

---

---

# EXAMINING EMPATHY: DISCRIMINATION, EXPERIENCE, AND JUDICIAL DECISIONMAKING

JILL D. WEINBERG\*

LAURA BETH NIELSEN†

## TABLE OF CONTENTS

I. INTRODUCTION .....	314
II. ASSESSING DISCRIMINATION: THREE PERSPECTIVES ON JUDICIAL DECISIONMAKING .....	321
A. THE EMPATHETIC PERSPECTIVE .....	323
B. THE LIBERAL LEGAL PERSPECTIVE .....	326
C. THE POLITICAL PERSPECTIVE .....	328
III. AN EMPIRICAL ANALYSIS OF FEDERAL DISTRICT COURT JUDGES AND DISCRIMINATION.....	329
A. DATA COLLECTION .....	330
B. STATISTICAL MODELS AND HYPOTHESES.....	333
IV. RESULTS.....	335
A. LOGISTIC REGRESSION MODEL.....	339
B. INDIVIDUAL-LEVEL ANALYSES .....	342
1. Judge-Plaintiff Minority Status.....	343

---

\* Ph.D. (candidate), Northwestern University; J.D. 2008, Seattle University; M.A. 2009, University of Chicago; M.A. 2010, Northwestern University.

† Research Professor, American Bar Foundation. Associate Professor of Sociology and Law & Director of Legal Studies, Northwestern University. J.D. 1996, Berkeley School of Law (Boalt Hall); Ph.D. Jurisprudence and Social Policy 1999, University of California, Berkeley. This research was supported by the American Bar Foundation, the National Science Foundation (#SES-0417389), and the Searle Foundation. The authors would like to thank Ellen C. Berrey, Patti Ewick, Ryon Lancaster, Robert L. Nelson, and Christopher W. Schmidt, as well as the participants at the Conference of Empirical Legal Studies (New Haven, 2010) who provided feedback on earlier versions of this Article, especially Bert Huang who provided great comments as our discussant.

C. SUMMARY .....	345
V. EMPATHY, EXPERIENCE, AND A NEW VISION OF JUDICIAL DECISIONMAKING .....	346
A. DIVERSITY OF THE JUDICIARY .....	346
B. EMPATHY AND THE EFFICACY OF THE ADVERSARIAL SYSTEM.....	348
C. ACCOUNTING FOR EMPATHY AND THE RULE OF LAW .....	349
VI. CONCLUSION .....	351

## I. INTRODUCTION

There are moments when the law is not enough.

In *Virginia v. Black*,<sup>1</sup> a normally silent Justice Clarence Thomas interjected with what one commentator called a “Luke-I-am-you-father”<sup>2</sup> voice. The case involved a First Amendment challenge to a Virginia law that prohibited cross burning. During a deputy U.S. solicitor general’s oral argument in favor of the law, Justice Thomas condemned him for not going far enough. Justice Thomas, who grew up in the segregated South and was the only black Justice on the bench, posed a very potent question: “Aren’t you understating the . . . effects of . . . the burning cross” given that crosses were “symbol[s] of [a] reign of terror” during the “100 years of lynching . . . in the South?” He continued, “I think that what you’re attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish.”<sup>3</sup>

Similarly, during the Senate Judiciary Committee hearing on the nomination of then-nominee, now-Justice Sonia Sotomayor, Senator Jeff Sessions challenged her prior representations that she could be an impartial judge by quoting remarks she made the day before: “You have repeatedly

1. *Virginia v. Black*, 538 U.S. 343 (2003). The specific issue before the Court was whether an anti-cross-burning statute violated the First Amendment right to symbolic expression. *Id.* at 351–52. Symbolic expression, or “symbolic speech,” refers to actions that convey a particular message. Generally, symbolic expression has been protected by the First Amendment; most notably, flag burning, wearing armbands, or sit-ins have been a form of protest. For a broad discussion of these cases, see Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197; Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004).

2. Dahlia Lithwick, *Virginia Burning: Are Cross-Burnings Speech or Violence?*, SLATE (Dec. 11, 2002, 6:21 PM), <http://www.slate.com/id/2075301/>.

3. Transcript of Oral Argument at 20–21, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107).

made this statement: ‘I accept the proposition that a difference there will be by the presence of women and people of color on the bench, and that my experiences affect the facts I choose to see as a judge.’”<sup>4</sup> Without hesitation, Sotomayor responded, “the point that I was making was that our life experiences do permit us to see some facts and understand them more easily than others.”<sup>5</sup> Ultimately, Senator Sessions made his stance clear that empathy and judicial decisionmaking can and should be mutually exclusive, saying, “Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.”<sup>6</sup>

These stories involving Justices Thomas and Sotomayor raise (again) the issues of whether judges are, or can be, “impartial” and whether empathy is compatible with judicial reasoning.<sup>7</sup> The discussion of whether judges can,<sup>8</sup> or should,<sup>9</sup> set aside their personal feelings and experiences is

---

4. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 84 (2009) (statement of Sen. Sessions, Ranking Member, S. Comm. on the Judiciary) [hereinafter *Confirmation Hearing on Judge Sonia Sotomayor*].

5. *Id.* (statement of Hon. Sonia Sotomayor).

6. *Id.* at 7 (statement of Sen. Jeff Sessions).

7. John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard,”* 120 YALE L.J. ONLINE 89, 90 (2010) (“To the Right, empathy was nothing less than a code word for judicial activism, a dog whistle to the Democratic base that the President would choose judges who would put the counsel of a bleeding heart above the demands of impartial justice.”); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1631 (2010) (“No sooner had President Barack Obama uttered the word ‘empathy’ in connection with judicial appointments that the word took on a life of its own. It became a code word for judicial overreaching, and it served as the blank slate onto which politicians painted doomsday scenarios of a judiciary run amok.” (footnote omitted)).

8. Legal commentators are skeptical of this possibility. *See, e.g.*, Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) (“[J]udges disserve themselves and the system if they presume that bias and prejudice do not enter the decisionmaking process to some degree.”); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 605 (1996) (“Pure impartiality is an ideal that can never be completely attained. Judges, after all, are human beings who come to the bench with feelings, knowledge, and beliefs that cannot be magically extirpated.”).

9. The notion that judges should be impartial has a long-standing tradition within American government. This philosophy dates back to Alexander Hamilton’s *Federalist Paper No. 78* in which he said the judiciary “is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.” THE FEDERALIST NO. 78 (Alexander Hamilton). The current rules governing judicial conduct adopted Hamilton’s stance of the impartial judge. This declaration is featured statutorily. *See* 28 U.S.C. § 455(a) (2006) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”). This proposition is also featured in the American Bar Association’s Model Code of Judicial Conduct. The provision that addresses bias defines it solely in terms of an individual’s personal background. MODEL CODE OF JUDICIAL CONDUCT 2.3(B) (2007) (“A judge shall not . . . manifest bias or prejudice, . . . including but not limited to bias [or] prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status,

not new; most legal academics (at least since the Legal Realists of the early twentieth century), recognize that judicial decisionmaking involves some discretion<sup>10</sup> and that decisionmaking does not occur in a vacuum. More recently, Critical Race Theorists have begun to ask if identity plays a role specifically in judicial decisionmaking, and more broadly within the law.<sup>11</sup> Although there has been a recent return to legal formalism and original intent among some legal theorists,<sup>12</sup> fundamentally, legal scholars share the

---

socioeconomic status, or political affiliation . . .”). Although judges are prohibited from unethical and inappropriate political activity, *see* MODEL CODE OF JUDICIAL CONDUCT 4 (2007), there is no explicit text that warns judges about having his or her political attitudes influence their judicial duties.

Notwithstanding the Model Code of Judicial Conduct, some legal commentators argue that citizens are ambivalent about having impartial triers of fact. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1217 (1992) (“We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person’s own implication in the lives of others.”). We believe this apparent ambivalence comes from confusion concerning commentary on the role of experience. Specifically, critics often conflate experience with bias and impartiality. In other words, a judge can bring his or her personal experiences to the bench but they should not undermine the law’s purpose of objective and detached decisionmaking. *See* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98 n.12, 99 (1997) (stating that the contributions judges from minority backgrounds can make to judicial decisionmaking actually foster impartiality by “diminishing the possibility that one perspective dominates”).

10. *See, e.g.*, VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT* 30 (2006) (commenting that Legal Realists are credited for asserting that judges insert their own beliefs and values into their decisionmaking); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 15, 15–16 (2007) (same). For a more detailed discussion, see *infra* note 31.

11. *See, e.g.*, PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT*, at xiv (1990) (discussing “the need to reconcile subjectivity and objectivity in producing scholarship”); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 6–7 (1991) (illustrating one critical race theorist’s attempt to challenge traditional concepts of “objective” legal scholarship by writing as “black, female and [a] commercial lawyer”); Angela P. Harris, *Race and Essentialism in Feminist Legal Thought*, 42 STAN. L. REV. 581, 583–84 (1990) (commenting that although most legal thinkers prefer to speak from a position of “objectivity” and “neutrality” rather than “subjectivity” and “bias,” there are theorists who would advance a more self-referential voice); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17, 19 (Mari J. Matsuda et al. eds., 1993) (“This description ties law to racism, showing that law is both a product and a promoter of racism.”); Girardeau A. Spann, *Pure Politics*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 21, 24 (Richard Delgado & Jean Stefancic, eds., 2000) (“[E]ven if a justice makes strenuous efforts to compensate for his or her known prejudices, the justice will still be vulnerable to those biases and predispositions that continue to operate at a subconscious level . . .”).

12. Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999) (discussing the various modes of modern legal formalism); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J.

recognition that there is some level of discretion inherent to judicial decisionmaking.

These questions have emerged explicitly in the most recent Senate confirmation hearings of U.S. Supreme Court nominees.<sup>13</sup> There have been questions about whether the nominee's social background would affect her ability to adjudicate cases fairly. Concerns central to the rule of law, such as predictability and consistency of the judiciary, have led politicians to question the role of personal identity in judicial decisionmaking. While these political ideology and constitutional theory questions are asked of all nominees, identity characteristics like race, sex, and the like typically are only asked of white female judges and minority judges. No senator asked Judge Roberts whether his social position (wealthy, white man) would affect his ability to fairly decide cases.

This criticism may also be part of what motivates advocacy of other measures that would limit the scope of judicial power, such as passing legislation that strips jurisdiction from federal courts<sup>14</sup> or overrides the

---

CONST. L. 155, 159 (2006) (proposing a "neoformalis[t]" theoretical framework that would require judges to follow their legal precedent).

13. This statement is not meant to suggest that judicial activism and political motives have entirely disappeared from confirmation debates. For example, Senator Al Franken of Minnesota asked Sotomayor to define the phrase "judicial activism" because "in political discourse about the role of the judiciary, that is almost the only phrase that is ever used. And I think that there has been an ominous increase in what I consider judicial activism of late . . ." *Confirmation Hearing on Judge Sonia Sotomayor*, *supra* note 4, at 383 (statement of Sen. Franken, Member, S. Comm. on the Judiciary). Another example from the hearing is featured in the statements of Linda Chavez, President and Chairman of the Center for Equal Opportunity. Chavez claimed that Sotomayor "drunk deep from the well of identity politics" and continued to provide examples in which her policy preferences guided her decisions in cases involving race-based government contracts, bilingual education, racial profiling, and affirmative action. *Confirmation Hearing on Judge Sonia Sotomayor*, *supra* note 4, at 493 (statement of Linda Chavez, President & Chairman of the Ctr. for Equal Opportunity). We are suggesting that there is an increased interest in the social and personal background of individuals that carries significant implications for decisionmaking and the opinions rendered. In fact, the statement made by Senator Sessions shows an interesting conflation between empathy and politics, *see Confirmation Hearing on Judge Sonia Sotomayor*, *supra* note 4, in which being empathetic makes a judge political and one who seeks to inject those preferences in cases.

14. Although there is no express provision regarding jurisdiction-stripping, the Constitution provides some (albeit more elusive) guidance regarding this matter. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Not surprisingly, scholars have written extensively on the interpretation of Article III and the constitutionality of limiting federal jurisdiction. *See, e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901–16 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 209–10 (1997); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953); Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation*

holdings of the Supreme Court.<sup>15</sup> These criticisms are frequently theoretical and are generally based on the untested assumption that a judge's personal background influences case disposition.

For all the political posturing and jurisprudential discussion about whether and to what extent identity is relevant<sup>16</sup> for judicial appointment or judicial decisionmaking, there has been a remarkable dearth of empirical data analyzing whether judges of different social backgrounds decide cases differently.

This Article is motivated by empirical and normative questions. First, do judges' personal backgrounds affect their case outcomes?<sup>17</sup> We sought to test whether federal judges with different identity characteristics make systematically different decisions, using a comprehensive dataset on federal employment civil rights cases. We believe employment civil rights cases give substantive intellectual purchase for this analysis. Aside from being one of the largest categories of civil court filings on the federal docket in

---

*of Article III*, 1997 BYU L. REV. 847, 856–94; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1636–41 (1990).

15. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–53 (1990) (discussing the increasing trend of congressional overrides of Supreme Court decisions); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533, 555 (2006).

16. Discussion of empathy became a part of the Supreme Court confirmation process in recent years primarily because President Obama said he would seek out judges who were empathetic while following the rule of law. He said:

I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook; it is also about how our laws affect the daily realities of people's lives. . . . I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at [sic] just decisions and outcomes.

President Barack Obama, Remarks on the Retirement of Justice David Souter (May 1, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900317/pdf/DCPD-200900317.pdf>. However, the role of empathy and judging has played a role in confirmation hearings, but, as one commentator points out, Senators only express concern when the nomination is made by a Democratic president. See Glenn Greenwald, *Justice Sam Alito on Empathy and Judging*, COMMON DREAMS (May 27, 2009), <http://www.commondreams.org/view/2009/05/27-13> (comparing the treatment of Republican judicial nominee Alito and Democratic nominee Sotomayor). Greenwald points to a number of instances in which then-nominee, now-Justice Samuel A. Alito somewhat embraces a judicial philosophy that includes empathy and experience: "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account." *Id.* (citing *Confirmation Hearing on the Nomination of Hon. Samuel Alito, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2006) (statement of Hon. Samuel Alito)).

17. We are not seeking to make a causal argument—for example, minority status does not cause a judge to vote a certain way—but rather, our primary research question is whether judges with a particular set of social characteristics systematically evaluate cases differently.

the United States,<sup>18</sup> litigation by private parties is arguably the most common form in which discrimination claims are adjudicated.<sup>19</sup> In addition, these contests often are emotionally charged for the parties. It may well be that if judges have been targets of discrimination, the experience will shape their perceptions about the presence or absence of discrimination.

Second, if personal background does influence case outcome, what are the implications for the justice system? We examine these questions empirically, focusing on case disposition at the summary judgment phase.<sup>20</sup> Summary judgment is an interesting trial moment to study because it is typically the first<sup>21</sup> opportunity and one of the only points in litigation

---

18. According to United States Courts 2010 caseload statistics, 32,125 private civil rights cases commenced in federal district court or federal circuit court of appeals, which is the largest case category in the federal court system. U.S. COURTS, Federal Judicial Caseload Statistics (Mar. 31, 2010), <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C03Mar10.pdf>. The universe of potential claims is even higher if we consider charges filed with the Equal Employment Opportunity Commission ("EEOC"). In 2010, the EEOC received 99,922 charge filings. While this figure reflects multiple claims of discrimination—for example, race and gender discrimination—these data suggest that there are more aggrieved employees who perceive themselves to be victims of discrimination, but who are not captured by court-filing statistics. Charge Statistics: FY 1997 Through FY 2010, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Jan. 8, 2012).

19. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 94–128 (2010) (discussing the historical trend of reliance on private litigation of civil rights issues).

20. There is variation in summary judgment rates across time, district, and case category, but these measures have been descriptive and have not investigated issues of judicial decisionmaking patterns from this perspective. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592–93 (2004); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 863 (2007); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 483–84 (2004); William P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427, 435–48 (1977); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 164–77 (2000); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, CORNELL LAW FACULTY PUBL'N 1, 2 (Aug. 5, 2008), [http://scholarship.law.cornell.edu/lrsp\\_papers/108](http://scholarship.law.cornell.edu/lrsp_papers/108).

21. FED. R. CIV. P. 56. Although there are several pretrial dispositive motions such as early dismissal, a dismissal in those instances may be the result of a procedural defect and not necessarily based on the merits. These defects include lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, and failure to join a party. FED. R. CIV. P. 12(b)(1)–(5), (7). Moreover, one merits-based defense under Rule 12—failure to state a claim upon which relief can be granted pursuant to 12(b)(6)—permits plaintiffs to amend their complaints. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE CIV.* § 1357 (3d ed. 2010). Dismissal of a case is only permitted if amending the complaint would be futile. See, e.g., *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1060 (9th Cir. 2008) (finding the amendment of complaint futile because the statute of limitations had run); *Bonano v.*

when parties call upon the trial judge to assess the merits of the plaintiff's claim and determine whether the case—in part or in whole—should proceed to trial.<sup>22</sup> In addition, and as importantly, the Federal Rules of Civil Procedure give judges considerable discretion to retain or dispose of cases at this phase, so it provides a unique opportunity to reveal the circumstances under which judges give a nonmoving party (which typically in litigation is the plaintiff) the benefit of the doubt.<sup>23</sup>

The Article is divided into four parts. Part II discusses the juridical, psychological, and political science literature to assess what we know about how personal background can influence judicial decisionmaking. Part III describes the data and methods we use to address our research question. Our study investigates questions concerning judge-plaintiff minority status using logistic regression to estimate predicted effects of minority status on outcome, controlling for other potentially relevant variables. Prior studies largely examine judicial behavior at a more macro level and do not probe the relationship between plaintiff characteristics and a judge's personal background.<sup>24</sup> By focusing on detailed case characteristics, this study provides evidence about whether the claims asserted or the plaintiffs' characteristics affect summary judgment rates in civil rights matters. Part IV presents the empirical results. Our data show variation across judges—namely, that white judges tend to dismiss cases for summary judgment at a higher rate than minority judges. These findings also show no political party effects, suggesting judicial decisionmaking may be less influenced by political ideology than some political scientists suggest and more influenced by experience than we have previously considered. Part V discusses the findings and concludes by considering how personal background may affect judicial decisionmaking. We then propose future

---

Southside United Hous. Dev. Corp., 363 F. Supp. 2d 559, 562–63 (E.D.N.Y. 2005) (rendering leave to amend futile when proposed new claim cannot withstand motion to dismiss for failure to state a claim).

22. See 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE CIV. § 2712 (3d ed. 2010).

23. FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . .”). See also WRIGHT, MILLER & KANE, *supra* note 22, § 2728 (The summary judgment standard supplies courts with the discretion to deny a motion even when the moving party could show there is no genuine issue of material fact). However, this discretion was briefly curtailed with the 2007 revision to the Rule 56 in which all references to “shall” were changed to “should” only to be changed back in 2010. WRIGHT, MILLER & KANE, *supra* note 22, §§ 2711, 2728. See also Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1147–49 (2010) (replacing “shall” with “should” allows for some, but not carte blanche, discretion to deny a motion for summary judgment even if there is no genuine issue of material fact).

24. See *infra* Part II.B.

research that can unpack these findings in a more systematic way.

## II. ASSESSING DISCRIMINATION: THREE PERSPECTIVES ON JUDICIAL DECISIONMAKING

Most empirical scholarship on judicial decisionmaking focuses on case outcomes in the appellate and Supreme Courts. Our research diverges from this pattern because we study district court judges and their decisions at the motion for summary judgment phase of trial. Rather than focusing on the mechanisms that drive judicial behavior, this Article contributes to the burgeoning discourse on federal district court judicial decisionmaking.<sup>25</sup> Most empirical work on the federal judiciary examines decisionmaking at the appellate and Supreme Court levels in part because the decisions judges render there carry significant precedential power and because they are easily accessible for study via online databases. These studies, however informative, do not capture the additional constraints<sup>26</sup> placed on lower

---

25. See generally NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005) (arguing that the appointment of lower court judges has become more and more politicized in the past few decades); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (exploring how gender affects a judge's individual decisionmaking as well as that of the other judges on the panel); Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL'Y 37, 38 (2009) (discussing the "complicated relationships within the federal judicial hierarchy"); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 26 J.L. ECON. & ORG. 1 (2011) (hypothesizing that federal district judges write opinions hoping to minimize their workload while maximizing their reputations and chances for advancement to higher courts); David A. Hoffman, Alan Izenman & Robert J. Jeffrey Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007) (discussing empirical data from trial courts that show that judges who write opinions are influenced mainly by procedure rather than by attempts to appeal to a wider audience or advance their own careers); Charles A. Johnson, *Law, Politics, and Judicial Decisionmaking: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325 (1987) (testing two competing theoretical models of lower federal court reactions to Supreme Court decisions); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts*, 36 AM. POL. RES. 669 (2008) (presenting empirical analysis offering support for the claim that district courts are constrained by the anticipated responses of appellate courts); Christina L. Boyd, *The Impact of Courts of Appeals on Substantive and Procedural Success in the Federal District Courts* (July 14, 2009) (working paper), available at <http://ssrn.com/abstract=1434076> (arguing that appellate courts impact district courts regarding which parties are victorious and which methods of decisionmaking take place).

26. Researchers have recognized that judges may be political but their voting must take into account the constraints placed on them, including any institutional constraints placed by the courts such as stare decisis. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 10 (1998). See also Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 591 (2001) (arguing that justices who vote according to their individual preferences and against the majority's interests risk congressional reversal and replacement); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 24 (2007) (explaining that while judicial

court judges; namely, appellate review and the more strict application of the law to cases.<sup>27</sup> And, they tell us very little about the day-to-day functioning of district courts.

A second contribution of this analysis is that we study judicial decisionmaking midstream in the litigation process,<sup>28</sup> while empirically testing whether legal and extralegal variables have any explanatory power in predicting case survival at the summary judgment phase. Given the critical role judges play at summary judgment,<sup>29</sup> it is important to understand how and why judges reach the decisions they do when evaluating the merits of a case. In the context of employment civil rights cases, the determination of discrimination—and more specifically, its presence or absence—depends largely on the judge’s perception of an employer’s actions against a plaintiff. Because illegal discrimination can operate through implicit bias rather than overt harassment,<sup>30</sup> the facts and

---

decisionmaking is influenced by “judges’ policy preferences,” it is “constrained by the prospect of higher court review”).

27. See *infra* Part II.A.

28. Most of the empirical work in this area focuses almost exclusively on settlement rates. See, e.g., Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?* 6 J. EMPIRICAL LEGAL STUD. 111, 125–46 (2009) (analyzing aggregate settlement rates in two federal districts); Galanter, *supra* note 20, at 481–84 (2004); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (“[C]ourts and policymakers should approach settlement with a more critical eye, distinguishing ‘good’ settlements from less desirable ones”); Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 40 (2002) (“[S]ettlement rates for some type of cases—such as torts—exceed[] 90 percent.”); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 161–62 (1986) (examining judges’ roles in settlement). However, there is significant literature that focuses on various factors that influence whether a case does go to trial. See, e.g., Cecil et al., *supra* note 20, at 863 (finding that summary judgment motions increased between 1975 and 2000, but that this did not influence outcome); Eisenberg & Lanvers, *supra* at 129–35 (finding that summary judgment rates varied across case categories and districts, particularly with matters concerning civil rights); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–94 (2010) (finding that only 6 percent of cases actually make it to trial and that the success of plaintiffs depends on whether the individual is represented by an attorney).

29. See Burbank, *supra* note 20, at 616 (finding that in 2000, judges in the Eastern District of Pennsylvania terminated 4.1 percent of cases by summary judgment); Cecil et al., *supra* note 20, at 883 (finding that 7.8 percent of cases ended at summary judgment in 2000); Eisenberg & Lanvers, *supra* note 20, at 13–17 (finding that the difference in summary judgment rates depending on district court was highly statistically significant).

30. See, e.g., Marianne Bertrand, Dolly Chugh & Sendhil Mullainathan, *Implicit Discrimination*, 95 AM. ECON. REV. 94, 94 (2005) (“[S]ometimes . . . discrimination may be *unintentional* and outside of the discriminator’s awareness”); John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65–66

evidence in these cases often are ambiguous and open to interpretation.

Although our analysis cannot capture the actual decision-making processes of a judge, we draw from a number of theories which, at the macro level, provide descriptive and explanatory power to our data. Three perspectives<sup>31</sup> are useful for considering judicial decisionmaking: (1) the empathetic perspective, a seldom-discussed view that suggests judges decide cases based on their lived experiences and interactions with macro-social factors that contain systemic social barriers to people of color and women; (2) the legal perspective or the legal model of decisionmaking, which takes the position that judges mechanistically apply the law to facts; and (3) the political perspective or the empirical explanation, which contends that judges tend to render opinions based on political, ideological, or strategic preferences.

#### A. THE EMPATHETIC PERSPECTIVE

Although judges may decide cases mechanically or politically, the empathetic perspective suggests that judges do not completely abandon their experiences when deciding cases. There are instances in which an individual's personal background influences how she perceives social situations. As Justice Sotomayor suggests, living in the United States as a Latina tends to include different life experiences, resultant attitudes, and world views. Perhaps as proponents and critics suggest, judges acknowledge the importance of law, yet add life experience resulting from

---

(2002) (analyzing the effect of implicit bias on interracial interactions); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971–73 (2006) (explaining that implicit bias demonstrated in tests is predictive of implicit bias in actual behavior); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (“There is now persuasive evidence that implicit bias against a social category . . . predicts disparate behavior toward individuals mapped to that category.”); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1004 (2006) (“[M]any scholars have drawn on advances in the empirical social sciences to demonstrate that what the law refers to as ‘intentional discrimination’ can just as easily result from the uncontrolled application of implicit, unconscious, or automatic stereotypes and other subtle ingroup preferences as from the operation of conscious discriminatory designs.”); Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOC. 299, 314–20 (2006) (“[A]n implicit attitude is an attitude that can be activated without conscious awareness and, when so triggered, influences judgments and actions”).

31. This is not a full and exhaustive list of theories, or perspectives, on judicial decisionmaking. For example, scholars have offered pragmatic, economic, strategic, and organizational theories of judicial behavior. We believe that with the specific case of civil rights claims, legal, political, and ideological empathy best describe how judges go about assessing these types of claims. For a review of theories not presented in this article, see RICHARD A. POSNER, *HOW JUDGES THINK* 19–56 (2008).

shared kinds of experiences.<sup>32</sup> Given this, we contend “empathy” (by which we mean the world views of judges that are formed, at least in part, by the social location they occupy), plays a crucial role in cases that are more emotionally charged and morally consequential, as viewed differently from controversies that are not (e.g., federalism and takings clause matters).<sup>33</sup> We believe that empathy and politically motivated decisionmaking are not synonymous, but scholars are quick to conflate the two.

The empathetic perspective also comes from the Critical Race Theory tradition, which suggests that a diverse judiciary greatly shapes judicial decisionmaking, legal analysis, and, by extension, the law itself.<sup>34</sup> Specifically, judges who hail from different social or cultural backgrounds may provide a more nuanced understanding of facts, evidence, and credibility determinations than judges who lack such experience. While the jurisprudential discourse in this area is significant,<sup>35</sup> there has been little empirical work to move beyond the anecdotal or doctrinal accounts.

To support this claim, we draw from the extensive literature in psychology that examines the influence of individual background on how individuals respond to questions about the presence or absence of discrimination. While psychologists define empathy in a variety of ways, the general definition suggests that empathy is an emotion that becomes activated by imagining or observing another person’s particular situation.<sup>36</sup>

---

32. See, e.g., Richard L. Allen, Michael C. Dawson & Ronald E. Brown, *A Schema-Based Approach to Modeling an African-American Racial Belief System*, 83 AM. POL. SCI. REV. 421, 435 (1989) (finding that a black individual’s socioeconomic status, religion, and media structure influence that individual’s cognitive processing of information).

33. This is empirically consistent with research that shows judges deciding cases less ideologically if the subject matter of the case is less political or morally charged. See Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 325–30 (2004).

34. See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117–19 (2003) (discussing how judges’ diverse backgrounds inform their judicial decisionmaking); Sherrilyn A. Iffill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 449–57 (2000) (connecting judicial diversity with diverse judicial decisionmaking).

35. See *supra* note 11.

36. E.g., C. DANIEL BATSON, *THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER* 86 (1991) (defining empathy as a “set of congruent vicarious emotions, those that are more other-focused than self-focused, including feelings of sympathy, compassion, tenderness, and the like”); MARK H. DAVIS, *EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH* 12 (1996) (describing empathy as an inner imitation when observing another person or object); Martin L. Hoffman, *Is Altruism Part of Human Nature?*, 40 J. PERSONALITY & SOC. PSYCHOL. 121, 128 (1981) (defining empathy as a “vicarious affective response to others: that is, an affective response appropriate to someone else’s situation rather than one’s own”).

Often (but not always), by observing or imagining the other person's emotions in a particular context, an empathetic response is generated because of "perspective taking."<sup>37</sup> In other words, empathy is a stand-alone emotion, but there can be an element of vicarious emotion as well. Empathy is different from sympathy, in which a person merely imagines the experiences of another. In contrast, a person experiencing empathy is aware and actually sensitive to the state or condition of another.<sup>38</sup>

Empathy has been shown to have a substantial impact on decisionmaking. For example, previous research shows that individuals who empathize with victims have a greater willingness to help that individual.<sup>39</sup> Whether a person is more or less empathetic depends on common membership in a social category or group.<sup>40</sup> Often these differences are based on race<sup>41</sup> and gender<sup>42</sup> categories.

Since empathy involves understanding the emotional states of other people, minority judges may be more open to the perspectives of members of subordinated groups, which posit that discrimination itself exists and remains a social problem. This proposition is consistent with research that suggests that individuals are more or less likely to perceive the presence of discrimination based on their identification with a stigmatized social

---

37. DAVIS, *supra* note 36, at 14. In our research, an example of empathy is a judge who identifies with the feelings of a victim of discrimination by putting himself or herself in the place of the victim as a way to understand the emotional evidence that is typically presented in employment civil rights matters.

38. *Id.* at 3–5.

39. See, e.g., C. Daniel Batson, et al., *An Additional Antecedent of Empathic Concern: Valuing the Welfare of the Person in Need*, 93 J. PERSONALITY & SOC. PSYCHOL. 65, 70 (2007) (finding that when an individual's welfare was valued more highly, empathic concern for the individual was also higher, and this increased empathy was "associated with increased helping"); C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 1042, 1052 (1995) ("Knowing and feeling empathy for the person in need . . . led many participants to forsake justice in the interest of benefiting the person for whom they felt empathy . . ."); Christine A. Smith & Irene H. Frieze, *Examining Rape Empathy from the Perspective of the Victim and the Assailant*, 33 J. APPLIED SOC. PSYCHOL. 476, 476 (2003) ("Empathy with a rape victim or perpetrator might influence perceptions, judgments, and blame of a rape victim or perpetrator.").

40. C. Daniel Batson et al., *Empathy, Attitudes, and Action: Can Feeling for a Member of a Stigmatized Group Motivate One to Help the Group?*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1656, 1657 (2002) ("There is considerable evidence that feeling increased empathy for a person in need increases the readiness to help that person." (citation omitted)); Mark Tarrant & Aimee Hadert, *Empathic Experience and Attitudes Toward Stigmatized Groups: Evidence for Attitude Generalization*, 40 J. APPLIED SOC. PSYCHOL. 1635, 1652 (2010).

41. James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1208 (2002).

42. Smith & Frieze, *supra* note 39, at 493.

group.<sup>43</sup> Group identification theory suggests that the more an individual identifies with a social group, the greater the likelihood that he or she will interpret interpersonal interactions in terms of group-based attitudes and beliefs.<sup>44</sup> Consistent with this theory, a number of studies reported strong correlations between group identification and perceptions of discrimination among members of devalued groups.<sup>45</sup>

Perceptions of discrimination between people who more or less identify with a social group are most pronounced in ambiguous situations.<sup>46</sup> For example, when there are ambiguous prejudice cues, women who highly identified with gender as their social group were significantly more likely to attribute a negative evaluation from a male as sex discrimination.<sup>47</sup> By contrast, women with low gender identification did not attribute ambiguous interpersonal cues to sex discrimination.<sup>48</sup> These findings suggest that in ambiguous circumstances, individuals who highly identify with their groups are vigilant for discrimination, whereas individuals with low group identification did not perceive discrimination. These processes may be particularly important in the context of employment discrimination cases, where indicators of discrimination in the workplace may be subtle.

#### B. THE LIBERAL LEGAL PERSPECTIVE

A second theory of judicial decisionmaking is the liberal legal model,

---

43. Cheryl R. Kaiser & Clara L. Wilkins, *Group Identification and Prejudice: Theoretical and Empirical Advances and Implications*, 66 J. SOC. ISSUES 461, 462–63 (2010); Brenda Major, Wendy J. Quinton & Shannon K. McCoy, *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 251, 258–59 (Mark P. Zanna ed., 2002).

44. Major, Quinton & McCoy, *supra* note 43, at 280, 308.

45. Brenda Major et al. *Perceiving Personal Discrimination: The Role of Group Status and Legitimizing Ideology*, 82 J. PERSONALITY & SOC. PSYCHOL. 269, 273 (2002); Robert M. Sellers & J. Nicole Shelton, *The Role of Racial Identity in Perceived Racial Discrimination*, 84 J. PERSONALITY & SOC. PSYCHOL. 1079, 1088–89 (2003). *See also* Nyla R. Branscombe, Michael T. Schmitt & Richard D. Harvey, *Perceiving Pervasive Discrimination Among African Americans: Implications for Group Identification and Well-Being*, 77 J. PERSONALITY & SOC. PSYCHOL. 135 (1999) (finding that blacks who perceive prejudice more closely align themselves with the minority group); Michael T. Schmitt et al., *Perceiving Discrimination Against One's Gender Group Has Different Implications for Well-Being in Women and Men*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 197, 198–99 (2002) (“[D]isadvantaged groups are likely to perceive prejudice against them as occurring across a wider variety of contexts than do privileged groups.”).

46. *E.g.*, Brenda Major, Wendy J. Quinton & Toni Schmader, *Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 220, 228–29 (2003).

47. *Id.* at 228.

48. *Id.*

which eschews “empathy” or “life experience” in favor of a model whereby judges act consistently to apply facts to law.<sup>49</sup> The liberal legal model is the most traditional (albeit aspirational) type of judicial decisionmaking. This theory suggests that judges decide cases by determining the relevant legal rule or principle and then apply it mechanistically to the facts of a case or controversy.<sup>50</sup> This view posits that judges interpret the law “in light of the plain meaning of statutes and the Constitution, the intent of the framers, . . . precedent,” and a balancing of societal interests.<sup>51</sup> Judges do not consider their personal or political views when adjudicating cases.<sup>52</sup>

This model has more explanatory power at the trial court level than at the appellate court level because of the additional constraints placed on trial court judges.<sup>53</sup> Not only can their decisions be reviewed by two levels of appellate courts, but also trial judges do not have control of their dockets to selectively accept cases to further their political objectives.<sup>54</sup> Even though appellate courts have similar restraints—namely, a higher reviewing court—rarely are cases granted certiorari and taken up to the Supreme Court.<sup>55</sup>

However, for many legal thinkers, such as legal realists and critical legal scholars, the notion that decisionmaking can and does follow a mechanical pattern of legal reasoning is questionable. Because these scholars believe the law is indeterminate and open to interpretation, they believe there is little possibility for a judge to mechanistically apply the law.<sup>56</sup> “In every legal system,” according to H.L.A. Hart, “a large and

---

49. Robert N. Wilentz, *Judicial Legitimacy—Finding the Law*, 8 SETON HALL LEGIS. J. 221, 228 (1985).

50. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988); Wilentz, *supra* note 49, at 228 (“The [mechanical] approach posits that all a judge need do is apply predetermined rules to the facts of a case.”). *But see* Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL’Y 583, 583 (1993) (rejecting the argument that legal formalism is “the mechanical application of determinate rules”).

51. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48 (2002).

52. Under this model of judicial behavior, judges serve merely as the mechanism to discharge the relevant law to a case or controversy. POSNER, *supra* note 31, at 42 (“Since the rules are given and have only to be applied . . . the legalist judge is uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy judgments, because he is not engaged, or at least he thinks he is not engaged, in making such judgments.”).

53. Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 233 (2009).

54. *Id.*

55. *Id.*

56. Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 51 (Martin P. Golding & William A. Edmundson eds., 2005). This critique comes from multiple schools of thought. For legal realists, the law is indeterminate not only because the law on the books (statutes, case law, etc.) is a system of contradictory rules, but also

important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.”<sup>57</sup>

### C. THE POLITICAL PERSPECTIVE

Given that the liberal legal model serves as more of an ideal type of decisionmaking, scholars recognized and sought to capture what judicial behavior really looks like using empirical attitudinal models.<sup>58</sup> This perspective suggests that judges have political preferences and seek to embed them in the opinions they render.<sup>59</sup> In other words, legal rules express the preferences of judges, and how they interpret the rules reflect their social, economic, and political outlook.

The attitudinal model shows empirical evidence of voting driven by political ideology (although most studies have relatively low explanatory power, meaning that political ideology can explain a relatively small percentage of the variation observed). Based on the assumption that votes can be directly correlated to judicial attitudes by coding and tracking votes, not only do studies find that judges display attitudinal patterns by consistently favoring conservative or liberal laws,<sup>60</sup> but there is also

---

because decision makers must look at extralegal considerations such as evidence, which harbors no standardized outcome. *Id. See, e.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* 46–52 (1930) (explaining legal realism); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431, 464–65 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *HARV. L. REV.* 697, 710 (1931) (recognizing “a plurality of elements in all situations and . . . the possibility of dealing with human relations in more than one way”). A more extreme interpretation from the critical legal studies movement views the law’s indeterminacy as a way for judges to embed political agenda into the decision. *See* DAVID KAIRYS, *INTRODUCTION TO THE POLITICS OF LAW* 1, 4 (1983) (“[T]he law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues . . . Judges then make choices, and those choices are most fundamentally value based, or political.”); SEGAL & SPAETH, *supra* note 51, at 87–88 (“[T]he legal realists argued that lawmaking inhered in judging.”).

57. H.L.A. HART, *THE CONCEPT OF LAW* 136 (2d. ed. 1994).

58. *See generally* SEGAL & SPAETH, *supra* note 51 (discussing the use of the attitudinal model to explain judicial decisionmaking).

59. *See id.* at 86 (“Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”).

60. *See, e.g., id.* at 323 (finding a very strong correlation of 0.76 between ideological values and voting); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 *AM. POL. SCI. REV.* 557, 561–62 (1989) (finding a very strong correlation of 0.80); Sunstein, Schkade, & Ellman, *supra* note 33, at 314–15 (finding a 13 percent difference in overall voting patterns between democrat and republican circuit court judges, even before considering panel effects).

support for the proposition that precedent does not constrain judges from voting based on their policy preferences.<sup>61</sup>

Despite the empirical power of many studies working within the attitudinal model, serious critiques have been made against this model. Social science research on judicial behavior may accurately measure what (some) judges do, but it is speculative about the judges' motives and incentives for acting ideologically or strategically, particularly at the trial court level.<sup>62</sup> While political and social considerations undoubtedly play a role throughout the realm of judicial decisionmaking,<sup>63</sup> the likelihood that judges behave consistently within attitudinal categories depends on institutional incentives and disincentives, including but not limited to institutional constraints,<sup>64</sup> such as standard of review, appellate court review, and the law itself. On the other hand, federal district court judges may have ambition for higher office (for example, the U.S. Court of Appeals or the Supreme Court), and thus may have significant incentives to placate others who aid in the nomination of judges. However, we also believe that there are instances in the litigation process in which trial judges have opportunities to legitimately exercise discretion, conditions not all that different from those upon which the attitudinal model is premised.

### III. AN EMPIRICAL ANALYSIS OF FEDERAL DISTRICT COURT JUDGES AND DISCRIMINATION

This analysis investigates whether and to what extent the three perspectives play a role in explaining how federal district court judges decide employment civil rights cases. Although scholars suggest that

---

61. SEGAL & SPAETH, *supra* note 51, at 111. However, the one caveat to this proposition is that most of these studies examine judges who reside in courts of appellate jurisdiction.

62. See C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 17 (1996) (“[T]he axiomatic interpretation of aggregate outcomes as the product of extralegal policy preferences assumes away important questions about the cognitive process by which legalistic procedures produce politicized outcomes . . .”).

63. Numerous studies have found links between lower court judges' policy preferences, as measured by the judges' prior party affiliations, the party of the appointing president, and the judges' voting decisions. See, e.g., *id.* at 24–57; C.K. Rowland & Robert A. Carp, *A Longitudinal Study of Party Effects on Federal District Court Policy Propensities*, 24 AM. J. POL. SCI. 291, 300 (1980). However, these studies did not sufficiently account for the possibility that even policy-maximizing lower court judges will find their behavior constrained by the threat of reversal on appeal.

64. Going beyond the attitudinal model, this theory contends that preferences cannot be viewed in isolation, but should be considered in the way they interact with the collegial institutional context, including stare decisis and other judges. As such, judicial decisionmaking cannot be explained without accounting for these interactive effects and the strategic behavior they occasion. Put simply, judges behave strategically to achieve those goals, given the institutional context, structures, and constraints. EPSTEIN & KNIGHT, *supra* note 26, at 10–11.

judges tend to decide cases politically, we hypothesize that judges' decisions may vary according to their personal characteristics, demographics, and life experiences (perhaps without intention). Social-psychological research demonstrates that if there is ingroup bias, it is most likely to occur when race or gender are "primes,"<sup>65</sup> making employment civil rights cases a theoretically rich location for empirical study of these questions. Part III.A describes the data collection process; Part III.B explains our statistical models and our predictions.

#### A. DATA COLLECTION

The data analyzed in this Article comes from a large random sample of federal district court filings of employment civil rights disputes filed between 1988 and 2003. The sample comprises employment civil rights cases filed in seven regionally diverse districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco, which account for the districts in which roughly 20 percent of all federal district court cases are filed.<sup>66</sup> Researchers traveled to these district courts and federal records centers, where cases are archived, to ensure a random

---

65. In social psychology, "primes" refer to cues that are introduced to individuals and can produce and reproduce stereotypes such as race and gender. Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1477 (1998). These primes can often influence the interpretation of events. For example, individuals primed with racial stereotypes are more likely to find a black criminal defendant guilty than a white criminal defendant. Bernd Wittenbrink & Julia R. Henly, *Creating Social Reality: Informational Social Influence and the Content of Stereotypic Beliefs*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 598, 603 (1996). These primes are implicit and seemingly automatic responses to different forms of cues such as word or visual images. The most famous study is the Implicit Association Test where participants are presented with visual images or words that they have to sort based on association. For example "Black" and "White" would be on the same screen as "safe" or "dangerous." Research indicates that these primes—although unconscious—are very racialized and reveal stereotypic associations to individuals based on their race. See generally Greenwald, McGhee & Schwartz, *supra* (discussing the usefulness of implicit association tests based on the findings of three experiments).

66. The research design replicated and greatly expanded on the earlier research project of John Donohue and Peter Siegelman, who investigated the changing nature of federal employment discrimination law from the 1970s through 1990. See generally John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (analyzing the effects of the business cycle on employment discrimination litigation); John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993) (same); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995) (same). Our data were a random sample of federal district court cases and 100 interviews with plaintiffs, defendants, and their attorneys. Nielsen, Nelson & Lancaster, *supra* note 28, at 181.

sample of case filings (rather than using databases like Westlaw, LexisNexis, or Public Access to Court Electronic Records (“PACER”), which contain only some of these cases).<sup>67</sup> Our elaborate coding form asked over one hundred questions concerning case characteristics as well as outcome. For this paper, however, we will primarily be relying on the variables for the outcome of summary judgment motions and the race of the presiding judge.

We cross-referenced the judge and district court to obtain information about judges using the Federal Judicial Center’s biographical directory, including age, years on the bench, race, gender, and the President who appointed the judge to the bench.<sup>68</sup> Given our research question, we retained only those cases in which the judge presiding over the case was appointed by the President of the United States, to control for possible political party biases and also because magistrate judges are appointed by a majority vote of federal district judges of a particular district and are not appointed for life.<sup>69</sup>

Although our dataset features a number of measures that capture various points within litigation—pretrial dismissal under Rule 12, early and late settlement, and trial—we limited our analysis for this Article to matters in which a judge decided a motion for summary judgment. This decision has practical and theoretical justifications. Practically, our data show that few cases reach trial (100 of our 1672 observations), and within that group only a handful were bench trials,<sup>70</sup> which limits the universe of cases we can rely on to evaluate differences across judge and plaintiff backgrounds.

Summary judgment is a good choice for analyzing judicial decisionmaking because it is a merits-based motion, but a stage in litigation where the judge possesses considerable discretion. Rule 56 of the Federal Rules of Civil Procedure authorizes a federal district court judge to

---

67. Research on whether a judge’s social background truly plays a role in case outcomes has yielded mixed results within social science. Some scholars believe that any apparent differences stem from which cases are published, suggesting that judges recognizing that their opinions will be cited style them differently. *See* Keele et al., *supra* note 53, at 218–19.

68. For example, only twenty-six federal district court judges are black females, or 4.4 percent. Federal Judicial Center, Biographical Directory of Judges, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Jan. 16, 2012).

69. Our decision to remove magistrate judges from our dataset was a conscious one. Federal district court judges are nominated by the President, *see* U.S. CONST. art. II, § 2, and confirmed by the Senate, *see* U.S. CONST. art. III, § 1. Magistrate judges are appointed by a majority vote of federal district judges in a particular district. 28 U.S.C. § 631(a) (2006). Given this distinction, we believed that there is no ideology measure for these individuals.

70. Nielsen, Nelson & Lancaster, *supra* note 28, at 187.

authorize judgment in whole or in part in a case when the record establishes that a party is entitled to that judgment as a matter of law.<sup>71</sup> Put simply, this rule permits a judge to look at the merits of the case and the presence or absence of “genuine dispute as to any material fact.”<sup>72</sup> Although the Rules Advisory Committee modified Rule 56, judges still have some discretionary power to retain cases that do not satisfy the standard of the rule. In 2007, Rule 56 was briefly amended so that in Rules 56(c), (d), and (e), all references to when summary judgment “shall” be entered were changed to “should.”<sup>73</sup> However, in 2010, the Advisory Committee reinstated “shall” for these provisions.<sup>74</sup> This marked an acknowledgment that a judge can “deny summary judgment even when it appears that there is no genuine issue of material fact.”<sup>75</sup> In other words, even when a plaintiff does not produce sufficient evidence to survive a summary judgment motion, a judge can choose to retain a case even if the nonmoving party does not satisfy the burden of production or persuasion.

The dependent variable we analyzed was whether a case survived, or was disposed of, in summary judgment. We coded this variable dichotomously—“0” representing a case that survived in whole or in part and “1” representing a case that was dismissed in its entirety. Because our theoretical questions focused on whether a judge perceived the plaintiff as the victim of illegal discrimination, this coding scheme is the most accurate.<sup>76</sup> In addition, as a practical matter, some plaintiffs may assert multiple claims not knowing what form of discrimination was operating in the workplace (for example, gender versus race discrimination).

We analyzed 522 motions for summary judgment decided by 431 federal district court judges determining the fate of 520 plaintiffs. The demographic characteristics of the judges are described and discussed below, but the proportion of minority judges in our sample is lower than the representation of minority judges on the federal bench generally.

---

71. FED. R. CIV. P. 56.

72. FED. R. CIV. P. 56(a).

73. FED. R. CIV. P. 56 advisory committee’s note on 2007 amendments.

74. FED. R. CIV. P. 56 advisory committee’s note on 2010 amendments.

75. See WRIGHT, MILLER & KANE, *supra* note 22.

76. Our data features cases of plaintiff-initiated and cross-motions for summary judgment (albeit very few). To account for this, we coded our outcome variable to indicate whether the plaintiff’s motion was dismissed or retained.

## B. STATISTICAL MODELS AND HYPOTHESES

To assess the relationship between judges' demographic characteristics and summary judgment outcomes, we analyze the effect of various case characteristics on the probability that a case is dismissed at summary judgment. Because the dependent (or outcome) variable is binary, we specify three different logistic regression models.<sup>77</sup>

$$\text{Model 1: } \ln[P/(1-P)] = \beta_0 + \beta_1 X_{i\_case} + e_i$$

$$\text{Model 2: } \ln[P/(1-P)] = \beta_0 + \beta_1 X_{i\_judge} + e_i$$

$$\text{Model 3: } \ln[P/(1-P)] = \beta_0 + \beta_1 X_{i\_judge} + \beta_2 X_{i\_case} + e_i$$

In each model,  $\ln[P/(1-P)]$  represents the outcome of case  $i$  at summary judgment.<sup>78</sup> As noted above, all the cases in the dataset involve a determination at this phase of litigation and are coded as "1" if the case is dismissed and "0" if the case survives in whole or in part.<sup>79</sup> The first model includes only plaintiff and case characteristics. This model is meant to consider whether case disposition at summary judgment depends not on the judge presiding over the matter, but rather on elements such as the type of claim asserted (sex versus race discrimination); the plaintiff's characteristics such as occupation and tenure on the job; and the plaintiff's representational status. This model is similar to a model in our previous research<sup>80</sup> but eliminates a number of variables that were insignificant.<sup>81</sup>

---

77. For a more detailed discussion about logistic regression, see generally, FRED C. PAMPEL, *LOGISTIC REGRESSION: A PRIMER* (Michael S. Lewis-Beck ed., 2000) (addressing the logic of logistic regression, the interpretation of results, estimation procedure, and probit versus logit analysis).

78. The outcome is the probability of presence of a particular outcome. This figure is represented as logged odds. PAMPEL, *supra* note 77, at 10. In this case, we are interested in the probability that a case would be dismissed at summary judgment.

79. We coded our variable in this fashion because it is typical for plaintiffs to include multiple claims and plead in the alternative, which is permitted under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 8(d)(2)–(3).

80. See generally Nielsen, Nelson & Lancaster, *supra* note 28.

81. We removed two variables that we constructed and used in previous work. Although these variables were meant to measure the "quality" of the case (and by extension the "strength" of the case), they were found to be statistically insignificant and somewhat imprecise. One variable was the index of legal effort. See Nielsen, Nelson & Lancaster, *supra* note 28, at 182. This measure ranged from 0 to 3 and points were assigned if a case file contained depositions, expert testimony, or statistical evidence at summary judgment. *Id.* From a doctrinal perspective, the quantity of evidence proffered does not and should not influence the ruling of a summary judgment motion. See WRIGHT & MILLER, *supra* note 21. The second variable we eliminated from our analysis was the treatment of the charge that preceded the lawsuit by the EEOC, as well as the EEOC priority code for cases filed after 1995. See Nielsen, Nelson & Lancaster, *supra* note 28, at 182. The EEOC established a priority case handling process in which an EEOC complaint processing specialist assigned each case an A, B, or C priority code. *Id.* at 191. The specialist also decided if further investigation will "probably" result in a cause finding (an "A" case), will "likely" result in a cause finding (a "B" case), or has "uncertain merit" (a "C" case). *Id.* This

We constructed this model to test the legal model because it takes into account case-specific variables that would influence the outcome at summary judgment. In other words, if we find this model to best describe our data, a judge's political or personal preferences do not play a role in case disposition.

The second model contains variables for judges' demographic characteristics. The variable  $\beta_1$  is a binary variable coded as "2" if the judge is identified by the Federal Center as a racial minority and "1" if the judge is white.<sup>82</sup> We included a number of covariates concerning a judge's background that have previously been found to influence case outcomes including: race,<sup>83</sup> gender,<sup>84</sup> and the political party of the appointing President.<sup>85</sup> This model presumes that a judge's personal background will

---

variable not only was insignificant, but research also reveals that the assignment of priority codes is somewhat inconsistent. *See id.* at 191–92; C. Elizabeth Hirsh, *Settling for Less?: Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239 (2008) (discussing the EEOC "Charge Handling Priority System" and finding that "[t]he intensity of investigations varies considerably across cases").

82. Our coding scheme for this variable was a conscious one. First, we had few observations involving different ethnic and racial minority judges that when we attempted to create a variable for each group based on white, black, Asian, Hispanic and other, many of these variables dropped out of our model. Theoretically, our decision to make this a binary variable (minority/nonminority) based on literature suggesting that minority status leads to increased sensitivity to situations involving discrimination.

83. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156–63 (2009) (finding that both the race and political affiliation of judges impacts the outcome in discrimination cases); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decisionmaking: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 761 (2001) ("[B]lack judges are somewhat more likely to incarcerate defendants and hence are more punitive in their sentencing decisions."); Thomas M. Uhlman, *Black Elite Decisionmaking: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 891 (1978) (finding little difference between black and white judges "in determining guilt and assigning punishments," but noting that "[r]ace-related defendant disparities appear in sentencing").

84. *See, e.g.*, Boyd, Epstein & Martin, *supra* note 25, at 406 ("observ[ing] consistent and statistically significant individual and panel effects in sex discrimination disputes"); Sue Davis, Susan Haire & Donald Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993) (finding statistically significant differences between men and women judges in their support for employment discrimination claimants and for criminal defendants in search and seizure cases); John Gruhl, Cassa Spohn & Susan Welch, *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 320 (1981) (finding that "[w]omen are about twice as likely to sentence females to prison as men are"); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (finding that plaintiffs in sexual harassment and sex discrimination cases "were twice as likely to prevail when a female judge was on the bench").

85. *See, e.g.*, SEGAL & SPAETH, *supra* note 51, at 217–22 (discussing presidential impact on the Supreme Court based on how many Justices they appointed and who those Justices replaced); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of*

correlate with the outcome of summary judgment.

The third model is a combination of the first two. This model takes into account a judge's personal background while controlling for variables that may affect summary judgment outcome, particularly plaintiff and case characteristics. This model not only controls for all judge-specific and case-specific variables, but it also accounts for a type of judicial behavior in which legal, political, and empathetic perspectives are operating.

If judges' demographic characteristics have an effect on summary judgment motion outcomes, we should see variation across judges according to minority status or gender, even holding constant the political party of the judge. We also might expect to see variation across plaintiff characteristics. If judicial variables have negative coefficients in models 1 and 3, it means that minority judges are less likely to dismiss their cases at summary judgment. If the political theory of judicial decisionmaking is operating, we would expect to see judges appointed by Democratic presidents to be less likely to dismiss cases. If psychological theories of empathy and identity group theory are operating, the plaintiff's personal background in tandem with a judge's personal background will predict whether a case survives summary judgment.

#### IV. RESULTS

We first ran a number of descriptive and bivariate analyses of summary judgment outcomes with key explanatory variables. The dependent measure (outcome of motion for summary judgment) was close to even, but that defendants were slightly more likely to be successful at this stage of litigation than were plaintiffs. In the 522 cases that reached summary judgment, 293 (or 56%), terminated the plaintiffs' case, while all or some portion of the plaintiffs' case survived in 229 (or 44%) of the cases we analyzed.

Next, we analyzed key judicial characteristics. Table 1 below presents these descriptive statistics. These data show that, in the aggregate, minority judges have served on the bench for virtually the same period as white judges (9.95 years versus 9.88 years for white judges). The number of

---

*Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 276–77 (1995) (finding that “[c]ases before judges appointed by Republican presidents are more likely to have settled and won or settled than cases before judges appointed by Democratic presidents, although the result [was] not statistically significant”); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1521–28 (2007) (finding that Justices behave according to the appointing President's expectations in the early years of their tenure, but that as time passes, the influence of the appointing President decreases).

---

---

Republican-appointed judges was higher (54.5% versus 44.5% for Democrat appointees)<sup>86</sup> but on a proportionate basis, minority judges were 53.2% Republican and 46.8% Democrat. Roughly 10% of the judges in our sample were racial/ethnic minorities and 22% were female. Thus, our sample includes slightly fewer women judges than the national composition (22% in our sample versus 29% nationally), and many fewer minority judges (10% in our sample versus 23% nationally).<sup>87</sup> The differences between our sample and the broader judiciary are the result of drawing from selected jurisdictions and not the entire federal district court judiciary.

---

86. Within the comprehensive dataset, there was a higher proportion of minority judges who were elected by Democrat presidents (67.59% minorities versus 32.41% white).

87. Federal Judicial Center, *supra* note 68.

TABLE 1. Descriptive Statistics on Judges at Summary Judgment

<i>Variable</i>	<i>Frequency</i>	<i>Percent (%)</i>
<i>Race</i>		
White	432	85.35
Minority*	47	9.81
<i>Gender</i>		
Male	374	78.1
Female	105	21.9
<i>Political Party of Appointing President</i>		
Republican	261	54.5
Democrat	218	45.5
<i>Years on Bench</i>		
White	Mean = 9.88	$\sigma = 7.8$
Minority*	Mean = 9.95	$\sigma = 7.5$

\*Minority includes Black, Hispanic, and Asian. Minority status used for analysis based on Federal Judicial Center's classification.

After analyzing the simple distributions of case outcomes and judicial characteristics, we ran bivariate analyses of three categories of variables against the dependent variable: plaintiff characteristics, claim characteristics, and judicial characteristics. This revealed two statistically significant relationships.<sup>88</sup>

88. The flipside is that we found a number of variables for which the relationship with our dependent variable was insignificant; most notably, the judge's political party affiliation ( $\chi^2(1) = 0.0555, p = .814$ ).

TABLE 2. Cross Tabulation Representational Status by Summary Judgment Outcome

Representational Status	Case Dismissed at Summary Judgment		Total
	No	Yes	
Pro Se	29 (23.20%)	298 (76.8%)	382
Representation	180 (47.12%)	202 (52.88%)	125
TOTAL	209	298	507

( $r = 0.209$ ;  $\chi^2(1) = 22.4$ ,  $p = .000$ )

A plaintiff's representational status had a large, significant effect on summary judgment outcomes ( $r = 0.209$ ;  $\chi^2(1) = 22.4$ ,  $p = .000$ ). In table 2 above, the proportion of pro se plaintiffs who had their cases dismissed at summary judgment was 0.768 (67.79 percent), while plaintiffs with attorneys had their cases dismissed only 52.88 percent of the time. This reveals nearly a 24 percent difference in summary judgment outcome based only on whether the plaintiff has a lawyer. However, other plaintiff characteristics, such as gender and age, were not significantly associated with summary judgment outcome. This finding is consistent with previous work with this dataset<sup>89</sup> and existing access to justice research.<sup>90</sup>

TABLE 3. Cross Tabulation Judge Minority Status by Summary Judgment Outcome

Judge Minority Status	Case Dismissed at Summary Judgment		Total
	No	Yes	
White	169 (39.12%)	263 (60.88%)	432
Minority	29 (61.7%)	18 (38.3%)	47
TOTAL	198	281	479

( $r = -0.1364$ ;  $\chi^2(1) = 8.91$ ,  $p = .003$ )

Table 3 above shows a strong and significant difference in the outcomes handed down by minority judges versus white judges ( $r =$

89. See Nielsen, Nelson & Lancaster, *supra* note 28, at 188–92 (finding that legal representation is critical to plaintiff success in court generally, but also to avoid losing at summary judgment).

90. See, e.g., WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (Richard H. Hall ed., 1990); DEBORAH L. RHODE, ACCESS TO JUSTICE 14–15 (2004); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346–52 (2008).

-0.1364;  $\chi^2(1) = 8.91, p = .003$ ). Overall, white judges are far more likely to grant a motion for summary judgment for the defendant (61 percent of cases), than are their counterpart minority judges (38 percent of the time, or some 23 percent less than white judges). This finding is consistent with previous work concerning the role of race and decisionmaking.<sup>91</sup> However, there was no statistically significant difference in dismissal rates based on a judge's gender, political party affiliation, or years on the bench.

#### A. LOGISTIC REGRESSION MODEL

The focal point of our analysis examines the independent main effects of plaintiff, claim, and judicial characteristics and how they influence summary judgment outcomes. We present the results of our logit model in table 4.

---

91. See Chew & Kelley, *supra* note 83, at 1156–58 (finding that judges' race impacts the outcome in discrimination cases).

TABLE 4. Binary Logit Models Predicting Summary Judgment Outcome, 1988–2003

Independent Variable	Litigation Characteristics	Judicial Characteristics	Complete Model
<i>Plaintiff Characteristics</i>			
Minority	0.267(0.491)		0.244 (0.524)
Female	-0.719(0.511)		-0.831(0.535)
Manager, Professional	-1.836**(0.699)		-1.658*(0.735)
Sales, Service, Office Occ.	-1.915**(0.727)		-1.64*(0.764)
Age	-0.0228(-1.09)		-0.012(0.0244)
Member of Union	0.285(0.57)		-0.217(0.612)
<i>Statutory Basis / Type of Discrimination</i>			
Title VII – Race	-0.596(0.533)		-0.532(0.576)
Title VII – Sex	1.658**(0.591)		1.63*(0.605)
Title VII – Other	0.102(1.209)		-1.206(-0.92)
ADEA – Age	0.242(0.528)		0.348(0.551)
ADA – Disability	-0.309(0.508)		-0.145(0.543)
42 USC 1981	0.482(0.516)		0.558(0.536)
42 USC 1983	-1.841*(0.76)		-1.890*(0.776)
Constitutional Case	0.624(0.874)		0.529(0.907)
Other Statutory Basis of Suit	-0.349(0.449)		-0.446(0.480)
<i>Alleged Discriminatory Practice</i>			
Hiring	-2.037**(0.764)		-1.97*(0.789)
Firing	-0.805(0.436)		-0.749(0.460)
Retaliation	-1.053*(0.418)		-0.0950*(0.454)
Sexual Harassment	-1.048(0.791)		-0.600(0.863)
Conditions of Employment	-0.309(0.471)		-0.424(0.499)
Pay	-1.155*(0.589)		-1.17(0.617)
<i>Litigation/Representational Status</i>			
<i>Pro Se</i>	2.081***(0.565)		2.024***(0.58)
Multiple Plaintiffs	-1.781*(0.727)		-1.705*(0.735)
<i>Judicial Characteristics</i>			
Minority		-2.581***(0.773)	-2.339*(0.961)
Female		-0.179(0.388)	-0.436(0.522)
Democrat		-0.141(0.332)	-0.0227(0.429)
Years on Bench		0.0088(0.0205)	-0.018(0.0273)
Constant	6.186***(1.746)	3.035***(3.31)	8.65***(2.158)
Observations	184	184	184
<i>AIC</i>	227	243.9	226.4
<i>BIC</i>	304.2	260	316.4

As model 1 shows, a number of variables predict the dismissal of a case at summary judgment, including a plaintiff's representation status

(unrepresented plaintiffs' cases are more likely to be dismissed), and the number of plaintiffs (the more plaintiffs in a lawsuit, the less likely it will be dismissed). These findings are consistent with our bivariate analyses. Pro se plaintiffs are statistically more likely to have their cases dismissed entirely at summary judgment ( $b = 2.081, p < .001$ ). In addition, a case with more than one plaintiff is less likely to be dismissed entirely at summary judgment ( $b = -1.78, p < .01$ ). There were no significant differences based on a plaintiff's minority status or gender, but we suspect that controlling for claim type (race discrimination versus sex discrimination) accounted for any potential variation. In this model, sex discrimination claims were more likely to be dismissed at summary judgment ( $b = 1.658, p < .01$ ).

Model 2 examines only judicial characteristics, with the hypothesis that judges may decide cases politically or personally, regardless of claim characteristics. Although this model is the weakest of our three models, it shows that a judge's minority status significantly predicts case disposition. Consistent with our bivariate analysis and other literature, a white judge is more likely to dispose of a case at summary judgment than a minority judge ( $b = -2.581, p < .01$ ). This holds true even when controlling for judges' gender, political party, and tenure effects.<sup>92</sup>

For purposes of this analysis as well as for the remainder of the Article, we focus on model 3 featured in table 2 because the fit statistics indicate that this model best fits our data.<sup>93</sup> From this model, we find a

---

92. We did not include district effects in our analysis for a number of reasons. First, we examined whether minority judges were evenly distributed within the various jurisdictions. We found that minority judges were evenly distributed within the seven jurisdictions, although there were slightly more judges in the Eastern District of Pennsylvania and fewer in the Northern District of Texas: Eastern District of Pennsylvania (18.04%); Northern District of Illinois (16.22%); Southern District of New York (14.23%); Northern District of California (13.78%); Northern District of Georgia (9.72%); Eastern District of Louisiana (8.94%); and Northern District of Texas (7.2%). We then conducted a bivariate analysis to determine whether there were statistically significant differences in summary judgment outcome based on district. There were significant differences across jurisdictions ( $\chi^2(6) = 32.76, p = .000$ ), but the actual distribution showed that only the Eastern District of Pennsylvania retains cases at summary judgment at a higher rate, whereas the other districts have a higher proportion of dismissing cases entirely. This is the same jurisdiction with a higher proportion of minority judges than the other federal district courts.

93. We conducted Akaike Information Criterion ("AIC") and Bayesian Information Criterion ("BIC") tests to judge which model best fit the values of our data. These tests select the model that maximizes the log likelihood (the likelihood that the true values from our data "fit" the values produced from the logistic regression), given the number of parameters (independent variables). See generally Kenneth P. Burnham & David R. Anderson, *Multimodel Inference: Understanding AIC and BIC in Model Selection*, 33 SOC. METHODS & RES. 261 (2004) (discussing AIC versus BIC model selection and multi-model inference, including methods of model averaging). When we compared our first and third models, we found that the third model—which included claim, plaintiff, and judicial

number of effects that influence summary judgment disposition. With respect to plaintiff and claim characteristics, cases involving sex discrimination are more likely to be dismissed ( $b = 1.63, p < .01$ ). Not surprising, in this case, the number of plaintiffs and representational status predicted whether a case was dismissed on summary judgment. When a case has more than one plaintiff, it is significantly less likely to be dismissed ( $b = -1.705, p < .05$ ). When a plaintiff is unrepresented, a case is more likely to be dismissed ( $b = 2.024, p < .001$ ).

In model 3, there is only one variable that predicts whether a case will be dismissed entirely at summary judgment. Consistent with our bivariate analysis and model 2, a white judge is more likely to dispose of a case at summary judgment than is a minority judge ( $b = -2.339, p < .05$ ). This holds true even when controlling for judges' gender, political party affiliation, and tenure effects.

#### B. INDIVIDUAL-LEVEL ANALYSES

While the effects presented in table 4 provide an overall analysis of the determinants of outcomes in employment cases at the summary judgment phase, we also were interested in examining the interaction between certain characteristics of the plaintiffs and the minority status of the judge. To get at this analysis, we constructed predicted probabilities, which allowed us to understand the exact impact of a variable on our outcome.<sup>94</sup> We also considered representational status because of its statistical significance in our logit models and because it may capture more latent forms of racial and socioeconomic disadvantage.<sup>95</sup> What follows is a

---

characteristics—best fit our data.

Even though district did not appear to influence summary judgment outcome, we ran a logistic regression that accounted for district effects. Aside from the Eastern District of Pennsylvania remaining significant, district effects proved to be insignificant. We removed district effects from our final model because they also weakened the fit of our model to our data. The McFadden's  $R^2$  went up from 0.321 (32.1 percent) to 0.371 (37.1 percent), suggesting that the variance increased as we took into account district effects. Moreover, although the AIC value went down as we added our district variables, the BIC statistic (which imposes a more stringent standard), was smaller when we removed them from the model. This is consistent when running the likelihood ratio test in which district variables did not improve the model ( $p = .0520$ ).

94. J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 119–20 (1st ed. 2001). We controlled for judge and plaintiff minority status as well as representational status and held the other variables at their means.

95. Both the more comprehensive data and summary judgment sample show that minorities are more likely to pursue these matters pro se. In our larger sample, 21.48 percent of plaintiffs remained pro se throughout litigation versus 8.13 percent of white plaintiffs. Robert L. Nelson et al., Rights on Trial: Race and Representation in Employment Civil Rights Litigation 55 (Apr. 11, 2011) (unpublished

presentation of race and pro se estimates.

### 1. Judge-Plaintiff Minority Status

Table 5 shows that white and minority judges dispose of race discrimination summary judgment motions at different rates. And, when judges hear cases brought by plaintiffs who are the same minority status as the judge, the cases survive motions for summary judgment at a much higher rate. For example, when a white judge decides a case involving a white plaintiff, the plaintiff's case (or some portion of it) has a 40 percent predicted probability of surviving a motion for summary judgment. When a white judge adjudicates a case involving a minority plaintiff, however, the predicted probability of the plaintiff's case surviving summary judgment drops to roughly 34.43 percent.

TABLE 5. Predicted Probabilities Estimated for Minority Status Using Logit Model

Independent Variable	SJ Survival $Pr(y = 0 x)$	SJ Dismissal $Pr(y = 1 x)$
White Judge		
White Plaintiff	0.4014	0.5986
Minority Plaintiff	0.3443	0.6557
Minority Judge		
White Plaintiff	0.8742	0.1258
Minority Plaintiff	0.8448	0.1552

Minority judges are more likely to allow employment civil rights cases to continue past motions for summary judgment regardless of the race of the plaintiff. When a minority judge presides over a case involving a minority plaintiff, the plaintiff's case (or some portion of it), has an 84.48 percent predicted probability of surviving summary judgment. And, consistent with prior research,<sup>96</sup> our data demonstrates that a minority judge is likely to allow some portion of a white plaintiff's case to continue at nearly the same predicted probability (87.42 percent). Overall, there is a

manuscript) (on file with authors). Our summary judgment subsample shows that of the cases that reached summary judgment, 32.27 percent were cases brought by minority pro se plaintiffs, while 13.66 percent of cases were brought by white pro se plaintiffs.

96. See Uhlman, *supra* note 83.

47.28 percent difference between white and minority judges who adjudicate claims involving minority plaintiffs, and roughly a 50 percent difference between white and minority judges who adjudicate claims involving white plaintiffs.

## 2. Judge-Plaintiff Minority and Representational Status

Because our logit model revealed that unrepresented plaintiffs are more likely to have their cases dismissed at summary judgment, we constructed hypothetical cases to examine the predicted probabilities of case dismissal based on race and representational status.

TABLE 6. Predicted Probabilities Estimated for Minority and Pro Se Status Using Logit Model

Independent Variable	SJ Survival $Pr(y = 0 x)$	SJ Dismissal $Pr(y = 1 x)$
White Judge		
White Pro Se Plaintiff	0.1331	0.8669
Minority Pro Se Plaintiff	0.1073	0.8927
Minority Judge		
White Pro Se Plaintiff	0.6141	0.3859
Minority Pro Se Plaintiff	0.5549	0.4451

As we have shown, pro se plaintiffs are more likely to have their cases dismissed at summary judgment. These differences become more pronounced depending on the judge's race. Table 6 above reveals similar trends in minority status and disposal of cases. White judges tend to dismiss minority pro se plaintiffs at a slightly higher rate than white pro se plaintiffs. They will dismiss a case involving a pro se minority plaintiff 89.27 percent of the time, whereas they will dismiss a case involving a white pro se plaintiff 86.7 percent of the time. Minority judges dismiss cases at a much lower rate than white judges. Cases involving a minority judge and a minority pro se plaintiff have a 44.51 percent predicted probability they will be dismissed. And cases involving a minority judge and a white pro se plaintiff are even less, where the predicted probability of a dismissal is 38.59 percent. This is nearly a 44.76 percent difference between white and minority judges who adjudicate claims involving

minority pro se plaintiffs, and a 48.1 percent difference between white and minority judges who adjudicate claims involving white pro se plaintiffs.

### C. SUMMARY

These results provide support that empathetic decisionmaking plays a role in employment civil rights cases. The logistic regression model that included plaintiff, claim, and judicial characteristics shows that the minority status of the judge predicts whether a case will be dismissed entirely at summary judgment. When we conducted a fine-grain analysis—examining plaintiff and judge minority status—we found that white judges were less likely to dismiss a case at summary judgment than minority judges. Even though white plaintiffs had a lower predicted probability of having the cases dismissed, this probability was even lower if a minority judge adjudicated a claim involving a white plaintiff.

Our findings found some support for the liberal legal model, but also clearly demonstrate that a judge's minority status still explained a great deal. A liberal legal model of decisionmaking would suggest that claim or plaintiff characteristics would make little difference but rather the merits of the claim would predict case outcome. The two representation variables would provide support for this claim because both predicted case disposition. When we accounted for representational effects in our predicted probabilities, we saw variation based on plaintiff-judge minority status. The predicted probabilities did change—namely, that pro se plaintiffs had a higher predicted probability of having their case dismissed—but our data still showed that white judges were more likely to dismiss cases involving minority plaintiffs while minority judges were less likely to dismiss cases involving white plaintiffs.

Finally, our findings did not provide support for the political model of decisionmaking. In the two models that accounted for the political party affiliation of the judge, there was no significant difference when a judge was appointed by a Democratic or Republican president or when a judge resided in the Northern District of Texas versus the Northern District of California. Although we cannot say for sure what affects judicial decisionmaking at the summary judgment phase, we suspect that judges were acting less politically because of the discretionary nature of the summary judgment motion and because the cases we examined were at the district court level (and hence there was less at stake politically or professionally).

Our findings are both strong and provocative. For sociolegal scholars

---

---

to better understand the dynamics of personal experience and empathy, we require more research on judicial decisionmaking at different points in pretrial and trial process. And, these analyses would need to span different areas of legal decisions. The “prime” associated with employment discrimination cases may make judicial characteristics and empathy more salient than it would be in say, bankruptcy or contract cases. Methodologically, the regression models and predicted probabilities yielded interesting findings about real cases; however, every case is unique. In other words, our current data cannot identify what specific information influences whether a judge sees (or does not see) discrimination. The use of an experimental research would be the most appropriate approach because we would have greater control scenarios presented to individuals and to manipulate variables that we believe shape an individuals’ interpretation of events.

#### V. EMPATHY, EXPERIENCE, AND A NEW VISION OF JUDICIAL DECISIONMAKING

These results suggest that judges’ assessments of employment discrimination cases vary. We contend that this variation is the result of the different attitudes, opinions, and experiences that stem from being white or a person of color. White judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges. Our data also show that even when we take into account pro se status—believing that the economic and legal resources may influence the viability of a claim—white judges tend to dismiss cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs. Equally compelling is the finding that there is a higher predicted probability that minority judges dismiss cases involving minority plaintiffs than cases involving white plaintiffs, even when we take into account representational effects. These results raise a number of issues concerning the diversity of the judiciary, the mission of the adversarial system, and the role of social science research to aid in judicial decisionmaking.

##### A. DIVERSITY OF THE JUDICIARY

A diverse judiciary is essential to the administration of justice and to the retention of faith in the courts.<sup>97</sup> The law recognizes that litigants are

---

97. The qualitative data from our larger project reveals that plaintiffs lose faith in the legal

entitled to a jury of their peers from the community,<sup>98</sup> yet they often have a judge who comes from a different racial, ethnic, or socioeconomic background. In other words, while the Constitution does not provide for a “judge of her peers,” they are very much the face of justice that litigants will associate when perceiving the fairness of the legal system.

Judges are gatekeepers. They are instrumental in adjudicating discrimination claims—particularly because so few cases reach jury trial.<sup>99</sup> As such, they serve as the primary triers of fact in these cases. For this reason, it is important to have a diverse judiciary—accounting not only for traits we typically associate with “diversity” such as race, gender, sexual orientation, and so forth. Instead, we should embrace a broader understanding of diversity that captures a broader array of characteristics such as geographical, socioeconomic, professional, and intellectual backgrounds.

According to the Federal Judicial Center, diversity within the federal judiciary is minimal.<sup>100</sup> Only 136 of the 597 active federal district judges are a member of a racial/ethnic minority, roughly 22.8 percent.<sup>101</sup> This figure is slightly larger for female judges; 174 federal district court judges are women—roughly 29 percent.<sup>102</sup> These figures do not account for other

---

authorities, specifically, and the legal system, more broadly. Interviews with plaintiffs show that they become disillusioned during the litigation process because they believe that judges make value judgments about the litigants, and in turn, about the merits of the case, particularly in instances in which the plaintiff is pro se. See Ellen Berrey, Stephen Hoffman & Laura Beth Nielsen, *Situated Justice: Plaintiffs' and Defendants' Perceptions of Fairness in Employment Discrimination Cases*, in LAW & SOC'Y REV. (forthcoming) (manuscript at 1, 18–25, 31–33) (on file with the authors); Chen, *supra* note 34, at 1117 (“A diverse judiciary . . . enhances courts' credibility among affected communities who would otherwise feel they have no voice within the institution.”); Ifill, *supra* note 34, at 410 (“Because they can bring important and traditionally excluded perspectives to the bench, minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities.”).

98. See *Taylor v. Louisiana*, 419 U.S. 522, 526–27 (1975) (noting that the American concept of a jury trial contemplates a jury drawn from a cross-section of the community); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (reversing defendant's conviction because members of a particular ethnic group were systematically excluded from serving on juries).

99. See, e.g., Nielsen, Nelson & Lancaster, *supra* note 28, at 187 (finding that only 100 of the 1,672 federal employment discrimination cases in their random sample reached trial).

100. Federal Judicial Center, *supra* note 68.

101. *Id.* This figure is higher than the percentage of racial/ethnic minorities in the legal profession overall. In 2010, only 11.1 percent of lawyers were racial/ethnic minorities. Bureau of Labor Statistics, *Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, <ftp://ftp.bls.gov/pub/special.requests/lfaat11.txt> (last visited Jan. 8, 2012). However, it is lower than the percentage of racial/ethnic minorities in general, which is over 25 percent. Karen R. Humes, Nicholas A. Jones & Roberto A. Ramirez, *Overview of Race and Hispanic Origin: 2010*, 2010 CENSUS BRIEFS, (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (C2010-BR02) (reporting that 72.4 percent of the general population identifies as white).

102. Federal Judicial Center, *supra* note 68. This figure is slightly lower than the legal profession

characteristics that further limit the diversity of the bench, such as females who are racial/ethnic minorities.<sup>103</sup> More critically, variables such as socioeconomic status, geographic region of sitting judges, and life experiences may play a critical role in how individuals understand cases that involve more than simply applying the law to the facts.

Increased diversity does not mean appointing judges who have predetermined positions, but instead those who have different ways of looking at the world.<sup>104</sup> In the context of discrimination claims, anecdotal and empirical accounts show that those who experienced prejudice or bias are more likely to develop empathy resulting from that experience.<sup>105</sup> We believe this evidence can be beneficial for judges who preside over civil rights matters. As seen by the comments of Justices Thomas and Sotomayor, there are instances in which a simple holding fails to describe and capture the meaning and significance behind words and actions.<sup>106</sup> In the context of civil rights claims, the manner in which discrimination manifests is difficult to pinpoint with a one or two sentence discussion.

#### B. EMPATHY AND THE EFFICACY OF THE ADVERSARIAL SYSTEM

The adversarial system is characterized as uniform and predictable. In the ideal circumstance, if one judge adjudicates a claim and believes the plaintiff suffered illegal discrimination, a similarly situated judge should arrive at a similar decision. The point is that there should be a degree of predictability to the civil litigation process. If the outcomes of a case can vary if the plaintiff is from a different minority group than the judge, the ideals of an adversarial system governed by the rule of law are diminished.

---

overall, where women make up 31.5 percent of all lawyers. Bureau of Labor Statistics, *supra* note 101.

103. For example, only twenty-six federal district court judges are black females, or 4.4 percent. Federal Judicial Center, *supra* note 68.

104. See, e.g., Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1235 (2006) (“Diversity of viewpoint, then, might be a first-best goal for the judiciary. If we included judges from a range of ideological backgrounds, and ensured that they deliberated together on appellate panels, we might expect a high level of openness to alternative conceptions of political morality.”); Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 150 (1999) (“The best judge . . . should be able to see and assess the differing perspectives of the many parties and persons involved in the litigation. This is where diversity becomes important.”).

105. See *supra* text accompanying notes 1–7.

106. While this article sought to show the importance of a diverse judiciary through legal narrative and empirical evidence, the call for a more diverse judiciary has been previously made by some of the Justices themselves. Justice Ginsburg has commented that “[a] system of justice is the richer for the diversity of background and experience of its participants.” Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003).

Our data show that case viability in discrimination claims depends greatly on two variables. First, the minority status of a judge influences whether a case will survive summary judgment. Our logistic regression model and the predicted probabilities not only show significant differences in how judges decide discrimination cases, but they also show that such differences depend on the minority status of the plaintiff and judge.

Second, the representational status of the plaintiff affects whether a case will survive summary judgment. One obvious explanation for this finding is that a pro se plaintiff does not have the legal expertise or financial resources to respond to a motion for summary judgment. As a result, the evidence a plaintiff proffers is usually a personal account with little or no physical evidence such as an email exchange or testimony from coworkers. However, when we look closer at our data, black male plaintiffs are significantly more likely to be pro se than other groups, and in particular, white plaintiffs.<sup>107</sup> Findings from the quantitative analysis alone might suggest a few interpretations. Regarding race, one possible theory is that black plaintiffs, and by extension the majority of Title VII race claimants, are less likely to be able to afford attorneys or earn attorneys' cooperation in a contingency fee arrangement.<sup>108</sup> Another possible theory is that these plaintiffs have less social capital, meaning fewer personal and social connections of the type that would match them with attorneys; in this scenario, plaintiffs might never attempt to seek out attorneys or gain initial access, regardless of ability to pay.<sup>109</sup>

### C. ACCOUNTING FOR EMPATHY AND THE RULE OF LAW

Given the disparities in summary judgment outcomes, how can we promote an agenda of judicial diversity while maintaining the consistency and predictability of the adversarial system and the rule of law? We believe that social science research can help judges learn to be more empathetic, and, in turn, better positioned to have a better understanding of their cases. Specifically, psychology research on empathetic induction consistently shows improved attitudes toward members of marginalized groups.<sup>110</sup> This

---

107. Nelson et al., *supra* note 95, at 23–24.

108. *Id.* at 27.

109. Nelson et al., *supra* note 95.

110. See, e.g., Batson et al., *supra* note 40, at 1665 (finding that participants induced to feel empathy for a heroin user had more positive attitudes toward people addicted to drugs than participants not induced to feel empathy); *id.* at 1656 (finding that empathy induction proved to improve attitudes concerning people with AIDS, who are homeless, and convicted murderers); Krystina A. Finlay & Walter G. Stephan, *Improving Intergroup Relations: The Effects of Empathy on Racial Attitudes*, 30 J. APPLIED SOC. PSYCHOL. 1720, 1731–32 (2000) (finding that participants who read about discrimination

research not only shows a growing awareness for victims,<sup>111</sup> but also helps individuals to understand members of stigmatized groups.<sup>112</sup> However, teaching individuals to be more empathetic varies based on intragroup and intergroup characteristics.<sup>113</sup> Research reports that group membership can moderate the impact of empathetic induction; individuals with different group membership exhibit less empathy than those who are similarly situated.<sup>114</sup> Notwithstanding these findings, the research in this area consistently shows that empathetic induction helps individuals recognize more nuanced, situational narratives that are distinct from their own.<sup>115</sup>

Along the same lines, social science can expose inequality and the harmful effects of discrimination, phenomena that have become more implicit, embedded, and institutionalized. Social science evidence has undeniably been a successful tool for policy and legal change. *Brown v. Board of Education* is often cited as the paradigmatic example of this.<sup>116</sup> The Supreme Court turned to social science to justify that de jure racial segregation of schools not only is inherently unequal, but also that the impact of segregation practices is harmful.<sup>117</sup> For judges who may not have a genuine understanding of matters concerning discrimination, social science has the power to expose embedded inequality in society and how it impacts individuals emotionally, professionally, and economically. For

---

against blacks or were instructed to be empathetic toward victims of discrimination improved their attitudes concerning blacks); James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1216 (2002) (finding that empathy-induced participants had altered and more lenient judicial determinations about a defendant); Theresa K. Vescio, Gretchen B. Sechrist & Matthew P. Paolucci, *Perspective Taking and Prejudice Reduction: The Meditational Role of Empathy Arousal and Situational Attributions*, 33 EUR. J. SOC. PSYCHOL. 455, 467 (2003) (finding that participants instructed to “take perspective” of a black male as he described his difficulties experienced more empathy for him and more favorable attitudes about blacks).

111. C. Batson et al., *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. PERSONALITY & SOC. PSYCHOL. 105, 107 (1997). This study found that people who were responsible for their own victimhood—for example, a person who contracted AIDS because of unprotected sex—invoked a less empathetic response. However, participants could still be empathetic if they learned of a victim’s responsibility after empathy induction. *Id.* at 107–11.

112. *See supra* note 110.

113. *See generally* C. Daniel Batson & Nadia Y. Ahmad, *Using Empathy to Improve Intergroup Attitudes and Relations*, 3 SOC. ISSUES & POL’Y REV. 141 (2009) (discussing four empathy states, empathy at the intergroup level, and the role of empathy in existing programs meant to improve intergroup relations).

114. Johnson et al., *supra* note 110 at 1209.

115. *See supra* note 110.

116. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

117. *Id.*

skeptics who believe that legal claims are frivolous or are simply meant to further political objectives (for example, the need for and efficacy of affirmative action policies), scientific research provides a level of objectivity and reliability to the discourse that goes beyond one judge's opinion—for example, showing objective data that organizational practices have the power to substantially exacerbate or mitigate bias in pay and promotion practices.

## VI. CONCLUSION

The most recent Supreme Court Justice confirmations reignited an important debate worthy of legal and empirical examination. Specifically, the call for empathetic judges sparked discussions concerning the nature of decisionmaking and whether a judge's background should enter the courtroom. Critics of the empathetic judge view cognitive and affective awareness of a litigant's state or condition not only as an indicator of partiality, but also as a mere window dressing for political motivations. For advocates of the empathetic judge, a diverse vision and understanding of cases involving more contextualized disputes such as discrimination can lead to outcomes that account for embedded issues such as implicit bias.

While legal scholars have long explored the impact of a diverse judiciary, few have examined it from an empirical standpoint. We sought to fill this gap by focusing our analysis on individual-level variables including the race, gender, and representational status of the plaintiffs in tandem with judicial characteristics. Even after controlling for potential confounding variables such as the judge's political party affiliation, years on the bench, and other case characteristics, we found that minority judges tend to assess discrimination claims differently than white judges. Although this finding is consistent with previous work on judicial decisionmaking, the insignificance of political party in our data suggest that some apolitical factor was motivating judges.