficult odds faced by discrimination litigants arise at least in part from commonly shared American background beliefs. Indeed, existing evidence strongly suggests that judges and jurors are influenced by their background beliefs about discrimination and the meritocratic foundations of our society; and that these beliefs tend to lead to adverse outcomes for discrimination claimants. Thus, while further research is required to confirm the influence of background beliefs on real-world outcomes in discrimination cases, it is worth taking seriously the possibility that such beliefs are an important driver of the difficult odds that discrimination litigants face. What are the implications of taking seriously this type of an account?

While a complete answer to this question is beyond the scope of this Article,<sup>177</sup> it is possible to identify for initial discus-

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175. See *supra* notes 160–74 and accompanying text.

176. See *supra* notes 160–74 and accompanying text.

177. For example, how—if at all—litigants can or should call to the attention of judges the possibility that background beliefs of the kind described by psychologists are influencing their decision-making in discrimination cases is a complex question, beyond the scope of my discussion here. Similarly, I do not elaborate on the implications of the findings of psychology scholars for attempts to answer important empirical questions in the field of discrimination law, including most notably the role of merit in adverse discrimination out-

sion several of the most important implications here. First, as elaborated below, the findings of psychology scholars—which point to widely held background beliefs as an important cause of the difficulties faced by discrimination litigants—strongly suggest the need to rethink prevalent scholarly approaches to anti-discrimination reform. Indeed, crediting the findings of psychology scholars, both of the most commonly suggested types of reform seem likely to have significant limitations as mechanisms for meaningfully improving outcomes for discrimination litigants.<sup>178</sup>

Second—as a corollary of this first point—it may be necessary to think creatively about how we can improve outcomes for putative victims of discrimination. As set forth below, one possible alternative, which has been rarely addressed in the legal literature to date, would be to make increased use of approaches that do not focus on group-based discrimination claims (e.g.,

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comes. Finally, I do not attempt to answer (although I briefly touch on, *infra* note 178) the deeper philosophical questions that the findings of psychology scholars raise—such as whether, in a democracy, it is appropriate (or even desirable) for the widespread views of the public regarding what “is” discrimination to find expression in the day to day adjudication of individual legal cases.

178. Of course, the question of whether the profoundly low success rates that discrimination litigants currently face *should* be improved, or are instead appropriate (either because they reflect an actual lack of discrimination or because they are congruent with public beliefs), is itself deeply contested. A full exploration of this question is well beyond the scope of this Article. However, it is worth observing that particularly in the area of discrimination—where the groups who are the intended beneficiaries of the law are likely to have divergent views from the general population regarding the merits of the claims that are being dismissed—there may be profound legitimacy concerns about permitting the continuation of a regime that with near-universality rejects the claims that are being made under the law (and that overwhelmingly relies on judge-effectuated procedural devices as the mechanism for doing so). *See, e.g.*, Robinson, *supra* note 6, at 1106–17 (describing extensive evidence of minority/majority gaps in perceptions of discrimination); *see also* Kahan et al., *supra* note 174, at 881–87, 895–97 (describing the legitimacy concerns that are raised by courts summarily dismissing claims that an identifiable section of society would perceive as meritorious); Burbank Letter, *supra* note 42, at 11–12 (noting that the behavior of judges in the employment discrimination context may be an example of the type of cognitive illiberalism described by Kahan, *supra*). The remedy I propose in this Article—increased use of approaches that in some way remediate discrimination, but that ask a distinct liability question—can be seen as a compromise approach, insofar as it could potentially improve outcomes for putative victims of discrimination while not requiring the adoption of a legal regime that is deeply divergent from most people’s beliefs about what discrimination “is.” *See infra* Part IV.B.

just-cause claims or Family and Medical Leave Act claims).<sup>179</sup> Indeed, such “extra-discrimination remedies” (EDRs)—because of their independence from commonly held understandings of “discrimination”—seem uniquely situated to avoid many of the difficulties that discrimination litigants have faced in bringing discrimination claims.

#### A. THE LIMITATIONS OF CURRENT APPROACHES TO REFORM

Legal scholars have traditionally focused on doctrinal reform of the anti-discrimination laws as the leading remedy for the perceived limitations of the anti-discrimination regime.<sup>180</sup> Across a wide array of contexts over the span of decades, legal scholars have repeatedly turned to doctrinal reform recommendations (often to be judicially effectuated, although sometimes requiring legislative action) as the centerpiece of their recommendations for improving outcomes for discrimination liti-

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179. There is a robust literature addressing individually many of the non-group-based claims I discuss here, but relatively little that has looked globally at such claims as an alternative to the anti-discrimination laws. *But cf.* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240–51 (2011) (discussing the general movement towards universalized claims as opposed to discrimination-focused claims in employment law, and offering a number of critiques of this move). For a few of the works that have looked at just-cause regimes specifically as an alternative to the discrimination laws, see, for example, Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 100–07 (2008); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1509–24 (1996). For a discussion of the Family and Medical Leave Act (FMLA) as an alternative to traditional discrimination-law approaches (and an argument that it is superior for effectuating certain types of change), see Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1157–65.

180. It would be impossible to catalog here the many thoughtful recommendations for doctrinal reform of the anti-discrimination laws that have been put forward in the last several decades. For a few recent examples, see, for example, Krieger & Fiske, *supra* note 159, at 1052–60; Sullivan, *The Phoenix*, *supra* note 35, at 192–97 (2009); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 46–92 (2005); see also Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–56, 387 (1987) (recommending doctrinal reform suggestions as a partial solution, but also acknowledging the practical difficulties that would exist in implementing doctrinal reform suggestions); Robinson, *supra* note 6, at 1152–70; (same); and compare Gelbach et al., *supra* note 6, at 847–48 (discussing the possibility of doctrinal reform as a solution, but also noting the potential risks of such an approach).

gants.<sup>181</sup> These doctrinal reform recommendations—while often carefully researched and persuasively reasoned—have very rarely been put into practice.<sup>182</sup> Moreover, even where doctrinal reforms have been adopted, they appear to have had a relatively minimal impact on the outcome of most discrimination claims.<sup>183</sup> Thus, despite decades of thoughtful scholarly proposals, discrimination litigants today remain subject to extremely difficult odds, with a substantially lower likelihood of success than virtually any other category of federal litigants.<sup>184</sup>

These results are unsurprising from the perspective of a psychological account of the current limitations of anti-discrimination law. Indeed, taking a psychological account seriously, it seems highly likely that the very same belief systems that have limited individual discrimination litigants' chances for success will effectively impede efforts to convince judges and/or legislators to adopt substantial doctrinal reforms of the anti-discrimination laws. If a judge or legislator does not see a specific set of facts as discrimination, there is little reason to believe that he or she will be willing to adopt a doctrinal reform designed to codify such an understanding as binding law.<sup>185</sup> Thus, for many of the same reasons discussed in Part II, it

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181. *See supra* note 180.

182. There are several notable exceptions. For example, it is widely acknowledged that modern sexual harassment doctrine owes much of a debt to the academic work of Catherine MacKinnon, among others. *See, e.g.*, Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)); Marianne Wesson, *Sex, Lies and Videotape: The Pornographer as Censor*, 66 WASH. L. REV. 913, 926 (1991); *see also* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 237–38 (2d ed. 1999). For a recent essay by Catherine MacKinnon criticizing existing sex discrimination doctrine, *see* Catherine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

183. *See supra* Part I. In addition to the exceptions discussed above, *supra* note 182, it seems likely that the addition of a right to a jury trial in the 1991 Civil Rights Act resulted in some improvement in trial outcomes for discrimination litigants. *See, e.g.*, Clermont & Schwab, *From Bad to Worse*, *supra* note 27, at 116, 130–31 (documenting that discrimination litigants consistently fare better in jury trials than in bench trials).

184. *See supra* Part I.

185. Catherine Albiston has made a very similar observation in the context of examining the ways that widespread and entrenched norms regarding what work “is” shape the scope of discrimination protections that judges are willing to afford. *See* Albiston, *supra* note 179, at 1128–57; *cf.* Bagenstos, *supra* note 35, at 44–45 (discussing the problems that entrenched judicial views of the meaning of discrimination hold for many contemporary proposals to address structural discrimination).

seems unlikely that most truly significant doctrinal reforms of the anti-discrimination laws will be adopted in the first instance.<sup>186</sup>

Perhaps even more significantly, taking a psychological account seriously calls into doubt whether even “successful” doctrinal reforms (i.e., those adopted by a court or legislature) will have the intended effects of significantly improving outcomes for discrimination litigants.<sup>187</sup> In many, albeit certainly not all, cases there will be room for even a conscientious judge or juror to reach more than one result, even where a particular doctrinal loophole has been closed or a particular reform has been effectuated.<sup>188</sup> This capaciousness of possibilities is not systematically problematic, if one assumes that judges and jurors in fact behave as idealized adjudicators, with no common directional biases. While one case may go against a discrimination litigant,

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186. For example, one of the most obvious potential reforms of the anti-discrimination laws, institution of a “pretext only” regime (i.e., a regime in which a finding of discrimination is required where a prima facie case and pretext have been proven), has been legislatively attempted, but has failed to achieve significant levels of support. See, e.g., Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext and the “Personality” Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 239 (1997); see also *infra* note 248 (discussing further the possibility of using a “pretext only regime”). See generally Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 952–53 (2005) (noting that all efforts to amend Title VII during the fourteen-year time frame between the Civil Rights Act of 1991 and 2005 had failed).

187. There are significant selection effects problems with trying to rigorously measure the impact of particular doctrinal reforms, since such doctrinal reforms typically also result in an increased number of claims. To the extent that scholars have endeavored to do so in the discrimination law context, they have typically not found statistically significant effects. See, e.g., Juliano & Schwab, *supra* note 158, at 554, 575–77; see also *infra* note 191 and accompanying text (discussing the backlash that followed the Americans with Disabilities Act’s (ADA) institution of a much more plaintiff-favorable understanding of discrimination).

188. This is particularly true of doctrinal reforms that would simply eliminate intermediate burdens on the plaintiff, but that do not place radical structural limitations on judges’ or jurors’ discretion on the ultimate question of discrimination. So long as the ultimate question remains whether discrimination has occurred (and the decision-maker retains discretion to define what discrimination *is*), there is nothing to stop a judge or a juror from finding against a plaintiff on the ultimate question, as opposed to some intermediate doctrinal obstacle. The findings of psychology scholars—as well as existing experience to date in the federal courts—strongly suggest that this is likely to be a significant impediment to improving success rates for discrimination plaintiffs, even where intermediate doctrinal obstacles have been removed.

another will go against the defense, and the particular reform will, overall, have its desired result.

If, however—as the findings of psychology scholars suggest—most people are predisposed to minimize the likelihood of discrimination, the “close calls” are likely to predominantly be made in a manner unfavorable to discrimination litigants. Over time, the accretive nature of the law means that results—even if originally bolstered by a particular doctrinal reform—will ultimately come to resemble roughly the state of affairs that we currently face, with discrimination litigants facing extremely difficult odds.<sup>189</sup> And in fact, it is precisely this dynamic that appears to have substantially led to the current state of affairs. Discrimination law’s “meaning,” abysmal as it is for most discrimination litigants, has not been crafted exclusively, or even principally, through sweeping anti-plaintiff Supreme Court decisions, but through the multiplicity of plaintiff-unfavorable individualized judgments in the district courts and courts of appeals.<sup>190</sup>

Equally problematically, both psychology and legal scholars have documented that reforms that deviate too far from prevailing understandings of what constitutes discrimination (which among most people are fairly restricted) are likely to be even more directly undercut. For example, as Linda Hamilton Krieger and others have described, a substantial “sociolegal backlash” (characterized by, *inter alia* a disregard of explicit statutory provisions, of agency guidance, and of legislative history) accompanied the ADA’s enactment, and its pressing of a more expansive legal understanding of discrimination.<sup>191</sup> Psy-

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189. This phenomenon roughly resembles what Linda Hamilton Krieger has referred to as “sociolegal capture.” See Krieger, *supra* note 35, at 347–51.

190. For a discussion of this issue in the ADA context, see e.g., Mathew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS, *supra* note 35, at 62, 66–72. This phenomenon (i.e., the accretion of plaintiff-unfavorable standards through numerous individualized judgments) has significant drawbacks, insofar as it allows important policy choices about what discrimination is to be obscured under the guise of doctrinal and factual technicalities. This hiding-the-ball approach makes many important choices about the shape of discrimination law difficult to attack directly, as they are couched in the language of individualized circumstances, rendering them facially (while not genuinely) unimportant.

191. Krieger, *supra* note 35, at 361–82; see also Bagenstos, *supra* note 35, at 43 & nn.223–24; Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, in BACKLASH

chology scholars have documented a similar phenomenon among lay people, who, for example, report an inability or unwillingness to follow instructions directing them to apply a “reasonable woman” standard in sexual harassment cases, and who report confusion and an inability to properly apply instructions that require them to treat disparate impact as a form of discrimination.<sup>192</sup> Thus, more substantial reforms may be limited through more direct retrenchment even if they make it through the initial hurdles to adoption.<sup>193</sup>

There are thus substantial reasons to be skeptical of the efficacy of doctrinal reform under a psychological understanding of the current dynamics of discrimination litigation. Taking seriously such a psychological understanding (and history) suggests that such reforms are—as a general matter—unlikely to be adopted. Moreover, they seem unlikely, even if adopted, to result in systematic change. Whether through the slow accretive process of anti-plaintiff results, or through direct backlash, doctrinally driven efforts to reform the prevailing (and limited) conception of discrimination seem unlikely (absent accompanying social change) to fundamentally succeed in their transformative project.<sup>194</sup>

So if doctrinal reform of the discrimination laws seems an unlikely remedy for the current limits of the American anti-discrimination program, what is the alternative? One alternative proposal that has become increasingly popular among legal scholars in recent years is private institutional reform, effect-

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AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS, *supra* note 35, at 122, 149–50; Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315 (2009).

192. See, e.g., Robinson, *supra* note 6, at 1161; E-Mail from Laurie T. O'Brien, *supra* note 90.

193. This phenomenon—i.e., disregarding legal instructions that are contrary to culturally meaningful lay understandings—has also been documented in other areas of the law. For an excellent discussion of findings on this issue in the criminal law context as well as a theoretical discussion of the potential reasons for it, see Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 793–97 (2010).

194. While space does not permit full exposition of the normative implications of using doctrinal reform as a method of remedying the difficult odds that discrimination litigants face, it should be noted that there may also be significant normative considerations that militate against attempting to use doctrinal reform as the primary method for attempting to override the influence of widely shared background beliefs.

ated by and within the very institutions that are the potential sites of discriminatory events (for example, employers).<sup>195</sup> These recommendations have taken a wide variety of forms, but have been united in their consensus that many of the intractable problems of contemporary discrimination are a poor fit for our existing model of judicially enforced discrimination laws.<sup>196</sup> They thus have recommended a turn to private institutional actors as the primary agents of change.<sup>197</sup> For example, some scholars have suggested that employers be encouraged to adopt more effective internal systems for detecting and remediating discrimination, or to adopt policies that help avoid “second generation” employment discrimination problems (such as the difficulties that women and people with disabilities disproportionately face in meeting stringent “face time” requirements).<sup>198</sup>

While these more recent institutional reform recommendations are thoughtful and often powerfully argued (as their doctrinal predecessors were), there are obvious and significant obstacles to their success, particularly in their more radical iterations.<sup>199</sup> Most notably, to the extent that scholars proposing

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195. See, e.g., Rachel Arnow-Richman, *Public Law and Private Process: Towards an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 63–74; Robinson, *supra* note 6, at 1170–79; Sturm, *supra* note 36, at 553–66.

196. See, e.g., Arnow-Richman, *supra* note 195, at 30–45, 84–86; Sturm, *supra* note 36, at 475–79.

197. See *supra* note 195.

198. See, e.g., Arnow-Richman, *supra* note 195, at 29–30, 84–86; Sturm, *supra* note 36, at 475–79.

199. I should note that I am *not* suggesting that civil rights law is ineffective in institutionalizing lower levels of employer discrimination, as compared to a “no law on the books” regime. Indeed, existing work suggests that providing for formal anti-discrimination protections for particular groups may play a very important role in reducing discrimination and furthering economic progress for protected groups (although there are often difficulties in measuring the extent of effects). See, e.g., John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1640–41 (1991) (noting that results are consistent with the conclusion that civil rights law and enforcement played a major role in African American economic advancement in the 1960s and 1970s but that other factors, such as improved education, also played a role). This Part addresses the distinct issue of whether it is realistic to expect that—to the extent that discrimination persists *despite* formal legal protections—institutional reform is likely to provide a particularly effective vehicle for reform. Cf. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1567–68 (1992) (discussing the ways that civil rights law has led to in-

such reforms rely on judicial oversight as a motivational mechanism for ensuring the effectiveness of private institutional reform (for example, by making legal liability contingent on the implementation of an “effective” process of internal problem solving for discrimination-related issues), they are likely to face precisely the same obstacles that direct doctrinal reform has encountered. As Samuel Bagenstos has persuasively argued, “[j]udges who are committed to an individualized, fault-based understanding of employment discrimination law” are unlikely to enforce robust requirements for private institutional reform, whether they are the primary implementers of such reforms or simply (as the private institutional scholars propose) the watchdogs of failures of compliance.<sup>200</sup> There is little reason to believe that a simple change of focus (from direct judicial enforcement to judicial monitoring of private enforcement) will expand judicial conceptions of discrimination or the concomitant narrowness of focus that currently prevails in judicial approaches to discrimination litigation.

Absent the “stick” of effective judicial monitoring, proposals for private institutional reform must rely on private employers themselves (and/or institutional intermediaries such as HR consultants) to be the guardians of effective reform. But, there are profound reasons to be skeptical of the efficacy of relying on employers and HR consultants as a means of promoting true change. If, as psychology scholars have documented, most people do not see discrimination in all but the most egregious circumstances, how can we expect even good-faith private institutional actors to meaningfully detect the problems they are trying to correct?<sup>201</sup> And, while reforms can be adopted even in the absence of a full understanding of contemporary discrimination (and indeed are often justified today in terms which are substantially or entirely divorced from a recognition of ongoing

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stitutionalization of equal employment opportunity and affirmative action practices by employers, but noting that the institutionalization of such practices may not lead to real results). *See generally infra* note 205 (regarding the mixed success of institutionalized equal employment opportunity practices in reducing discrimination and improving employment rates for protected groups).

200. Bagenstos, *supra* note 35, at 44.

201. *Cf.* Nielsen et al., *Uncertain Justice*, *supra* note 2, at 33–34 (finding that even in confidential after-the-fact interviews, defendants in discrimination lawsuits consistently maintained that they had not discriminated).

discrimination),<sup>202</sup> how effective can such policies—decoupled from an understanding of their purpose—be?

Sociological research confirms the intuition that there are reasons to be deeply concerned about advocating primary reliance on employer-driven institutional reforms, particularly insofar as those reforms have been decoupled from robust perceptions of continuing discriminatory practices. At this juncture, a wide range of diversity reforms (ranging from diversity training to affirmative action to work/family balance measures) have been voluntarily adopted by American workplaces, affording the opportunity to study both the mechanics of adoption and the outcomes of such measures.<sup>203</sup> What such research suggests is that, *first*, most firms adopt reforms *not* for their actual efficacy in reducing discrimination (or in response to perceived discrimination), but for their perceived value in increasing stability and limiting legal liability,<sup>204</sup> and *second*, that many existing

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202. See, e.g., FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 158–59, 231–32 (2009) (documenting that many equal opportunity policies have been justified and adopted by businesses for reasons unrelated to an actual desire to remediate ongoing discrimination); see also Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1589–91, 1620–21, 1626 (2001) (discussing the rise of diversity rhetoric as a justification for internal employer reforms, and documenting the self-conscious divorcing of such rhetoric from the need to remediate or address discrimination).

203. See, e.g., Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 599 fig.2 (2006) (tracking the adoption of various forms of diversity programs by medium and large employers over time). Strikingly, despite the existence of widespread EEO-related reforms—and extensive research regarding their adoption by organizations—there have been until recently very few systematic studies of the efficacy of such reforms. *Id.* at 590; see also DOBBIN, *supra* note 202, at 21 (“One of the most surprising things about the compliance regimes that corporations popularized is that they remain largely untested.”). The study by Kalev and her colleagues is one of the most systematic attempts to date to investigate the actual influence of such policies on outcomes, although there are also others. See *infra* note 205.

204. See, e.g., DOBBIN, *supra* note 202, at 223; Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1204, 1234–37 (2007); Kalev et al., *supra* note 203, at 610. The same may not be true of the HR professionals and consultants who are the primary advocates of such internal policies (although typically not the decision-makers on whether the policies are adopted). It appears that there may be a sincere commitment on the part of many such professionals to the principle of equal opportunity. See, e.g., DOBBIN, *supra* note 202, at 158–59. *But cf.* Edelman et al., *supra* note 202 (describing the rise of “diversity” rhetoric in the professional management literature, and the extent to which it was often characterized in contradistinction to, and as superi-

reforms are at best modestly effective and may even be counterproductive in achieving anti-discrimination outcomes.<sup>205</sup> For example, recent research has shown that businesses' adoption of the most common form of diversity training is followed by a substantial *decrease*—of approximately 10%—in minority and female representation in management.<sup>206</sup> Moreover, it appears

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or to, more traditional EEO-based or affirmative action-based approaches). Nevertheless, even in this context, there appear to have been very limited efforts to ascertain and act on the actual efficacy of reforms. *See infra* note 207 and accompanying text.

205. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 972–76 (1999); Meg A. Bond & Jean L. Pyle, *Diversity Dilemmas at Work*, 7 J. MGMT. INQUIRY 252, 262 (1998); Frank Dobbin, et al., *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOC. REV. 386, 406 (2011); Kalev et al., *supra* note 203, at 605 tbl.3; *see also* Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 408 (2007) (describing how organizational work/family policies may have limited effectiveness in practice); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 41 & n.225 (2003) (“Since surveys began to track levels of harassment more than twenty years ago, the number of employers enacting and disseminating anti-harassment policies has grown exponentially while the underlying level of harassment has gone unchanged.”); Madeline E. Heilman et al., *The Affirmative Action Stigma of Incompetence: Effects of Performance Information Ambiguity*, 40 ACAD. MGMT. J. 603 *passim* (1997) (showing that, in the experimental context, affirmative action beneficiaries were perceived as less competent and recommended for lower salary increases); Erin L. Kelly et al., *Getting There From Here: Research on the Effects of Work-Family Initiatives on Work-Family Conflict and Business Outcomes*, 2 ACAD. MGMT. ANNALS 305 *passim* (2008) (showing mixed results of compiled studies regarding the effectiveness of work-family initiatives, including some studies that have found negative correlations between such policies and positive outcome measures); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 228–35 (2004) (discussing mixed results of research studying the effectiveness of anti-harassment policies); *cf.* Lauren Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 508–19 (1993) (performing qualitative analysis of the handling of civil rights complaints by internal corporate complaint handlers, and showing that such complaints were typically recast in non-EEO terms (e.g., as simple personality conflicts or poor management) and dealt with through measures designed to diffuse tension as opposed to measures aimed at effectively remediating or preventing future discrimination); Lauren Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 448–49 (1999) (noting that when the courts “adopt forms of compliance created within organizational fields, they run the risk of institutionalizing the very forms of discrimination that laws were originally designed to alleviate”).

206. *See, e.g.*, Shankar Vedantam, *Most Diversity Training Ineffective*,

that employers are unlikely to abandon or modify existing programs in response to ineffectiveness, even where those programs are affirmatively counter-productive from the perspective of anti-discrimination outcomes.<sup>207</sup>

Of course, all this does not mean that voluntary reforms are universally ineffective or have no role to play in promoting equality. To the contrary, existing research makes clear that some private institutional reforms—most notably those geared towards creating clear lines of responsibility and clear measures for success—do have significant effects on the actual representation of women and minority workers.<sup>208</sup> And, as to numerous other reforms—such as those aimed at promoting work/life balance—the verdict remains out, with some studies suggesting efficacy and others suggesting little, or counter-productive, effects.<sup>209</sup> Thus, further pursuit of institutional reforms may well be worthwhile, insofar as such reforms are tailored to the developing findings regarding what programs are actually effective in achieving anti-discrimination goals. Nevertheless, existing research suggests that, like doctrinal reform, such reforms are unlikely to provide a panacea for preventing or remedying discrimination, and indeed suggests the need to proceed with caution in promoting further efforts at voluntary reform.

A final possible solution to the problems of contemporary

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*Study Finds*, WASH. POST, Jan. 20, 2008, at A3 (describing the results of a follow-up study conducted by Alexandra Kalev that is not yet in publication).

207. See, e.g., Kalev et al., *supra* note 203, at 599 fig.2, 605 tbl.3 (documenting that diversity training—whose only statistically significant impact is a *reduction* in representation of certain minority groups—has been by far the fastest growing category of diversity programming during the most recent decade studied). See generally *supra* note 203 (noting that minimal efforts have been made to study the efficacy of equal opportunity programs, despite their widespread adoption by American companies).

208. See, e.g., Kalev et al., *supra* note 203, at 602–04 (reporting research results showing that “[t]he most effective practices are those that establish organizational responsibility: affirmative action plans, diversity staff, and diversity task forces”).

209. See, e.g., Albiston, *supra* note 205, at 407–09 (describing research on the efficacy and limitations of work/family policies); Grossman, *supra* note 205, at 41–49 (describing mixed research regarding the efficacy of anti-harassment policies and practices); Kelly et al., *supra* note 205 (providing a broad overview of work-family initiatives scholarship, and discussing the mixed results that such scholarship has found regarding effectiveness); Lawton, *supra* note 205, at 228–35 (discussing mixed results of research studying the effectiveness of anti-harassment policies).

discrimination law that has sometimes—albeit much less frequently—been discussed by legal scholars is the possibility of modifying judge and juror attitudes towards discrimination cases by pursuing social change through public education or other means.<sup>210</sup> In theory, this type of social change work is an obvious (and perhaps the most obvious) response to the findings of psychologists detailed in Part II. If people’s background views about issues such as meritocracy, the incidence of discrimination, and discriminatory prototypes can be changed, existing psychological research provides every reason to believe that many of the limitations of contemporary discrimination law could be erased. And, there is evidence that at least some of these views are mutable over time, suggesting their susceptibility to external influence.<sup>211</sup>

However, existing evidence also suggests that to the extent there have been shifts in these discrimination-related views, they have been towards viewpoints that are increasingly unfavorable for discrimination litigants (for example, perceptions of discrimination as rare have become increasingly common over time).<sup>212</sup> Moreover, existing psychological research provides

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210. See, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1521–28 (2005) (“Consequently, it is crystal clear that the first step in any campaign to eliminate racial castes in education must be consciousness raising and ‘cognitive liberation’ about the validity of the tests themselves.”); Travis, *supra* note 191, at 377–78 (addressing strategies to address ADA backlash); see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking and Misremembering*, 57 DUKE L.J. 345, 418–20 (2007) (arguing for the importance of social change as a mechanism for reducing implicit biases).

211. See, e.g., KLUEGEL & SMITH, *supra* note 98, at 186–91 (showing shifting views about racial discrimination and equality of opportunity in the 1970s); see also *Washington Post-Kaiser Family Foundation poll*, Q#34 (2011), available at [http://www.washingtonpost.com/wp-srv/politics/polls/postkaiserpoll\\_110211.html](http://www.washingtonpost.com/wp-srv/politics/polls/postkaiserpoll_110211.html) (last visited March 27, 2012) (showing a 7% increase in the proportion of respondents reporting that racism is not a problem in our society between 1995 and 2011).

212. See KLUEGEL & SMITH, *supra* note 98, at 186–91; *Washington Post-Kaiser Family Foundation poll*, *supra* note 211, at Q#34. This conclusion is also supported by the shift in the perspective of the federal judiciary, which originally developed a number of the fundamental doctrinal tests governing Title VII based on the assumption that discrimination was a relatively likely explanation for the disparate treatment of African Americans. See, e.g., *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (stating that the *McDonnell Douglas* prima facie case “raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of [discriminatory] factors” (quota-

substantial reasons to suspect that, in the long term, meritocracy beliefs (e.g., the belief that everyone can get ahead in life) may be the lynchpin of the difficulties faced by anti-discrimination litigants—and that this set of beliefs, in particular, is likely to resist efforts at change.<sup>213</sup> Finally, the experience of civil rights organizations in continuing to attempt to promote this type of change throughout the last several decades is not encouraging. Despite ongoing efforts to publicize continuing egregious incidents of discrimination, and to institutionalize broader understandings of discrimination, the public continues to adhere strongly to the view that discrimination is a rare, explicit, and narrow phenomenon and that America is fundamentally a meritocracy.<sup>214</sup> Thus, while continuing efforts at social change are obviously critically important to ongoing efforts to remedy the difficulties of discrimination law, the mechanisms for effectuating such change are far from clear.<sup>215</sup>

Thus, taking seriously a psychological account, none of the principal existing academic reform proposals seems likely to result in a radical reconfiguration of the current difficulties that

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tion omitted)).

213. See, e.g., Lipkus & Siegler, *supra* note 108, at 470 (“[M]eritocracy beliefs may have a causal influence on conceptions of racism.”); O’Brien et al., *supra* note 104, at 437–39 (showing that meritocracy beliefs are a significant predictor of the adoption of narrow individualistic understandings of discrimination, and that such narrow individualistic understandings of discrimination are associated with decreased perceptions of the incidence of discrimination in specific circumstances); see also Jost & Hunyady, *supra* note 101, at 260–64 (describing the psychological antecedents and benefits of adopting meritocracy beliefs, and suggesting that such beliefs are widespread because they fill a common need to justify the status quo). See generally *supra* notes 98–100 and accompanying text (describing the overwhelming prevalence of meritocracy beliefs in American society).

214. See *supra* notes 98–100, 147–48 and accompanying text.

215. Of course, even in today’s society, ascription to the view that discrimination is a rare, narrow phenomenon varies to some extent across groups. See *supra* notes 147–48 and accompanying text. Thus, one possible reform that might avoid the need for broad-based social change would be the increased appointment of individuals who are from groups more likely to subscribe to discrimination-litigant friendly views to the bench (this might include, for example, the appointment of minority and women judges, but also the appointment of more plaintiff-side litigators and progressive scholars). Several studies have shown that such judges are in fact more likely to rule in favor of discrimination litigants. See *supra* note 149 and accompanying text; cf. Scott A. Moss, *Judicial Hostility to Litigation and How it Impairs Legal Accountability for Corporations and Other Defendants*, 4 ADVANCE 5, 20–22 (2010) (arguing that the uniformity of the Justices’ backgrounds on the Supreme Court has led to an anti-litigation outlook that pervades the Court’s contemporary case law).

putative victims of discrimination face. As a result, it is important to explore other alternative measures that may provide an alternate means of redress, and that may be less likely to implicate restrictive American background beliefs. In the following Section, I turn to a discussion of one such alternative, i.e., extra-discrimination remedies.

#### B. THE ALTERNATIVE OF EXTRA-DISCRIMINATION REMEDIES

Extra-discrimination remedies (EDRs), as I use the term, are remedies that in some way address questions of discrimination (or that allow a putative victim of discrimination to challenge a discriminatory job action), but that do not ask the liability question of “discrimination.” (For example, just-cause claims, which allow employees to challenge unfair firings of any kind, and Family and Medical Leave Act claims, which allow employees to challenge family or medical leave-related terminations, are both examples of what I refer to as EDRs). While EDRs do not feature prominently in the existing anti-discrimination literature,<sup>216</sup> they are in fact hardly a novel innovation in the real world of anti-discrimination litigation. Thus, for example, a disabled employee who is terminated after taking medical leave will often file a single lawsuit, alleging that her termination was *both* discriminatory (on the basis of disability) and a violation of the Family and Medical Leave Act’s protected leave provisions. Similarly, in states whose statutes or common law permit a “just cause” cause of action, minority employees often claim that their firing was both discriminatory and made without just cause. As a result, my discussion here relates to the possibility of increased use of existing EDRs, as well as legislative advocacy for more widely available EDRs, rather than an entirely new approach to conceptualizing and litigating discrimination claims.

As set forth below, there are ample reasons for believing that this approach—i.e., increased use of and legislative advocacy for EDRs—may reap significant benefits for putative victims of discrimination. Indeed, taking seriously the findings of psychology scholars, it seems likely that EDRs will be uniquely

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216. I do not mean to suggest that I am alone in discussing this possibility, although many of the prior works have focused on a specific EDR as an alternative or supplement to discrimination claims, as opposed to a more general turn towards these types of remedies. For some of the prior works that have addressed EDRs in the context of anti-discrimination law, see *supra* note 179.

situated to avoid many of the obstacles to litigant success that are posed by the restrictive and widely shared public views regarding discrimination. Of course, as with any proposed approach, there are also likely to be some drawbacks to increased focus on EDRs. Below, I briefly elaborate on the definition of EDRs (as it is used herein), followed by a more extended discussion of the general benefits and drawbacks of increased use of EDR approaches.

### 1. Defining Extra-Discrimination Remedies

It is helpful to begin by adopting a tailored definition of extra-discrimination remedies (EDRs). After all, construed literally, EDRs can include virtually any approach to remedying problems of group-based inequality that are not founded in discrimination claims. Thus, for example, policy-based anti-poverty initiatives, just-cause legislation, and anti-standardized testing initiatives can all be considered forms of EDRs. Using the term in this broad sense, however, runs the risk of analytical incoherence and vastly exceeds the scope of what it is possible to address in the context of a single Article. Thus, my focus herein is on the potential advantages (and drawbacks) of one specific type of EDR—those EDRs that provide a litigation-based remedy.

So what types of litigation-based remedies might qualify as EDRs? Drawing on existing statutory and common law templates,<sup>217</sup> such remedies might include:

- “Just cause” remedies—In those states that have just-cause legislation (or a similar common law cause of action), employers cannot terminate an employee without just cause (e.g., employee misconduct or performance issues).<sup>218</sup> Just-cause claims—where they are available—

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217. I should note that while my focus is on existing litigation-based EDRs (litigation-based EDRs which have already been adopted or are being considered for adoption in one or more jurisdictions in the United States), in many cases such EDRs would need to be legislatively adopted in a more significant number of jurisdictions in order to be of substantial use to discrimination litigants. *See infra* Part IV.D.

218. *See, e.g.*, Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-901 et seq. (2011). While “just cause” legislation would provide the most significant protections for employees who experience unwarranted terminations, many states have developed more limited common law protections through expanded tort or contract-based remedies. For an overview of the types of common law protections that have been developed in various states,

provide an obvious alternative (or adjunct) to discriminatory termination claims, as discrimination victims virtually always contend that the reasons for their firing were not justified. Moreover, termination claims comprise almost two-thirds of contemporary discrimination claims, and thus just-cause claims (if broadly available) would cover a substantial proportion of the claims being brought by putative victims of discrimination.<sup>219</sup>

- Family and Medical Leave Act-type statutes—The Family and Medical Leave Act (FMLA) and similar state statutes provide for legally protected paid or unpaid leave and benefits for those with caretaking responsibilities, pregnant women, and/or people with serious medical conditions.<sup>220</sup> These types of statutes help solve the problem of structural barriers to employment for women and people with disabilities by creating entitlements to a certain amount of “full time/face time” flexibility<sup>221</sup> and paid or unpaid leave (both of which are often required to a greater extent by women and people with disabilities). As a result, FMLA-type remedies can serve as an adjunct (or alternative) claim in an array of situations involving the impact of structural discrimination on women and people with disabilities.
- Healthy workplace laws—Healthy workplace laws make employers responsible for all on-the-job harassment, irrespective of the discriminatory motivation of the harassers.<sup>222</sup> As reflected in current EEOC filings, harass-

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see Benjamin B. Dunford & Dennis J. Devine, *Employment At-Will and Employee Discharge: A Justice Perspective on Legal Action Following Termination*, 51 PERSONNEL PSYCHOL. 903, 907–16 (1998).

219. See, e.g., John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

220. See, e.g., Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (2006); see also *Federal vs. State Medical Leave Laws*, U.S. DEPT OF LABOR, <http://www.dol.gov/whd/state/fmla/index.htm> (last visited May 10, 2012) (providing links to the twelve jurisdictions with state-level FMLA laws).

221. I borrow this term from Michelle Travis, who has properly noted that the presumed “full time/face time” norm has a significant adverse impact on women and people with disabilities. See Travis, *supra* note 180.

222. Professor David Yamada has written extensively on this issue and has drafted a model law that is currently under consideration in a number of states. See David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J.

ment is one of the predominant complaints raised by putative victims of discrimination, comprising a component of roughly one-third of all discrimination charges.<sup>223</sup> Thus, healthy workplace laws could provide a significant adjunct or alternative to discrimination-based harassment claims.

- School-based anti-bullying legislation—School-based anti-bullying legislation, like healthy workplace laws, makes institutions responsible for student-on-student or teacher-on-student harassment, often without regard to whether the harassment was motivated by discrimination.<sup>224</sup> Like healthy workplace laws, anti-bullying statutes can provide an alternative (or adjunct) to existing discrimination-based claims, where the plaintiff has been subjected to harassment based on their protected class status.
- Common law claims—A wide array of common law claims, from intentional infliction of emotional distress to wrongful discharge in violation of public policy, can be

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475 *passim* (2000) (discussing the problem, analyzing existing legal theories, and proposing a legislative solution); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 *passim* (2010) [hereinafter Yamada, *Workplace Bullying*] (describing the prior ten years of progress regarding workplace bullying and providing and analyzing model legislation, "The Healthy Workplace Bill," aimed at combating workplace bullying). While no state has yet enacted these types of laws, they have been introduced in a number of states and are under active consideration in New York as well as other locales. See Mike Schlicht & Tom Witt, *Bipartisan Consensus at Last*, ITHICA J., June 1, 2010 (Viewpoints), available at 2010 WLNR 11069671; Yamada, *Workplace Bullying*, *supra*, at 252.

223. Compare Charge Statistics: FY 1997–FY 2011, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited May 10, 2012) (99,947 total charges in FY 2011), with *Harassment Charges, EEOC & FEPAs Combined: FY 1997–FY 2011*, EEOC, <http://www1.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm> (last visited May 10, 2012) (30,512 harassment charges in FY 2011).

224. See COLO. REV. STAT. § 22-32-109.1(2)(A)(X) (2011); CONN. GEN. STAT. ANN. § 10-222d (West 2010); GA. CODE ANN. § 20-2-751.4 et seq. (West Supp. 2011); 105 ILL. COMP. STAT. § 5/10-20.14 et seq. (2006); LA. REV. STAT. § 17:416.13 et seq. (Supp. 2012); N.H. REV. STAT. ANN. § 193-F et seq. (LexisNexis 2010); N.J. STAT. ANN. §§ 18A:37-13–18 (West 2010); N.Y. EDUC. LAW § 2801-a (McKinney 2009); OKLA. STAT. ANN. tit. 70 §§ 24-100.2–100.5 (West 2005 & Supp. 2011); OR. REV. STAT. ANN. §§ 339.351–364 (West Supp. 2011); R.I. GEN. LAWS ANN. § 16-21-24 (West 2011); VT. STAT. ANN. tit. 16 § 565 (2004); WASH. REV. CODE ANN. § 28A.300.285 (West 2011); W.VA. CODE ANN. § 18-2C et seq. (LexisNexis 2008 & Supp. 2011).

used to hold individual wrong-doers (and sometimes their employers) responsible for wrongful conduct targeting a putative victim of discrimination.<sup>225</sup> Discrimination victims already fairly commonly include such claims in litigation, where they are available under the specific jurisprudence of the jurisdiction in which the case arose.<sup>226</sup>

- Retaliation claims—Retaliation claims can be brought under all of the major discrimination laws if an employer has taken action against an employee for complaining about discrimination or otherwise pursuing discrimination claims.<sup>227</sup> Retaliation claims can be characterized as a hybrid EDR/discrimination claim, insofar as they are predicated on the employee's opposition to what they perceived as discrimination, but do not require a judge or jury to find that the individual was actually discriminated against.<sup>228</sup> As is illustrated by EEOC charge statistics, retaliation claims already serve as a frequent adjunct to discrimination claims, with roughly one-third of all charges raising a retaliation claim.<sup>229</sup>

Thus, litigation-based EDRs can take a diversity of forms in addressing contemporary problems of group-based inequality—forms that will vary depending on context and on the group inequality to be addressed. Through this diversity of forms,

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225. See sources cited *infra* note 226; see also Dunford & Devine, *supra* note 218 (describing the array of approaches that states have taken to just-cause common law claims).

226. See, e.g., Katie R. Eyer, *Lesbian, Gay, Bisexual, and Transgendered Employees*, in REPRESENTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED CLIENTS IN PENNSYLVANIA 81, 99–102 (2009) (discussing the ways that common law claims have been utilized to protect the rights of LGBT victims of harassment and discrimination); Julie Gannon Shoop, *Common Law Claims Gain Favor in Job Discrimination Cases*, TRIAL, Feb. 1996, at 75, 75–76 (describing litigants opting to pursue state common law claims rather than Title VII claims in federal court); Jason E. Pirruccello, Note, *Contingent Worker Protection From Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191, 194, 206–222 (2005) (describing an array of common law claims that could provide a cause of action for independent contractors who experience on-the-job discrimination or harassment).

227. See *Retaliation*, EEOC, <http://www.eeoc.gov/laws/types/retaliation.cfm> (last visited May 10, 2012).

228. Under existing retaliation doctrine, an employee does not have to prove that he or she was actually discriminated against in order to prevail. *Id.*

229. See *Charge Statistics: FY 1997–FY 2011*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jan. 25, 2012).

EDRs could potentially be used by many putative victims of discrimination as an alternative or adjunct to discrimination claims, allowing them to raise claims that do not involve framing the issue as one of “discrimination.”<sup>230</sup>

## 2. Potential Benefits of Extra-Discrimination Remedies

So what are the potential benefits of EDRs from the perspective of a putative victim of discrimination? Most obviously, such approaches obviate the need for a judge or jury to make a determination that a particular set of facts is (or could be) discrimination. Because the operative issue under EDRs is not whether a particular individual has been discriminated against—but rather whether the set of facts presented can fulfill a distinct (and typically more straightforward) set of statutory or judicial requirements—the difficult and psychologically contingent question of whether discrimination truly took place need not be resolved.

The findings of psychology scholars suggest that this distinction is likely to make a substantial difference in the adjudication of the claims of putative victims of discrimination. Thus, for example, existing mental prototypes or templates—a factor that has been documented to significantly *diminish* most people’s willingness to make attributions to discrimination—are likely to instead be helpful to many EDR litigants.<sup>231</sup> For exam-

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230. Of course, litigation-based EDRs will not always be available as an alternative (or adjunct) to discrimination claims. For example, to the extent that scholars have decried the lack of a strong disparate impact doctrine in contemporary anti-discrimination law, this problem is unlikely to be fully resolved by litigation-based EDRs (although it may certainly be partially addressed through piecemeal approaches, as evidenced by the success of FMLA-style laws). *See supra* notes 220–21 and accompanying text. It may be that policy-based approaches or broad-based social change will be necessary to effectuate the types of sweeping changes in the disparate impact area that advocates and scholars would like to see occur. Similarly, EDRs are unlikely to be able to provide a meaningful alternative for those few discrimination cases that are based on class or collective claims. *Cf.* Nielsen et al., *Individual Justice*, *supra* note 27, at 189 (showing that class and collective claims comprise a very small proportion of all discrimination claims litigated, and that such claims are among the most successful discrimination claims (and thus may not require supplementation through EDRs)). Nevertheless, litigation-based EDRs are likely to be a possibility in many of the areas in which discrimination litigants currently bring individualized claims.

231. *See supra* notes 137–43 and accompanying text. Obviously, different prototypes may be activated by different EDRs, and thus the influence of this factor will not be monolithic. However, it appears that for some of the major

ple, as the work of Pauline Kim and others has shown, most employees have expansive beliefs about non-just-cause terminations, believing that a wide array of factually unjustified firings are unfair and unlawful, despite the fact that at-will employment remains the norm in most states.<sup>232</sup> Similarly, many individuals have expansive views of what constitutes retaliatory behavior—views that tend to be far more expansive than corresponding views regarding what constitutes discrimination.<sup>233</sup> Thus, the prototypes that judges and jurors have in relation to many EDRs are likely to be much more plaintiff-favorable than commonly held discrimination prototypes. Insofar as the work of psychology scholars suggests that such prototypes influence outcomes, EDRs are thus likely to be better situated than discrimination claims to prevail.<sup>234</sup>

For similar reasons, preexisting beliefs about the commonality or rarity of a particular type of illegal or illicit behavior—beliefs that, as described above, typically decrease willingness to make attributions to discrimination—are unlikely to have a comparable effect on the adjudication of many EDRs.<sup>235</sup> Thus,

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EDRs, including “just cause” litigation, this factor may help—rather than hurt—claimants.

232. See Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447 *passim*.

233. Certainly, the spate of recent Supreme Court decisions broadly construing retaliation law (during a time frame when the Court has been less than expansive in its construction of discrimination law generally), are suggestive that the Court itself has a broader understanding of retaliatory behavior than its accompanying views of discrimination. See, e.g., *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 867–70 (2011) (holding that terminating an employee’s fiancé in retaliation for conduct protected under Title VII violates Title VII’s retaliation provision, and that fiancé was a “person aggrieved” entitled to sue under Title VII); *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 555 U.S. 271, 276–80 (2009) (holding that an employee who participated in an employer-initiated discrimination investigation was protected against retaliation under Title VII); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (construing Title VII’s anti-retaliation provision as providing broader coverage than its anti-discrimination provision, and holding that retaliation provision encompasses all “materially adverse” retaliatory actions, even where they do not affect the terms or conditions of employment).

234. See *supra* notes 231–33 and accompanying text.

235. See *supra* note 144–46 and accompanying text. Again, this factor—namely, individuals’ preexisting beliefs about the commonality or rarity of a particular type of illegal behavior—will not have a monolithic impact, but instead will vary depending on the EDR that is relied upon. However, there is again data that suggests that many significant EDRs may be better situated than discrimination claims vis-à-vis this issue.

while it is well-documented that the general public tends to believe that discrimination is rare (and that this view tends to decrease attributions to discrimination in individual cases), a very significant proportion of the American public has *personally* experienced a termination or layoff that they believe was unfair (i.e., not for just cause or due to company fault).<sup>236</sup> Similarly, illegal or unethical corporate behavior, as a general matter, is perceived as relatively common by the American public, a finding that is perhaps unsurprising in the milieu of Enron and Bernie Madoff.<sup>237</sup> Thus, unlike discrimination—which is widely thought of as rare today—the illegal or illicit behaviors addressed by many EDRs are thought of as common. As a result, this factor is likely to actually *benefit* many EDR plaintiffs, or at a minimum, not stand as a hindrance to EDR plaintiffs' success.

Finally, existing psychological research suggests that meritocracy beliefs—perhaps the lynchpin of most individuals' unwillingness to make attributions to discrimination—simply are not challenged by attributions to unfairness or other types of impropriety in the same way they are by allegations of discrimination. Psychology scholars have documented that claims of

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236. See, e.g., E. Allan Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful-Termination Claims*, 45 ADMIN. SCI. Q. 557, 568, 571 (2000) (in survey of unemployed adults, 34% believed that their employer was at fault in the termination, and mean response by study respondents indicated a general perception that terminations were unfair); see also JESSICA GODOFSKY ET AL., JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., WORK TRENDS: AMERICAN WORKERS ASSESS AN ECONOMIC DISASTER 9 (2010), available at [http://http://www.heldrich.rutgers.edu/sites/default/files/content/Work\\_Trends\\_September\\_2010.pdf](http://http://www.heldrich.rutgers.edu/sites/default/files/content/Work_Trends_September_2010.pdf) (finding that the majority of Americans believe the unemployed are out of work due to no fault of their own); Rich Morin, *Most 'Re-employed' Workers Say They're Overqualified for Their New Job*, PEW RES. CTR. (Sept. 2, 2010), available at <http://pewresearch.org/pubs/1718/re-employed-workers-recession-satisfaction-job-qualification> (reporting data showing that many workers have experienced a job loss in recent years).

237. See *Questions and Answers About Enron: How is the American Public Reacting to the Enron Crisis?*, GALLUP NEWS SERV. (Feb. 14, 2002), <http://www.gallup.com/poll/5332/questions-answers-about-enron.aspx> (reporting poll responses showing that 75% of respondents believed that the types of activities that were engaged in by Enron also exist at "some" or "most" other large corporations; also showing that only 16% rated the honesty and ethics of business executives as "high" or "very high"); see also *Ethics Impact Employment and Productivity*, MGMT. WORLD (Jan./Feb. 2009), [http://cob.jmu.edu/icpm/management\\_world/AllJan09.pdf](http://cob.jmu.edu/icpm/management_world/AllJan09.pdf) (one in four survey respondents indicated that within the past six months they had witnessed unethical or illegal behavior in their own workplaces).

discrimination trigger uniquely hostile responses from observers and that claims of generic unfairness (or other attributions that are not localized in discrimination) attract far less hostility.<sup>238</sup> For example, while individuals who make attributions to discrimination are often stereotyped as difficult, unpleasant, and undesirable to work with, people who make attributions to other causes (including simple unfairness or the difficulty of the task) are evaluated significantly more favorably.<sup>239</sup> This phenomenon, moreover, appears to be directly linked to meritocracy beliefs, with the level of hostility expressed towards those who make attributions to discrimination—but *not* other causes—varying considerably based on the strength of the observer’s meritocracy beliefs (and/or based on whether the observer has been primed with meritocracy beliefs).<sup>240</sup>

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238. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 47–50 (summarizing the results of prior studies, which had found that those who attribute a lack of success to discrimination are derogated much more significantly by research subjects than those who attribute to other causes); Kaiser & Miller, *Stop Complaining*, *supra* note 118, at 258, 261 (demonstrating that subjects rated an African American as more hypersensitive, emotional, argumentative, irritating, troublemaking and complaining when he attributed his failure to discrimination, even where there was significant evidence of discrimination; also showing that attribution to *other* external causes (such as difficulty of the test) did not result in increased derogation as compared to internal causes (such as answer quality)); see also Shelton & Stewart, *supra* note 97, at 220–21 (showing a statistically significant correlation between confronting discrimination and being perceived as a “complainer,” and an inverse correlation between discrimination confrontation and being perceived as a “good person,” but finding no statistically significant trends in perception of confronters where women confronted “offensive” but nondiscriminatory comments). *But cf.* Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1507 (2003) (reporting findings that jurors are, as a general matter, suspicious of plaintiffs of all kinds because of a perception that the fact of bringing a lawsuit is counter to the ethic of individual responsibility).

239. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97 at 47–50; Kaiser & Miller, *Stop Complaining*, *supra* note 118, at 258, 261; see also Shelton & Stewart, *supra* note 97, at 220–21 (finding similar results when individuals confront discriminatory comments).

240. See, e.g., Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 54–57 (summarizing results of a number of studies showing that meritocracy beliefs moderate psychological threat responses to attributions of discrimination, but do not have a comparable effect in the context of attributions to other causes); Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1527, 1531 (reporting experimental results showing that meritocracy beliefs moderate the extent of derogation directed at individuals who make attributions to discrimination but do *not* moderate the extent of derogation directed at individuals who make attributions to other causes, including simple unfairness).

The reason for this disparity in responses appears to be relatively straightforward—while claims of discrimination raise the specter of systematic deviations from meritocratic norms and thus trigger defensive responses, as discussed in Part II—claims of simple unfairness or violation of technical legal norms do not.<sup>241</sup> In essence, illegal discrimination is perceived to be part of a wider societal phenomenon (group-based bias against particular groups), whereas other forms of unfairness or illegality (including arbitrary—but nondiscriminatory—employer actions) are perceived as non-systematic and thus unthreatening to the global prevalence of meritocracy.<sup>242</sup> As a result, attributions to unfairness or violations of technical legal norms do not trigger the types of psychological responses (such as rationalization, victim blame, and denial) that are triggered in the context of attributions to discrimination.<sup>243</sup>

Thus, all three of the factors that psychology scholars have identified as playing a role in the reluctance of most individuals to make attributions to discrimination<sup>244</sup> are unlikely to have a comparable effect in the context of EDRs.<sup>245</sup> Moreover, one additional feature of EDRs—their tendency to impose more concrete standards for adjudication than discrimination claims—is likely to further improve EDRs' success rates vis-à-vis discrimination claims.<sup>246</sup> Indeed, psychology scholars have shown that

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241. See, e.g., Kaiser et al., *Why Are Attributions to Discrimination Costly*, *supra* note 106, at 1528 (theorizing that discrimination attributions are likely to be particularly threatening to meritocracy beliefs because of their global implications).

242. *Id.*

243. See *supra* notes 238–40 and accompanying text; see also Kaiser, *Dominant Ideology Threat*, *supra* note 97, at 54–55 (discussing studies that have found that high endorsers of meritocracy beliefs as well as those primed with meritocracy beliefs, experience heightened psychological distress (feeling anxious, nervous, distressed) when witnessing an attribution to discrimination).

244. See *supra* Part II (describing in detail the factors that psychology scholars have identified as playing a role in the reluctance of most individuals to make attributions to discrimination).

245. Cf. Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 398–404 (2000) (in the criminal law context, arguing that policies that harness existing norms rather than relying on a pure deterrence model are more likely to succeed).

246. For example, one type of FMLA claim (albeit not the only type) looks simply at whether the employer has complied with legally specified leave and reinstatement requirements in order to determine liability. For a description of the FMLA and its requirements, see *Family and Medical Leave Act*, U.S. DEPT OF LAB., <http://www.dol.gov/whd/fmla/> (last visited May 10, 2012). Simi-

well-defined and non-ambiguous constraints on decision-making (often referred to as “strong situations”) can be significantly more effective at constraining psychological biases (and other individualized factors) than the type of weak constraints found in discrimination laws.<sup>247</sup> Thus, even if judges and jurors do have biases regarding EDR claims, the presence of strong constraints may make the effectuation of those biases less likely.<sup>248</sup>

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larly, many just-cause regimes impose liability based on an employer’s failure to comply with its own written termination procedures, an inquiry that will often (but not always) involve the application of a more concrete set of constraints. *See, e.g.*, Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-904 (2011) (defining a discharge as wrongful where “the employer violated the express provisions of its own written personnel policy.”).

247. *See, e.g.*, William H. Cooper & Michael J. Withey, *The Strong Situation Hypothesis*, 13 PERSONALITY & SOC. PSYCHOL. REV. 62, 62–64, 70 (2009) (describing the hypothesis, noting that it is widespread, but cautioning that existing research does not currently provide adequate empirical support to confirm the hypothesis); Kahan, *supra* note 193, at 774–75, 796 (finding that very clear explicit legal standards do have some impact on outcomes, even where jurors have strong underlying background views); Rustin D. Meyer et al., *A Review and Synthesis of Situational Strength in the Organizational Sciences*, 36 J. MGMT. 121, 133–34 (2010) (providing a meta-analysis of the literature and finding some support for the strong situation hypothesis). Although it appears that strong situations do restrain the impact of preexisting background views and biases, they are not entirely effective at eliminating the influences of underlying beliefs. For example, even in the presence of a very specific jury instruction apparently requiring conviction, Dan Kahan found that more than one third of study participants continued to act in accordance with their preexisting (and inconsistent) views regarding the meaning of “rape.” *See* Kahan, *supra*, at 795–97.

248. One could also argue based on this literature that the anti-discrimination laws should be amended to provide more concrete constraints. The most obvious such amendment would modify the law to provide for a “pretext only” regime, i.e., a regime in which the judge or juror is required to find discrimination upon a determination that the reason the employer has given for the termination was not the true reason. (This, of course, is an approach which has been rejected by the Supreme Court, *see* *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 514–15 (1993), but Congress could adopt such an approach through legislative action.) Alternatively, a judge or juror could be required to make a finding of discrimination where the employer has made remarks that are indicative of group bias (although this is an approach that even many progressives—including myself—might find discomforting). While there is some theoretical appeal to these types of approaches, there are real risks in attempting to force judges and jurors to classify a particular factual circumstance as discrimination when their intuitive views are strongly divergent from that understanding. As an initial matter, while strong constraints have been shown to have *some* effect on outcomes, there remain a substantial number of decision-makers who will follow their preexisting beliefs. *See, e.g.*, Kahan, *supra* note 193, at 774–75, 796 (experimentally demonstrating this phenomenon in the criminal law context). Moreover, crafting a legal discrimi-

Initial empirical findings suggest that the foregoing advantages of EDRs are far from merely theoretical. As Kevin Clermont and Stewart Schwab have documented, FMLA claims—which provide structural remedies for inequality-based problems without requiring findings of group-based discrimination—fare far better than discrimination claims.<sup>249</sup> Thus, for example, FMLA claimants win pretrial adjudications at roughly 4 times the rate of discrimination litigants, and prevail at trial in roughly 60% of cases, as compared to the roughly 30–35% trial victory rates of discrimination litigants.<sup>250</sup> Indeed, the overall “win” rate for FMLA litigants is close to double the win rates for discrimination claimants (win rates that are strikingly similar (and low) across all of the various discrimination statutes, including Title VII, the ADA, § 1981 and the ADEA).<sup>251</sup> These results—a double or more success rate for FMLA claim-

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nation regime that is increasingly divergent from public understandings of discrimination seems likely to only increase the problem of doctrinal drift discussed in *supra* notes 189–90 and accompanying text. Finally, forcing decision-makers to apply a specific definition of discrimination that does not comport to public understandings seems likely to only exacerbate the public perception of discrimination litigation (and litigants) as predominantly frivolous. Thus, to the extent that similar ends can be achieved without requiring the classification of the ultimate event as discrimination (for example, through just-cause legislation, which imposes an even higher standard on employers than a “pretext only” regime), this approach seems preferable to trying to further define “discrimination” under the law in ways that profoundly diverge from common understandings. Cf. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679 (1996) (arguing that the presence of discrimination protections, coupled with a lack of just-cause termination protections in most states, may funnel claims which are more properly characterized in just-cause terms into discrimination causes of action); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 782 (2006) (characterizing as one of two “critical mistakes” underlying disparate impact the notion “that it was possible to redefine discrimination purely through legal doctrine” and noting that the redefinition of discrimination in law has not led to a similar redefinition in public opinion).

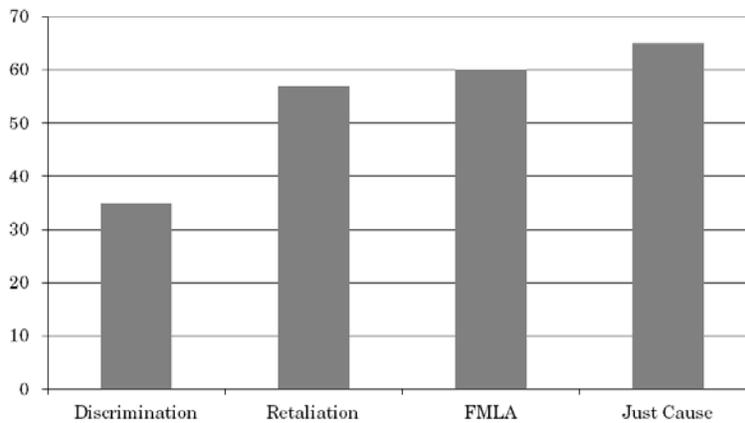
249. Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 445.

250. *See id.* In the case of bench trials alone, the disparities are even more striking, with 80% of FMLA claimants prevailing before judges as compared to a 20–25% success rate for discrimination litigants. *Id.* In calculating figures based on the data provided by Clermont and Schwab, I omitted § 1983 claims, as it was unclear whether such claims were exclusively discrimination-related or also included other forms of constitutional or statutory claims that can be brought pursuant to § 1983.

251. As noted, *supra* note 30, the overall win rates for virtually all classes of discrimination litigants are very similar and cluster around ten or eleven percent. *See supra* note 30 and accompanying text.

ants as compared to discrimination litigants—are striking and suggest that there may in fact be substantial advantages to EDRs.<sup>252</sup>

**Figure 3**  
**Trial Win Rates: Discrimination Plaintiffs v. EDR Plaintiffs**



Data from Kevin M. Clermont & Stewart J. Schwab, *Emp. Discrim. Plaintiffs in Federal Court* (2009) / *How Emp. Discrim. Plaintiffs Fare in Federal Court* (2004); David. Oppenheimer, *Verdicts Matter* (2003); Wendy Hyland, *Equal Opportunity for Employers* (2001).

While there is less extensive data on the success rates of litigants bringing just-cause claims, existing studies strongly suggest that the success rates of such litigants also substantially exceed the success rates of discrimination litigants.<sup>253</sup> Thus,

252. The comparative success of FMLA claimants may explain why pregnancy and other family responsibilities discrimination claims have a much higher success rate than other forms of discrimination claims. *See, e.g.*, MARY C. STILL, CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF LAW, *LITIGATING THE MATERIAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 13–14* (2006), available at <http://worklifelaw.org/pubs/FRDreport.pdf> (highlighting the high win rates in family responsibilities discrimination cases when compared to win rates in traditional employment discrimination cases). Since such claims can often be brought under both the FMLA and Title VII, they typically will have a basis both in EDRs and in discrimination law. I am unaware of any author that has disaggregated family responsibilities discrimination by statutory basis of claim to try to determine whether the increased incidence of success is an artifact of the prevalence of FMLA claims in that context.

253. *See, e.g.*, Oppenheimer, *supra* note 147, at 516, 518, 520–22, 524 (describing prior studies of common law just-cause claims at trial, which had consistently found success rates in the 60–70% range); S. Richard Pincus, *Final*

existing studies of trial victory rates (the primary area that has been studied for just-cause claims) have repeatedly found that plaintiffs prevail at trial on statutory or common law just-cause claims at a rate of roughly 60–70%.<sup>254</sup> This success rate is very similar to the FMLA success rate found by Clermont and Schwab,<sup>255</sup> and vastly exceeds the trial success rates experienced by any class of discrimination litigants.

Finally, retaliation claims brought under the anti-discrimination laws—which have characteristics of both a discrimination claim and an EDR—appear to have success rates at trial that are slightly lower than the success rates of FMLA and just-cause litigants but that remain substantially higher than the success rates of discrimination litigants.<sup>256</sup> Thus, retaliation claims—which do not ask the judge and jury to make an ultimate finding of discrimination, but which often rely to some extent on the reasonableness of an employee’s perception that discrimination occurred—appear to fall somewhere between true EDRs and discrimination claims in their level of success.

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*and Binding Arbitration: A Sensible Alternative to Expensive Employment Litigation*, 22 J. HEALTH L. 343, 343 n.5 (1989) (citing to study reporting a 64% success rate for wrongful discharge cases at trial); *cf. supra* note 250 and accompanying text (discussing trial success rates for discrimination claimants, which have generally been reported in the 30–35% range).

254. See Oppenheimer, *supra* note 147, at 516, 518, 520–22, 524; Pincus, *supra* note 253, at 343 n.5.

255. See Clermont & Schwab, *How Plaintiffs Fare in Federal Court*, *supra* note 27, at 445.

256. There is relatively little data on how retaliation claims fare in court. However, news reports suggest a trial victory rate of roughly 57%. Wendy Hyland, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 KY. L.J. 273, 277 n.19 (2001); see also Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning*, 21 BERKELEY J. EMP. & LAB. L. 166, 191 n.132 (2000) (discussing an analysis performed for USA Today by Jury Verdict Research showing that individuals who file retaliation lawsuits win more cases than victims of “age, disability, race or sex discrimination”); Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 3 n.3 (2006) (noting that retaliation claims are the most successful type of employment discrimination claims). See generally Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women’s Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL’Y 1, 38–45 (2010) (arguing that the retaliation cause of action has operated to fill existing gaps in the vitality of challenges to sex discrimination in the specific context of Title IX and athletics).

Of course, none of the data described above was collected as part of an analysis designed to test the comparative efficacy of EDRs and discrimination claims, much less as part of a study designed to ascertain the causes of any disparity in success rates. Thus, they cannot answer the ultimate question of whether EDRs are more effective than discrimination claims in similar factual circumstances, or whether any comparative advantage of such claims results from the lesser salience of the type of background beliefs that have been found to be associated with resistance to making attributions to discrimination.<sup>257</sup> Moreover, no existing analysis has addressed the issue of how lawsuits involving concurrent EDR and discrimination claims fare (whether, for example, a concurrent EDR claim raises the likelihood of success on a discrimination claim, or conversely, whether EDR claims fare worse when brought together with discrimination claims). Thus, further research is necessary to answer many substantial questions regarding the potential utility of EDR claims. Nevertheless, existing data provides considerable reasons to believe that EDR claims are significantly more likely to result in successful outcomes for litigants than traditional discrimination causes of action.

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257. For a discussion of the findings of psychology scholars regarding individuals' resistance to making attributions to discrimination and the background beliefs that have been found to play a role in this phenomenon, see *supra* Part II.

### 3. Possible Critiques of Extra-Discrimination Remedies<sup>258</sup>

Even if EDRs are more effective than discrimination remedies, there may, of course, still be a number of critiques to placing increased focus on their use. Among the most compelling of such critiques is the lost moral valence of moving away from claims of discrimination towards an increased focus on claims that are—by their very nature—designed to be less morally and socially charged. Most individuals who are deeply invested in the anti-discrimination enterprise—including scholars, advocates, and litigants—care about redressing discrimination precisely because it *is* discrimination. Whether some abstract technical violation of the law has occurred often matters little (if at all) to the emotional and moral salience of the alleged wrongdoing.

The most compelling response to such arguments—at least on an individual level—is that there are precious few moral victories for victims of discrimination in the current state of affairs. Certainly, for the significant number of litigants who lose their cases outright (on motion practice or at trial, for example), there is no moral justice. And, for those who settle, moral victories are often also in short supply.<sup>259</sup> Indeed, few would contend that receiving \$30,000 in exchange for signing an agreement that typically requires promises of secrecy, agreements not to disparage the employer or voluntarily help other victims of discrimination, and that is larded with employer refutations that

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258. For each of the individual EDRs mentioned here, there is an extensive literature addressing its merits and drawbacks from an individualized perspective. *See generally, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (making arguments in support of the employment at will); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996) (discussing the relative merits of legally imposed workplace regulations as compared to those that are based on informal norms, with particular attention paid to just-cause regimes/norms); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010) (critiquing the American approach to reconciling work-family conflict and suggesting that such an approach may be partially responsible for the United States' inadequate maternity leave policies). My discussion herein does not extend to such critiques, but is limited to critiques of the general concept of making increased use of EDRs as a means of improving the odds of success for putative victims of discrimination. Whether a specific EDR is advisable from perspectives other than the potential benefit to putative victims of discrimination is a complex question that would, of course, need to be fully engaged before proceeding with specific legislative action.

259. *See infra* note 260 and accompanying text.

any discrimination ever took place constitutes a moral victory.<sup>260</sup> Even for those few clients that have won major trial victories—purportedly the ultimate form of moral vindication—the seemingly never-ending cycle of post trial motions and appeals blunts the moral force of victory, and dispels any notion that the employer has truly “learned” anything. In short, there is little likelihood of moral gain for individual victims of discrimination, while there is much to lose in defeat.

While critiques of lost moral valence thus have little power on an individual level, they are worth taking more seriously on a global level. After all, the abandonment of a principal focus on discrimination (in academia, in litigation, or in advocacy) can only hasten the already sturdy perception of discrimination as a rare and aberrant phenomenon that need not preoccupy our attentions today. Such an outcome obviously disserves the interests of discrimination victims, insofar as it would predictably lead to even further deterioration of support for efforts to remediate discrimination (whether on a global or individual scale). It would be ironic, to say the least, if efforts to better serve putative victims of discrimination contributed to the demise of the most stalwart protector of such victims—discrimination laws themselves.<sup>261</sup>

As a result, it seems clear that some balance between the remedies that will most effectively serve putative victims of discrimination now and the strategies that will most effectively enhance the public salience of discrimination in the long-term is needed in pursuing discrimination reform.<sup>262</sup> As we learn

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260. Cf. Nielsen et al., *Uncertain Justice*, *supra* note 2, at 16, 33 (noting that defendants, even post-settlement, consistently maintain that no discrimination took place and that their decision to settle was purely pragmatic).

261. Derrick Bell has made a similar point in calling for increased focus on pursuing equality by “forging fortuity” outside of the confines of discrimination doctrine, while noting that we neglect formal discrimination protections at our peril. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 189–93* (2004).

262. I should be clear that there are certain circumstances in which this balance will obviously weigh in favor of focusing energies on discrimination approaches. Most notably, in circumstances where a group (such as lesbian/gay/bisexual/transgender employees) has not yet achieved statutory anti-discrimination protections, it seems clear that the primary objective must be to obtain such protections (although EDR claims may be helpful—and indeed sometimes the only alternative—in obtaining redress for current victims of discrimination). Put simply, without a statutory baseline rendering discrimination illegal, concerns about the scope of what people may perceive as dis-

more about how EDRs operate—whether they are effective as an adjunct (as opposed to a substitute) to discrimination claims and what types of claims fare best comparatively under EDR-type approaches—we will be better able to assess when an EDR-based approach seems most appropriate, and when discrimination claims (either as an adjunct or alone) remain the best approach. Moreover, increased advocacy and publicity around the enactment of EDRs should not detract from the continuing need to publicize compelling instances of discrimination and to agitate for broader public understandings of discrimination’s harms. In short, there is little to lose, and potentially much to gain, from pursuing both EDRs and more traditional discrimination remedies.

The question then becomes whether this type of approach is practically or politically feasible. After all, while EDRs are already available in some jurisdictions in some forms, significantly increased reliance on EDRs would require the enactment of legislation, which is hardly a trivial enterprise. There are, moreover, numerous potential obstacles that one can envision to successful efforts to promote such remedies, such as a lack of collective focus of advocacy groups (incidental to the wide array of potential remedies that such groups could seek to promote), and a decreased willingness of constituents and granting agencies to fund non-group based legislative efforts by civil rights advocacy groups.

This Article cannot hope to fully address the political complexities of enacting new EDR legislation. However, a few ob-

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crimatory are hardly the most central of discrimination victims’ concerns. See, e.g., KATIE R. EYER, PROTECTING LESBIAN GAY BISEXUAL AND TRANSGENDER (LGBT) WORKERS: STRATEGIES FOR BRINGING EMPLOYMENT CLAIMS ON BEHALF OF MEMBERS OF THE LGBT COMMUNITY IN THE ABSENCE OF CLEAR STATUTORY PROTECTIONS 18 (2006), available at [http://www.acslaw.org/sites/default/files/Eyer\\_on\\_Protecting\\_LGBT\\_Workers--FINAL\\_0.pdf](http://www.acslaw.org/sites/default/files/Eyer_on_Protecting_LGBT_Workers--FINAL_0.pdf) (identifying a “federal civil rights law prohibiting sexual orientation and gender identity discrimination” as a goal “critical to creating genuine change in working conditions and employment opportunities”); Katie R. Eyer, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 LAW & SEXUALITY 160, 164 (2010) (arguing that “an identity politics model is necessary in order for a legally disfavored group to make the transition to formal legal equality”). Among other things, while discrimination law is by no means perfect in deterring real-world discrimination, it does have *some* deterrence effects—effects that would be completely lost absent formal anti-discrimination protections. See generally *supra* note 199 (describing research relating to the role of formal anti-discrimination protections in improving economic outcomes for protected groups).

servations are worth making here. First, the problem of a diffuse focus that pursuing EDRs brings, while real, should be surmountable by effective coalition building and the prioritization of the most broadly applicable of reforms. Thus, for example, just-cause legislation, whose benefits as an adjunct to discrimination claims would be available to all groups who seek to bring discrimination claims, is an obvious place to begin and would allow the building of broad coalitions around a single movement for change. Such a movement would undoubtedly have the advantage of being able to attract the support of others beyond the groups traditionally protected by discrimination legislation, including workers' advocacy groups and others seeking a fairer and more predictable employment regime.<sup>263</sup> Indeed, existing social science research suggests that EDRs—precisely because of their broad-based and inclusive nature—may be among the most politically viable of legislative approaches to reform.<sup>264</sup>

Moreover, to the extent that EDR-related efforts constitute only a fraction of the work of civil rights advocacy groups, it seems unlikely that they will materially affect the support for those organizations. As set forth above, there are good reasons for civil rights organizations to continue to engage in a diversity of approaches, including robust efforts to utilize and further expand traditional discrimination remedies.<sup>265</sup> And indeed, many civil rights organizations *already* engage in a diversity of approaches, including EDR-based advocacy around issues that are considered material to their constituents' equality con-

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263. Employers may even be included among those who would support these types of reforms, as employers may prefer the predictability of a fixed legal regime to the uncertainty that accompanies the common law regimes that exist in many states.

264. See, e.g., Margaret Weir et al., *The Future of Social Policy in the United States: Political Constraints and Possibilities*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 421, 421–45 (Margaret Weir et al. eds., 1988) (describing the political difficulties faced by social welfare programs that are associated only with poor or minority constituents and describing the enhanced political viability of very broad-based social welfare programs); cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523–28 (1980) (arguing that the result in *Brown v. Board of Education* was made possible only a result of the convergence of the interests of the white majority with the anti-segregation outcome of *Brown*, and that commitment to enforcement waned again when those interests diverged).

265. See *supra* notes 260–61 and accompanying text.

cerns.<sup>266</sup> It thus seems profoundly unlikely that further diversifying advocacy efforts will materially harm the support for advocacy groups that promote civil rights concerns.

Finally, it is worth noting that the history of efforts to legislatively enact EDRs provides a basis for some hope regarding such approaches' political feasibility, although certainly not for unqualified optimism. Many EDRs, including for example FMLA-style laws, have been successfully enacted in the past.<sup>267</sup> Moreover, to the extent that efforts to enact such legislation have failed, it has often been at least in part because of the ambivalence or active resistance of groups (such as unions or trial lawyers) that are natural allies, but have nevertheless faced context-specific competing concerns.<sup>268</sup> Thus, there are reasons to believe that EDR-based legislation could achieve political success (albeit certainly not in all jurisdictions or at all times) if backed by a broad-based and sustained coalition of civil rights groups and other progressive allies. At a bare minimum, EDR legislation seems as likely to be politically viable as the primary alternative (i.e., significant amendments to the anti-discrimination laws) given the broader-based constituency that EDRs would ultimately protect.<sup>269</sup>

#### CONCLUSION

Few would dispute that civil rights litigants (and their advocates) have radically transformed the American social and political landscape. Discrimination is today a term with tre-

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266. See, e.g., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., <http://www.naacpldf.org> (last visited May 10, 2012) (detailing the array of racial justice work that the LDF is currently working on, including work that is not focused on purely discrimination-based remedies).

267. See *supra* notes 220–21 and accompanying text.

268. See, e.g., Jack Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 561–63 (1985) (noting that unions have typically not lobbied on behalf of unjust discharge legislation, and that such legislation has been actively opposed by plaintiff-side trial lawyers in some of the states where it has been proposed); see also Chris Bragg, *'Poison Pill' Measures Pulled From Ballot*, COLO. STATESMAN (Oct. 3, 2008), <http://www.coloradostatesman.com/content/%3Fpoison-pill%3F-measures-pulled-ballot> (describing a deal between Colorado labor and business leaders to remove certain pro-worker initiatives, including an initiative that would have required “just cause” for terminations in Colorado, from the November 2008 ballot, in exchange for business opposition to certain anti-union measures on the ballot).

269. See *supra* note 264 and accompanying text. See generally *supra* Part IV.B.2 (discussing the potential benefits of EDRs).

mendous social and moral valence that denotes—for most of us—a particularly pernicious form of invidious wrong. The overwhelming majority of individuals in contemporary American society believe that discrimination is wrong and have vested conceptions of the forms that this wrong can and does take.

And yet the work of psychology scholars suggests that it is precisely the widespread social valence of discrimination that may be driving the difficult odds that discrimination litigants face in today's legal milieu. It is because the public has developed its own strongly held views about discrimination—views that are independent of any technical legal requirements for proving discrimination—that the drift of the law towards unfavorable outcomes for discrimination litigants is so intractable and so pronounced. For while the public believes that discrimination is fundamentally wrong, it also believes it is a narrowly defined phenomenon: a phenomenon that is aberrational and rare in today's society.

These findings suggest the need to look beyond traditional discrimination claims when seeking to protect the interests of putative victims of discrimination. Using extra-discrimination remedies (i.e., remedies that do not focus on group-based discrimination claims) provides one such alternate approach. While such remedies will undoubtedly not serve as a panacea for the difficulties that discrimination claimants face, they may—by decoupling the legal inquiry from the emotionally loaded terrain of discrimination—significantly improve outcomes for individual victims of discrimination.

Thus a “cooler” approach<sup>270</sup>—by its nature designed to avoid the pursuit of moral victories—may be the most effective means of improving outcomes for individual victims of discrimination. Such a compromise approach will no doubt—like most compromises—be profoundly unsatisfying to those on both

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270. Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 492–98 (1999) (noting that framing criminal law discourse in terms of deterrence is often a cover for other more controversial commitments but also observing that the cooling effect of relying on a less controversial discourse may make it easier for diverse citizens to agree on policy commitments); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1476–77 (2004) (noting that the anti-classification understanding of *Brown* was adopted in part because it provided a “cooler” and less controversial way of justifying the decision and discussing at length both the practical benefits and limitations that the cooler approach entailed).

sides of the discrimination debate. But for individual victims of discrimination, it is hard to dispute that outcomes matter. And ultimately, what happens to those individual victims—those the anti-discrimination regime is designed to serve—must matter to all of us in looking to the future of anti-discrimination reform.