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# The Rubric of Force: Employment Discrimination in the Context of Subtle Biases and Judicial Hostility

## **Keywords**

Status-production, Brown v. Board of Education, Racial biases, Employment discrimination

# THE RUBRIC OF FORCE: EMPLOYMENT DISCRIMINATION IN THE CONTEXT OF SUBTLE BIASES AND JUDICIAL HOSTILITY

By Anand Swaminathan\*

When the United States Supreme Court instructed lower federal courts to enforce *Brown v. Board of Education*<sup>1</sup> “with all deliberate speed,” it made “vagueness and gradualism” its official policy for social advancement.<sup>2</sup> Fifty years along the path of gradualism, has our society lost the ability to make continuing progress in combating racial discrimination?

I argue that we have abandoned our commitment to the quest for equal treatment, largely because we have failed to understand the evolving nature of discrimination. In this article, I raise the notion of “force” as an overarching theme that provides a means by which to understand the subtler nature of today’s discrimination and provides renewed justification for the legal regime used to combat it. This article situates the notion of force within the employment discrimination context, partly to define a reasonable and representative scope of study, but also in response to the rich debate over the last ten years as to whether Title VII and other statutes regulating discrimination in the workplace should exist at all.

## THE NOTION OF FORCE

According to civil libertarian legal scholar Richard Epstein, Title VII is counterproductive because its inefficiencies cause the overall economic pie to shrink, as companies hire fewer workers and thereby decrease opportunities for those meant to benefit from antidiscrimination laws.<sup>3</sup> Epstein argues that the market, operating without restrictions, would solve the problem of discrimination by accruing competitive advantage to those who do not maintain discriminatory practices. In Epstein’s view, what small amount of discrimination remains is both tolerable and, in fact, productive.<sup>4</sup>

Richard McAdams presents an alternative economic theory of discrimination termed status-production,<sup>5</sup> which posits that “discrimination and racist behavior generally are processes by which one racial group seeks to produce esteem for itself by lowering the status of another group.”<sup>6</sup> Within this theory, McAdams argues that discrimination will persist in competitive markets even though discrimination is, from an economic perspective, inefficient and decreases overall wealth because it results in a diversion of resources and deadweight loss.<sup>7</sup> McAdams presents three explanations as to why discrimination will persist in competitive markets: (1) the power of discriminatory social norms, (2) the existence of “reciprocity” (restricting social contact to ingroup members) between whites, and (3) under certain circumstances, the effect of esteem-producing racial biases.<sup>8</sup> According to McAdams, “the key to understanding [discrimination and racist behavior generally] is to perceive its

subordinating quality. Status comes about by *disparaging others*, by asserting and reinforcing a claim to superior social rank.”<sup>9</sup> These explanations highlight an important point: subordinating another group achieves greater esteem for the subordinator by denying the very act of derogation; hence, subtler forms of discrimination are more effective than overt ones.

Epstein’s associational theory, by presenting a world in which individuals look innately within their own groups to develop personal connections, lacks any coercive effect. On the other hand, McAdams’ theory focuses quite acutely on the programmatic domination of one group by another. This focus on force is crucial to the debate because it is force that provides the strongest justification for state intervention. Epstein concedes that state intervention was needed in the Jim Crow South, reasoning that the explicit use of physical violence and coercion kept blacks from participating in markets.<sup>10</sup> In his view, the distinction between that period and the present one is the absence of state-sponsored force, a shift he identifies as occurring in 1954 with the Supreme Court’s decision in *Brown v. Board of Education*. I argue that *Brown* merely required a change in the *form* of force. In a way, the coercive force has moved underground, and McAdams’ status production theory lays the foundation for a more thorough explanation of discriminatory behavior.

While McAdams’ language sounds of deliberateness, or premeditation, in this article I consider the growing evidence that subconscious biases contribute to discriminatory outcomes, and place this dynamic within the broader notion of force. In doing so, I reject Epstein’s sterile, almost placid, treatment of these phenomena as part of innate associational “preferences” or “tastes.” Epstein states that *Brown* led to cultural and social changes to the very fabric of the South and asserts that this change resulted in a drastic reduction in the use of force that eliminated the need for legal intervention in combating discrimination. He does not consider the possibility that previously acceptable behaviors would not be abandoned but rather replaced by new, subtler forms of subordination. To establish the persistence of force through new forms, then, would be to lay a strong challenge at the feet of Epstein and others who concede that state intervention was warranted in the Jim Crow South, but argue that such intervention is no longer needed today.

## LINGERING FORCE: COGNITIVE BIASES AND IMPLICIT ATTITUDES

The discriminatory behavior of whites in McAdams’ theory is understood as serving to produce and maintain social status. To this end, despite the influence of competitive markets, whites

use discriminatory social norms and what McAdams terms reciprocity. This behavior of whites, in McAdams' approach, is treated as purposeful or intentional. However, these same means, and resulting end, may be compounded by implicit attitudes and unintentional motivations. Indeed, they may even be the result of healthy cognitive functioning. A study of these forms will buttress McAdams' theory of status production while providing further evidence of ongoing force unaccounted for in, and contrary to, Epstein's assumptions.

### COGNITIVE BIASES AS FORCE

Linda Hamilton Krieger's 1995 article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, presents a detailed study of behavioral research on cognitive biases and their implications on established legal doctrine.<sup>11</sup> Krieger explains that in the 1970s, psychologists began to recognize that intergroup biases could result not only from motivational processes but also from typical cognitive processes. Called social cognition theory, psychologists began to identify "normal" cognitive processes like categorization and information processing that could also create and reinforce racial biases.<sup>12</sup> According to this view, stereotyping is a cognitive process, resembling categorization, that alters perception, interpretation and other forms of information processing in predictable ways.<sup>13</sup>

Social cognition theory suggests that individuals who may not harbor racist beliefs may nonetheless suffer from unintended but systematic prejudice as a result of categorization-like stereotypes. Behavioral experiments have shown that when individuals are divided into groups, even for trivial or random reasons, they display strong biases in their perception of differences and in the evaluation and reward of ingroup versus outgroup members.<sup>14</sup> Subjects perceive ingroup members as more similar and outgroup members as more different than when those same persons are viewed in the absence of groupings. In addition, subjects are better able to recall undesirable behavior when committed by outgroup members instead of ingroup members, significantly overrate the product of their own group in comparison to that of outgroups, and disproportionately attribute ingroup members' failures to situational factors (i.e. environmental or contextual factors) and outgroup members' failures to dispositional factors (i.e. personal attributes or traits).<sup>15</sup>

In addition to categorization-based biases, social cognition theorists have also identified biases resulting from salience-based cognitive distortions in perception and memory. Studies have found that individuals judge the actions of minorities in more extreme ways when they are token members of a group than when they are members of a fully integrated group.<sup>16</sup> In one study, white males and females evaluated law school applications containing incidental indications of the applicants' race. Evaluators judged black applicants with strong credentials more favorably than otherwise identical white applicants, and judged black applicants with weak credentials less favorably than otherwise identical white applicants.<sup>17</sup>

According to some theorists, these studies show that we pay more attention to stimulus objects that are more salient or distinctive, and as a result more information about these objects is perceived, encoded and stored in memory.<sup>18</sup> Thus, because data regarding such stimuli are more available to the perceiver, impressions formed under conditions of high attention have a greater valence, positive or negative, explaining the polarized evaluation phenomena.<sup>19</sup> An alternative explanation of the polarization findings incorporates previous studies showing that individuals perceive ingroup members as relatively heterogeneous, or complex, while they view outgroup members as relatively homogeneous.<sup>20</sup> As a result, they have an increased appreciation of complexities in evaluating ingroup members and greater awareness of the inadequacy of available information,<sup>21</sup> and thus are more cautious in their judgments.<sup>22</sup> In contrast, evaluations of undifferentiated outgroup members are more broad and inexact, generally either "good" or "bad."<sup>23</sup>

The studies above regarding categorization and salience constitute cognitive sources of stereotypes and schemas, acting as a lens through which subsequent events are viewed. How do these schemas influence behavior? A 1980 study using school-age children examined the effect of social schemas on the interpretation of ambiguous information, presenting cartoon drawings and verbal descriptions of a scene in which one student was poking a classmate in the back with a pencil.<sup>24</sup> Asked to rate the behavior of the offending student, the study found that switching the race of the actor had a significant impact on the manner in which the children categorized the behavior. Specifically, subjects judged the behavior of black actors to be more mean and threatening, and less playful and friendly, while the opposite result obtained when the actor was white.<sup>25</sup>

A further example of schematic distortion affects how we attribute causes to events. This analysis expands upon research regarding "fundamental attribution error," in which people tend to underestimate the impact of situational factors and overestimate the impact of dispositional factors.<sup>26</sup> A variation on this, known as the "ultimate attribution error," relates directly to the categorization-based biases identified above, showing that people tend to attribute desirable ingroup behaviors to internal, dispositional factors but attribute similar behavior by outgroup members to environmental causes.<sup>27</sup> One such study found that subjects perceived misconduct to be more likely to recur where the behavior was in accordance with stereotypes of the actor's ethnicity than when stereotype-inconsistent or stereotype-neutral. Furthermore, when misconduct was stereotype-inconsistent or stereotype-neutral, subjects were better able to recall information about surrounding life circumstances of the transgressor.<sup>28</sup>

In the employment setting, the implications of these studies on how cognitive processes shape perceptions and influence behavior are numerous. Racial minorities are more likely to be alienated as a result of overperceived differences and are more likely to have their work undervalued as compared to that of majority (ingroup) members. In addition, any mistakes they

make at work weigh more heavily in their supervisors' minds and are more likely to be attributed to personal, and not situational, factors, and hence result in more negative personal judgments. These concerns are only exacerbated by salience-based distortions, such that racial minorities in predominantly white employment settings are susceptible to evaluation in the extremes. While the data also shows that their successes are also viewed more positively, the net effect may only be more alienation from co-workers.

In this setting, where there appears to be little room for error for racial minorities in the cognitive minds of their employers, the studies also show that minorities do not get the benefit of the doubt. Instead, in the plethora of ambiguous circumstances that can arise in the workplace, existing schema and causal distortions will act to place a thumb on the scale against minority employees. That is, it is likely that a racial minority involved in a verbal dispute in the workplace will not be seen as passionate or playful but aggressive and threatening; and, this aggressive and threatening behavior is more likely to be attributed to individual character than surrounding circumstances. In this way, the conduct will appear worse, present less opportunity for mitigation or rehabilitation, and thus result in more drastic consequences. Without ever injecting motivational or intentional racial attitudes, cognitive biases present the possibility of just such a playing field. This series of cognitive operations in the minds of employers did not cease the day *Brown v. Board of Education* was decided, nor did it cease the following day.

### IMPLICIT ATTITUDES

The operation of force via subtle, often subconscious and unknowing, discrimination is further evidenced through tests measuring explicit versus implicit attitudes. Generally, these tests show that even individuals who believe that they hold no prejudices towards racial minorities nonetheless harbor such negative attitudes at a strikingly high rate.<sup>29</sup> Unlike the cognitive bias studies discussed above, which focused on bias-creating effects (or byproducts) of otherwise normal cognitive functioning, implicit attitudes tests allow for the inference that individuals who believe they hold no negative racial prejudice nonetheless harbor such attitudes as the result of social conditioning and cultural or other experiential factors. While sharing the unintentionality of cognitive biases, implicit attitudes can be seen as closer to overt discrimination in that they reflect learned behavior or the suppression of previously held overt attitudes.<sup>30</sup> They may also be confirmation of the cognitive bias effect, reflecting the inevitable progression of cognitive-based stereotypes or schemas into implicit attitudes. Either way, implicit attitudes present a second way of capturing the subtle force that continues to operate in the post-*Brown* era.

Implicit Association Tests (hereinafter "IAT") are a method of indirectly measuring the strengths of associations among concepts.<sup>31</sup> IATs are presented on web-based computer interfaces in which instances of four concepts must be sorted using only two options, each of which is assigned to two concepts.<sup>32</sup> The

IAT rationale is that people will find it easier to sort a pair of concepts when they are closely associated than when they are weakly associated. Ease of sorting is indexed both by the speed of responding and the frequency of errors, where faster responding and fewer errors indicate stronger associations. Basically, if you respond faster when "white" and "good" are paired than when "black" and "good" are paired, your score would reflect a preference for whites.<sup>33</sup>

Immediately prior to taking the IAT, subjects are asked to complete a short questionnaire asking about their explicit preferences among the concepts used in the upcoming IAT and including basic demographic information.<sup>34</sup> In this way, IATs are able to compare conscious, explicit attitudes against unconscious, implicit ones. One study, conducted on the original IAT website between October 1998 and April 2000, consisted of 541,696 interpretable tests,<sup>35</sup> of which approximately 221,000 responses were black-white racial attitudes tests (both name and face-based).<sup>36</sup> Analysis of the preference among test takers found that 73% of test-takers automatically favor white over black, and as many as 88% of test-takers showed either pro-white or anti-black preferences.<sup>37</sup> On the explicit measure, whites showed a preference for white over black, but black respondents showed an even stronger preference for black over white. However, on the implicit measure, whites showed a strong preference (significantly stronger than the magnitude of explicit preference) for white, while black respondents showed a weak preference for white over black.<sup>38</sup>

New studies that place the IAT in various contextual settings supplement the notion of environmental factors as the source of implicit attitudes and raise possibilities as to how we can combat the effects of these biases. Studies have shown that situational factors, like receiving the IAT from a black experimenter or being shown pictures of, or made to think about, admired black individuals like Martin Luther King, Jr., Michael Jordan, and Bill Cosby, can lower bias scores.<sup>39</sup> Similarly, test-takers display reduced implicit gender biases when asked to reflect beforehand on certain questions, like "What are strong women like?"<sup>40</sup>

In terms of implications on actual behavior, one study found that those test-takers who showed the strongest implicit racial biases, when given the option of working with a white or black partner, tended to choose a white partner. Another experiment found that those who showed strong implicit preference for heterosexuals over homosexuals were more likely to avoid eye contact and show signs of unfriendliness when introduced to someone who they were told was gay. Finally, a German study found that volunteers whose results suggested more bias against Turks (an immigrant group in Germany) were more likely to find a Turkish suspect guilty when asked to make a judgment about criminality in an ambiguous situation.<sup>41</sup>

While critics of both cognitive bias and implicit association theories exist, these studies are oft-repeated and consistent with traditional laboratory findings.<sup>42</sup> Moreover, in analyzing the results of various experiments simulating different hiring-related

decisions, their explanatory power is tremendous. For example, in 2003, Bertrand and Mullainathan conducted a now-famous study in which Boston and Chicago-area employers were sent fictitious resumes that were identical except for interchanging African-American and white applicant names.<sup>43</sup> The study found that applicants with white-sounding names received fifty percent more callbacks from potential employers.<sup>44</sup> Another famous study analyzed the hiring practices at eight leading orchestras dating back to the 1960s.<sup>45</sup> In response to concerns of gender bias in hiring, many orchestras in the 1970s and 1980s shifted from conductors hand-picking new members to a blind jury-selection process in which applicants performed behind a screen in order to conceal their identity, creating a unique opportunity to test for gender-biased hiring. The use of the screen led to a 50% increase in women advancing out of the preliminary rounds and a 30% increase in their chances of being hired in the final rounds.<sup>46</sup>

Although interconnected, it is important to recognize that the source of cognitive biases and implicit associations are presumably different. In one case, it is the cognitive processes that are considered healthy and crucial; in the other, it is the absorption of cultural and situational norms. Together, they demand a shift in focus from our words and thoughts to our subconscious motivations. Moreover, the force of cognitive biases is particularly powerful because of where this manifestation occurs: at the subconscious level. Greater esteem is achieved for a subordinating group when it can deny the act of subordinating, making its status appear innate or natural, as opposed to constructed.

#### **IMPACT OF SUBCONSCIOUS BIAS ON EMPLOYMENT DISCRIMINATION**

By placing the operation of force, at least in part, at the cognitive level and recognizing that even individuals who do not intend to discriminate are nonetheless influenced by implicit biases, it is possible to argue that discrimination is not the exception but the rule in today's workplace. Decisions in which ambiguity and subjectivity are abundant are highly susceptible to the influence of bias. In the employment setting, subjective decision making is commonplace. So, how much discrimination occurs in the workplace?

Survey data on personal experiences with employment discrimination suggest that while discriminators may not recognize that their decisions are clouded by subtle, subconscious biases, victims do. According to national Gallup polls, the percentage of African Americans reporting that they were discriminated against "at [their] place of work within the last 30 days varied between 21% and 18% for the years 1997 through 2001."<sup>47</sup> Thirty-three percent of African Americans and Latinos reported that at least one time at their job, they were not offered a job that a white person got because of racial discrimination, and thirty-one percent reported being passed over for a promotion that was offered to a white person because of racial discrimination.<sup>48</sup>

Researchers at Rutgers University conducted a 2002 study focused specifically on employees and found that 10% of em-

ployees said they had been "treated unfairly at their workplace because of their race or ethnicity." Among this group, 28% reported being passed over for promotion, 21% reported being assigned undesirable tasks, and 16% reported hearing racist comments. Among African Americans, over half of those surveyed "knew of" discrimination in the workplace in the last year, and 28% had themselves experienced racial discrimination in the last year. Given the pervasive nature of subtle forms of discrimination and the tiny percentage of employees perceiving discrimination who actually file claims, one begins to wonder not why there are so many employment discrimination claims but why there are so few.<sup>49</sup>

Admittedly, other scholars have considered the meaning of these subtle forms of discrimination on employment relationships and the surrounding legal regime.<sup>50</sup> My effort here is to place these ideas within a more comprehensive framework for understanding how discrimination operates in our society. More narrowly, I hope these studies rebut the fallacy of Epstein's force-free, post-*Brown* America.

#### **MARKET FORCE: HOW BUSINESS CYCLES EXERT DISCRIMINATORY FORCE**

Here, my endeavor is to consider the relationship between market fluctuations and other force phenomena, including the subtle biases discussed above. The employment setting is an apt one for the study of force. For one, it is an area in which discriminatory behavior has been historically pervasive. Moreover, the plethora of data and statistics available for study provide a practical reason for studying employment discrimination.

By way of background, in order for a complaint of discrimination to become a lawsuit in federal court, an employee must first file a formal complaint with the Equal Employment Opportunity Commission ("EEOC"). After a brief investigation, the EEOC determines whether a case is worth pursuing. If so, it may work with the parties to obtain a settlement or sue on behalf of the employee. In all other cases, the EEOC issues a "right to sue" letter to the employee, at which point an aggrieved employee can file a lawsuit in federal court.<sup>51</sup> Thus, the two major sources of data are the EEOC's Annual Charge Statistics and the Judicial Facts and Figures maintained by the Administrative Office of the United States Courts.<sup>52</sup>

The intuition regarding the relationship between business cycles and employment discrimination is simple: when unemployment rates are low, jobs are available in abundance, so employees who experience discrimination have attractive alternatives to litigation; when unemployment rates are high, jobs are scarce and employees will stay put in a discriminatory work setting, at least for a while. Meanwhile, employers concerned about turnover and associated costs have fewer incentives to prevent such treatment during periods of high unemployment, when they can easily find attractive candidates to replace aggrieved employees. A separate factor supporting this expected effect is that periods of greater unemployment will inevitably be accompanied by a greater number of discrimination-inducing

events – that is, layoffs and firings.<sup>53</sup>

Economists John Donohue III and Peter Siegelman conducted a comprehensive empirical study of the explanations for fluctuations in the amount of employment discrimination litigation, based on data from 1970-1989.<sup>54</sup> In part, Donohue and Siegelman were trying to understand why employment discrimination lawsuits in federal court grew 2166% from 1970-1989 while the general civil caseload only grew only 125% over the same period. As an initial matter, they found that the volume of employment discrimination displayed two patterns: (1) a general upward trend in the long-term, and (2) erratic fluctuations around this trend in the short-term.<sup>55</sup> They also found that the combination of upward trend over time and the lagged unemployment rates explained 96% of the variance in the number of suits.<sup>56</sup>

Applying a similar series of regressions to quantify the impact of various factors likely to contribute to the long-term, upward trend,<sup>57</sup> Donohue and Siegelman concluded that almost 20% of the increased volume of employment discrimination litigation over the period from 1970-1989 could be explained by rising unemployment.<sup>58</sup>

In one sense, unemployment rates themselves contain a racially discriminatory component. Research shows that non-white workers experience a significantly higher rate of unemployment than white workers. Unemployment rates among African Americans and Latinos are consistently higher than for whites, and African Americans in particular have consistently experienced approximately twice the level of unemployment as whites.<sup>59</sup> In this way, unemployment rates exert market force through their inherently racially-disparate functioning. In the following section, I delve deeper into market operations to consider how shifts in the unemployment rate may catalyze and exert force. .

#### *UNEMPLOYMENT RATES AND EMPLOYER BEHAVIOR AS FORCE*

As economists acknowledge, weak labor markets may create an incentive for employers to “indulge in discriminatory preferences” as a result of the excess supply of labor, with an available pool of workers that presumably includes many talented and qualified workers. Employers may also see economic downturns as an opportunity to weed out minority employees who they perceive as underperforming or problematic by urging them to quit. Economists question this incentive by pointing to the high cost of firing, suggesting that the costs of potential employment discrimination litigation create a disincentive to behave in a discriminatory manner, and thus neutralize the labor availability effect.<sup>60</sup> However, this theory rests on the assumption that a significant portion of individuals who are discriminated against will actually bring claims. The assumption is hasty.

In the Rutgers survey, discussed in Part II, *supra*, 34% of those who reported racial discrimination in the workplace did not do anything, and only 3% said that they actually sued their

company or co-worker. Among African Americans who perceived discrimination, less than 1% (0.85%) actually filed a formal complaint with the EEOC, and less than one quarter of one percent (0.22%) actually file a federal lawsuit.<sup>61</sup> Indeed, an employer seeking to push people out could be quite successful in doing so without facing a lawsuit: at least four times as many people will quit than file a formal complaint with the EEOC, and 16 times as many will quit than file a suit in federal court.<sup>62</sup>

Donohue and Siegelman engage in an extensive analysis of EEOC and federal court data to address the possibility of increased employer discrimination during periods of high unemployment.<sup>63</sup> They conclude that no such rise in discriminatory behavior occurs among employers.<sup>64</sup> In support of their conclusion, Donohue and Siegelman identify several empirical findings that contradict the causality of employer behavior. First, they posit that the federal government would not experience incentives to discriminate in the way private employers would, and thus data showing that suits against the federal government follow the same unemployment-related pattern as suits against private employers can only be attributed to the worker benefits effect.<sup>65</sup> Second, they note that the upswing in employment litigation begins within one or two quarters of the economic downturn, though it usually takes longer to satisfy the administrative and procedural requirements for filing suit in federal court, suggesting that increased federal court filings are based on complaints filed with the EEOC prior to the upswing in unemployment rates (and any associated increase in employer discrimination).<sup>66</sup> Third, they find that while the number of federal court filings increase in recessions, the number of EEOC charges remains relatively constant, a pattern inconsistent with increased employer discrimination.<sup>67</sup>

Having laid out their argument against increased employer discrimination, Donohue and Siegelman go on to hypothesize as to the empirical results one may expect to find as a result of a worker benefits effect, eventually showing that the predicted results do indeed occur. Under a worker benefits effect, periods of higher unemployment lead to increased durations of unemployment, and therefore greater backpay awards. Larger damage awards result not only in the established increase in litigation, but also make cases with a lower probability of success more attractive by increasing the possible rewards of successful litigation. Indeed, looking at figures from the same period, Donohue and Siegelman find a small decrease in plaintiff win rates and larger damages awards as unemployment rates rise.<sup>68</sup> In sum, Donohue and Siegelman create a seemingly impenetrable argument rejecting the employer behavior effect and lending strong support for a worker benefits effect.<sup>69</sup>

Nonetheless, I advocate for caution in interpreting their findings. While the strength of their argument rests in its reliance on empirical support from employment litigation data, so too may its weakness. I argue that documented evidence of judicial hostility to employment discrimination litigation may very well poison the well of federal court data used in their findings. This hostility calls for a reinterpretation of their data to consider

the possibility of increased employer discrimination during economic downturns.

### **MARKET FORCE AND EMPLOYEE BENEFITS**

The worker benefits effect essentially argues that, in economic downturns, relatively little changes besides the cost calculus of employees. Even assuming this is true, I argue that the worker benefits effect should be understood within the rubric of force. The fact that longer durations of unemployment make it more economically viable to bring a claim does not, in and of itself, imply that employees are bringing weaker or more frivolous claims. Indeed, the very nature of backpay awards creates a wage threshold whereby high-earning victims of discrimination are more likely to find it worthwhile to sue than low-earning workers. The marginally lower-earning worker whose claim is made worthwhile by the increased length of unemployment is no less meritorious. Instead, valuing a discrimination claim based on the length of unemployment, rather than the actual discriminatory conduct, merely highlights the unfortunate impact – call it force – on low-wage victims of discrimination as a result of a backpay-based remedy structure. After presenting evidence of judicial hostility in the next section, I consider whether victims of discrimination are penalized for bringing their claims during periods of high unemployment .

### **JUDICIAL HOSTILITY TO EMPLOYMENT DISCRIMINATION LITIGATION**

In 1997, the Second Circuit instituted a task force to study the issue of gender, racial, and ethnic fairness in its courts.<sup>70</sup> Generally, the task force began by surveying judges, court employees and attorneys about their observations of gender, racial, and ethnic bias in the courthouse. In regards to bias directed at attorneys, the survey found that judges observed almost no racial or ethnic bias against minority attorneys, an observation shared by white male and white female courtroom employees.<sup>71</sup> Among minority law clerks and courtroom deputies, on the other hand, 24% reported observing a minority attorney's competence challenged because of his or her race or ethnicity, and 19% report observing a minority attorney mistaken for a non-attorney.<sup>72</sup> Among minority attorneys, 39% reported that they "often" or "occasionally" observed various kinds of incidents of racial or ethnic bias directed at minority attorneys, including derogatory racial or ethnic comments; 46% reported being ignored, interrupted, or not listened to; and 52% had been mistaken for a non-attorney.<sup>73</sup>

As previously noted, employment discrimination litigation in federal court increased by 2166% from 1970-1989, versus a 125% increase in the overall civil caseload. Between 1992 and 1997, the volume of discrimination cases nearly doubled.<sup>74</sup> Meanwhile, judicial attitudes toward employment discrimination litigation reflect what can only be described as disgust. In a 1994 *New York Times* article, a former federal judge complained that discrimination cases are an unjustifiable consumer of judicial time because they are "rarely settled, are characterized by

high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use."<sup>75</sup> The Second Circuit Task Force found that other judges privately agreed that the *Times*' article captured the views of colleagues who felt the cases were "small potatoes," clogging up the federal courts and diverting judges' attention from larger, purportedly more significant, civil cases.<sup>76</sup>

Statistically, in the few employment discrimination cases that do make it to trial,<sup>77</sup> plaintiffs are almost twice as likely to win before a jury as they are in a bench trial.<sup>78</sup> From 1990 to 2001, plaintiffs' win rates before juries ranged from 36-44% while win rates before judges ranged from 14-33%.<sup>79</sup> Despite plaintiffs' minimal chances of making it to trial and obtaining a favorable decision, they fair even worse on appeal. In fact, the differential between plaintiff and defendant success rates is greater in employment discrimination cases than any other category of civil cases.<sup>80</sup> When an employment discrimination defendant wins at trial and the case is reviewed on appeal, only 5.8% of those judgments are reversed. By contrast, when an employment discrimination plaintiff wins at trial and the case is reviewed on appeal, 43.61% of those judgments are reversed.<sup>81</sup> Looking solely at post-verdict defense motions for judgment notwithstanding the verdict, proceedings with historically low rates of success, five out of six such appeals resulted in reversals in the Second Circuit from 1992 through 1995.<sup>82</sup>

In a sense, these results are not surprising. There is little reason to believe that federal judges, who are predominantly white and the majority of whom are men, are any less susceptible than the general population to cognitive or implicit biases in decision making. Perhaps, part of the problem can be attributed to a legal regime that is too onerous on plaintiffs and inconsistent with the realities of modern discrimination. In sum, anecdotal evidence of judicial attitudes, lower win percentages at trial before judges than juries, and the widespread perception of bias among minority employees (and attorneys), all evince a certain judicial hostility toward employment discrimination claims.

### **A CRITIQUE OF DONAHUE AND SIEGELMAN**

Donohue and Siegelman fail to account for evidence of the increasingly aggressive use of summary judgment by defendants in the area of employment discrimination.<sup>83</sup> In light of the evidence discussed above, summary judgment effectively precludes the jury's opportunity to perform its traditional duty while simultaneously transferring authority to hostile judicial decision-makers.

Donohue and Siegelman argue that increased rates of settlement and decreased plaintiff win rates at trial during periods of high unemployment lend support to the worker benefits effect.<sup>84</sup> Assuming as they do that "weaker" claims (defined as those with lower probabilities of success) represent the majority of additional cases during market downturns, and that weak claims are likely to settle, increased rates of settlement and lower win



rates at trial support their theory.<sup>85</sup> However, given the growing success of employer motions for summary judgment, in conjunction with the proposal that the incremental, or additional, recessionary claim is weaker, employers should seek and win a greater number of summary judgment claims. Therefore, a better test of whether weaker claims are brought during recessions would study whether rates of summary judgment increased during periods of high unemployment.<sup>86</sup> Correspondingly, rates of settlement should have a smaller, or negligible, correlation with high unemployment. Any actual increase in settlements, then, or findings showing a lack of correlation between summary judgment and increased unemployment, may instead reflect a *greater* quantity or magnitude of employer discrimination.<sup>87</sup> Similarly, we know it is a rare employment discrimination plaintiff who refuses settlement, overcomes a motion for summary judgment and makes it to trial;<sup>88</sup> presumably even rarer would be such a result for one who brings an incrementally “weaker” claim during a period of high unemployment. Among the few cases that make it to trial, then, the win rates should remain relatively constant. Lower plaintiff win rates, in turn, may reflect judicial animosity.<sup>89</sup>

One may be skeptical of the idea that judges are intentionally hostile to claims of discrimination, but subtle biases provide a way of understanding observed judicial hostility to employment discrimination litigation as the result of subconscious influences. Unlike cell phones and cameras, subconscious biases are not checked at the courthouse door. In fact, the differing perceptions of discrimination toward minority employees by white versus minority employees *in the workplace*<sup>90</sup> are consistent with the differing perceptions of discrimination towards minority attorneys by white versus minority attorneys and courtroom employees *in the courthouse*.<sup>91</sup> Indeed, law clerks and courtroom employees identified behaviors that would reflect the operation of categorization-induced biases and negative schemas, including challenges to the competence of minority attorneys and mistaken assumptions that they were non-attorneys.

The intentional-sounding theory presented previously, in which employers increase discriminatory force during periods of high unemployment, can be presented in nonmotivational terms. Employers seeking to make workforce reductions in order to take advantage of the large labor pool will likely seek to push out those who are seen as difficult or as underperformers. Again, this determination itself would be influenced by previous judgments contaminated by subtle biases. In a recession, choosing whom to terminate among a group of adequately performing individuals introduces greater ambiguity, and hence greater susceptibility to the effects of cognitive biases. Finally, subtle biases may also interact with market forces through the behavior of co-workers. Innate ingroup preferences are likely to serve an unknowing status-producing end among white employees, such that individuals who are socially isolated from their work teams, who are more likely to be outgroup employees, would be most vulnerable.

These dynamics, if associated with market downturns, could cast doubt on Donohue and Siegelman’s findings. For example, employer behavior in market downturns may place increased pressure on a set of vulnerable employees without increasing the number of total employees subject to discrimination, explaining the lack of cyclicity in EEOC charges. Similarly, employers may take small steps to reduce costs or take advantage of increased labor *in anticipation of* market downturns and associated increases in unemployment. If so, the upturn in employment litigation within only two quarters after the onset of market downturns<sup>92</sup> may be consistent with increased employer discrimination. While these dynamics present a rebuttal to Donohue and Siegelman, when understood in full they present a way of understanding the relationship between subtle biases, employer behavior and market conditions.

### A FORCE-BASED PRESCRIPTION

Through cognitive and implicit biases, we learn that negative racial attitudes are pervasive and affect decision-making on all levels, even among those who genuinely believe they are acting in a race-neutral manner. The employment setting, wrought with ambiguous and subjective decision making at all stages of interracial interactions, from hiring to firing, raises basic questions about the sort of remedy, and proof structure, that should be implemented to combat such discrimination.

The two major frameworks used to argue workplace discrimination claims are disparate treatment and disparate impact. Under disparate treatment, an employee must prove that the employer’s decision was motivated by a racially discriminatory purpose. Under disparate impact, employees can forgo a showing of discriminatory purpose by identifying a facially-neutral employment policy that has a disproportionate impact, or effect, on racial minorities.<sup>93</sup> In practice, neither adequately captures the operation of subtle forms of force. Disparate treatment, with its focus on intent, or purpose, is immediately deficient. Moreover, its traditional proof structure requires the identification of a similarly situated member of another race who was treated differently. Yet cognitive biases teach us that employers, unknowingly, may perceive differences in qualifications or performance between two virtually identical, or “similarly situated” individuals as a result of ingroup versus outgroup status. This difference will then be articulated as a challenge to the employee’s attempt to identify a similarly situated individual.

Disparate impact seems better suited to remedy discrimination rooted in the subconscious because of its substitution of effect for intent. However, disparate impact theory, as applied currently, is also problematic. First, it requires the identification of a specific, facially-neutral policy or practice that constitutes the source of the disparate impact. Decisions infused with bias-susceptible subjectivity do not easily lend themselves to this causal attribution. We are not talking about an employer policy that says all employees must live within a two mile radius of work; we are talking about interviews, performance reviews, and everyday interactions that are capable of producing system-

atically-biased outcomes. Second, even if a causal relationship between a specific practice and a racially disparate outcome can be established, courts are likely to be extremely reluctant to tell an employer that they cannot engage in many of these practices, especially if the employer can prove that the practice is consistent with business necessity.

I argue for a bias-sensitive theory of discrimination in which disparate treatment still provides the basic framework but where the focus shifts from establishing that there was a discriminatory purpose to establishing that discriminatory biases, explicit or implicit, permeated the employer's decision. In the process, evidence of racially disproportionate outcomes, divorced from any particular practices, could constitute a single relevant factor in attempting to prove the role of force in decision making. The crucial components, however, are the relevant facts and the inferences that can be drawn from them.<sup>94</sup>

By presenting a more accurate picture of how discrimination operates, force theory's most useful contribution may be in providing guidance as to what facts are relevant and what weight should be given to each. For example, the cognitive bias studies discussed above suggest that cases involving minority employees who are in predominantly homogeneous groups, where they are "token" members of their race, should raise red flags. These employees are more likely to be victims of ingroup preferences, are more likely to be judged negatively for ambiguous actions, and are more likely to be judged harshly for relatively minor performance deficiencies. Similarly, regardless of the racial composition of the workplace, ingroup preferences will often be proxied by particular negative assessments of outgroup employees. For example, social isolation caused by ingroup preferences may be seen as "not being a team player." In addition, the overall market conditions and unemployment rate may also provide useful contextual information about the force at play in the workplace at the time of relevant decision making.

Similarly, cognitive biases suggest that certain inferences and presumptions should be given little or no weight in assessing whether force contaminated an employment decision. For example, because studies show that outgroup members are more likely to be judged in extremes, both positively and negatively, a few highly-placed African American executives within a company would provide little evidence of non-discriminatory decision making. Similarly, evidence of bias in mental processing would advocate for the abolition of the "same actor" presumption, a judicially-created legal standard holding that "where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."<sup>95</sup> As a result of cognitive biases, it is perfectly plausible that a hirer would recruit a minority employee and then later judge that individual negatively in various ambiguous situations because of unknowing biases. Or, upon a single perceived deficiency or error by a minority employee, the hirer may subconsciously reorient the minority employee within a negative racial

schema that he had previously thought the employee transcended on the basis of her application or interview. In turn, from that point forth, ambiguous situations are more likely to be understood in a schema-consistent way and these schema-consistent activities are more likely than schema-inconsistent activities to be recalled by the hirer when making later firing, promotion and demotion decisions. By presenting a more complicated picture of decision making, where subconscious considerations influence determinations, inferential shortcuts require questioning.

Where factual circumstances play such an important role, factfinders should be armed with the tools to properly weigh relevant evidence. By training federal judges on their own hostility to employment litigation, statistical evidence of the prevalence of employment discrimination, and the impact of cognitive biases on decision making, judges may be in a better position to determine whether context-providing facts are relevant. For example, courts may need to allow for more scrutinizing review of past performance, placing a greater burden on employers to justify negative determinations based on ambiguous conduct. In addition, minority plaintiffs may be able to support an inference of bias by applying the common disparate treatment strategy of identifying ingroup members who were "similarly situated" but treated differently (more favorably). Courts, in turn, must recognize the role of subtle biases in shaping the very determination of whether a given ingroup member was actually "similarly situated." As an example, an employer will likely deny that two employees are similarly situated by citing the minority employee's greater number of warnings/reprimands, or by identifying more negative performance evaluations. Yet, the differing patterns of behavior may be nothing more than manifestations of the employer's subconscious biases. Therefore, courts should engage in a thorough review of past actions that constitute negative assessments to determine whether biases have contaminated employers' very evidence of nondiscrimination. Similarly, coworker testimony as to these previous disputes may prove informative (and could warrant more or less weight depending on ingroup or outgroup status, for example). Finally, the strikingly common use of summary judgment is particularly disturbing, as the notion of force illustrates that factual circumstances in the employment setting are both complicated and conceptually crucial.

In the section above, I have tried to present some of the implications of a broader notion of force on the current employment discrimination legal regime. Specifically, subconscious biases and their relationship to judicial hostility present numerous concerns as to the type of inferences that can accurately be made in interpreting fact patterns and the ability of legal decision makers - both judges and juries - to avoid the influence of the very same biases they are tasked with assessing.

#### *FORCE AND ROLE OF THE STATE*

By engaging Epstein on the utility of the antidiscrimination

laws, a basic question arises as to the role of the state in regulating racially discriminatory conduct. Epstein's approach is basically that of the laissez faire capitalist, arguing for a hands-off approach in which discrimination will largely be eliminated by markets because of the costs of discriminating. Under this approach, the Jim Crow South was an artificial construct and *Brown v. Board of Education* was the normalizing event that, by eliminating the state-sponsored exertion of discriminatory force, returned markets to their "natural" state. The natural order restored, markets are poised to do their noble work of eliminating inefficiencies and growing the pie.

The rubric of force presents a different view. Regardless of whether a return to a state of nature can be achieved, the force notion compels the view that such a state does not currently exist. Instead, implicit biases suggest that pre-*Brown* attitudes may have found a new home in the subconscious. Cognitive biases support this theory and further suggest that, at least as long as there are identifiable ingroup and outgroup members, a force-free state of nature may never exist.

As a final point, a view of subtle biases as potentially omnipresent suggests that, because of a dearth of truly objective actors, a seismic realignment of the current legal regime may be needed. Where all employment decisions involving racial minorities are reasonably likely to be infected with racial bias,<sup>96</sup> perhaps the presumption of nondiscrimination and the burden of proof should be reversed. Indeed, the United States is in the minority in its use of the at-will employment presumption.<sup>97</sup> Canada bars dismissals that are "unjust" or not supported by "just cause," and nearly all European countries place a similar burden of good cause for dismissal on employers.<sup>98</sup>

The force notion raises questions about the viability of a model that shifts responsibility from the state to workers, who

are treated as an army of "private attorneys general."<sup>99</sup> Where litigation is costly and the problem of discrimination is pervasive, placing the onus on businesses would serve to level the playing field by at least aligning burden with resources.<sup>100</sup>

## CONCLUSION

Legal philosopher Robert Hale argues that coercive force is not created through the application of government regulation or the adoption of any particular legal rule. Rather, the total amount of coercion remains constant while its distribution is shifted.<sup>101</sup> For example, the choice of a particular rule of property, while enhancing the rights of the property holder, simultaneously places a restriction on the use of that property for all others. Contrary to the suggestion by free market advocates that state regulation is the *creation* of coercion upon private parties, in reality these free market proponents simply advocate for a state of affairs in which the balance of coercion is struck at one extreme, which inevitably favors those with the most capital. While the capitalists run amok, racial minorities are subject to the coercive force of history, culture, and cognition.

In the employment discrimination setting, anti-discrimination laws ensure that the balance is not set at the free marketers' extreme, but racial minorities nonetheless labor under too heavy a burden. Vulnerable to the cognitive bias and implicit attitudes of employers, the current balance places the onus on victims of racial discrimination to police what is a pervasive societal ill, permeating our collective *subconscious*, with little help. The status quo asks racial minorities who suffer discrimination in the workplace to seek redress in an unknowingly hostile judicial forum through the use of a set of clumsy legal rules that misunderstand the nature of the problem. If equality is a goal that our society values, a new balance must be struck.

## ENDNOTES

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313 (Oxford University Press 2004).

<sup>3</sup> See, e.g., Richard A. Epstein and Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 S. CAL. INTERDISC. L.J. 349 (1993); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws are Still a Mistake*, 108 HARV. L. REV. 1085 (1995).

<sup>4</sup> See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS, 47-78, 91 (Harvard University Press 1992); see also Epstein, *supra* note 3, at 1097 (identifying benefits to racial discrimination where firms "create limited public goods that are easier to supply as the homogeneity in the tastes of group members increases," and noting that "firms that cater to these preferences could well have higher production at lower costs and hence would prosper in a market setting").

<sup>5</sup> See Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination* 108 HARV. L. REV. 1003 (1995).

<sup>6</sup> *Id.* at 1044.

<sup>7</sup> *Id.* at 1074.

<sup>8</sup> See *id.* at 1072-73 ("A final factor that contributes to the persistence of discrimination is racially biased beliefs or stereotypes. As noted above, discriminatory norms invoke rationalization mechanisms; discriminators prefer to have reasons for discriminating other than a bare interest in status production").

<sup>9</sup> *Id.* at 1044.

<sup>10</sup> See Epstein, *supra* note 3, at 1105.

<sup>11</sup> See Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

<sup>12</sup> *Id.* at 1187.

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* at 1191-93 (discussing one study that found that subjects permitted to allocate monetary rewards chose a strategy that would maximize differences in rewards between ingroup and outgroup members, choosing that strategy over both fairness and maximization of mutual gain).

<sup>15</sup> *Id.* at 1192.

<sup>16</sup> See Shelley E. Taylor, *A Categorization Approach to Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1, 83, 90-94 (David L. Hamilton ed., Lawrence Erlbaum 1981).

<sup>17</sup> See Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Outgroup Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 693 (1980). This study obtained similar findings regarding gender and age.

<sup>18</sup> See Russell A. Jones, *Perceiving Other People: Stereotyping as a Process of Social Cognition*, in IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING 41, 46-49 (Arthur G. Miller ed., Praeger Publishers 1982); see also David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping* 60-61 in 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 2, (Leonard Berkowitz ed., 1979); see also Shelley E. Taylor & Susan T. Fiske, *Saliency, Attention, and Attribution: Top of the Head Phenomena* 264-68 in 11 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 249 (Leonard Berkowitz ed., 1978).

<sup>19</sup> See Krieger, *supra* note 11, at 1194.

<sup>20</sup> See, e.g., Edward E. Jones, George C. Wood, & George A. Quattrone, *Perceived Variability of Personal Characteristics, Ingroups and Outgroups: The Role of Knowledge and Evaluation*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 523, 523-24 (1981); Bernadette Park & Myron Rothbart, *Perception of Outgroup Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of Ingroup and Outgroup Members*, 42 J. PERSONALITY & SOC. PSYCHOL. 1051, 1054-58 (1982).

<sup>21</sup> See Linville & Jones, *supra* note 17, at 689.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 691-92.

<sup>24</sup> See H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980).

<sup>25</sup> In a similar study, white college students were asked to evaluate conduct in a scene involving an altercation between two males. Where the antagonist, or instigator, was black, his behavior was characterized as "aggressive" or "violent." But where he was white, his behavior was characterized as "playing around" or "dramatizes." See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 594-95 (1976).

<sup>26</sup> See, e.g., Edward E. Jones, *How Do People Perceive the Causes of Behavior?*, 64 AM. SCIENTIST 300 (1976); see also Jones, *supra* note 18, at 57-64; Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY, 337, 347 (Leonard Berkowitz ed., 1978).

<sup>27</sup> See Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461, 464-66 (1979).

<sup>28</sup> Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 277-81 (1985).

<sup>29</sup> The tests are also used to measure implicit biases based on gender and age.

<sup>30</sup> See Shankar Vedantam, *No Bias*, WASH. POST, Jan. 23, 2005, at W12 (relaying that Mahzarin Banaji, a Harvard psychologist and one of the founders of the test, says the test "measures the thumbprint of the culture on our minds").

<sup>31</sup> Brian A. Nosek, Anthony G. Greenwald, Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, Psychology Press, in AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR (J.A. Bargh ed., Psychology Press 2007).

<sup>32</sup> *Id.* (In a typical black-white IAT, subjects are first presented with a screen on which "Black" appears on the top of one side of the screen and "White" appears on the top of the other side of the screen. A series of faces pop up in the middle of the screen, one-by-one, and subjects must classify them as white or black by clicking the "E" or "I" key on their computer (corresponding with the side of the screen on which the category appears). Subjects are instructed to proceed as quickly as possible through the images. Next, the words "Good" and "Bad" appear at the top of the screen and subjects must similarly categorize words such as "laughter," "happiness," "evil" and "grief." Next, the two sets will be paired, so "Black" appears with either "good" or "bad" on one side of the screen and "white" with the other. Now, the same pictures and words appear in the middle of the screen and subjects must properly categorize them. The pairings are then reversed and the process repeats itself. The process is thoroughly randomized, including the sides of the screen on which categories appear, the order of the pairings, and the order of the words and images in the middle).

<sup>33</sup> Based on the difference in response times, the preferences are categorized as "slight", "moderate", or "strong." See generally <https://implicit.harvard.edu/implicit/demo/selectatest.jsp>.

<sup>34</sup> See Nosek, Greenwald, and Banaji, *supra* note 31, at 103.

<sup>35</sup> See Brian A. Nosek, Mahzarin R. Banaji, and Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH AND PRACTICE 101, 103 (2002) (explaining that findings by the original creators of the IAT use data that are further scrubbed based on extreme responses, in which respondents were either too slow in responding, or made substantial errors in classification).

<sup>36</sup> *Id.* at 105.

<sup>37</sup> Craig Lambert, *Buried Bias and Bigotry*, HARVARD MAGAZINE, Jul.-Aug. 2002; see also Vedantam, *supra* note 30.

<sup>38</sup> *Id.*

<sup>39</sup> See Lambert, *supra* note 37; see also Vedantam, *supra* note 30.

<sup>40</sup> See Lambert, *supra* note 37.

<sup>41</sup> See Vedantam, *supra* note 30.

<sup>42</sup> See Krieger, *supra* note 11, at 1208.

<sup>43</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market*

*Discrimination* 2, 6-9 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003).

<sup>44</sup> *Id.* at 2-3, 10.

<sup>45</sup> Claudia Goldin and Cecilia E. Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians* (Nat'l Bureau of Econ. Research, Working Paper No. W5903, Jan. 1997).

<sup>46</sup> *Id.* at 25.

<sup>47</sup> Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 683 (2005).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* Nielsen and Nelson's article presents evidence of underclaiming in the area of employment discrimination in greater detail, as well as a discussion of the explanations and implications of underclaiming.

<sup>50</sup> See, e.g., Krieger, *supra* note 11.

<sup>51</sup> See Nielsen and Nelson, *supra* note 47, at 691 (indicating that out of approximately 80,000 total charges per year, the EEOC actually litigates between 200 and 400 claims per year, or roughly one quarter of one percent of total complaints. Most cases end in a finding of "no reasonable cause" (57%), which means the agency does not find the case meritorious and the individual may pursue a private cause of action, or are closed administratively (21%), which means the case is closed without any remedy or finding for the charging party).

<sup>52</sup> It is important to note that while the EEOC breaks down the total charges by type of discrimination, the federal court statistics are grouped into total employment discrimination lawsuits and disaggregated based on disposition of suits. Since federal courts do not break down total lawsuits by type of discrimination, a common assumption made in statistical analysis in this area is that the percentages of race, national origin, sex, age and disability claims in federal court will match that of EEOC complaints.

<sup>53</sup> See *supra* text accompanying note 52. For a more detailed discussion of this argument and its shortcomings, see John J. Donohue & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. Cal. L. Rev. 709, 719-723 (1993).

<sup>54</sup> John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

<sup>55</sup> *Id.* at 985.

<sup>56</sup> *Id.* at 988.

<sup>57</sup> See *id.* at 990-1000 (specific factors isolated for include the following: a roughly 2.31 percentage point increase in unemployment rates between 1969 and 1989; a 62%, or 28.41 million person increase in the protected population of workers attributable to demographic changes including increased participation in the labor force by women; a 15.45 million increase in protected workers as a result of the 1972 Amendments to the Civil Rights Act; the entrance of 49.19 million "new entrants," or young workers, with a higher propensity to sue; the enactment of the Age Discrimination and Employment Act in 1968 which by 1989 formed the basis for 15.1% of employment civil rights cases; the Supreme Court's expansion of §1981 of the 1866 Civil Rights Act to include employment discrimination based on race within the meaning of "making and enforcement of contracts;" and the Supreme Court's creation of the disparate impact theory of discrimination in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

<sup>58</sup> *Id.* Together, congressional expansion of protections through enactment of the ADEA and the lowering of the minimum firm size subject to the Civil Rights Act explain another 20% of the increase in litigation. The Court's expansion of legal doctrine to include reverse discrimination, pregnancy claims and a broader understanding of §1981 explained 9.7% of the increased litigation. *Id.*

<sup>59</sup> Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20<sup>th</sup> Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 740-42 (2000). In relation to market cycles, this two-to-one ratio is maintained through booms and busts, implying that twice as many African Americans gain employment during booms and twice as many become unemployed during recessions. *Id.*

<sup>60</sup> See Donohue & Siegelman, *supra* note 54, at 723-24.

<sup>61</sup> See discussion *supra* Part II.

<sup>62</sup> See Nielsen and Nelson, *supra* note 47, at 693-96.

<sup>63</sup> See Donohue & Siegelman, *supra* note 54 at 726-61.

<sup>64</sup> Donohue & Siegelman, *supra* note 54 at 762.

<sup>65</sup> Donohue & Siegelman, *supra* note 54 at 728-32. Donohue and Siegelman use the phrase "worker benefits effect" to connote the idea that any increase in the amount of employment discrimination claims filed during periods of high unemployment is the result of the change in the expected value, or benefit, of a successful lawsuit to the employee, not the result of any increase in discriminatory behavior among employers.

<sup>66</sup> Donohue & Siegelman, *supra* note 54 at 732-41.

<sup>67</sup> Donohue & Siegelman, *supra* note 54 at 741-44.

<sup>68</sup> Donohue & Siegelman, *supra* note 54 at 757, 760.

<sup>69</sup> Before continuing, a few caveats are in order. Donohue and Siegelman's findings reflect data prior to the Civil Rights Act of 1991, which expanded the scope of Title VII's protections to include compensatory and punitive damages, and enabled plaintiffs to have their cases heard before a jury. See 42 U.S.C. § 2000e-2(m); §102 of the 1991 Civil Rights Act, 42 U.S.C. §1981a (2002). By presenting plaintiffs with remedies beyond backpay, employees considering litigation now face a different cost calculus. In a study published this year, Donohue and Siegelman reconsider their prior findings in light of the 1991 Amendments, finding that, for the period from 1991-1996, the correlation between increased employment discrimination litigation and higher unemployment no longer holds. John J. Donohue III and Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 261, 262-76 (Laura Beth Nielsen and Robert L. Nelson eds., 2005). They reason that the diminished role of backpay decreases the importance of duration of unemployment, breaking the key connection to market conditions. However, as Donohue and Siegelman acknowledge, there are several reasons to approach the new findings with caution. First, a large number of the additional employment claims can be assumed to be claims arising under the newly-enacted Americans with Disabilities Act and judicial decisions recognizing the hostile work environment theory of employment discrimination. In addition, market conditions since the passage of the Civil Rights Act have not included the fluctuations in unemployment necessary to properly test for cyclicality.

Finally, in the context of race, the 1991 Civil Rights Act made minimal changes; prior to its passage, plaintiffs proving race-based employment discrimination under Title VII could obtain monetary damages by attaching a §1981 claim. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (providing a private remedy for racial discrimination in the making and enforcement of private contracts). Moreover, the amendment allows punitive damages for intentional discrimination (as opposed to disparate impact cases), but states that a plaintiff can only recover punitive damages if the defendant acted "with malice or with reckless indifference" to the individual's rights. 24 U.S.C. §1981(a). Some circuit courts read that language to mean that punitive damages require either egregious or extraordinarily egregious conduct. See, e.g., *Luciano v. Olsten Corp.*, 110 F.3d 210 (2nd Cir. 1997). In 1999, the Supreme Court eased plaintiffs' burden by holding that the 1991 Act does not mandate intentional discrimination be egregious in order to merit punitive damages. See *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). Under the new standard, in which "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages," it is still true that only a subset of intentional discrimination cases will qualify for punitive damages. *Id.* at 536.

<sup>70</sup> *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124 (1997).

<sup>71</sup> *Id.* at 173-74.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Donohue & Siegelman, *supra* note 54 at 262.

<sup>75</sup> Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES Dec. 27, 1993, at A17.

<sup>76</sup> See 2nd Cir. Task Force, *supra* note 70, at 343-44.

<sup>77</sup> See Nielsen and Nelson, *supra* note 47, at 693-96 (stating that in 1990, two thirds of cases were dismissed without judgments and only 8.7% went to trial. By 2001, almost three-quarters of cases were dismissed without judgments, and only 3.8% went to trial. Over the period, the largest percentage of dismissals were settlements, ranging from 35-43%. About 30% were dismissals without judgment and about 25% were dismissals based on other judgments, including default judgments and pretrial motions such as summary judgment. These non-settlement dismissals predominantly favor defendants).

<sup>78</sup> See 2nd Cir. Task Force, *supra* note 70, at 345.

<sup>79</sup> See Nielsen and Nelson, *supra* note 47, at 698.

<sup>80</sup> Theodore Eisenberg and Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* (2001). This gap in reversal rates is consistent across all United States Circuit Courts of Appeal. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See 2nd Cir. Task Force, *supra* note 70, at 347-48.

<sup>83</sup> See, generally, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

<sup>84</sup> See Donohue & Siegelman, *supra* note 54.

<sup>85</sup> See Donohue & Siegelman, *supra* note 54 at 438-42.

<sup>86</sup> Although, in light of the evidence of judicial impatience with employment claims, increased rates of summary judgment during periods in which there is an

influx of such claims could also result from judicial docket-clearing – that is, a court's tendency to rid itself of such claims through the filing of dispositive motions.

<sup>87</sup> In fact, as Donohue and Siegelman acknowledge, more meritorious claims are also more likely to settle. See Donohue & Siegelman, *supra* note 54 at 442.

<sup>88</sup> Donohue & Siegelman, *supra* note 54.

<sup>89</sup> Complicating the matter, while the argument against increased employer discrimination may be buttressed if it can be shown that grants of summary judgment for defendants do indeed increase during recessions, it raises other concerns. The increased success of summary judgment motions would indicate that, in light of judicial hostility to employment discrimination litigation, fluctuations in market conditions contribute to racially discriminatory force upon protected workers by harming their ability to receive redress for statutory violations of their civil rights. Accepting Donohue's and Siegelman's focus on the impact of a backpay-based remedy structure, low-wage workers with no-more-frivolous claims would account for a significant portion of the increased litigation. Why should these litigants now face a legal system inhospitable to their claims? See Donohue & Siegelman, *supra* note 54.

<sup>90</sup> Donohue & Siegelman, *supra* note 54.

<sup>91</sup> See 2nd Cir. Task Force, *supra* note 70, at 173-4.

<sup>92</sup> Donohue and Siegelman posit that three quarters are the minimum time necessary to go from filing a complaint with the EEOC to bringing a claim in federal court. See Donohue & Siegelman, *supra* note 54.

<sup>93</sup> Under disparate impact theory, after the employee's statistical showing, the employer still has an opportunity to establish that the challenged policy is necessary for the operation of the business.

<sup>94</sup> At least one scholar has argued that these subtle forms should be regulated through a two-tier legal system in which only employer conduct reflecting intentional discrimination would be subject to compensatory and punitive damages while proof of discriminatory outcomes reflecting unknowing biases would only be subject to equitable remedies such as backpay and reinstatement. See Krieger, *supra* note 11, at 1241-45.

Although reinstatement is rarely an agreeable option to either party, and backpay has long been the dominant equitable remedy for victims of employment discrimination, perhaps this trend would not hold for subconscious discrimination. Perhaps employers, found liable of only unknowing conduct and not invidious behavior, would be more amenable to reinstating an employee; perhaps victims would see employers as less blameworthy and thus find their workplaces still desirable places in which to work. If not, one may expect to see a reiteration of the business cycle effect and an associated increase in market force during periods of high unemployment, as well as increased exclusion of low-wage workers from seeking redress for discriminatory treatment.

<sup>95</sup> *Proud v. Stone*, 945 F.2d 796 (4th Cir.1991) (applying the presumption in an age discrimination case). This standard was then made applicable to other protected groups; See, e.g., *Wexler v. White's Furniture, Inc.*, 317 F.3d. 564, 572-74 (6th Cir. 2003) (en banc); *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461 (6th Cir. 1995).

<sup>96</sup> Interestingly, evidence of ingroup versus outgroup behavior could implicate not only white supervisor-black employee scenarios, but also nontraditional scenarios such as "reverse discrimination," racial discrimination by a racial minority against a different racial minority, and even discrimination by a racial minority supervisor against an employee of the same race.

<sup>97</sup> See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, B.C. L. REV. 351, 405 (2002). The at-will rule is the principle that an employer can fire an employee at any time, for any reason, and employees can similarly leave at any time, for any reason.

<sup>98</sup> *Id.* For example, an employer in France must show a reason that is both genuine and serious to warrant termination. In Germany, the Constitution proscribes "socially unwarranted dismissals . . . not based on reasons connected with the person or [his conduct] . . . or [not based] on urgent social needs that preclude his continued employment."

<sup>99</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting that "the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority").

<sup>100</sup> On the other hand, placing the onus on employers may be too onerous in light of the pervasive nature of force, essentially holding employers accountable for a societal ill whose ramifications take hold well before and beyond the scope of the employment relationship.

<sup>101</sup> See BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 18 (Harvard University Press 1998) ("[W]hen the government intervened in private market relations to curb the use of certain private bargaining power, it did not inject coercion for the first time into those relations; it merely changed the relative distribution of coercive power").