2008

Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants

Jessica Fink
California Western School of Law, jfink@cwsl.edu

UNINTENDED CONSEQUENCES: HOW ANTIDISCRIMINATION LITIGATION INCREASES GROUP BIAS IN EMPLOYER-DEFENDANTS

JESSICA FINK*

INTRODUCTION

Since the passage of Title VII of the Civil Rights Act of 1964,[1] countless individuals have turned to the courts to redress alleged violations of their civil rights. Indeed, in the four-plus decades since the passage of Title VII, discrimination claims brought under Title VII (along with its counterparts within the federal antidiscrimination statutory scheme)[2] have consumed an increasing portion of the federal court docket.[3] This increase suggests that in the eyes of many employees, the answer to workplace bias exists within the courtroom.

Bias itself, however, has changed dramatically in the years since the passage of Title VII.[4] As social norms in this country have evolved, examples of overt discrimination, where women and minorities received blatantly inferior treatment in educational opportunities, public transportation, employment, and other public goods, have become increasingly less common.[5] At the same time, however, more elusive strains of bias have emerged, particularly in the workplace. Some employers, for example, simply have become more skilled at hiding their discriminatory animus, finessing discriminatory decisions so that they appear to be untainted by bias.[6] Other employers may find their workplace behavior unintentionally shaped by bias and stereotype—a phenomenon that commentators

---

* Assistant Professor, California Western School of Law. I am grateful to my colleagues at California Western who provided me with valuable comments and suggestions at a work-in-progress session regarding this project. I owe a special thank you to Thomas Barton, Robert Bohrer, Barbara Cox, Ruben Garcia, and Michael Yu, each of whom reviewed earlier drafts of this work and offered insightful guidance and feedback. My thanks also go to Christine Jolls for her feedback in the initial stages of the project and to Orly Lobel and the students in the University of San Diego Law Work, Welfare and Justice Seminar who also provided me with constructive input. Thank you to Michael Favale and Andriy Shemchyshyn, the students who provided research assistance on this project. Finally, thanks and love to my husband Robert for his unwavering support.

1. 42 U.S.C. §§ 2000e to 2000e-17 (2000), *amended by* Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000) (Title VII). Among other things, Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2000).

2. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000) (ADEA) (prohibiting age discrimination in employment); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12117 (2000) (ADA) (prohibiting disability discrimination in employment).

3. *See* Joshua M. Javits & Francis T. Coleman, *High Court to Revisit Issue of Mandatory Arbitration*, NAT'L L.J., Oct. 5, 1998, at B5 ("[C]ourts and government agencies are being overwhelmed by more than 200,000 employment discrimination filings each year, increasing at a rate of about 23 percent a year."); *see also* Vivian Berger, et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000%, while the docket as a whole increased a mere 125%.") (citation omitted).

4. For purposes of this Article, bias generally can be defined as "an inclination of temperament or outlook; *esp*: a highly personal and unreasoned distortion of judgment: PREJUDICE." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 118 (11th ed. 2003).

5. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) ("Smoking guns—the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'—are largely things of the past.").

6. *See infra* note 15 and accompanying text.

refer to as "implicit" or "unconscious" bias.[7] Admittedly, Title VII has improved the working conditions for many women and minorities, helping to break down various barriers that previously stymied the advancement of such individuals. The total elimination of bias in the workplace, however, has not been achieved, and many of the barriers that remain for women and minorities are difficult to detect.

In light of these changes in the nature of discrimination, many scholars have criticized current antidiscrimination laws as failing to address adequately modern bias, particularly implicit or unconscious bias.[8] The criticism by these scholars, however, presents an incomplete picture of the problems inherent in our system: The "flaw" in the current antidiscrimination framework is not just that anti-discrimination laws fail to *address* these subtle biases in an adequate manner, but rather that these antidiscrimination laws—and, specifically, the litigation brought under such laws—may actually be *exacerbating* such biases.

This exacerbation of bias under the current antidiscrimination regime is the focus of this Article. Specifically, this Article examines the extent to which employment discrimination litigation conducted under the current legal framework increases the biases of those involved in this process, particularly defendant-employers. It examines whether discrimination litigation enhances and exacerbates the negative views that these defendants may have toward not just the plaintiff who initiated the litigation, but also toward the broader protected class to which the plaintiff belongs. For example, does the defendant in a race discrimination suit, sued by an African American employee, walk away from the litigation not only resenting the African American plaintiff who initiated the lawsuit, but also with an increased bias against African Americans as a *group*?

This Article takes as its jumping-off point the fact that, even under the best of circumstances, litigation can be a daunting and emotionally destructive process for all parties involved—plaintiffs, defendants, and witnesses alike. This holds particularly true where the underlying claim is one as divisive and controversial as an allegation of workplace discrimination: Both the plaintiff, who feels that he or she received differential treatment because of some immutable characteristic, as well as the defendant, who stands accused of such socially unacceptable behavior, will pour enormous time, energy, and resources into vindicating their respective positions. Whatever the outcome, both parties likely will leave the experience with their views about their "opponents" indelibly changed. This Article focuses on whether a discrimination defendant's changed views about an individual plaintiff may carry over into changed views about the *larger group* to which the plaintiff belongs. It presents evidence that this phenomenon—referred to herein as

7. *See infra* notes 17–24 and accompanying text.

8. *See infra* note 16 (criticizing the current system as permitting employers to conceal discriminatory conduct without actually reducing workplace bias); *see also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978 n.45 (2006) (collecting sources that have criticized current antidiscrimination law for its failure adequately to address implicit bias). *But see* Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias* (Oct. 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959228 (last visited Dec. 16, 2008; arguing that current antidiscrimination laws, while not directly aimed at addressing implicit bias, might have the fortuitous effect of reducing such bias by encouraging—and sometimes mandating—greater diversity in the workplace and other environments).

"litigation-induced group bias"—in fact exists, and discusses some of the implications that might flow from that conclusion.

Part I of this Article briefly expands upon the different types of bias that can infect employers' decisions, from the blatant discrimination that largely has disappeared from American society, to intentional discrimination that employers strategically hide from public view, to the unconscious biases that affect the decisions of employers and others without them even knowing it.

Part II develops this Article's central argument regarding the existence of litigation-induced group bias, presenting support for the idea that the litigation of discrimination claims exacerbates defendants' biases against the *entire protected group* to which the plaintiff belongs.[9] Relying primarily on social science research and prior legal scholarship in this area, Part II sets forth how discrimination litigation may not only trigger defendants' unconscious biases, but may also motivate employers to engage in more conscious and strategic (but discreet) discrimination when selecting which employees to hire.

Part III of this Article analyzes the implications of this phenomenon of litigation-induced group bias, exploring how (if at all) this should affect the legal framework under which courts analyze "retaliation claims" under Title VII. Specifically, Part III notes that the targets of litigation-induced group bias likely will not find protection under current retaliation jurisprudence[10] and asks whether this existing framework should be expanded to create a cause of action that would protect these individuals: Should an employee who himself/herself has not engaged in any protected activity, but who receives the brunt of employer-bias that was generated from *another employee's* protected activity (i.e., another employee's discrimination suit against the employer), have a claim for retaliation under Title VII? As discussed in greater detail below, this Article ultimately concludes that this type of doctrinal revision would not be an appropriate response to the problem of litigation-induced group bias.

Finally, Part IV explores some alternate approaches to addressing litigation-induced group bias, asking whether there are other changes, short of doctrinal changes, that could be made in response to this problem. Focusing in particular on the conduct of lawyers who represent employers in discrimination cases, Part IV argues that, by embracing certain alternate approaches to their legal practice—such as creative problem solving, therapeutic jurisprudence, or alternative dispute resolution procedures—management-side lawyers could reduce significantly the

---

9. This Article repeatedly refers to "protected groups" or "protected classes." As a general matter, these terms refer to those classes of individuals who are protected from discrimination by Title VII, which prohibits discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a) (2000). Of course, many state and local laws (as well as other federal laws) provide protection to other classes of individuals not covered by Title VII. *See, e.g.*, 29 U.S.C. §§ 621–634 (2000) (prohibiting age discrimination in employment); 42 U.S.C. §§ 12101–12117 (2000) (prohibiting disability discrimination in employment); Cal. Gov. Code § 12940 (2004) (including marital status, medical condition, and sexual orientation, among others, as protected categories). While many of the arguments herein use discrimination on the basis of *race* to illustrate this Article's pertinent points, these arguments presumably would apply with equal force to discrimination on the basis of these other protected characteristics.

10. *See infra* notes 99–108 and accompanying text.

level of litigation-induced group bias that results from discrimination litigation without compromising their duty to represent their clients zealously.[11]

This Article certainly does not contend that discrimination litigation is the only (or even the most significant) cause of such employer bias. Indeed, factors unrelated to litigation—such as long-held stereotypes or ignorance about particular groups—undoubtedly may lead employers to discriminate in the workplace. This Article also does not contend that this problem of litigation-induced group bias warrants revising Title VII in any way that would bar individuals from using the courts to vindicate their civil rights. To the contrary, in many cases, the benefits accrued by discrimination litigation will outweigh the "costs" described herein.[12] This Article merely acknowledges one significant side-effect of Title VII litigation, asserting that in addition to *redressing* discrimination, this litigation may simultaneously *exacerbate* the broader biases that defendant-employers hold. While there are a variety of possible means for tackling this problem, including making drastic changes to the antidiscrimination framework, this Article focuses on steps that lawyers could take *within* the current system to reduce this unfortunate result of Title VII litigation.

I. A BRIEF DISCUSSION OF BIAS: OVERT AND INTENTIONAL; HIDDEN AND KNOWING; IMPLICIT AND UNCONSCIOUS

Because this Article focuses on the extent to which discrimination litigation exacerbates employers' biases, a brief discussion regarding the nature of bias is in order. Bias and discrimination exist in several forms. At the time of Title VII's passage, and for some years thereafter, many individuals in American society blatantly and knowingly discriminated against others on the basis of race or gender or other protected characteristics in various aspects of daily living.[13] In the years since Title VII came into effect, however, such overt discrimination has become increasingly less acceptable. Today, few employers would readily admit to making an employment decision on the basis of such unacceptable criteria.[14]

Despite the fact that overt discrimination has decreased, wholly eradicating discrimination from our society unfortunately has proven to be no easy task. Rather, the type of bias that affects individual behavior has simply changed form. Some employers, for example, have not actually eliminated bias from their decision-making processes, but rather just have learned to "mask" this illegal conduct, developing mechanisms to make discriminatory decisions appear neutral. As various

---

11. One introductory caveat is in order. This Article admittedly discusses the phenomenon of litigation-induced group bias from a purely theoretical perspective. Without a doubt, definitive findings regarding the existence and impact of litigation-induced group bias would require, at a minimum, a more detailed (and probably empirical) analysis of employers' views regarding particular classes of employees both before and after being involved in discrimination litigation with a member of the relevant protected group. While this Article does not include that type of rigorous empirical analysis, such analysis presents a fruitful area for future research.

12. *See generally* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8 (discussing how antidiscrimination law may reduce implicit bias).

13. *See* sources cited *supra* note 5; *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95 (2003) ("In the early days of Title VII, discrimination was often the result of blatant racism and conscious reliance on stereotypes.").

14. *See* Green, *supra* note 13, at 91.

commentators have observed, a biased employer can do much (especially with the help of savvy legal counsel) to make discriminatory actions appear unbiased.[15] These strategies, while helping employers avoid Title VII liability, ultimately do little to decrease employers' discriminatory attitudes.[16]

Even among those employers who do not *knowingly* harbor discriminatory animus against members of a protected group, bias may be more rampant than many scholars and other members of the public previously understood. A wealth of research over the past two decades—including empirical, social science, and psychological research—has revealed that certain deeply-rooted, *unconscious* biases have a substantial effect on the decisions that individuals make in the workplace and beyond.[17] In other words, people apparently make "discriminatory" decisions—decisions based on stereotypes and biases—all the time, without even knowing that they are doing so.[18]

Much of the research in this area has focused on the cognitive processes that create these "implicit" or "unconscious" biases.[19] These studies discuss the fact that humans inherently use stereotypes as a shortcut to process the infinite volume of data in the modern world.[20] In turn, these stereotypes often become imbedded in the human consciousness in the form of implicit biases against particular groups.[21] Moreover, once the stereotypes take root, they "may...operate largely independent

---

15. *See infra* note 16.

16. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964, 980–88 (1999) (describing the "litigation avoidance strategies" engaged in by employers and noting that "the recommended strategies teach managers to bulletproof their decisions but may do nothing to alter the conscious and subconscious discriminatory impulses that can drive decision making"); *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 705 (2003) (acknowledging that Title VII enforcement litigation can provide a foundation for increased compliance with the law, but noting that it can "lead to the adoption of merely symbolic reform"); Audrey J. Lee, Comment, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) ("[E]mployers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.").

17. *See infra* note 19.

18. Much has been written about the role of implicit bias in antidiscrimination law. For a non-exhaustive sampling of research in this area, see, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–10 (2006); Green, *supra* note 13, at 95–111; Hart, *supra* note 5, at 745–49; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323–26, 329–44 (1987); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899–917 (1993); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 917–25 (1999); Sturm, *supra* note 5, at 468–74; Lee, *supra* note 16, at 483–86; Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law* 1 HARV. L. & POL'Y REV. 477 (2007); Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 4–19.

19. *See* Lee, *supra* note 16, at 483–84 (discussing the "[n]atural human process of categorizing like objects together and [the] related cognitive biases [that] can result in and perpetuate individuals' implicit reliance on stereotypes" (citing Krieger, *supra* note 18, at 1186–09)); *see also* Andrew Polland, *The Emergence of Self-Directed Work Teams and Their Effect on Title VII Law*, 148 U. PENN. L. REV. 931, 947 (2000) (stating that "[i]t is now fairly well established in social psychology that prejudice can pervade an individual's thoughts and actions subconsciously. This theory is based on the human brain's instinctive categorization of everything to aid in processing information..." (citing Krieger, *supra* note 18 (footnote omitted))).

20. *See* Krieger, *supra* note 18, at 1187–89.

21. *See* Lee, *supra* note 16, at 484 (noting that "[s]tereotypes cause discrimination by influencing how individuals process and recall information about other people" (citing Krieger, *supra* note 18, at 1199)).

of the intent of an individual."[22] Thus, an employer who acts upon an unconscious or implicit bias might have no *conscious* prejudices against members of a protected group and may vehemently deny any bigotry if questioned about his or her views.[23] Yet as study after study has shown, these implicit, unconscious biases ultimately can play a significant role in shaping such actors' decisions.[24]

Thus, in examining the extent to which discrimination litigation exacerbates employers' biases, and in asserting that an employer will leave the litigation process resenting not only the employee who acted as plaintiff but also others who share plaintiff's protected characteristic(s), this Article is concerned with much more than just an employer engaging in overt, obvious discrimination against these other employees. Rather, it focuses on whether discrimination litigation motivates employers to make biased decisions while cleverly hiding their animus, and on whether the litigation process heightens employers' implicit, unconscious biases against members of the plaintiff's protected class.

II. THE UNEXPECTED IMPLICATIONS OF PURSUING ONE'S RIGHTS: HOW TITLE VII LITIGATION INCREASES BIAS IN DEFENDANTS

The purpose of Title VII is to eliminate discrimination in employment on the basis of various protected characteristics, including race.[25] It therefore would be quite ironic to find that the litigation of claims under Title VII actually *increases* the biases of employer-defendants. A wealth of evidence, however, indicates that this is precisely what is occurring.

Part II.A examines defendants' psychological and emotional responses to discrimination litigation, describing how the frustration, hostility, and anger that inherently arise in any type of litigation are even more pronounced in the context of a Title VII lawsuit. Part A first focuses on a defendant's reaction to an *individual* discrimination plaintiff as a result of the litigation process, and then examines the extent to which these negative views about the individual plaintiff "spill over," often unconsciously, into negative views of the entire protected group to which the plaintiff belongs.

Part II.B examines this issue of litigation-induced group bias from a somewhat different perspective, moving beyond the implicit, unconscious biases that

---

22. Lee, *supra* note 16, at 483 (citing Krieger, *supra* note 18, at 1188).

23. *See* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 1–2 (noting that implicit bias might be found in actors who "might well have no conscious prejudice and sincerely disclaim and reject bigotry"); Lawrence, *supra* note 18, at 322 (stating that most Americans are unaware of their own racism).

24. *See* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 13 n.42 (collecting authority discussing various measures of the impact of implicit racial and other biases). For a concrete example of the means for measuring implicit bias, including an opportunity to take an Implicit Association Test (IAT) that gauges implicit biases in a number of categories, see the website for "Project Implicit," which comprises a network of laboratories, technicians, and research scientists at Harvard University, the University of Washington, and the University of Virginia. *See* https://implicit.harvard.edu/implicit/ (last visited Dec. 16, 2008).

25. *See* H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 (stating that the "purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin"); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977) ("The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.") (citations omitted).

discrimination litigation may generate within defendants and focusing on more conscious (albeit, likely unspoken) biases that defendants may acquire as a result of the litigation experience. Specifically, Part II.B examines the extent to which litigation provides defendant-employers with a more explicit disincentive to hire other members of the plaintiff's protected class because of the increased risks associated with employing—and perhaps someday terminating—such individuals.

A. The Psychological Impact of Being Accused of Discrimination

Nobody wants to be the defendant in a lawsuit. Modern litigation has become increasingly complex and adversarial, often culminating in a drawn-out process that leaves the participants emotionally and psychologically (as well as financially) scarred.[26] Almost fifty years ago, psychologist Robert S. Redmount wrote at length about the "injuries" that litigants sustain as a result of the litigation process, describing the frustration, fear, and hostility that both plaintiffs and defendants often experience during the course of a lawsuit.[27] More recently, attorney Larry J. Cohen and psychologist Joyce H. Vesper coined the term "forensic stress disorder" to describe the particular diagnostic category that they believe should apply to the stress induced by litigation.[28] Cohen and Vesper note that while some individuals can tolerate the uncertainty that is inherent in the legal process, others find it "overwhelming and maddening," often experiencing symptoms such as "sleepless nights and agonizing days filled with obsessive thinking, panic attacks, and fear."[29]

Notably, the litigation experience will be "particularly difficult for the defendant, who is involuntarily made to play this role."[30] Thus, this section focuses on such defendants' experiences in and reactions to litigation, both to the extent the process alters their view of the plaintiff as an individual and, more importantly, the extent to which it increases their biases against a larger class of individuals.

---

26. *See* Robert M. Hayden & Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker*, 3 LAW & HUM. BEHAV. 21, 33 (1979) (discussing the extent to which adversary proceedings tend to be detrimental to the relationship of parties who have interpersonal relationships other than those at issue in a given case); Brent K. Marshall et al., *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 LAW & POL'Y 289, 290 (2004) (describing the legal system in the United States as "uniquely conflict-oriented, expensive, and legalistic"); Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 109 (2000) ("Litigation requires the expenditure of huge sums of money and takes the litigant away from employment and personal endeavors.").

27. Robert S. Redmount, *Psychological Discontinuities in the Litigation Process*, 4 DUKE L.J. 571 (1959).

28. Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 LAW & PSYCHOL. REV. 1, 4–5 (2001).

29. *Id.* at 5. Cohen and Vesper argue that "[t]he adversarial nature of the American justice system has the inevitable result of producing stress for all parties involved because, under the adversarial system, only one party can be victorious." *Id.* at 1; *see also* Paul R. Lees-Haley, *Litigation Response Syndrome*, 6 AM. J. FORENSIC PSYCHOL. 3 (1988) (using the term "Litigation Response Syndrome" to describe the anxiety, depression, or stress caused by litigation); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 9 (1986) ("For plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows—indeed, they may be stigmatized. Even those who prevail may find the process very costly.") (footnotes omitted).

30. *See* Winick, *supra* note 26, at 109.

1. Reactions by the Defendant-Employer to the Plaintiff as an Individual

For a number of reasons, the extreme stress and anxiety induced by litigation seem particularly likely to arise with respect to the defendant in discrimination litigation. First, the stigma involved with being a defendant in a discrimination case often is more acute than the stigma associated with defending against other types of tort claims.[31] Under the current legal framework, society "labels anyone who engages in discrimination as a sinner who should be frowned upon by the enlightened masses."[32] Indeed, the very nature of the pleadings in discrimination cases likely leads to a heightened degree of defensiveness and resentment by the defendant: the complaint, for example, will describe in detail the specific words and deeds allegedly stated and engaged in by the defendant that were offensive on the basis of some protected characteristic, often leaving the defendant feeling as if his or her "innocent" conduct has been misconstrued.[33]

Compounding these emotional factors, the economic cost of defending a discrimination suit tends to be particularly high because defendants often pour tremendous resources into fighting allegations of discrimination.[34] Some estimate that an employer may spend close to $100,000 to defend against an individual claim of discrimination, and more than $460,000 to defend against a discrimination class action.[35] This high economic cost for what the defendant likely sees as an unfounded suit undoubtedly exacerbates the defendant's resentment toward the plaintiff.[36]

---

31. *See* Mijha Butcher, Comment, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 226 (2003) ("The stigma associated with being a discriminator frustrates litigation efforts for victims of unjust employment practices because the accused is obliged to take a strong stance in favor of his innocence."); Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 81 (1998) (stating that an accusation of discrimination "raises the temperature of an employment dispute and puts the moral reputation of the employer and its agents on the line"); *cf.* Maimon Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L. J. 887, 900 (discussing use of consent decrees in Title VII litigation as a means to avoid the "stigma associated with being a defendant charged with race or sex discrimination").

32. Butcher, *supra* note 31, at 234; *see also id.*, at 235 ("High profile cases often lead to boycotts, angry denials and an increase in interracial distrust. Counsel for the plaintiffs sometimes use the opportunity to embark on a public shaming of the defendants to remind the public that discrimination still exists and that the people who exhibit such behavior should not be allowed in the circle of decent Americans. These efforts understandably lead to more vigorous denials and rancor because the defendants believe strongly in their innocence.").

33. Pollard, *supra* note 18, at 933 n.106 (noting that the plaintiff's pleadings in a disparate treatment case "must produce evidence of race-inappropriate language and deeds to demonstrate intent," which Pollard contends "produces feelings of betrayal on the part of the defendant, who often honestly does not believe her off-color remarks are relevant").

34. *See* Estlund, *supra* note 31, at 80–81 ("[A]n accusation of discrimination is likely to provoke a costly fight, at least in close (i.e., most) cases.").

35. *See* Lamont E. Stallworth, et al., *Discrimination in the Workplace: How Mediation Can Help...*," DISP. RESOL. J., Apr. 2001, at 35, 37 (citing WAYNE F. CASCIO, *The High Cost of Mismanaging Human Resources, in* COSTING HUMAN RESOURCES: THE FINANCIAL IMPACT OF BEHAVIOR IN ORGANIZATIONS 83–105 (2000)).

36. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 518 (2003) (noting the effort by civil rights opponents to "persuade the American public that discrimination law is an extortion system that brings enormous unwarranted benefits to women and minorities").

In addition to these rather obvious sources of a defendant's hard feelings toward the plaintiff, more complex psychological responses to the plaintiff's allegations of discrimination may further complicate how the defendant views the complaining employee. A recent study by psychologists Cheryl R. Kaiser and Carol T. Miller indicates that members of stigmatized groups who "claim[] discrimination" may be perceived as "troublemakers" as a result of such complaints.[37] Notably, this negative reaction was found to take place even in circumstances when clear evidence indicated that the complaining individuals in fact had experienced discrimination.[38] In other words, a plaintiff may be seen as wrong for complaining about discrimination, even when his or her complaints have merit. Thus, the defendant in a Title VII case—already primed to resent the plaintiff because of the stigma, stress, and expense of the suit—psychologically will have a ready target for his or her ire, viewing the plaintiff not as a victim of workplace mistreatment, but rather as an agitator intent on causing trouble.

For all of these reasons, discrimination plaintiffs unsurprisingly find themselves faced with tremendous disapproval, hostility, and resentment from defendants whom they sue. Even without the data cited above, none of this would be surprising; an afternoon watching courtroom dramas on television would illustrate this point. A growing body of evidence, however, demonstrates an additional, less obvious point: As it turns out, the defendant's hostility in these cases may extend *beyond* the individual plaintiff, "spilling over" to other members of the protected class to which the plaintiff belongs. The exasperating litigation experience appears not only to alter the defendant's view of the plaintiff who initiated the suit, but also to induce bias against others who happen to share the plaintiff's protected classification(s).

2. How Hostility Toward the Plaintiff Transforms into Litigation-Induced Group Bias

While one can understand a defendant leaving the expensive, stressful, and highly personal experience of discrimination litigation with a negative view of the *plaintiff* who initiated the lawsuit, it seems far less intuitive to assume that such litigation would alter a defendant's view of others who merely share the plaintiff's protected characteristic(s)—those who are the same race as the plaintiff in a race discrimination suit, for example—but who otherwise were not involved in the plaintiff's lawsuit. Yet there is reason to believe that this broader change in defendants' attitudes may be taking place, perhaps without the defendant even realizing that such a change has occurred.

---

37. Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227, 236 (2003); *see also* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 32–36 (2005) (describing social science research demonstrating that individuals who claim retaliation are disliked because they are seen as transgressing the social order, even asserting meritorious claims).

38. Kaiser & Miller, *supra* note 37, at 236; *see also* Brake, *supra* note 37, at 19–20 ("Recent social science research shows that women and persons of color are perceived negatively and are disliked by majority group members when they step forward to challenge discrimination."). Brake discusses in particular Kaiser and Miller's finding that "the social penalty persists even when the subjects [of the study] are exposed to persuasive evidence that discrimination actually had occurred." *Brake, supra* note 37, at 33 (citing Kaiser & Miller, *supra* note 37).

One prominent scholar in the area of social cognition research, Linda Hamilton Krieger, has presented a framework for understanding this "spill-over" effect. Krieger argues that the mere introduction of "groupness" into a situation exacerbates and generates various types of intergroup biases.[39] She describes research conducted by others in her field that has shown that dividing people along group-based lines will "cause[] people to favor ingroup members in the allocation of rewards, in the evaluation of performance, in memory for positive versus negative behaviors, and in the attribution of success or failure."[40] According to Krieger, this research demonstrates that as soon as people are divided into groups, they exhibit strong biases in their perception of the differences between the groups and with respect to their evaluations of such groups.[41] "As soon as the concept of 'groupness' is introduced," Krieger argues, "subjects perceive members of their group as more similar to them, and members of different [groups] as more different from them, than when those same persons are simply viewed as noncategorized individuals."[42] Moreover, at the same time that individuals perceive similarities between themselves and others in their *own* group, they perceive those who are not in their group (i.e., "outgroup" members) as being even more homogeneous.[43] Once individuals are placed into groups, each side not only seems to seek cohesion among its own members, but also seems to see members of the "other" groups as a unified, undifferentiated mass of "lesser" antagonistic beings.

Krieger's work, along with the research on which she relies to formulate her theories, supports the idea of litigation-induced group bias in several interesting ways. First, an allegation of discrimination inherently injects "group-ness" into an employment dispute. The plaintiff in discrimination litigation is accusing the defendant of making an employment decision that was adverse to the plaintiff *because of* the plaintiff's membership in a particular group. Indeed, the plaintiff's group membership is the building block upon which his or her entire case depends: showing such "group membership" is one of the key elements of the plaintiff's prima facie case for discrimination.[44] Thus, according to Krieger's theories, a defendant in a race discrimination suit inherently would make generalizations about the plaintiff's racial group *as a whole* because of this tendency to view members of the plaintiff's racial group—the "outgroup"—as a homogeneous mass.[45]

---

39. *See* Krieger, *supra* note 18, at 1186–1209 (collecting and analyzing studies); *see also* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1274–75 (1998) [hereinafter Krieger, *Civil Rights Perestroika*].

40. Krieger, *Civil Rights Perestroika*, *supra* note 39, at 1274.

41. *See* Krieger, *supra* note 18, at 1191.

42. *Id.* at 1191–92 (footnote omitted).

43. *Id.* at 1192.

44. *See, e.g.*, Anders v. Waste Mgmt. of Wisconsin, Inc., 463 F.3d 670, 676 (7th Cir. 2006) (stating that establishing prima facie case of discrimination under *McDonnell Douglas* burden-shifting framework requires that plaintiff shows, among other things, membership in a protected class).

45. In some cases, the plaintiff and defendant will belong to the same race or other protected class, which admittedly would complicate the application of Krieger's work to theory of litigation-induced group bias. *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1085 (2004) ("In short, intra-racial or intra-gender discrimination occurs, if more rarely than cross-racial discrimination."). Some researchers, however, have theorized that negative responses of *in-group* members to claims of discrimination may be even more extreme than reactions by out-group members. *See* 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 (2005).

Krieger also notes that individuals will persist in exhibiting these inter-group biases even when they know that the groups in question were formed based on trivial characteristics, characteristics that would not provide any logical basis to make generalizations about an individual's status.[46] For example, participants in the studies described by Krieger were told that they had been grouped according to their ability to accurately estimate the size of certain dots,[47] their preferences for certain paintings of photographs,[48] or on a completely random basis.[49] Yet despite the fact that there was no compelling reason for these participants to feel allegiance to groups made on such a trivial or random basis, the participants in these studies continued to exhibit inter-group biases, homogenizing their own group and negatively differentiating those who belonged to other groups.[50]

In the context of discrimination litigation, the "groups" created along racial or gender or other lines, while surely not a legitimate basis for making legal distinctions among individuals, certainly are less trivial and more identity-driven than the arbitrary and/or random groups described by Krieger. Therefore, extending Krieger's analysis, one might expect to see intergroup biases similar to those described by Krieger among discrimination defendants whose involvement in litigation forces them to think in terms of race, gender, or other protected class-based distinctions. Just as the participants in the studies that Krieger cited exhibited intergroup biases despite the obviously insignificant basis for their respective group assignments, a discrimination defendant might unknowingly exhibit intergroup biases, even when he or she realizes that an individual's protected characteristic constitutes a similarly arbitrary and invalid basis for making an employment decision.

Other scholarship in this area provides further support for Krieger's observations about group dynamics and for the application of her findings to a theory of litigation-induced group bias. In *Exacerbation of Extreme Responses to an Out-Group*, psychologists James R. Meindl and Melvin J. Lerner describe how experiences of "personal failure" will affect an individual's views about his or her own group (the "in-group") and about those outside of the in-group (members of the "out-group").[51] Meindl and Lerner argue that an experience of personal failure and the lowered self-esteem that results will heighten individuals' sensitivity to group status and elicit more extreme reactions to out-group members.[52] They argue that the perceived threat to self-esteem that an individual experiences following a personal failure will cause him or her to evaluate out-group members in a manner that protects the superiority of his or her own group, the in-group.[53]

Without question, being accused of discrimination and having to go through the expensive and adversarial process of litigating such a claim seems to constitute the

---

46. *See* Krieger, *supra* note 18, at 1192.
47. *See id.* at 1191 (footnote omitted).
48. *See id.* (footnote omitted).
49. *See id.* (footnote omitted).
50. *See id.* (footnote omitted).
51. James R. Meindl & Melvin J. Lerner, *Exacerbation of Extreme Responses to an Out-Group*, 47 J. PERSONALITY & SOC. PSYCHOL. 71 (1984).
52. *See id.* at 71–72, 80.
53. *See id.* at 71.

type of negative self-esteem-reducing event that Mendl and Lerner describe. Indeed, as noted above, defendants accused of discrimination tend to view these allegations as a personal affront and generally understand that discrimination contradicts prevailing norms of behavior.[54] Therefore, according to Meindl and Lerner's reasoning, a defendant facing such allegations and mulling the mortifying possibility of public liability might take psychological steps to preserve the superiority of his *own* group, as opposed to the group to which the plaintiff belongs.[55]

Thus, at least on an unconscious level, defendants may transfer the hostilities that they feel toward the individual plaintiffs who sue them to the larger groups to which such plaintiffs belong. Moreover, as discussed in Part II.B below, this negative change in employer attitudes does not simply occur in the abstract; as it turns out, this bias also has real implications for employees who fall within protected groups, including their ability to get hired.[56]

B. Not Just "Unconscious" Bias: How Discrimination Litigation Causes Defendants to Make Conscious and Strategic (But Likely Unacknowledged) Decisions that Negatively Affect Members of a Protected Group

Part A of this section discussed the extent to which discrimination litigation might negatively alter a defendant's *implicit, unconscious* views regarding other employees who share the plaintiff's protected characteristic(s). Yet this change—this increase in bias against members of the plaintiff's protected class—does not always occur beneath the surface. Rather, the litigation of discrimination claims (and perhaps even the mere threat of such litigation)[57] has led many employers to

---

54. *See supra* notes 31–33 and accompanying text (discussing the stigma associated with being accused of discrimination).

55. *Cf.* Stephan Plass, *Truth: The Lost Virtue in Title VII Litigation*, 29 SETON HALL L. REV. 599, 626 (1998) (observing that "[a] law-abiding employer may also be stigmatized by wrongful allegations and develop negative stereotypes about members of protected groups"). This has the tendency to create a "general belief that *all* protected employees view Title VII as a job guarantee rather than a narrow constraint on management prerogatives." *Id.* at 626 n.126 (emphasis added). However, it is possible that in addition to producing group-based bias, discrimination litigation also may serve a "moral educative" function, by communicating to the defendant (and perhaps to others who are following this litigation) the unacceptability of particular alleged behavior by the defendant, hopefully sensitizing the defendant (and perhaps others) against future bias. While the analysis of this potential effect of discrimination litigation falls outside the scope of this Article, it presents an area that is ripe for future research. Many thanks to Professor Thomas Barton for raising this point.

56. Notably, the increase in inter-group hostility from the introduction of "groupness" into a situation may not only affect the employer (the defendant in the discrimination lawsuit), but also may arise in *co-workers* of the plaintiff. Workers who belong to a protected class may be the targets of some resentment by their "unprotected" co-workers, who sometimes see such "protected" employees as unfairly shielded from the ramifications of various employment setbacks or other arbitrary employer behavior, in contrast to their at-will peers. *See* Estlund, *supra* note 31, at 81. While not immediately relevant to the exacerbation of litigation-induced group bias in the employer and while not directly addressed in this Article, such co-worker bias from the protections provided by Title VII and its counterparts represents yet one more unfortunate byproduct of the current antidiscrimination regime.

57. *See infra* Part II.C. One question left unresolved by this Article is the distinction between whether *actual* involvement in litigation is required to trigger litigation-induced group bias, or whether the mere *threat* of such litigation will exacerbate such biases. This Article focuses on the extent to which actual involvement in litigation leads to litigation-induced group bias and explores solutions for this problem from within that framework. It seems likely, however, that a mere threat of discrimination litigation also could trigger bias in employers, particularly as such threats became more substantial and more imminent, and as an employer begins to incur greater expenses in time and money in seeking to avoid such threatened litigation.

develop a seemingly *conscious* (although likely unspoken) bias against members of a protected class—bias which in many cases may be equally difficult to detect.[58]

Part B of this Section focuses on this more conscious-but-hidden discrimination and looks at the extent to which discrimination litigation might lead employers to knowingly and discreetly allow bias to influence their employment decisions. In particular, Part II.B examines the effect that Title VII has had on the hiring patterns of employers who are covered by the Act, discussing the consensus among some scholars that this statute creates a *disincentive* for employers to hire members of a protected class.

Key to the analysis of the impact of antidiscrimination law on hiring patterns is the fact that the nature of Title VII litigation has changed considerably over the past forty years in ways that have interesting implications for the theory of litigation-induced group bias. Foremost among these changes is the increase in litigation related to allegedly unlawful terminations. While "failure to hire" cases initially made up the bulk of the courts' Title VII dockets, such discrimination litigation increasingly has involved employee discharge cases.[59]

Of course, some optimistically might attribute this change in the nature of discrimination claims to an improvement in employers' hiring practices (i.e., to the hiring of more protected workers, thus decreasing the number of employees who might have a hiring-based Title VII complaint).[60] Others, however, have rejected this optimistic view, examining this litigation data with a far more skeptical eye. John J. Donahue III and Peter Siegelman, for example, in their thorough analysis of the changing nature of Title VII litigation, note that "[i]t hardly makes sense to hire workers from a group one dislikes..., only to fire them once they are on the job."[61] Rather, they posit that there simply is a far greater likelihood of an employer being *sued* for an alleged wrongful termination than for the failure to hire a particular candidate; applicants simply are less likely to bring these types of failure to hire claims.[62]

If employees are more likely to allege bias when they are terminated from an existing position rather than when they are passed over for a job, employers will view termination-related suits as constituting a far greater liability risk than hiring-related suits.[63] Prudent employers, therefore, will act to protect themselves from this

---

58. *See supra* notes 15 and 16 and accompanying text (discussing employers' increasing skill at "masking" discriminatory decisions behind seemingly legitimate criteria).

59. John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991). Donahue and Siegelman specifically point out that, in 1966, "hiring charges outnumbered termination charges by fifty percent...but, by 1985, the ratio had reversed itself by more than 6 to 1." *Id.* at 1015. This trend apparently continued into the 1990s with termination-based EEOC complaints outnumbering hiring-based EEOC complaints by approximately ten to one. *See* Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire*, 45 J.L. & ECON. 41, 46 (2002).

60. *See* Hon. Julia S. Gibbons, *CLE Symposium: Fortieth Anniversary of Title VII*, 36 U. MEM. L. REV. 19, 24 (2005) (hypothesizing that change in ratio between hiring charges and termination charges "stems from actual changes in employers' hiring practice—a very positive benefit of Title VII.").

61. Donahue & Siegelman, *supra* note 59, at 1017.

62. *See id.* at 1025 ("[W]orkers are much more likely to sue when fired from a job they already have than when their application for a new job is rejected.").

63. *See id.* at 1017 n.107 ("[T]he expected damages for a discriminatory discharge are far greater than for a discriminatory failure to hire because there is a far greater likelihood of being sued by a discharged employee than by a rejected applicant.").

greater risk of termination suits. Donahue and Siegelman conclude that one reaction is that employers will have a modest net *disincentive* to hire members of a protected class.[64] According to Donahue and Siegelman, an employer evaluating a potential job candidate might take into account not only the value of that candidate if he or she is hired, but also the "costs" associated with that candidate if he or she is fired in the future.[65] If the candidate belongs to a protected class, such "costs" would include the threat of the employee filing a wrongful discharge claim under Title VII, and potentially having to defend against that claim.[66]

Admittedly, Title VII not only prohibits employers from terminating employees on the basis of some protected characteristic, but also expressly precludes employers from refusing to hire individuals on the basis of a protected characteristic.[67] In theory, therefore, the costs associated with potential liability for refusing to hire a protected employee should counterbalance the costs associated with potential liability for hiring (and then later perhaps firing) a protected employee. However, as noted above, discriminatory "failure to hire" suits are much harder to prove than discriminatory discharge suits, particularly where the employer faced multiple qualified candidates for a particular position.[68] Therefore, employers who discriminate in making a hiring decision may be able to do so relatively undetected, perhaps leading many employers to decline to hire a protected individual on the front-end in order to avoid the easier-to-prove termination litigation in the future.[69]

Notably, the greater difficulty associated with a potential plaintiff's ability to sue for wrongful failure to hire, as opposed to wrongful termination, is nothing new; it always has been harder for an individual to "prove" that he or she was wrongfully passed over for a position than that he or she was wrongfully fired. Therefore, this shift in the nature of Title VII claims, where hiring cases went from substantially outnumbering termination cases to representing a mere fraction of the docket when compared to termination cases, must result from more than just this differential in available proof; some other force also must be at work here. One possible explanation is that employers simply have become more aware of this aspect of

---

64. *Id.* at 1024 (citing Posner, *infra* note 71).

65. *Id.*

66. *Id.*

67. *See* 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire...any individual...because of such individual's race, color, religion, sex, or national origin....").

68. *Cf.* Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act* 51 J.L. & ECON. 433, 434 (2008) (noting that "it is difficult to prove or detect discrimination in hiring, and, thus, employers may choose not to hire older workers who will be difficult to fire").

69. While Donahue and Siegelman limit their discussion to the potential future "costs" of *terminating* an employee who is a member of a protected class, many employers likely recognize that such potential litigation costs could arise *throughout* the employment relationship with a member of a protected class because Title VII protects employees not only from termination on the basis of a protected characteristic, but also from numerous "adverse actions" on the basis of such a protected characteristic. *See* 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer—1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin.") (emphasis added). Accordingly, an employer might be faced with a potential Title VII claim by a protected employee with respect to a whole host of aspects of the employment relationship, such as compensation, promotions, or job assignments, providing a further disincentive to hire the employee to begin with.

Title VII. They have learned that the best way to avoid the "costs" associated with hiring women and minorities, without incurring legal problems, is to address this issue at the hiring stage. In other words, employers not only have become more aware over the years of the additional burdens associated with employing women and minorities, but they also have learned that they can avoid incurring those costs, discreetly and with minimal potential legal liability, by not hiring such individuals in the first place.

Donahue and Siegelman are not alone in observing the extent to which discrimination litigation (or the prospect thereof)[70] may create a disincentive for employers to hire employees who belong to a protected class. Indeed, Donahue and Siegelman's observations built on those of Judge Richard Posner, who had previously contended that Title VII provided certain employers with an economic disincentive to employ African Americans.[71] Posner noted that Title VII "makes it more costly to fire [black workers] because the firm may have to incur the expense of defending a Title VII disparate-treatment suit when a black employee is discharged."[72] Noting as well that increased wages would be required in workforces that previously paid black employees at a lower rate than white employees,[73] Posner identified what he called a "tax on employing black workers" that would "give firms an incentive to locate in areas with few blacks."[74] Therefore, according to Posner, one could expect Title VII, in some cases, to *reduce* the number of African Americans employed by a particular employer.[75]

Scholars such as Posner and Donahue and Siegelman articulated this theory regarding Title VII's hiring disincentive prior to the passage of the Civil Rights Act of 1991 (1991 CRA),[76] which amended Title VII, among other ways, by allowing the recovery of compensatory and punitive damages and permitting jury trials in intentional discrimination cases.[77] One would expect the purported hiring disincentive created by Title VII to continue at full force since the passage of this amendment, which only raised the stakes in Title VII litigation and thus made protected employees even *more* potentially costly to hire and to fire. Unsurprisingly, therefore, in the years since the passage of the 1991 CRA, various scholars have continued commenting on the perverse hiring disincentives created by Title VII.[78]

---

70. *See supra* note 57 (discussing the difficulty of distinguishing between the impact of *actual* litigation and the mere *threat* of litigation for purposes of analyzing litigation-induced group bias).

71. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517–19 (1987).

72. *Id.* at 519.

73. *See id.*

74. *Id.*

75. *See id.*

76. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1745, 105 Stat. 1071 (codified in various sections of 42 U.S.C.)

77. *See* 42 U.S.C. § 1981a(a)–(c) (2000).

78. *See, e.g.*, Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1488–89 (1996):

> By making it harder to fire certain workers, employment discrimination law tends to make these workers less attractive prospects at the hiring stage. An employer would prefer to hire someone who can be easily fired (should that prove necessary) than an otherwise identical applicant whose firing would be subject to legal scrutiny. Thus, protection against discriminatory firing acts as a kind of tax on hiring those to whom it is extended.

These scholars' writings provide further support for the views that litigation-induced group bias exists as more than just intangible changes in employers' unconscious attitudes and beliefs about those who share a discrimination plaintiff's protected characteristics and that litigation-induced group bias instead has a concrete, negative impact for these individuals by reducing their prospect of getting hired.[79]

Thus, it appears that litigation-induced group bias not only manifests itself on the unconscious level described in Part A above, but also on this more strategic-but-hidden level at play in employer hiring decisions. In both these respects, we see a result of discrimination litigation that runs squarely against the intent of Title VII's drafters, which was to eliminate discrimination in the workplace.[80]

See also Estlund, *supra* note 31, at 81 ("To the extent that employers see some identifiable classes of employees—chiefly minorities and women—as posing the risk of a costly discriminatory discharge claims [sic], a rational response is to discriminate illegally, but probably undetectably, at the hiring stage." (citing Donahue & Siegelman, *supra* note 59; Ayres & Siegelman, *supra*)); Joseph C. Feldman, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569, 579 (1999) (observing that Title VII case law and legislation "have created obstacles that give employers an implicit incentive to maintain a segregated workplace; if nonwhites are never hired, they can never sue for being fired" (citing Donahue & Siegelman, *supra* note 59)); Kathleen C. McGowan, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 164 (1998) ("Employers are reluctant to hire persons in protected classes because it will be more difficult to terminate their employment, even for cause, in contrast to their ability to freely terminate at-will employees."); *cf.* Lahey, *supra* note 68, at 1, 3, 25 (asserting that age discrimination laws, and threats of litigation under such laws, lead employers to hire fewer older workers, among other effects); Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 536–37 (2004) (reviewing DAVID C. STAPLETON & RICHARD V. BURKHAUSER, THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (2003)) (discussing view that Americans with Disabilities Act creates disincentive to hire disabled workers).

79. Interestingly, despite many scholarly musings on the hiring disincentive purportedly created by Title VII, empirical evidence supporting this phenomenon (or refuting it, for that matter) is surprisingly sparse. *See* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 26 (observing that "[d]efinitive empirical evidence supporting the hiring-disincentive account has been difficult to come by"). For one recent study that touches upon this issue, see Oyer & Schaefer, *supra* note 59, at 41–42, 49–52, 67 (arguing that CRA 1991 simultaneously created a "quota effect" that encouraged hiring of protected workers and a "sorting effect" that weighed against hiring such workers, and deeming the sorting effect stronger than quota effect). Some commentators have interpreted Oyer and Schaefer's research as providing empirical support for this "hiring disincentive" theory. *See, e.g.*, Margo Schlanger, *Second Best Damage Action Deterrence*, 55 DEPAUL L. REV. 517, 533 n.58 (2006) (citing Oyer and Schaefer, *supra* note 59, at 41 to support "documented tendency of employers to discriminate against job applicants whose treatment, if they are hired, is regulated under the civil rights laws"); Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, *supra* note 18, at 39 n.211 (characterizing Oyer and Schaefer's work as presenting a strong argument against those who assert that antidiscrimination laws will encourage quota-based hiring). On the other hand, there seem to be significant limitations with respect to Oyer and Schaefer's findings for purposes of this Article. *See, e.g.*, Oyer & Schaefer, *supra* note 59, at 56 (limiting finding of hiring disincentive only to specific industries that, pre-1991, had employed few protected workers and had been building on this number); *id.* at 57 (observing that CRA 1991 also led protected workers to become *more* concentrated in industries where they already had enjoyed strong representation); *see also* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 26–27, n.79 (interpreting Oyer and Schaefer's study as indicating that the CRA 1991 had "no overall effects (either positive or negative) on employment of protected groups, although employment seems to have increased in some industries and decreased in others").

80. *See* Oyer & Schaefer, *supra* note 59, at 67 ("[T]o the extent that [the CRA 1991] was intended to open new opportunities to the groups it protects, we find no evidence that it succeeded.").

C. An Incomplete Picture: Remaining Questions to Consider Regarding the Nature and Effect of Litigation-Induced Group Bias

Thus far, this Article merely has presented some evidence of an unfortunate byproduct of Title VII litigation—litigation-induced group bias. To be sure, this Article does not presume to establish an exhaustive analysis of the numerous factors that might trigger or exacerbate litigation-induced group bias; that research is left for another day. Specifically, some remaining questions to consider in this area include the following: Will the mere *threat* of litigation produce litigation-induced group bias, or is an employer's actual involvement in a lawsuit required? Does it matter, for purposes of this litigation-induced group bias, whether the defendant wins or loses the initial litigation? One would think that this outcome would make a difference and that an employer's loss to a discrimination plaintiff would be even more likely to engender hostility, anger, and ultimately bias against others in the plaintiff's protected class, yet this Article does not explore that issue.

This Article also does not examine fluctuations in employer bias over time: It does not explore whether litigation-induced group bias might dissipate at some point following the original lawsuit, nor does it examine the differences in employer bias *prior* to the initial litigation (i.e., differences between employers who *already* had some bias prior to being sued under Title VII, and thus had this bias exacerbated by the suit and employers who entered the initial Title VII suit substantially bias-free, only to leave the suit with some bias against other members of the plaintiff's protected class).

Finally, as noted above, this Article only scratches the surface in looking at empirical evidence regarding the existence of litigation-induced group bias. A more definitive finding regarding this proposed impact of discrimination litigation would require empirical social science and/or psychological research to measure the biases of discrimination defendants both *before* and *after* their involvement in litigation.

Despite these limitations on the scope of this Article's inquiry, the above analysis establishes a persuasive case that, in some form and to some degree, litigation-induced group bias is taking place. The questions, therefore, are how to address this bias and how to alter the environment for litigation discrimination claims to reduce or to eradicate this unfortunate and unintended side effect of Title VII litigation.

III. A POTENTIAL DOCTRINAL RESPONSE TO LITIGATION-INDUCED GROUP BIAS: EXPANDING TITLE VII'S RETALIATION DOCTRINE TO APPLY TO AN EMPLOYEE WHO RECEIVES ADVERSE TREATMENT AS A RESULT OF DISCRIMINATION LITIGATION INVOLVING *ANOTHER* EMPLOYEE

As noted above, the goals of Title VII are to eradicate discrimination on the basis of protected characteristics and to provide the targets of such discrimination with the necessary legal tools—including the right to litigate their claims in court—to achieve this result.[81] If the litigation of discrimination claims actually functions to *increase* the biases (both implicit/unconscious biases and conscious-but-unspoken

81. *See* 42 U.S.C. § 2000e-5(e), (f) (2000) (describing aggrieved individual's right to file a charge of discrimination and to bring civil action in court of law).

biases) that defendants have against other members of a discrimination plaintiff's protected class, then our antidiscrimination laws are having a profoundly undesirable and unintended effect.

Part III of this Article explores whether there is a doctrinal solution to this problem, looking specifically at whether the framework for analyzing Title VII retaliation claims should be revised to provide the targets of this litigation-induced group bias with an additional cause of action to vindicate their rights. Part A of this section first provides a brief outline of the elements of a "typical" Title VII retaliation claim, and then discusses the extent to which permitting a retaliation claim by the targets of litigation-induced group bias would require a significant expansion of this existing framework. Part III.B examines an area of current retaliation law that could provide a basis for allowing this expansion to take place. Finally, Part III.C discusses some of the potential problems that could flow from permitting employees to pursue retaliation claims under this expanded framework, ultimately deeming this approach unadvisable.

A. Where This "Expanded" Retaliation Claim Fits Within the Existing Legal Framework for Title VII Retaliation Claims

Under Title VII, an employee has a cause of action when he or she is discriminated against on the basis of a protected characteristic,[82] as well as when he or she suffers an adverse employment action because he or she has opposed some practice that Title VII forbids or because he or she has filed a charge of discrimination or otherwise testified, assisted, or participated in any discrimination investigation or proceeding.[83] This is known as the "retaliation provision" of Title VII.

To make out a prima facie case of retaliation, a plaintiff must show three things: (i) that he or she engaged in some "protected activity" under this "opposition" or "participation" framework, (ii) that he or she suffered some adverse employment action, and (iii) that there is some causal connection between the protected activity and the adverse action.[84] Thus, under this framework, an employee would have a retaliation claim if the employee were terminated, denied a promotion, or otherwise received adverse employment action because *that employee* had engaged in a "protected activity," perhaps by filing a charge of discrimination or bringing a Title VII lawsuit against his or her employer.[85] Similarly, an employee would have a

82. *See* 42 U.S.C. § 2000e-2(a) (2000).

83. *See id.* at § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

84. Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1075 (9th Cir. 2003), *as amended* (2004) (citation omitted); Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002) (citation omitted). An employee may do this through direct evidence of retaliation or through circumstantial evidence, using the burden-shifting approach commonly used in Title VII cases. *See Little*, 301 F.3d at 969 (citation omitted). Under this latter framework, once the employee makes this prima facie showing, the employer can avoid liability by articulating a legitimate, nondiscriminatory reason for the adverse action. *See id.* (citation omitted). The burden will then shift back to the employee to prove that this articulated reason is a mere pretext for retaliation. *See id.* (citation omitted).

85. *See, e.g.*, Decker v. Andersen Consulting, 860 F. Supp. 1300 (N.D. Ill.1994) (allowing retaliation claim to proceed where employee presented genuine issue of material fact that employer reduced her responsibilities and

retaliation claim against the employer if the employer took adverse action against the employee because he or she *actively supported* the discrimination allegations of a co-worker, such as by assisting in an EEOC investigation of the co-worker's discrimination allegations or by testifying in support of the co-worker at his or her Title VII trial.[86]

What if, however, a hypothetical employee had engaged in *no* protected activity of his or her own (i.e., had not filed his or her own charge of discrimination or court complaint) and had not done *anything* to support the co-worker's allegations? What if this employee simply happened to belong to the same protected class as the discriminated-against co-worker who had brought a Title VII claim against the employer? According to the theory of this Article, this hypothetical employee still could suffer negative consequences from the co-worker's protected activity, despite playing no role in the litigation: If the employer left this litigation having an increased (albeit, perhaps unconscious) bias against other members of the co-worker's protected class, that bias could manifest itself in adverse action toward this employee who happened to belong to the co-worker's protected class. In other words, by virtue of the employer's litigation-induced group bias, this employee would be "retaliated against" for his or her *co-worker's* protected activity, without actually engaging in any protected activity of his or her own according to current Title VII jurisprudence.

The question, therefore, is whether the current retaliation framework should expand to account for the results of this litigation-induced group bias. Given the evidence that one employee's protected activity—the filing of a discrimination lawsuit—can increase the bias that an employer has against *others* in the plaintiff's protected group, including those who did not engage in any "protected activity," should such an employer be liable for retaliation if it acts on this increased bias? Should the current framework for analyzing Title VII retaliation claims be expanded to create a cause of action for an employee who receives adverse treatment *solely* because he or she happens to belong to the same protected class as another employee who engaged in protected activity—protected activity in which this current employee played no part?

Of course, one possible reaction to the questions posed above could be: Why does it matter if we allow a retaliation claim in this context? If an employer takes adverse action against an employee because of some protected characteristic, then the employer will be liable for unlawful *discrimination* under Title VII, regardless of whether the employer's bias was caused by prior discrimination litigation with the employee's co-worker or by some other factor. For example, if an employer fires an African American employee because of his or her race, the employer will be liable for discrimination under Title VII regardless of whether this race-based animus stemmed from the employer previously being sued by an African American employee or from some other source. If the employer is going to be liable for

---

terminated her employment in response to her filing an EEOC charge of discrimination and informing employer of intent to pursue discrimination claim).

86. Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999) (allowing retaliation claim to proceed where plaintiff claimed that employer discharged her in retaliation for testimony against employer in gender discrimination suit filed by another employee).

unlawful *discrimination* under Title VII anyway, why does it matter if we allow an expanded cause of action for Title VII *retaliation* as well?

There are practical reasons why an employee in this situation might not be content merely with bringing a run-of-the-mill Title VII discrimination claim, but might also want the ability to assert a retaliation claim. In some cases, an employee will have greater recovery by alleging retaliation, either because the retaliation claim may succeed while the discrimination claim fails[87] or because an employee who succeeds in both claims may be entitled to additional damages associated with the retaliation claim.[88] Arguably, employees who are the targets of an employer's litigation-induced group bias experience both discrimination (adverse treatment because of a *protected characteristic*) and retaliation (adverse treatment in response to some *protected activity*—albeit, someone else's protected activity). Thus, some might argue that such employees should be able to enjoy the advantages of having *both* claims at their disposal to respond to their employer's illegally biased conduct.

In addition, certain policy reasons arguably support allowing employees to respond to an employer's litigation-induced group bias with this type of "expanded" retaliation claim, instead of or in addition to a garden-variety discrimination claim. In drafting Title VII, Congress clearly did not deem it sufficient merely to bar discrimination on the basis of various protected characteristics, but rather chose to give individuals who experienced or otherwise learned of such discrimination an additional tool to fight this wrongful conduct: Title VII's retaliation provision. This provision was enacted "to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation."[89] As one commentator observed, "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about...discrimination....To a large extent,

87. *See, e.g.*, Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000) (affirming summary judgment for employer on employee's Title VII sexual harassment claim but reversing summary judgment for employer on employee's retaliation claim); *see also* John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 541–42 (2007) (noting that plaintiffs often bring both a discrimination claim and a retaliation claim in one action, but that a plaintiff "can recover on a retaliation claim even when the court dismisses her underlying [discrimination] claim" (citing *Pryor*, 212 F.3d at 980)).

88. *See* Mehringer v. Village of Bloomingdale, No. 00 C 7095, 2002 WL 1888364, at *1, *4 (N.D. Ill. Aug. 14, 2002) (rejecting view that plaintiff's retaliation claim was redundant of discrimination claim, stating that "[r]etaliation and discrimination are distinct wrongs and involve different questions of intent") (citation omitted); *see also* EEOC Compliance Manual, Directives Transmittal 915-003, § 2-II(A)(5), *available at* http://www.eeoc.gov/policy/docs/threshold.html (last visited Dec. 16, 2008) [hereinafter EEOC Compliance Manual] ("An individual is protected against retaliation for participation in the charge process, however, regardless of the validity or reasonableness of the original allegation of discrimination. An individual need not establish a violation of the underlying statute to be afforded protection from retaliation."); Rhea Gertken, *Causation in Retaliation Claims: Conflict Between the Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 WASH. U. L.Q. 151, 152 (2003) (noting that "retaliation encompasses a distinct claim" from a charge of discrimination (citing EEOC Compliance Manual)).

89. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 799 (6th Cir. 2004) (citing EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993)) (internal quotation marks omitted); *see also* Jones v. Flagship Int'l, 793 F.2d 714, 726 (5th Cir. 1986) ("[S]ince the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of [Title VII's retaliation provision] is required.") (citations omitted).

the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation."[90]

Thus, perhaps this expanded retaliation doctrine is necessary to prevent a chilling effect among employees who are considering reporting discrimination in the workplace. Perhaps employees will hesitate to bring discrimination suits against their employers if they know that, down the road, their employers may take action against *other* employees who share their protected characteristics and that such future targets of the employer's bias only will have limited recourse for such adverse treatment. These employees may feel trapped between vindicating their own right to work in an environment free from discrimination, on the one hand, and their loyalty to other employees who share their racial, gender, or other minority-group background on the other hand—certainly an undesirable result. Allowing a retaliation claim for the future targets of litigation-induced group bias, advocates of expansion might argue, would free employees from having to make this difficult choice and decrease the possibility of this chilling effect on the reporting of workplace discrimination.

B. The Legal Basis for Applying the Title VII Retaliation Doctrine to Litigation-Induced Group Bias

In addition to the practical and policy reasons for considering an expansion of the retaliation doctrine, there also is some legal basis for revising the retaliation doctrine in this way despite the seemingly novel nature of this contemplated claim. As a threshold matter, there has been a trend among courts, including the U.S. Supreme Court, to interpret the protections under Title VII's retaliation clause broadly[91] on grounds that "[i]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of [Title VII]'s primary objective depends."[92] Moreover, several courts have shown an increased willingness to consider the type of social science evidence that underpins these types of "expanded" retaliation claims. Considering social science evidence requires courts to accept that certain unconscious biases or other cognitive phenomenon can impact how an employer treats an entire racial, ethnic, or other group of employees.[93] These courts might be more willing to

---

90. Brake, *supra* note 37, at 20.

91. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that "employee" in Title VII's retaliation provision applies to *former* employees as well as current employees because that interpretation is "more consistent with the broader context of Title VII and the primary purpose of § 704(a)"); *see also* Burlington N. & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (2006) (establishing an objective standard to determine whether employer conduct constitutes "adverse action" for purposes of Title VII retaliation claim).

92. *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2414.

93. *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 42 (1st Cir. 1999) (holding that Title VII's disparate treatment theory applies "both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias"); *id.* at 59–61 (discussing "unlawful discrimination [which] stem[s] from stereotypes and other types of cognitive biases," and citing scholarship regarding such biased thinking, including Krieger, *supra* note 18, and Lawrence, *supra* note 18 (citations omitted)); Chin v. Runnels, 343 F. Supp. 2d 891, 906–07 (N.D. Cal. 2004) (collecting cases where courts have recognized that subjective decision making can allow "subtle biases or unconscious stereotyping to affect processes," and citing examples of the "growing body of social science [research that] recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias") (citations omitted).

concede that an employer's ire toward one employee who brought suit against the company could translate into a more general hostility toward a broader group of workers.

Finally, and perhaps most significant to providing a legal basis for expanding the scope of Title VII retaliation claims, various scholars and courts have addressed the issue of "third-party retaliation," examining situations where an employer's adverse action against one employee arises from the protected activity of a different employee. In other words, an employer retaliates against one employee who has *not* engaged in protected activity because another employee with some relationship to that employee—his or her spouse, brother, or girlfriend—engaged in some protected activity. For example, Joe Senior gets fired because Joe Junior filed a discrimination charge, or Wendy Wife is demoted because Harry Husband called the EEOC.

Various courts have endorsed these sorts of third-party retaliation claims, finding them consistent with the purpose of Title VII.[94] According to these courts, Congress drafted Title VII's retaliation provision "to ensure that no person would be deterred from exercising his rights under Title VII by threat of discriminatory retaliation,"[95] a purpose that would be undermined if the statute did not protect against third-party reprisals.[96] Even the EEOC, which, among other duties, must provide technical assistance to employers regarding their duties under Title VII,[97] has adopted a position in favor of allowing such third-party retaliation claims, stating in its Compliance Manual that "Title VII...prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."[98]

In contrast to the position of these courts and of the EEOC, a number of courts have prohibited these types of third-party retaliation claims, deeming them inconsistent with the plain text of Title VII.[99] By its terms, Title VII's retaliation

---

94. *See, e.g.*, EEOC v. Ohio Edison Co., 7 F.3d 541, 545–46 (6th Cir. 1993) (allowing employee to maintain retaliation claim based on protected activity of former co-worker who was acting as the employee's representative); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210–12 (E.D. Cal. 1998) (allowing retaliation claim by employee based on protected activity engaged in by employee's sister); De Medina v. Reinhardt, 444 F. Supp. 573, 579–81 (D.D.C. 1978) (allowing retaliation claim by plaintiff who claimed employer retaliated against her based upon protected activities engaged in by plaintiff's husband).

95. *Ohio Edison Co.*, 7 F.3d at 543.

96. *See id.*; *see also* Carrie B. Temm, Comment, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. KAN. L. REV. 865, 870 (2006) ("Without this protection of third parties, employers would be free to fire anyone when another employee engaged in a protected activity...[which] would deter employees from making discrimination charges and opposing unlawful practices.").

97. *See* 42 U.S.C. § 2000e-4(g)(3) (2000).

98. EEOC Compliance Manual, *supra* note 88, § 8-II(B)(3)(c), *available at* http://www.eeoc.gov/policy/docs/retal.pdf (last visited Dec. 16, 2008; "Person Claiming Retaliation Need Not Be the Person Who Engaged in Opposition"); *id.* § 8-II(C)(3)(c) ("Person Claiming Retaliation Need Not Be the Person Who Engaged in Participation").

99. *See, e.g.*, Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) (declining to expand retaliation doctrine to apply to plaintiff who claimed that he was retaliated against for protected activity engaged in by co-worker who was his live-in girlfriend); Rainer v. Refco, Inc., 464 F. Supp. 2d 742, 751 (S.D. Ohio 2006) (declining to allow son to bring retaliation claim under Title VII and state law based on protected activity engaged in by co-worker/mother); *cf.* Fogelman v. Mercy Hosp., Inc., 283 F.3d 561, 564, 569–70 (3rd Cir. 2002) (rejecting third-party retaliation claim, brought under ADA, ADEA, and state law by son who claimed employer retaliated against him for co-worker/father's protected activity); Holt v. JTM Indus., Inc., 89 F.3d 1224, 1226–27 (5th Cir. 1996) (finding that husband lacked standing under ADEA to assert retaliation claim based on protected activity of co-worker/wife).

provision deems it unlawful for an employer "to discriminate against any...employee[]...because *he* has opposed any practice... or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[100] The statute does not appear to contemplate suits by those who have not *themselves* engaged in protected activity. Thus, courts declining to allow these third-party retaliation claims have expressed concern that such claims would expand the retaliation doctrine beyond its intended limits and "would open the floodgates to frivolous lawsuits because anyone who suffered an adverse action close in time after any other employee engaged in a protected activity would have a cause of action."[101]

These same concerns about excessive exposure for employers apply to using the retaliation doctrine to redress litigation-induced group bias. Given the current trend showing skyrocketing levels of discrimination litigation in the modern workplace,[102] virtually every employer conceivably could face the prospect of discrimination litigation at some point. If the third-party retaliation doctrine is expanded to cover every instance of suspected litigation-induced group bias, allowing a retaliation claim whenever an employee alleges that he or she took the brunt of employer bias that was generated in a prior, wholly unrelated suit, employers could have significant exposure under the retaliation doctrine every time they disciplined *any* employee who happened to share a protected characteristic with *any other* employee who previously brought a discrimination suit against the employer. Such potential liability literally could cripple employers' ability to make workplace decisions.

Picking up on some of these concerns, even those tribunals that have approved of third-party retaliation claims have limited their approval to some degree, requiring in virtually all such claims that there be some clear relationship between the employee who engaged in the protected activity and the employee who suffered the adverse action. The two employees in such cases (the one who engaged in protected activity and the one who experienced adverse action) have been spouses,[103] siblings,[104] or parent and child,[105] or otherwise shared some significant relationship.[106] In these circumstances, a court rationally could conclude that the

---

100. 42 U.S.C. § 2000e-3(a) (2000); (emphasis added). Notably, the relevant anti-retaliation provisions of the ADA and ADEA mirror the anti-retaliation provision of Title VII in all relevant respects. *See* 42 U.S.C. § 12203(a) (2000), 29 U.S.C. § 623(d) (2000).

101. Temm, *supra* note 96, at 878; *see also Fogelman*, 283 F.3d at 570 ("Congress may have feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity...would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees.").

102. *See supra* note 3.

103. *See, e.g.*, De Medina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978); *see also* EEOC Compliance Manual, *supra* note 88, § 8-II(C)(3) ("For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge. Both spouses, in such circumstances, could bring retaliation claims.") (citation omitted).

104. *See, e.g.*, EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210–12 (E.D. Cal. 1998).

105. *See* EEOC Compliance Manual, *supra* note 88, § 8-II(B)(3)(c) ("For example, it is unlawful to retaliate against an employee because his son, who is also an employee, opposed allegedly unlawful employment practices").

106. *See id.* ("Retaliation against a *close relative* of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative") (emphasis added); *cf.* EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) (allowing retaliation claim by employee who acted as representative for co-worker who had engaged in protected activity).

employee who was contemplating protected activity might be deterred from acting by the threat of adverse action against the other employee with whom he or she shared a close tie.[107]

No court, however, seems to have expanded the third-party retaliation doctrine beyond this point to allow a third-party retaliation claim where the two employees involved merely happened to work for the same employer.[108] While the theory of litigation-induced group bias presents an additional "tie" between the employees beyond their mere co-worker status (the protected characteristic that they share serves as an additional bond), nothing about this shared characteristic supports the idea that employer action against one employee bears any relationship to the protected activity of another employee. This characteristic-based tie alone cannot resolve some of the broader concerns that arise from expanding the retaliation doctrine to this degree.

C. Problems with Expanding the Retaliation Doctrine to Apply to the Targets of Litigation-Induced Group Bias

Despite the potential arguments for expanding the Title VII retaliation doctrine to cover third-party claims that result from an employer's litigation-induced group bias, the problems associated with this move counsel against its adoption. First, as discussed above, allowing one employee to "bootstrap" his or her retaliation claim to that of the protected activity of another employee with whom he or she has only a minimal demographic connection would stretch the causation element of the retaliation doctrine in problematic ways. Because the theory of litigation-induced group bias assumes that an employer leaves the litigation process harboring animus against all other employees who happen to share the plaintiff's protected characteristic(s), *any* adverse action that the employer subsequently might take against *any* other employee who shared such protected characteristic(s) automatically could appear suspect—despite the fact that the employer could have any number of legitimate reasons for taking action against this other employee. The mere fact that this adverse action chronologically followed litigation by another worker of the same protected class would inherently expose the employer to potential liability.[109]

Moreover, to the extent that the employer's prior involvement in discrimination litigation was presumed to exacerbate the *implicit* or *unconscious* biases of the employer,[110] this causation element would become even more complex because the

---

107. *See Nalbandian Sales, Inc.*, 36 F. Supp. 2d at 1210 ("A construction that requires standing only where the employee himself has participated in activity giving rise to unlawful retaliation...would chill employees from exercising their Title VII rights...out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative.") (citations omitted).

108. *See Ohio Edison Co.*, 7 F.3d at 546 (requiring some "causal link" between person retaliated against and person engaged in protected activity); *see also* Anita G. Schausten, Comment, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 J. MARSHALL L. REV. 1313, 1334–35 (2004) ("None of the courts that have allowed third-party claims suggest that coverage should be extended to the 'bare relationship of co-employees' without more.") (citations omitted).

109. *See* Temm, *supra* note 96, at 878 (describing courts' fears about creating potential retaliation claim for "anyone who suffered an adverse action close in time after any other employee engaged in a protected activity").

110. *See supra* Parts I, II.A.

employer might have no real way of disproving his or her retaliatory intent: If the employer were to deny that he or she harbored any bias as a result of the prior litigation (except perhaps bias against the original, individual plaintiff), the employee could argue that some *implicit* bias, undetected by even the employer him or herself, in fact must be at work. Indeed, even if the employer pointed to some "legitimate" reason for this adverse action (i.e., the employee's poor performance or insubordinate attitude), the employee could argue that this "legitimate" reason actually had its roots in the employer's unconscious, litigation-induced group biases—i.e., that the employer's poor evaluation of the employee was shaped by its unconscious bias. How would an employer disprove retaliation in such circumstances? The employer would be in the difficult position of "proving a negative"— proving that it not only did not have any conscious, intentional goal of harming members of a particular protected class, but also did not have any hidden, subconscious animus against such individuals.

Because of these concerns, as noted above, even those courts that have accepted the theory of third-party retaliation claims have required some substantial tie between the employees involved.[111] Likewise, scholars who have advocated for broader acceptance of third-party retaliation claims have limited their arguments to situations involving employees with "a relationship close enough to provide a deterrent risk to the individuals protecting their rights,"[112] observing that any broader application of third-party retaliation simply would not serve the underlying purposes of Title VII's anti-retaliation provision.[113] Requiring some connection between these two employees provides at least some basis for assuming that the protected activity of the first employee actually motivated the adverse treatment of the second, which is the very conduct that Title VII's retaliation provision truly intended to prohibit.

Finally, perhaps the most significant argument against expanding the retaliation doctrine to cover all targets of litigation-induced group bias is the fact that such a move might only exacerbate the problem that it was intended to solve. Broadening the retaliation doctrine in this way simply would create *more* litigation against the employers whose bias was exacerbated by this very process. Employers would experience additional frustration, embarrassment, expense, and stigma from the secondary lawsuit and thus would have more ammunition to fuel their biases (unconscious or otherwise) not only against those who initiated this litigation, but also (according to the theory of this Article) against the broader protected group to which these individuals belong. Indeed, this retaliation claim could seem like part of a never-ending cycle of litigation by the same group of employees, motivating the employer to take steps to end this vicious cycle, perhaps by decreasing its hiring of

111. *See* cases cited *supra* note 94.

112. Temm, *supra* note 96, at 890; *see also* Schausten, *supra* note 108, at 1334–35.

113. *See* Temm, *supra* note 96, at 890 ("An employee will not be deterred from bringing his discrimination claim if there is a threat that a person he merely works with will suffer adverse action as a result of his protected activity."); *cf. Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2409 (noting that, even under an expanded view of "adverse action," not *every* materially adverse action would support a retaliation claim, but rather only those employer actions that could "dissuade a reasonable worker from making or supporting a charge of discrimination.").

this category of individuals.[114] From this perspective, allowing an expanded retaliation claim to redress litigation-induced group bias seems ironically counterproductive.

Ultimately, the arguments in favor of expanding the Title VII retaliation doctrine to include this attenuated type of third-party claim are outweighed by the problems of proof and the potential for frivolous litigation that could flow from this change in the current legal framework. If potential plaintiffs in these retaliation cases were going to be left without *any* relief from their employers' litigation-induced group bias, perhaps the concerns about expanding this legal framework could be ignored. As noted above, however, these employees do have an alternate claim besides an expanded retaliation claim. If their employer terminates, demotes, or otherwise discriminates against them *because of* their protected characteristic, they still have a discrimination claim under Title VII, regardless of whether the employer's bias was caused by the prior litigation of another employee or some other factor. The same bias and adverse action that would form the basis of a third-party *retaliation* claim will form the basis of the plaintiff's *discrimination* claim. While this discrimination claim may present a lesser recovery for plaintiffs than if they were able to bring a retaliation claim,[115] limiting plaintiffs to a discrimination claim in this context seems an appropriate compromise that ensures some relief to employees who suffer workplace discrimination while preventing against an unwarranted expansion of Title VII.

IV. ALTERNATIVE SOLUTIONS: PRACTICAL IMPLICATIONS OF ASSUMING THAT DISCRIMINATION LITIGATION INCREASES BIAS

Thus far, this Article has presented a problem without offering a satisfactory solution. It has argued that the litigation of discrimination claims may increase defendants' biases but has expressed skepticism regarding a potential doctrinal means for addressing the bias. This lack of a doctrinal solution, however, does not end the analysis of how to reduce or avoid litigation-induced group bias. Rather, even if the doctrinal framework for litigating Title VII claims does not change, lawyers can, and should, do much *within* this framework to reduce the bias that results from such litigation.

These alternative solutions to the problem of litigation-induced group bias are the focus of Part IV. Assuming that the litigation experience increases the level of bias against the plaintiff's protected group as a whole, Part IV explores some of the practical implications of this conclusion, asserting that lawyers who represent employers in these types of claims should alter the way that they approach these allegations in order to prevent this negative ramification.[116] Specifically, Part IV encourages defense lawyers to approach the issue of litigation-induced group bias

114. *See supra* Part II.B.

115. *See supra* notes 87–88 and accompanying text.

116. While many of the principles discussed herein would be equally beneficial when used by attorneys representing plaintiff-employees in discrimination disputes, this Article focuses on the extent to which the application of these principles to discrimination *defendants* (i.e., employers) might prevent litigation-induced group bias in such defendants.

in a proactive manner in order to prevent their clients from leaving the litigation process with their biases exacerbated.

Part A of this section focuses on some relatively new and developing areas of legal thought, the "creative problem-solving" and "therapeutic jurisprudence" approaches to resolving legal disputes. As discussed below, incorporating principles from these schools of thought can reduce defendant-employers' negative reactions to the litigation process. Part B of this section focuses on the forum in which discrimination disputes are resolved, examining the role that alternative dispute resolution (ADR) mechanisms might play in preventing the development of litigation-induced group bias.

A. A Different Approach to Representing Clients in Discrimination Disputes: The Role of Creative Problem Solving and Therapeutic Jurisprudence in Avoiding Litigation-Induced Group Bias

Rather than creating a new legal claim for employees who are the targets of an employer's litigation-induced group bias, a more prudent approach to resolving this dilemma is to prevent this bias from ever developing. In this vein, there are steps that defense lawyers can take to eliminate some of the stress and resentment that flows from discrimination suits without compromising their duty of zealous representation. Both creative problem solving and therapeutic jurisprudence address this proactive, preventative approach.

1. Creative Problem Solving as a Means for Preventing Litigation-Induced Group Bias

Creative problem solving is an approach to the law that incorporates traditional legal principles with principles from such diverse fields as sociology, social anthropology, behavioral sciences, business theory, and economics, among others.[117] Creative problem solving aims "to make the law a more sensitive and respectful shaper of the social, physical and relational environment...[and] to give lawyers the understanding, skills, and attitudes needed to apply tools of persuasion and reconciliation where [those tools] may be more appropriate."[118] In this way, creative problem solving focuses on both the legal and human elements of a dispute[119] and encourages actors to seek collaborative and long-term solutions to problems.[120]

---

117. *See* James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 312 (1998) (listing the broad range of fields covered by creative problem solving).

118. *See* Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning and Values*, 34 CAL. W. L. REV. 273, 283–84 (1998) (characterizing the traditional common law approach to legal disputes as having a "flattened vision of humanity" and describing creative problem solving as a "flexible alternative which will better respect the human context of legal problems").

119. *See* Cooper, *supra* note 117, at 311 ("Creative Problem Solving also recognizes and vindicates human nature to all so-called legal situations."); *see also* Barton, *supra* note 118, at 283–84; Katharine Rosenberry, *Creative Problem Solving: Mixing the Traditional with the Non-Traditional*, SAN DIEGO LAW. (Mar./Apr. 2004, at 44) ("By defining the problem in human as well as legal terms, the association [i.e., the problem-solver] not only solved the problem but also prevented it from happening again.").

120. *See* Sturm, *supra* note 5, at 475 (describing the problem-solving process as one that "identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information,

While creative problem solving represents an innovative way of approaching a legal dispute by taking a more comprehensive view of the pertinent issues involved, it in no way advocates an abandonment of traditional, "legal" ways of analyzing a problem. Creative problem-solving is not a call for lawyers to ignore logic or to disregard strategic concerns in zealously representing a client.[121] Rather, it simply is a way of combining traditional legal methods of problem analysis with additional, non-legal approaches in viewing a client's problem.[122] The problem-solving lawyer simply adds additional skills and additional procedures to his or her "bag of tricks" in addressing a client's dilemma.[123] At bottom, this is what clients want from their counsel: someone to solve their problems using whatever skills—legal or otherwise —are required to do so.[124]

For several reasons, this more holistic approach to examining a legal dispute would be quite effective in the context of discrimination claims, particularly with respect to the quest to reduce or to avoid litigation-induced group bias. First, as discussed in Part II.A above, discrimination litigation is highly personal and the parties' emotional and psychological reactions play a significant role.[125] These emotional aspects of a discrimination dispute trigger the hostility that a discrimination defendant feels toward the plaintiff and, ultimately, toward others in the plaintiff's protected class. In a discrimination suit, the defendant feels personally attacked and stigmatized by the allegation that he or she has engaged in behavior as socially unacceptable as discrimination, and he or she may respond by blaming the plaintiff for creating this unpleasant situation and by characterizing the plaintiff as no more than a greedy troublemaker.[126] Moreover, as previously noted, this defensive reaction may occur even when there is some evidence that the plaintiff actually experienced discrimination.[127] While an objective view of such evidence of discrimination would indicate a need for the defendant to alter his or her behavior to remedy discriminatory conduct, the hostility and resentment that the defendant feels at being accused of such unacceptable behavior may obscure his or her ability to recognize this apparent wrongdoing. In such cases, the "problem" of the defendant's animus remains unsolved. Moreover, the *increase* in the defendant's hostility toward the plaintiff and others who share the plaintiff's characteristic means that the problem has in fact only gotten worse.

Despite the significance of the emotional aspects of a discrimination dispute, they often are ignored by both counsel and the court because they do not fit cleanly

---

builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion").

121. *See* Sturm, *supra* note 5.

122. *See* Cooper, *supra* note 117, at 313 ("Creative Problem Solvers must have the skillsets to select collaboration and facilitation in some contexts, and a litigious, adversarial and competitive approach in others."); Rosenberry, *supra* note 119, at 44 (characterizing creative problem solving as mixing both traditional and non-traditional approaches to resolving a dispute).

123. *See* Barton, *supra* note 118, at 276 (asserting that "better problem solving by lawyers requires expanding the diversity of alternative procedures they may call upon for resolution").

124. *See* Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811 (1999) ("[M]ost clients expect their lawyers to integrate legal considerations with other aspects of their problems.").

125. *See supra* Part II.A.

126. *See supra* Part II.A.

127. *See supra* note 38 and accompanying text.

within the plaintiff's prima facie case or the defendant's response thereto. A plaintiff's anger at perceived differential treatment is meaningless if he or she cannot show that similarly situated employees outside of his or her protected class received better treatment;[128] a defendant's belief that the plaintiff is greedy and opportunistic is irrelevant to the defendant's ultimate liability if the plaintiff otherwise establishes the required elements under Title VII.[129] Thus, amidst all the focus on whether the defendant did or did not *previously* discriminate against the plaintiff, the potential for a defendant's biases to be *exacerbated* by litigation often goes unchecked.

Creative problem solving, however, can avoid this result not only by addressing the "legal issues" related to a defendant's conduct, but also by taking account of the "human elements" of a discrimination claim and attempting to craft a solution that addresses those human elements. For example, one scholar in this area, Susan Sturm, has described a way of using problem-solving principles to redress workplace bias in a manner that accounts for people's subjective views.[130] According to Sturm, bias in the modern workplace does not arise merely because of the behavior of some "bad actor," and may not necessarily be easily categorized into a discrete legal claim.[131] Rather, Sturm believes that bias may arise as part of a larger organizational culture in which "participants...may experience the same conduct quite differently, depending on their position in relation to the conduct, their power, their gender, their mobility, their support networks, and the degree of their cross-gender interaction."[132] In other words, the employer facing Title VII liability might not even perceive its conduct as wrongful in many cases.

Finding the employer liable in this context will not "solve" the problem of workplace discrimination; in fact, it seems likely to do little more than engender greater hostility and resentment by the employer. A more sound approach, under Sturm's analysis, would be for the employer to implement broader, structural changes in the workplace that take into account individual employees' perspectives and capacities.[133] From the lawyer's perspective, these changes ideally could be done *prospectively*, before any problems regarding workplace discrimination arise, perhaps by analyzing the client's policies and procedures for their discriminatory impact on protected groups, or by providing diversity training to the employer's

---

128. *See, e.g.*, Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 564 (7th Cir. 1998) ("[T]he plaintiffs have not demonstrated...that Wal-Mart treated similarly-situated female employees more leniently....Wal-Mart's quick decision to terminate the plaintiffs may seem unfair in a work environment that appears rife with similarly off-color conduct. We have noted time and again, however, that 'we do not sit as a super-personnel department that reexamines an entity's business decisions.'" (citation omitted)).

129. *See, e.g.*, Hudson v. Wal-Mart Stores, Inc., 412 F.3d 781, 786 (7th Cir. 2005) (declaring it "beside the point" whether the plaintiff was not quite an "innocent victim" in workplace altercation that led to his termination, and stating that "[o]ur only concern is whether Wal-Mart's proffered explanation [for plaintiff's termination] is a lie to cover-up for retaliation").

130. Sturm, *supra* note 5, at 460–64 (describing concept of "second generation" discrimination as a "structural, relational, and situational" phenomenon and introducing the argument for a "de-centered, holistic, and dynamic approach to these more structural forms of bias").

131. *Id.* at 471 (citing Krieger, *supra* note 18, at 1184–85; Vicki Schultz, *Reconceptionalizing Sexual Harassment*, 107 YALE L. J. 1683, 1689–90 (1998)).

132. *Id.* at 472 ("Those involved in conduct producing bias may not perceive their behavior as problematic or discriminatory.").

133. *See id.* at 475.

workforce, or by suggesting specific structural changes to the employer's hiring or promotion or termination practices to ensure equal treatment among employees.[134]

Admittedly, some employer-side attorneys will not have the power or opportunity to tinker with their clients' structural makeup prior to any problem arising. Creative problem solving, however, also can reduce bias in the context of already pending disputes, particularly where the parties enjoy an ongoing relationship (such as when a current employee or group of employees makes allegations against an employer). Indeed, unlike the traditional approach to litigation, which almost always poisons the relationship between the defendant-employer and plaintiff-employee,[135] a problem-solving approach often works to preserve and to protect these relationships.

Barbara Cox has written about the use of problem solving to redress existing discrimination while still preserving a complex relationship between the parties involved. In her recent piece regarding the Association of American Law Schools' (AALS) efforts to encourage implementation of an amended Bylaw that prohibited discrimination on the basis of sexual orientation,[136] Cox describes how many AALS member schools, including religiously affiliated schools that deemed homosexuality inconsistent with their religious tenets,[137] initially resisted incorporating this "nondiscrimination" into their school policies.[138] According to Cox, however, AALS's use of creative problem solving techniques allowed it ultimately to achieve full compliance with this Bylaw, without sanctioning or otherwise jeopardizing its relationship with any member schools in the process.[139] Cox describes the host of non-confrontational methods used by AALS to achieve this result,[140] observing that AALS "did not simply assert its power against its members, but rather engaged in a continuing dialogue, whether with the AALS membership as a whole, with the groups of schools who opposed implementation, or with each individual member school."[141]

---

134. Sturm has written a thorough and insightful analysis of some of the structural changes that employers proactively could develop and implement to identify, prevent, and redress bias. *See id.* at 530 (citing interviews conducted with employer-side counsel and observing that management lawyers, by "prod[ding] and enabl[ing] their clients to adopt more functional and fair human resource systems," can play an important role in reaching creative approaches to solving problems associated with alleged workplace discrimination).

135. *See supra* Part II.A.

136. Barbara J. Cox, *AALS as Creative Problem-Solver: Implementing Bylaw 6-4(A) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education*, 56 J. LEGAL EDUC. 22 (2006).

137. *See id.* at 32–33.

138. *See id.* at 24–26. Specifically, Cox provides data that shows that, of the 162 member schools included in her survey, "55 schools required some time and effort before they agreed to [adopt policies compliant with the Bylaw], and many schools required significant time and effort before they agreed to adopt such policies." *Id.* at 26.

139. *Id.* at 27. "The reason the AALS could persuade all of its member schools to adopt compliant policies is that they used creative problem solving techniques and values, along with institutional design principles, that best allowed it to manage the conflict that arose when schools were asked to adopt policies of their own." *Id.* at 55.

140. For example, AALS delayed implementation of the amended Bylaw to allow some schools to come into compliance on their own. *See id.* at 30–31. AALS also considered input from a broad range of member schools, including those who opposed the amended Bylaw, as a means of encouraging consensus-building. *See id.* at 35. Moreover, to help those religiously affiliated schools that faced particular difficulty in enacting policies that satisfied both their religious concerns and AALS requirements, AALS sent copies of other schools' compliant policies and arranged special AALS site visits to meet with the administration of problem schools to encourage their compliance with the Bylaw. *See id.* at 49.

141. *Id.* at 27.

Cox's observations have clear application for reducing hostility among defendants in the broader handling of discrimination claims, particularly in the employment context. She observes that the AALS and each of the individual member schools had a strong incentive to preserve their existing relationship.[142] Similarly, the parties involved in a workplace discrimination dispute often have a mutual desire to preserve their relationship, particularly where the employer-employee relationship has been a long-term one. This mutual desire may be a result of the plaintiff wanting to continue his or her employment; the defendant may need the plaintiff's cooperation in transitioning his or her duties to a new employee who will replace the plaintiff; or the plaintiff may plan to remain in the same industry and geographic area after leaving employment with the defendant, making it likely that the plaintiff and defendant will cross paths in the future. Thus, just as AALS's decision to address concerns about discrimination using a collaborative, problem-solving approach—rather than an adversarial, antagonistic approach—functioned to preserve its relationships with its member schools, a discrimination lawyer's encouragement of a problem-solving approach can preserve his or her client's relationship with its former or current employee. For example, rather than approaching every allegation of discrimination as an opportunity for a scorched-earth battle against the accusing employee, the employer could be encouraged to actually *investigate* the employee's concerns, with an eye toward understanding and addressing the employee's complaints.[143]

Another way to incorporate problem-solving principles into ongoing litigation relates to the proposed remedies for the dispute. Whether as part of settlement negotiations or as part of the judgment phase in litigation (assuming the employer is found liable for discrimination), lawyers on both sides can attempt to craft creative remedies that will minimize the bias that the employer will experience from the suit, perhaps by combining traditional money damages with less conventional remedial tools. For example, the employer may agree to provide diversity or harassment training to its employees, revise objectionable corporate policies, or make other structural changes in the workplace to remedy alleged discrimination. These "non-monetary" aspects of a judgment certainly are not "cost-free" to the employer: training may be expensive and revising workplace procedures or structures will take time and money. While these "costs" still might trigger some resentment and bias on the part of the employer—particularly if the suit was contentious or the money damages remain high despite these additional remedial aspects—these creative remedies should decrease workplace discrimination going forward, thus preventing the future occurrence of the very lawsuits that induce and exacerbate bias in employers.[144]

---

142. *See id.* at 41 ("[I]t was clear that the AALS did not want to lose member schools, and the member schools did not want to lose their membership in the AALS.").

143. Admittedly, this approach will be far more feasible when the employee merely has lodged an *informal* complaint internally with the employer and has not yet filed a charge of discrimination.

144. Such increased workplace diversity also might reduce some *existing* bias in the workforce. *See* Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, *supra* note 8, at 20–25 (discussing the extent to which workplace diversity decreases implicit bias).

Finally, a creative problem solving approach can reduce litigation-induced group bias by helping the parties avoid litigation altogether. By avoiding the stress and uncertainty that trigger bias—aspects that primarily result from litigation itself—counsel may be able to help their clients emerge from a discrimination dispute with their broader views about other groups unchanged. As discussed in greater detail below, this can be done by encouraging the use of alternatives to litigation[145] or by helping the parties to reach a fair and amicable (and early) settlement, where appropriate.[146]

Creative problem solving thus presents some ripe opportunities for lawyers to take steps to reduce litigation-induced group bias in their employer-clients. Admittedly, however, there are significant limitations on the effectiveness of the solutions proposed above, some easily solvable, some less so: First, many lawyers incorrectly perceive these problem-solving techniques as inconsistent with their role as zealous advocates; they believe that only by engaging in adversarial tenacity can they adequately represent their clients.[147] This hurdle, however, could be overcome quite easily by heeding the calls of many legal scholars to incorporate greater emphasis on problem-solving skills into legal education and attorneys' continuing education obligations.[148]

A second obstacle to the use of these problem-solving steps, however, is a bit more difficult to solve. Each of the techniques described above generally will require the client's acquiescence—either his or her agreement to alter certain workplace policies and procedures, consent to resolve the dispute in an alternate forum, or acceptance of certain settlement terms. But what if a client is stubborn? What if a client, despite its counsel's sound advice, elects to rush headlong into a contentious discrimination suit and refuses to consider any of these bias-avoiding alternatives? Is there anything that a lawyer *unilaterally* can do to prevent the client from experiencing litigation-induced group bias? Fortunately, yes.

2. Therapeutic Jurisprudence as a Means for Preventing Litigation-Induced Group Bias

As noted above, even under the best of circumstances, much about the handling of a discrimination suit will fall outside of the defense lawyer's control, particularly to the extent that the lawyer tries to manipulate the litigation process to avoid litigation-induced group bias. The lawyer could face an obstinate client who refuses even to consider the plaintiff's point of view or to contemplate any potential

---

145. *See infra* Part IV.B.

146. *See infra* notes 167–175 and accompanying text.

147. *See* Sturm, *supra* note 5, at 564 (observing that "[l]egal education overemphasizes the litigation domain, and thereby fails to provide adequate training or legitimation of lawyers' roles as problem solvers").

148. *See, e.g.*, Thomas D. Barton, *The Modes and Tenses of Legal Problem Solving, and What to Do About Them in Legal Education*, 43 CAL. W. LAW. REV. 389, 390, 407–16 (2007) (discussing ways to incorporate various problem-solving approaches into law school curriculum); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107 (1999) (describing a course to teach problem solving to law students); Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 872–77 (2003) (describing suggested approaches for law schools to encourage creative problem solving among law students).

changes to the workplace; the lawyer could be up against overly litigious and inflexible opposing counsel who adopts a scorched-earth strategy, even in the face of collaborative efforts by the defendant; or the lawyer could have a case with hotly contested facts that make early resolution of the claim impossible. However, in such circumstances, where a creative resolution to the plaintiff's claim seems unlikely, the lawyer need not give up all hope at resolving the dispute in a manner that avoids exacerbating his or her client's biases. Rather, the lawyer simply must focus on his or her *own* conduct—including his or her own relationship with the defendant—in trying to prevent the litigation-induced group bias from arising. In this respect, the teaching of "therapeutic jurisprudence," a school of legal thought that is related to creative problem solving,[149] can play a significant role.

Therapeutic jurisprudence is "the study of the role of the law as a therapeutic agent."[150] Therapeutic jurisprudence focuses on the impact that the law can have on individuals' "emotional life and...psychological well-being,"[151] taking as its basic premise the belief that "law is a social force that [will have]...consequences for the mental health and psychological functioning of those who it affects."[152] Those who subscribe to the doctrine of therapeutic jurisprudence thus view all aspects of the law potentially as having either positive or negative (i.e., therapeutic or anti-therapeutic) consequences for those involved in the legal process.[153] Therapeutic jurisprudence seeks to alter each aspect of the legal system to enhance its therapeutic potential while not sacrificing principles of due process.[154]

Therapeutic jurisprudence does not suggest that these therapeutic goals should trump other concerns regarding justice or due process,[155] nor does it suggest that lawyers revert to the role of psychotherapist in counseling their clients.[156] Rather,

---

149. *See* Cooper, *supra* note 117, at 314 (characterizing therapeutic jurisprudence as "part of the Creative Problem Solving matrix"); *id.* at 322 (describing therapeutic jurisprudence as one of several schools of thought under the creative problem solving umbrella).

150. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000) (citing DAVID B. WEXLER & BRUCE J. WINICK, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996)).

151. *See id.*

152. Dennis P. Stolle, et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997); *see also* Michael L. Perlin, *Stepping Outside the Box: Viewing Your Client in a Whole New Light*, 37 CAL. W. L. REV. 65, 78 (2000) (stating that "therapeutic jurisprudence studies the role of law as a therapeutic agent, recognizing that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or anti-therapeutic consequences").

153. *See* Perlin, *supra* note 152, at 78; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185–91 (Mar. 1997).

154. *See* Perlin, *supra* note 152, at 78.

155. *See id.*; *see also* Wexler, *Therapeutic Jurisprudence: An Overview*, *supra* note 150, at 125 ("It is important to recognize that therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other ones." (citing WEXLER & BRUCE, *supra* note 150, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE)).

156. *Cf.* David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 747 (2005) (acknowledging that a criminal defense lawyer "is not a therapist or social worker, and is not expected to be," but advocating that criminal defense lawyers still can play significant roles as "change agents" in clients' lives); Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 904 (1998) (discussing use of therapeutic jurisprudence in counseling clients regarding advance directive instruments and stating, "[t]he suggestion is not that attorneys should be therapists, but rather, that they should be psychologically minded. Just as an understanding of the basic principles of economics can generally

therapeutic jurisprudence merely seeks to "humaniz[e] the law" by drawing attention to these often-ignored emotional and psychological aspects of the legal process.[157] Its goal is merely to suggest a broader focus for examining legal issues by incorporating these other concerns into the legal analysis wherever possible in order to avoid emotional and psychological harm to the participants in the legal action.[158]

Given the stressful and emotionally charged nature of discrimination litigation (particularly for defendants in such suits),[159] this more holistic method of approaching legal disputes seems a particularly useful tool for lawyers representing discrimination defendants. One would hope that, by applying the tools of therapeutic jurisprudence to their representation, attorneys in such cases could avoid some of the negative consequences of discrimination litigation, including the biases that defendants frequently experience as a result of the process.

Consistent with the tenets of therapeutic jurisprudence, employer-side lawyers can take several specific steps to prevent their clients from experiencing litigation-induced group bias. For example, Professor Bruce Winick, a leading scholar in the area of therapeutic jurisprudence, has observed that by providing the client with information about the meaning of various stages of the litigation process—a process that often seems complex and confusing to lay individuals, even sophisticated businesspeople—the lawyer can reduce some of the stress that the client experiences.[160] Winick notes that lawyers can achieve a similar stress-reduction by ensuring that the client is fully prepared for any testimony that he or she has to provide in the lawsuit, whether in deposition or at trial, including the opposing party's likely confrontational cross-examination.[161] The lawyer can further reduce a client's stress by staying near the client during such anxiety-prone periods as jury deliberations and announcement of the verdict.[162] In fact, counsel can have a significant impact on the client's attitude at the point when a decision is reached, by "helping the client to frame the decision in as positive a way as is possible."[163] Each of these simple steps, which help in reducing the anxiety and negative feelings that the defendant associates with the litigation process itself, may decrease negative post-litigation emotions such as litigation-induced group bias.

A lawyer also can encourage litigation procedures that will positively influence a defendant-employer's reaction to the litigation process. For example, Winick cites

---

improve the functioning of an antitrust lawyer or a business lawyer, an understanding of psychology can increase the effectiveness of the preventive lawyer").

157. Wexler, *Therapeutic Jurisprudence: An Overview*, *supra* note 150, at 125.

158. *See id.*

159. *See supra* Part II.A.

160. Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 109–10 (2000) (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 122 (1984)); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46–47 (1999).

161. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *supra* note 160, at 110–11.

162. *Id.* at 112–13.

163. *Id.* at 112. Winick notes that, even when the decision is unfavorable, allowing the client to share the loss with his/her attorney, a "trusted ally who has fought the battle with the client[,] can help the client to survive the bitter experience and the difficult emotions it may produce far better than would facing it alone." *Id.* at 112 (citing ROBERT A. WENKE, THE ART OF NEGOTIATION FOR LAWYERS, 8, 10 (1985)).

empirical research that shows that various "process" elements of the courtroom experience—such as whether a litigant believes that he or she was treated fairly in the proceedings, had an opportunity to tell his or her story, and believes that he or she was taken seriously by the decision maker—can influence the litigant's post-suit attitudes and behavior.[164] A defendant who believes that his or her voice was not heard during the proceedings may walk away from the litigation feeling coerced and disrespected.[165] Lawyers who listen to their client's concerns thoroughly and who communicate those concerns carefully when acting as the client's "voice" in the courtroom can help the defendant to feel heard in the litigation process.[166]

Finally, as mentioned above, one significant way to avoid litigation-induced group bias is to avoid litigation altogether. Therefore, an attorney who encourages a fair and appropriate settlement of a discrimination claim also can prevent this bias from developing: Clients will be freed from the stress and resentment of litigation, particularly where settlement occurs before the client has accrued substantial fees and expenses.[167] Settlement also allows the parties to move on from the hostilities and tensions of litigation and focus on the more pleasant aspects of their personal and professional lives.[168] Moreover, the negotiation process that is inherent to any settlement may itself have a therapeutic impact on the defendant to the extent that it gives the defendant some control over the outcome of the suit.[169] Indeed, the fact that settlement requires the parties to "communicate" with one another (albeit through counsel) and at least to consider each other's positions regarding the dispute may have a positive benefit on a defendant's emotional and psychological well-being following the lawsuit's resolution.[170]

Unsurprisingly, despite the benefits associated with settlement, clients caught up in the adversarial nature of a lawsuit often express resistance to this option. The defendant may be too angry to consider any resolution of the dispute,[171] may be in

---

164. *Id.* at 116 (footnotes omitted).

165. *See id.* at 116–17 (footnotes omitted).

166. *See id.* at 117–18 (noting that lawyers with strong listening skills can help a client "put events into perspective...[and] assist the client in undergoing a positive reframing of the incident and dealing effectively with what can and should be done thereafter").

167. *See* Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L. J. 189, 192–93 (2002) (discussing extent to which therapeutic jurisprudence principles can be applied in the context of settlement to avoid costs, risks, and stress of litigation and to minimize clients' negative reactions to litigation).

168. *See* Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *supra* note 160, at 113 (noting that a full-blown trial and appeal might span a several-year period and observing that "[i]t is unhealthy for the client to hold on to hatred, anger, and resentment during this several year period; giving it up can allow the client to experience a degree of peace, relaxation, and joy in life that might otherwise be impossible" (footnote omitted)).

169. *See id.* at 112–13 ("In general, people feel better about making their own decisions rather than having them imposed upon them by another. Exercising a degree of control and self-determination in significant aspects of one's life may be an important ingredient of psychological wellbeing. If the parties can come to their own solution to the controversy, they will likely feel better about it than when the judge does it for them." (footnote omitted)).

170. *See id.* at 112 (citing Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, and noting that "[n]egotiation can itself be a healing process, bringing together disputants to process and iron out their differences, and helping them to resolve their conflicts and to achieve reconciliation."); *see also infra* Part IV.B (discussing alternative dispute resolution procedures, including mediation).

171. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *supra* note 160, at 113 ("[S]trong emotion provoked by the controversy or its antecedents or by the lawsuit itself may make it impossible for the parties even to meet in the same room to discuss their differences." (footnote omitted)); *see also* Winick,

denial concerning their wrongdoing, or may otherwise try to minimize or rationalize their behavior.[172] In such circumstances, a lawyer can use the tools associated with therapeutic jurisprudence to overcome these obstacles to settlement. Winick notes, for example, that a lawyer will have to communicate with his or her client to discover the broader interests, goals, and needs of the client related to the suit—notions that often extend beyond the legal or financial aspects of a potential judgment.[173] The lawyer must be prepared to identify and to deal with the denial and other defense mechanisms utilized by the defendant that could impede the settlement process.[174] In addition, the lawyer might have to display the psychological sensitivity inherent to therapeutic jurisprudence to persuade the client to accept a reasonable settlement proposal. All of these tasks will require that the lawyer build a strong relationship of trust and confidence with the client by being sensitive to the client's psychological state, adopting a posture of support and non-judgment, creating an open atmosphere where the client can discuss personal and sensitive matters, and encouraging the client to express his or her feelings about the litigation experience.[175]

Thus, by using therapeutic jurisprudence principles, lawyers not only can make the litigation process less psychologically and emotionally taxing for their employer-clients, but can also help their clients avoid litigation entirely in some scenarios by reaching a fair and appropriate settlement of the dispute. To the extent that these resolved disputes include discrimination claims, the application of therapeutic jurisprudence principles represents one more way of avoiding some of the litigation-induced group bias that defendants otherwise might experience.[176]

B. A Different Forum for Resolving Discrimination Disputes: The Role of Mediation and Other Alternative Dispute Resolution Mechanisms in Avoiding Litigation-Induced Group Bias

Just as litigation-induced group bias can be prevented by defense counsel using skills to avoid the stress and anxiety of litigation, so too can this bias be averted by wholly removing the dispute from the courtroom and pursuing the claim through alternative dispute resolution procedures instead.

While ADR refers to a wide array of procedures that involve resolving a dispute out of court, methods of ADR generally fall into one of two categories: mediation, which is an informal, voluntary, and non-binding procedure in which a neutral third

---

The Expanding Scope of Preventative Law, *supra* note 167, at 193 ("Some clients are too angry with their adversaries to discuss anything, let alone the resolution of their dispute. Some will want to hold on to the dispute or even 'punish' their adversaries through the litigation process.").

172. *See* Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *supra* note 160, at 114 (footnote omitted); Winick, *The Expanding Scope of Preventative Law*, *supra* note 167, at 193.

173. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *supra* note 160, at 114.

174. *See id.* at 115 (footnote omitted); *see also id.* ("Clients need to be made to feel that their attorneys are their allies and confidants, and that they should be free to share their thoughts and feelings with counsel, no matter what they are.").

175. *Id.* (footnote omitted).

176. While not specifically addressed herein, many of the suggestions discussed above also could apply to attorneys who represent employees in discrimination claims; there are steps that these plaintiff-side attorneys could take to help prevent defendant-employers from experiencing litigation-induced group bias as a result of their client's lawsuit.

party assists the litigants in resolving the dispute;[177] or arbitration, where one or more impartial arbitrators, chosen by the parties, will hear the dispute and issue what generally will be a final, binding decision.[178] ADR has proven to be a useful tool for resolving a wide variety of disputes.[179] The focus of this section is on the benefits of ADR in the particular context of a discrimination dispute—and specifically, how using ADR can prevent the enhanced bias that a discrimination defendant otherwise would experience as a result of the litigation process.

First, as noted above, a significant potential cause of litigation-induced group bias is the feeling of stigmatization and personal failure that employer-defendants experience as a result of being accused of discrimination.[180] Faced with such feelings, rather than trying to understand and to address any potentially unfair treatment that the employer might have directed toward the plaintiff, the defendant feels obliged to vehemently deny any possibility of committing this disgraceful societal wrong[181] in order to avoid being labeled as a "backwards, discriminating social pariah."[182] ADR, however, provides a less blame-ridden approach to analyzing a discrimination dispute. As one commentator has observed, it is a less guilt-oriented and less public means of resolving the emotional issues inherent in a discrimination claim.[183] Unlike litigation, where the court inevitably finds a clear-cut winner and loser, ADR (and mediation in particular) encourages the parties to work together, with or without a third party, to jointly come up with an appropriate resolution.[184]

In addition to helping to avoid some of the stigma and guilt associated with traditional discrimination litigation, ADR prevents litigation-induced group bias in another way. One significant source of the stress and resentment that a discrimination defendant experiences from a discrimination suit stems from the

---

177. Butcher, *supra* note 31, at 253.

178. *Id.*

179. *See, e.g.*, Russ Bleemer, *With Mediation Leading the Way, Justice Department Readies Progess Report Touting Big ADR Savings*, 25 ALTERNATIVES TO HIGH COST LITIG. 90 (2007) (detailing extensive successful use of ADR techniques by various government agencies); *Surveys Show ABA Groups Support ADR*, DISP. RESOL. J., Feb.–Apr. 2007, at 8 (citing surveys indicating support for ADR among attorneys in private practice).

180. *See supra* Part II.A.

181. Butcher, *supra* note 31, at 255 ("ADR processes provide a confidential forum unattached to the blame-ridden, win-lose atmosphere of a traditional courtroom where the supervisor whose actions are in question can listen to the claimant's perspective and examine his own actions and implicit assumptions under the light of possible racial stereotyping."); *see also id.* at 226 (observing that "[t]he stigma associated with being a discriminator" forces the accused to "take a strong stance in favor of his innocence").

182. *Id.* at 251.

183. *Id.* at 226; *see also* Stuart H. Bompey, et al., 13 LAB. LAW 21, 28 (1997) (observing that arbitration hearings generally are conducted in private and with more informal proceedings than litigation in court).

184. *See* Butcher, *supra* note 31, at 251 (observing that the "winner-loser paradigm" of litigation "misses a wealth of surplus the parties could create together in the form of apologies, modified procedures and increased understanding, to name a few."); Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, TRIAL, June 1999, at 30, 31 (citing interview with a lawyer and mediation proponent who observed that ADR techniques can provide "a win/win outcome for both sides—or at least an outcome that both sides can endure and view as better than going through the cost and uncertainty of litigation"); *see also* Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156 (1999) (discussing mediation in context of sexual harassment disputes and observing that mediation "provides a comfortable forum for all parties and thus is more likely to facilitate a workable resolution...than a more adversarial process involving rights adjudicated in a formal setting under a fixed set of rules").

enormous amount of time and money that the defendant expends in litigation.[185] Both mediation and arbitration allow for the resolution of a dispute at a significant savings in time and money to the defendant.[186] For example, a recent General Accounting Office (GAO) report regarding employers' experiences with ADR noted that two federal agencies experienced time savings of between thirty-six and fifty-two percent by using ADR instead of formal litigation,[187] an experience shared by other employers (including private employers) who use ADR.[188] Regarding cost-savings, one private company included in the GAO survey reported reducing its expenditures on employment-related litigation by more than half via the use of ADR,[189] a finding that, again, is consistent with the experiences of other employers who have used ADR in this context.[190]

Finally, as scholars in the field of creative problem solving and therapeutic jurisprudence have noted, allowing a party to tell his or her side of the story in a dispute can decrease the negative emotional and psychological baggage that the party carries at the end of the legal process.[191] Mediation and arbitration—more so than litigation—provide the defendant with opportunities to tell his/her side of the story and to release some of the anger and hard feelings that he/she otherwise would harbor as a result of the litigation.[192] This venting process should further reduce the likelihood of the defendant leaving the experience of resolving the plaintiff's claims with hostile feelings toward the plaintiff—or toward others in the plaintiff's protected class.

The broad range of benefits from ADR—decreased stigma associated with the process, a reduction in time and money that the defendant-employer must expend on the litigation, and increased opportunities for both parties to vent their side of the

---

185. *See supra* notes 26, 34–36 and accompanying text.

186. *See* U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 2, 8 (1997) [(hereinafter GAO REPORT)] (citing employer concerns about high costs in time and money for traditional litigation as reason for increased use of ADR); *see also* Allison Balc, *Making It Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L. J. 241, 248 (2002) ("Effective mediation can help disputants reduce the substantial monetary, temporal, and psychological expenses that typically result from litigation."); Bompey et al., *supra* note 183, at 34–35 (citing case law to support contention that "[t]he principal advantages to employers of arbitration compared to civil litigation are time and money"); *id.* at 77–78 (discussing the enormous potential for savings in time and money when claims are mediated rather than litigated).

187. GAO REPORT, *supra* note 186, at 19.

188. *See* Bompey et al., *supra* note 183, at 35 (observing that arbitration can resolve disputes more quickly than traditional litigation because hearing dates typically are set before a trial would occur, because arbitrations tend to involve fewer postponements, the informality of the proceedings tends to lead to speedier hearings, and arbitrators typically issue prompt decisions); *see also id.* at 77–78 ("A claim that is settled through mediation is invariably resolved more quickly than one which goes to trial.").

189. GAO REPORT, *supra* note 186, at 19.

190. *See* Bompey et al., *supra* note 183, at 34–35 (observing that the limited discovery and motion practice in arbitration, along with the informality of the proceedings, make it significantly less expensive than civil litigation); *see also id.* at 77 (noting that mediation often includes substantial cost savings for parties because mediation makes an early settlement more likely and because mediation settlements often involve non-monetary relief).

191. *See supra* notes 164–66 and accompanying text; *see also* Balc, *supra* note 186, at 249 ("[O]n the part of the employer, where a complaint or claim is raised against an individual, he or she may be angry or have adverse feelings, which requires discussion and a resolution before being able to work productively with the employee.").

192. *See* Bompey et al., *supra* note 183, at 78 (describing mediation as "taking the emotional steam out of a dispute" by having the mediator "separate[] emotional issues from substantive issues" and by providing a chance for each side to tell its story without fear of an adverse reaction by the judge or jury).

dispute and to reach a mutually agreeable resolution—should have an immediate ameliorative effect on the level of litigation-induced group bias that an employer will experience after resolving the plaintiff's discrimination allegations. Rather than developing hard feelings toward the plaintiff (feelings that, as discussed above, may leak over into an increased bias toward other members of the plaintiff's protected class), the defendant may preserve a relationship with the plaintiff—or, at a minimum, end the relationship in an amicable manner.[193] This result, in and of itself, represents a strong argument for increasing the use of ADR in discrimination suits.

Adding to this benefit is the fact that the use of ADR for Title VII claims comports with congressional intent. Congress drafted Title VII to require that complaining parties, including the EEOC, attempt to conciliate disputes in a non-judicial forum before filing suit.[194] Likewise, the Civil Rights Act of 1991, which amended Title VII (along with other statutes), expressly encouraged the use of such alternative dispute resolution procedures to resolve these types of disputes.[195] While Congress may not have had the specific issue of litigation-induced group bias in mind in drafting this provision of Section 1981, Congress clearly recognized some of the broader benefits to using ADR in the highly charged realm of discrimination litigation.

Notably, the benefits that can arise from using ADR to resolve employment discrimination disputes are more than just hypothetical. Rather, employers that have experimented with using these alternate procedures for addressing discrimination disputes overwhelmingly have expressed satisfaction with the process. Between 1999 and 2000, the EEOC commissioned a study of its voluntary mediation program.[196] Among the many positive results that emerged from this survey, 96 percent of respondent-employers (and 91 percent of charging party-employees) indicated a willingness to participate in the EEOC's mediation program again in the future, should they be involved in another discrimination dispute.[197] Indeed, even where the parties did not obtain the outcome that they had hoped out of the mediation process, the participants in this program overwhelmingly indicated a willingness to use mediation again in the future.[198]

---

193. *See* Harkavy, *supra* note 184, at 160 (observing that mediation allows for the "resolution of a dispute in a manner so that the parties can continue their business, professional, or personal relationships").

194. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N. (78 Stat. 241) 2404 (discussing enforcement provisions of statute and stating that, where reasonable cause for finding discrimination exists, "the Commission must endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion"); *see also* EEOC v. Shell Oil Co., 466 U.S. 54, 78 (1984) ("Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." (citing Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982))).

195. *See* 42 U.S.C. § 1981 (2000) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.").

196. *See* E. Patrick McDermott, et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (2000), *available at* http://www.eeoc.gov/mediate/report/index.html (last visited Dec. 16, 2008) [hereinafter EEOC Mediation Study].

197. *See id.* § VI.D.

198. *See id.*; *see also* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 332

Thus, encouraging the broader use of ADR to resolve employment discrimination disputes represents yet one more means for redressing the problem of litigation-induced group bias while still serving the needs and interests of the parties. This could be accomplished in any number of ways. Increasing the awareness of employers (and their attorneys) regarding the availability of this alternative to litigation, and the many benefits associated with this approach; adopting more programs—like the EEOC program—that attempt to guide parties into volunteering to mediate their dispute; adopting mandatory ADR procedures for certain types of disputes; or a combination of all of these approaches would encourage the broader use of ADR and reduce litigation-induced group bias. Even where mediation or arbitration fails to resolve a particular employment dispute, the processes themselves, being cheaper and quicker (and, in the case of mediation, more collaborative than adversarial), may be able to mute some of the hostility that otherwise would arise when the dispute eventually is litigated. Such an outcome benefits not only the parties involved, but also benefits those who share the plaintiff's protected class and, ultimately, society as a whole.

V. CONCLUSION

If the true goal of our antidiscrimination law is to decrease not only the facial, obvious demonstrations of discrimination, but also the less apparent biases that affect individual behavior, then it is important to understand all of the sources and causes of such biases. Given that one such source of bias is the litigation that is conducted under these discrimination laws, and given the steadily increasing amount of discrimination litigation on the courts' dockets, this Article raises a concern that is both timely and important.

As noted at the outset, this Article does not assert that litigation is the only—or even the most significant—cause of workplace bias, nor does it contend that this "cost" of Title VII litigation outweighs the potential benefits of such suits. Without a doubt, such litigation has played an important part in redressing workplace discrimination and has helped countless women and minorities vindicate their civil rights. This Article merely observes that, along with the benefits of Title VII litigation, there also may be a somewhat less obvious drawback to such litigation, litigation-induced group bias.

Reasonable people can disagree as to whether litigation-induced group bias is appropriately remedied by expanding Title VII liability to cover the difficult-to-discern (and often unconscious) biases that employers experience following their involvement in litigation. This Article rejects that approach, believing that more litigation simply is not the answer. Rather, this Article contends that changes within the way that attorneys (particularly management attorneys) approach their representation of employer-defendants, along with an increased use of alternatives to litigation, are the better approach to reducing this pernicious form of bias.

---

n.40 (citing various sources documenting the growing preference among employers and employees for ADR as a mechanism to resolve workplace disputes).