

# Cognitive Illiberalism and Institutional Debiasing Strategies

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## I. INTRODUCTION

In a watershed empirical study conducted in 2007, law professors Dan Kahan, David Hoffman, and Donald Braman set out to determine what effect, if any, culturally motivated cognition had on individuals' interpretations of legally consequential facts.<sup>1</sup> Culturally motivated cognition is "the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires."<sup>2</sup>

Kahan, Hoffman, and Braman decided to test their thesis based on a challenge Justice Scalia issued as part of his majority opinion in *Scott v. Harris*.<sup>3</sup> In *Scott*, police officers conducted a high speed chase of a suspect's car through busy roads with other cars and pedestrians present.<sup>4</sup> The chase ended with one of the police cars intentionally bumping the suspect's car, causing it to roll over at high speed and rendering the suspect a quadriplegic.<sup>5</sup> The suspect sued the police department under federal civil rights law, alleging that the use of deadly force to terminate the chase constituted an unreasonable seizure under the Fourth Amendment of the United States Constitution.<sup>6</sup>

The entire car chase was captured on police car video cameras, and the video was submitted as evidence on behalf of the police to establish that their conduct was reasonable under the circumstances.<sup>7</sup> Agreeing with the police, Justice Scalia for the 8-1 majority found that, with the video as the primary evidence, the only possible conclusion was that the police acted in a reasonable manner.<sup>8</sup> In a footnote, Justice Scalia further stated: "We are happy to allow the videotape to speak for itself."<sup>9</sup> Justice Stevens, the lone dissenter, pointedly disagreed and concluded based on the same video that he did not necessarily believe that the police acted in a reasonable manner in attempting to apprehend the suspect.<sup>10</sup>

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1. Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

2. Dan M. Kahan et al., "They Saw a Protest": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. (forthcoming 2012) (manuscript at 3).

3. *Scott v. Harris*, 550 U.S. 372, 378–81 (2007); Kahan et al., *supra* note 1, at 838.

4. 550 U.S. at 375.

5. *Id.*

6. *Id.* at 375–76.

7. *Id.* at 378. The *Scott* video is available on the Court's website. *Video Resources*, SUP. CT. U.S. (Apr. 30, 2007), <http://www.supremecourt.gov/media/media.aspx>.

8. *Scott*, 550 U.S. at 378–80.

9. *Id.* at 378 n.5.

10. *Id.* at 390 (Stevens, J., dissenting) ("Rather than supporting the conclusion that what we see on the video 'resembles a Hollywood-style car chase of the most frightening

In their study, Kahan, Hoffman, and Braman showed the *Scott* video to a diverse demographic sample of 1,350 Americans.<sup>11</sup> Although most of the respondents agreed with Justice Scalia's interpretation of the video tape,<sup>12</sup> a surprising number of individuals, particularly those from defined cultural subcommunities, agreed with Justice Stevens's dissent that the video did not necessarily speak for itself.<sup>13</sup>

Based on their study's findings, Kahan, Hoffman, and Braman argued that Justice Scalia's opinion for the majority in *Scott* constituted a "type of decisionmaking hubris that has cognitive origins and that has deleterious consequences that extend far beyond the Court's decision in *Scott*."<sup>14</sup> They concluded that "judges' own perceptions of fact can sometimes furnish them with unreliable guidance on what 'reasonable' but culturally diverse people are likely to perceive."<sup>15</sup>

Moreover, and importantly, they contended that Justice Scalia's interpretative method "incurred [a] cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity 'unreasonable' and hence unworthy of consideration in the adjudicatory process."<sup>16</sup> This is what they referred to as "cognitive illiberalism." To counteract cognitive illiberalism, Kahan, Hoffman, and Braman suggested that courts could divest the law of culturally partisan overtones that detract from the law's legitimacy through various forms of debiasing education and techniques.<sup>17</sup>

In a recent paper, *Cultural Cognition at Work*,<sup>18</sup> I explored whether this same "decisionmaking hubris" with "cognitive origins" existed in other legal contexts, such as in labor and employment law decisions.<sup>19</sup> To my surprise, and counter to my initial intuition, culturally motivated

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sort,' the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue." (footnote omitted) (citation omitted)).

11. Kahan et al., *supra* note 1, at 841.

12. *Id.* at 879.

13. *Id.* at 841.

14. *Id.* at 842.

15. Kahan et al., *supra* note 2 (manuscript at 33).

16. Kahan et al., *supra* note 1, at 842.

17. *See id.* at 843 ("Judges, legislators, and ordinary citizens should therefore always be alert to the influence of this species of 'cognitive illiberalism' and take the precautions necessary to minimize it.").

18. Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010).

19. *Id.* at 111, 121 (quoting Kahan, *supra* note 1, at 842).

cognition, or “cultural cognition,”<sup>20</sup> did appear to provide a robust explanation for how Justices’ values in these cases could potentially lead to different perceptions of legally consequential facts in labor and employment law cases.<sup>21</sup> *Cultural Cognition at Work* therefore concluded by considering opinion-writing debiasing techniques for ridding legal decisions of delegitimizing bias in order to make these decisions more acceptable to a larger segment of society.<sup>22</sup>

Yet, little attention has been paid in the academic literature to *institutional* structures as a vehicle for judicial debiasing. This Article therefore investigates institutional debiasing strategies that may work to further minimize conflict in society over labor and employment law decisions. In this vein, Part II seeks to distill the essentials of culturally motivated cognition and how it relates to, yet differs from, other earlier studies on the role that values and assumptions play in labor and employment law cases. Part III then comprehensively explores a spectrum of debiasing strategies for legal decisionmakers, from opinion-writing debiasing strategies to institutional strategies involving specialized courts and judges. Finally, Part IV considers the arguments in favor of specialized judicial institutions, the arguments against such institutions, and finally, the promise of opacity in the judicial selection process.

The Article concludes by maintaining that the American legal system should at least experiment with institutional debiasing strategies to counteract culturally motivated cognition and the problems associated with cognitive illiberalism. Such an approach will (1) minimize the amount of needless discontent over American labor and employment law, (2) promote greater uniformity and predictability in these legal decisions, and (3) encourage the development of a professionalized group of labor and employment judges. These expert judges will thereafter have the means to uphold their commitment to the liberal ideal of deciding these cases in a neutral manner.<sup>23</sup>

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20. *Id.* at 148; *see also* Kahan et al., *supra* note 2 (manuscript at 1) (“*Cultural cognition* refers to the unconscious influence of individuals’ group commitments on their perceptions of legally consequential facts.”).

21. *Secunda*, *supra* note 18, at 139–40.

22. *Id.* at 140–48.

23. *See* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 6 (2011) (“The most fundamental form of individual freedom that liberal constitutionalism secures for its citizens depends on the promise that government won’t impose legal obligations that presuppose adherence to a moral or political orthodoxy.”).

## II. THEORETICAL FOUNDATIONS

The context for this Article is the phenomenon of culturally motivated cognition, or cultural cognition, and its influence on and danger to neutral decisionmaking by legal decisionmakers. This Part initially sets out the theoretical background by discussing the first generation of scholarly insight into the psychology behind judicial decisions. Thereafter, Part II.B discusses the next generation of insight-cultural cognition, which considers the mechanism by which this psychological phenomenon operates.

A. *The First Generation of Legal Realist Insight*

As legal scholars from generations past aptly observed, facts matter very much in labor and employment law cases. For instance, in *Values and Assumptions in American Labor Law*, James Atleson noted that “[l]egal criticism constantly expose[d] the failure of adjudicators either to justify coherently the decisions reached or to rationally place the decisions within the received wisdom.”<sup>24</sup> Atleson maintained that such decisions were due to more than just faulty analysis or judicial whimsy.<sup>25</sup>

Atleson provocatively argued that “many judicial and administrative decisions are based upon other, often unarticulated, values and assumptions that are not to be found or inferred from the language of the statute or its legislative history.”<sup>26</sup> Instead, he continued, “[t]he presence of such values and assumptions, often only implicit or hinted at, helps explain many decisions which otherwise seem odd, irrational, or at least inconsistent with the received wisdom.”<sup>27</sup> In other words, management and labor are fighting a cultural war of values, and legal decisionmakers often seem oblivious of their own motives when choosing one cultural value over another.<sup>28</sup>

Other scholars made similar arguments.<sup>29</sup> For instance, Gary Minda in his book, *Boycott in America*, discussed how the “cognitive effects of

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24. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 2 (1983).

25. *Id.*

26. *Id.*; *see also id.* at 10 (“The basic theme of the book . . . is that assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees, underlie many labor law decisions.”).

27. *Id.* at 10.

28. *Id.*

29. *See, e.g.*, GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999); Karl E. Klare, *Judicial Deradicalization of the Wagner*

legal imagination have remained concealed within law's official forms of reason."<sup>30</sup> He maintained that, "[l]ike a chameleon, the law is capable of changing the meaning it attributes to phenomena depending on the context and the ideological motivations of law's official interpreters."<sup>31</sup> Ideology, in Minda's sense, is not the vulgar ideology of the political,<sup>32</sup> but rather "refer[s] to the way cognitive thought conceals information about phenomena, especially the interests and values that may be implicated."<sup>33</sup>

Of course, Minda and Atleson were inspired by the realist critique of legal formalism from the early part of the twentieth century.<sup>34</sup> Consider the views of Jerome Frank, a well-known legal realist from that time period, on the legal perception of facts in this regard:

The fact is, and every lawyer knows it, that *those judges who are most lawless, or most swayed by the "perverting influences of their emotional natures," or most dishonest, are often the very judges who use most meticulously the language of compelling mechanical logic, who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules, who sedulously avoid any indications that they individualize cases.*<sup>35</sup>

Or those of Benjamin Cardozo, later a United States Supreme Court Justice:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. . . . But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.<sup>36</sup>

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*Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265 (1978) ("Law always expresses a vision of society. It also expresses the groups behind this vision and the interests served by conceiving the society in that particular form." (quoting José Antonio Viera-Gallo, *The Legal System and Socialism*, 1972 WIS. L. REV. 754, 755)).

30. MINDA, *supra* note 29, at xi.

31. *Id.* at xii.

32. See Secunda, *supra* note 18, at 110 n.12 (discussing one way judges' values impact their decisions as when they choose "the outcome that best promotes their political preferences without regard for the law" (quoting Dan M. Kahan, "Ideology In" or "Cultural Cognition of" Judging: What Differences Does It Make?, 92 MARQ. L. REV. 413, 415 (2009))).

33. MINDA, *supra* note 29, at xiii.

34. See, e.g., K.N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1243–44 (1938) (demonstrating one example of a realist critique of legal formalism).

35. JEROME FRANK, *LAW AND THE MODERN MIND* 148 (Anchor Books 1963) (1930).

36. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921); see also O'Connor v. Ortega, 480 U.S. 709, 734 n.3 (1987) (Blackmun, J., dissenting) ("It seems to me that whenever . . . courts fail to concentrate on the facts of the case, these predilections inevitably surface, no longer held in check by the 'discipline' of the

Finally, consider Felix Frankfurter, also later a Supreme Court Justice, who maintained: “It is plain . . . that judges are not merely expert reporters of pre-existing law. Because of the free play of judgment allowed by the Constitution, judges inevitably fashion law.”<sup>37</sup>

Atleson and Minda continued Frank, Cardozo, and Frankfurter’s realist critique of how legal decisionmakers’ values and assumptions can have a dispositive impact on how important legal issues are decided, and continued this critique particularly in the labor and employment law context.<sup>38</sup>

### B. *The New Generation of Legal Realist Insight*

But cultural cognition insights differ. They are not just another theory that recycles the basic thesis that values held by judges drive judicial decisions. Although past generations of legal scholars did eloquently and thoroughly discuss how legal decisionmakers’ values impacted labor and employment law cases, they did not describe the *mechanism* or *process* by which judges’ assumptions and values came to shape *facts* in labor and employment cases. This distinction is crucial because to counteract the influence of such values and assumptions, a psychological explanatory device for this phenomenon is required.<sup>39</sup>

Culturally motivated cognition is a theory that maintains that legal decisionmakers in many cases are not self-conscious partisans.<sup>40</sup> Rather, most of the time, they seek to arrive at the right decision without being ideologically committed to any prior legal or political view.<sup>41</sup> Nevertheless, disagreements over legally consequential facts are especially prevalent

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facts, and shape, more than they ever should and even to an extent unknown to judges themselves, any legal standard that is then articulated.”)

37. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 8 (1938).

38. More recently, other scholars have developed various forms of what has been called the “new legal realism.” See, e.g., Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 61 (2009) (surveying the scholarship and arguing that “‘new legal realism’ is a response to a ‘new formalism’—that derived from neoclassical law and economics.”); see also Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used To Be.”* 2005 WIS. L. REV. 365; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

39. Judge Frank recognized as much when he maintained that “[o]ur law schools must become, in part, schools of psychology applied to law in all its phases.” FRANK, *supra* note 35, at 156.

40. *Secunda*, *supra* note 18, at 139.

41. *Id.* at 110.

in labor and employment law cases.<sup>42</sup> In this highly polarized field, legal decisionmakers naturally align themselves, based on their worldviews, with employer or employee interests.

For instance, current administrative law practice prescribes how many Democrats and Republicans sit on the National Labor Relations Board (NLRB or Board) during any given period.<sup>43</sup> This state of affairs is not because most Board members are incapable of putting aside their ideological differences for the betterment of industrial relations in this country; I have argued in a previous empirical study that most of the time they do so.<sup>44</sup> Rather, Board members, federal judges, and for that matter any judicial and administrative decisionmaker in the workplace milieu, cannot help but to bring their cultural background to bear in deciding cases involving complex labor issues. Consequently, there is a need to “fortify” labor and employment law “with psychological realism,”<sup>45</sup> because there is an ongoing threat to the ideal of deciding labor and employment law cases in an evenhanded manner.

A brief synopsis of cultural cognition theory and its related concept of cognitive illiberalism will help to further elucidate how and why legal decisionmakers find themselves thwarted by this unconscious psychological barrier.

### 1. Cultural Cognition Theory

The judicial role in society is popularly understood by its principle purpose of providing a fair adjudication of disputes by a neutral decisionmaker—the judge or the jury.<sup>46</sup> Yet, a “practical barrier” exists.<sup>47</sup> That practical barrier is cultural cognition.

Cultural cognition, or culturally motivated cognition, describes a series of psychological processes that help to explain existing conflict among individuals over legally or politically consequential facts.<sup>48</sup> This

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42. *Id.* (“[D]isagreements are especially prevalent in labor and employment cases where the factual issues that divide judges involve a large amount of speculation and inconclusive evidence . . . .”); *see also* Kahan, *supra* note 23, at 58 n.328 (describing labor and employment law disputes as being “rife with potential for cultural conflict”).

43. *See* Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 87 n.200 (2004) (“Traditionally, the Board at any given time has three Members from the President’s political party and two Members from the other party.” (citing David A. Morand, *Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives*, 5 WIDENER J. PUB. L. 35, 79–80 (1995))).

44. *Id.* at 105–06.

45. *See* Kahan et al., *supra* note 2 (manuscript at 4).

46. *Id.* (manuscript at 3).

47. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116 (2007).

48. *See* Kahan, *supra* note 32, at 417–18.



is better understood in circumstances when individuals must make some sense and determination of uncertain and inherently ambiguous facts—a prospect not uncommon in many areas of our increasingly complex legal landscape.

Where uncertainty and ambiguity exist, individuals must fill that information deficit in some manner. In an effort to make sense of indeterminate facts among competing claims and arguments about how those facts matter, an individual will “tend selectively to credit empirical information in patterns congenial to their cultural values.”<sup>49</sup> At the same time, the idea of “naïve realism” explains that people simultaneously ignore or discount the views of people with different cultural outlooks.<sup>50</sup>

These psychologically based conflicts cause a continuing threat to democratic pluralism by pitting subgroups with different cultural biases against one another. Using an anthropologically based classification system,<sup>51</sup> studies have shown that persons with individualist, hierarchical values tend to be skeptical about facts and arguments that support a more communitarian or egalitarian social model because endorsing those arguments would work counter to their culturally identified group.<sup>52</sup>

Importantly for this Article, legal decisionmakers experience some of the same type of identity-protective pressure that nonlegal decisionmakers face. In the judicial context, what the legally consequential facts say largely depends upon *to whom* the facts are speaking. A different way of stating this is that the way that facts will matter in a given case will be based on how those facts are filtered and interpreted by the decisionmaker. Thus, the ultimate interpretation of those legally consequential facts will be distilled by the decisionmaker’s cultural worldview, likely favoring a particular outcome in agreement with the decisionmaker’s prior cultural worldview.<sup>53</sup>

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49. Kahan et al., *supra* note 2 (manuscript at 8).

50. See generally Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404 (1995) (explaining how naïve realism shapes individuals’ perceptions of others who hold different cultural beliefs).

51. See Secunda, *supra* note 18, at 112–15 (discussing anthropological studies exploring the relationship between risk perceptions and cultural worldviews).

52. Kahan et al., *supra* note 2 (manuscript at 9–11).

53. See Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 394 (2006) (“[W]hen decision makers use simplifying heuristics, they are likely to make mistakes in the direction of their pre-existing biases.”).

A more recent empirical study by Kahan, Hoffman, Braman, Evans, and Rachlinski illustrates in stark detail the extent to which cultural cognition can influence individuals' perception of factual events.<sup>54</sup> Study participants, a group of 202 randomly selected adults, were randomly assigned to view the same protest video.<sup>55</sup> One group was told the subject of the protest was against an abortion clinic while the other group was told the subject of the protest was against a military recruiting center at a university aimed at protesting the previous ban in the United States on gays openly serving in the military.<sup>56</sup> The participants were instructed to act as jurors in a case that "turned on whether a group of protesters had crossed the [constitutionally important] speech-conduct line."<sup>57</sup> In the video, participants were told that the police had halted the protest.<sup>58</sup> Because the First Amendment protects speech, if the participants found that the protest was speech, then the police action would be unlawful. However, if the participants found that the protest crossed the line from speech to conduct, the police would have a legitimate interest in halting the protest.<sup>59</sup>

Prior to viewing the video, the study participants answered a questionnaire and were rated based on their answers to four categories of cultural worldviews: hierarchy individualism, hierarchy communitarianism, egalitarian individualism, and egalitarian communitarianism.<sup>60</sup> The significance of the study's findings is that even though all the subjects viewed the same video, "what they *saw*—earnest voicing of dissent intended only to persuade [lawful speech], or physical intimidation calculated to interfere with the freedom of others [unlawful conduct]—depended on the congruence of the protesters' positions with the subjects' own cultural values."<sup>61</sup>

The study thus starkly illustrates the phenomenon of culturally motivated cognition and how it drives individuals' perceptions of legally consequential factual events. Ultimately, the participants' perception of the same protest was heavily influenced by their culturally motivated

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54. See Kahan et al., *supra* note 2.

55. *Id.* (manuscript at 16).

56. *Id.* (manuscript at 17); see also Videoreview12, *Abortion Clinic 11 22 2010*, YOUTUBE (Jan. 6, 2011), [http://www.youtube.com/watch?v=k8ru-FE2v\\_8](http://www.youtube.com/watch?v=k8ru-FE2v_8); Videoreview12, *Recruit Center 11192919.m4v*, YOUTUBE (Jan. 6, 2011), <http://www.youtube.com/watch?v=X3PJACpL53k>.

57. Kahan et al., *supra* note 2 (manuscript at 13).

58. *Id.*

59. *Id.* (manuscript at 11–12).

60. See *id.* (manuscript at 16–17). These worldview categories are based on the work of the noted anthropologist Mary Douglas. See generally MARY DOUGLAS, *NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY* 54–68 (1970) (describing group social patterns based on shared worldviews).

61. Kahan et al., *supra* note 2 (manuscript at 28).

cognition to either support the police action to halt the protest or disapprove the police action. It is this filtering process which explains the *mechanism* by which individuals fill perceived gaps in knowledge with an interpretation that accords with their prior cultural worldview.

Understanding cultural cognition as a practical barrier to the neutrality commitment of judges in the exercise of their judicial role is important because the mechanics are both *unconscious* and *natural*.<sup>62</sup> Although some judges can rightly be accused of engaging in an outright ideologically motivated form of judicial bias, this Article maintains that the majority of judges are sincerely not engaged in this kind of ideologically based decisionmaking.<sup>63</sup> Rather, a better and perhaps more helpful understanding is that “[s]tates of persistent group polarization are . . . inevitable—almost mathematically so—as beliefs feed on themselves within cultural groups, whose members stubbornly dismiss as unworthy insights originating outside the group.”<sup>64</sup> In short, it is the very mechanics of cultural cognition that push individuals to adopt viewpoints that favor their identified cultural worldview and lead to a phenomenon known as cognitive illiberalism.

## 2. *Cognitive Illiberalism*

Culturally motivated cognition is particularly problematic for legal decisionmakers because it leads to the phenomenon of cognitive illiberalism. Cognitive illiberalism is “the vulnerability of . . . legal decisionmakers to betray their commitment to liberal neutrality by unconsciously fitting their perceptions of risk and related facts to their sectarian understanding of the good life.”<sup>65</sup> As a result of this bias, the critical checking function performed by the judiciary is subject to unwitting corruption.<sup>66</sup>

Another danger of cognitive illiberalism is that individuals are very poor at identifying when they themselves are engaged in cognitive illiberal bias, but are quite adept at identifying when others engage in

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62. *See id.* (manuscript at 28–29).

63. *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1964 (2009) (“There may be some judges who care little about their colleagues’ views and who are determined not to engage in collegial interactions. However, they are not in the majority.”).

64. Kahan, *supra* note 47, at 125.

65. Kahan et al., *supra* note 2 (manuscript at 29).

66. *Id.* (manuscript at 10).

such bias.<sup>67</sup> In the labor and employment law context, this dynamic transforms everyday legal debates over how to provide justice and fairness in the workplace into instances of political and legal status competition between management and labor interests. In this regard, one need only consider recent, heated debates between management and labor interests concerning gender discrimination against women in the American workplace,<sup>68</sup> the need for private and public sector unions in the American workplace,<sup>69</sup> and the debate over whether the employment at-will doctrine should be discarded into the dustbin of history.<sup>70</sup> It often seems that the parties to these debates live in completely different realities.

It is when legal decisionmaking engages in this hubristic overconfidence in favor of the prevailing judge's cultural worldview that cognitive illiberalism endangers judicial legitimacy and its commitment to neutrality. A court majority, unconsciously motivated by cultural cognition, runs the risk of denigrating any differing viewpoint of a minority cultural identity group as an unreasonable interpretation of a set of legally consequential facts. In other words, this type of psychologically tarnished decisionmaking will invariably delegitimize the legal justification for the court's decision in the eyes of the thwarted cultural group.<sup>71</sup>

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67. See *supra* note 50 and accompanying text (discussing the psychological concept of naïve realism).

68. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2544–45 (2011) (finding that massive gender discrimination in employment class action could not be maintained consistent with requirements of federal class action rules).

69. The recent labor dispute over the rights of public sector union employees in Wisconsin, and the complaint filed by the NLRB against Boeing for allegedly retaliating against its unions by moving work from Washington to South Carolina, are two such examples. See A.G. Sulzberger & Monica Davey, *Union Bonds in Wisconsin Begin to Fray*, N.Y. TIMES, Feb. 21, 2011, at A1, available at <http://www.nytimes.com/2011/02/22/us/22union.html> (“Mr. Walker, the new Republican governor who has proposed the cuts to benefits and bargaining rights, argu[es] that he desperately needs to bridge a deficit expected to reach \$3.6 billion for the coming two-year budget.”); Editorial, *The NLRB v. Boeing*, L.A. TIMES (June 15, 2011), <http://articles.latimes.com/2011/jun/15/opinion/la-ed-boeing-20110615> (“The National Labor Relations Board accused Boeing earlier this year of illegally retaliating against unionized workers by expanding its facilities in a largely nonunion state, South Carolina. Republicans joined much of corporate America in denouncing the board’s complaint, calling it a barely disguised attack on state ‘right to work’ laws that make it harder for unions to organize.”).

70. One of the primary debates surrounding the drafting of the Restatement (Third) of Employment Law is whether the concept of at-will employment—under which employees can be fired for good, bad, or no cause—should continue to be enshrined in American employment law. See, e.g., Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279 (2005).

71. See, e.g., Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 620 (2009) (“[D]ifferent groups respond to the suggestion that a reinvigorated nuclear energy program is needed to respond to global warming. For those opposed to nuclear energy,

This is especially so because the nonpreferred group will readily recognize the occurrence of cognitive illiberalism as the underlying basis for the decision, rather than recognize the legal merits of that decision, no matter how justified those merits may be.<sup>72</sup> Consider in this regard the polarization caused by Wisconsin Governor Scott Walker's attempt to legislate out of existence most public sector collective bargaining rights. As predicted by cognitive illiberalism, those who favor minimalist government and management rights favor the legislation, while those who believe government should promote collective bargaining as a fundamental human right are dead set against it.<sup>73</sup> Rather than suggesting that either side is absolutely right in this controversy, this recent labor law real-world example illustrates well how cognitive illiberalism leads inevitably to the delegitimization of the law from the perspective of the losing party—in this case, the union side.

It was this same cognitive illiberalism that led Kahan, Hoffman, and Braman to criticize the decision announced by Justice Scalia in *Scott v. Harris* that “no reasonable jury” could reach a verdict that the police were not justified in using deadly force to end the car chase given the police videotape.<sup>74</sup> In many of the same ways, Justices and judges are privileging one cultural worldview over that of another in a number of important labor and employment law cases.<sup>75</sup> This phenomenon of culturally motivated cognition endangers judicial legitimacy because the

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the juxtaposition of the two issues seems absurd; but to those in favor of the technology the linkage is obvious.”).

72. In the context of assessing legal facts regarding risk, “individuals perceive the law as denigrating their visions of the good not merely when political actors [for example, judges] justify it on culturally partisan grounds but also when they justify it on the basis of perceptions of harm distinctive of their worldviews.” Kahan, *supra* note 47, at 152.

73. Compare Jill Cook, *Wisconsin Labor Protests: Labor Union Negotiations Hold Back Economic Progress*, ALESTLELIVE (Mar. 3, 2011, 12:00 AM), [http://www.alestlelive.com/opinion/article\\_3b756db7-5dde-54ae-94ab-6da2873be108.html](http://www.alestlelive.com/opinion/article_3b756db7-5dde-54ae-94ab-6da2873be108.html) (“Collective bargaining has become an overly abused tool for greed and excused failure.”), with Samuel A. Culbert, Op-Ed., *Why Your Boss Is Wrong About You*, N.Y. TIMES (Mar. 1, 2011), <http://www.nytimes.com/2011/03/02/opinion/02culbert.html?r=1&src=twrhp> (“Unions in Wisconsin are justified in worrying that limiting collective bargaining would lead to capricious firing or demotions, whether for age, personality, salary or any other criterion you can think of.”).

74. *Scott v. Harris*, 550 U.S. 372, 380 (2007); Kahan et al., *supra* note 1, at 879–81.

75. See Secunda, *supra* note 18, at 121–38 (providing examples of where cognitive illiberalism has resulted from the operation of culturally motivated cognition in recent U.S. Supreme Court labor and employment law cases).

underpinning of law should not be based on privileged worldviews but on inclusive or neutral criteria.

In any event, whether it is in labor and employment cases, constitutional law cases, or other cases, little doubt exists that the legitimacy of the courts is a pressing social concern. This is especially so in the broader judicial context outside of the Supreme Court among the lower federal and state courts where most cases are decided. These decisions have local implications for the parties involved in the litigation as well as for society as a whole. While “[t]here’s no accepted index of legitimacy for the court . . . [a]round the world, [the United States Supreme Court’s] influence has declined, measured by the number of times top courts in other countries cite it.”<sup>76</sup> As United States Supreme Court Justice Stephen Breyer and other court commentators recognize, the legitimacy of the courts depends to a large degree upon society’s perception of the judiciary as a neutral decisionmaking body.<sup>77</sup>

So, culturally motivated cognition not only provides a working theory about how most legal decisionmakers interpret legally consequential facts but also helps to explain the formation of cognitive illiberalism and the delegitimization of the very neutrality that most judges wish to foster. But methods do exist for counteracting these inherent biases. As Kahan and his co-authors aptly point out, “[J]ust like the rest of us, [judges] are perfectly capable of understanding that these dynamics exist and can adversely affect the quality of their decisionmaking.”<sup>78</sup>

To the extent that one sees cognitive illiberalism as being a consequence of unjust labor and employment law decisions, it is necessary to consider a number of institutional reforms that might help to eliminate both culturally motivated cognition from labor and employment law decisions and the prevalence of cognitive illiberalism surrounding disputes over labor policy in the United States. The next Part maintains that because better informed legal decisionmakers are more aware of their own culturally motivated cognition and the cognitive illiberalism it can engender

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76. See Lincoln Caplan, Editorial, *A Judge’s Warning About the Legitimacy of the Supreme Court*, N.Y. TIMES, Sept. 27, 2010, at A22 (discussing STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW (2010)).

77. In this regard, Justice Breyer’s view is that “the [C]ourt jeopardizes its legitimacy when it makes . . . radical rulings and that, in doing so, it threatens our democracy.” See *id.* Indeed, perceived procedural fairness of judicial decisionmaking affects legitimacy more than agreement with outcomes. See generally TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS (2011) (discussing what motivates individuals to cooperate with others, including legal institutions); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (Princeton Univ. Press 2006) (explaining what motivates citizens to follow the law).

78. Kahan et al., *supra* note 1, at 898; see also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (suggesting judges employ an “intuition-override” model of decisionmaking).

throughout society, a spectrum of judicial reform approaches should be explored to see whether all or parts of these debiasing strategies could help overcome legal decisionmakers' psychological limitations in deciding labor and employment law cases. These approaches range from fairly simple opinion-writing debiasing techniques to specialized courts and judges in the federal judiciary to the more radical idea of employment tribunals based on the British model.

### III. A SPECTRUM OF DEBIASING STRATEGIES

The purpose of this Part is not to try to find a one-size-fits-all approach to culturally motivated cognition and the related phenomenon of cognitive illiberalism in labor and employment law cases. Rather, the idea is to provide a series of potential debiasing mechanisms that might counteract some of the more stark examples of illiberal bias of cognitive origin in these cases. To be clear, the idea here is not simply to target culturally motivated cognition in the sense of wanting legal decisionmakers to craft more inclusive and less biased decisions, although that is certainly an important goal. The judicial reforms discussed below are also crucially concerned with an even greater problem: how labor and employment law decisions are communicated and perceived, and, as a consequence, may impact public discourse on important workplace issues.<sup>79</sup>

It is also important to understand that these suggested reforms are not meant to be mutually exclusive. For instance, creating a specialized employment court to help counteract cultural cognition will not necessarily eliminate the need for judges to become cognizant of their own illiberal biases and utilize various opinion-writing debiasing techniques. Quite to the contrary, debiasing techniques are relevant to our current judicial system and would remain relevant in any potential future system in which employment courts are utilized. However, the systemic advantages of a specialized employment judiciary—the expertise and familiarity specialized employment judges would have—coupled together with the proactive utilization of debiasing techniques might offer the best solution for enhancing the way in which labor and employment law decisions are communicated to the larger public.

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79. See Kahan, *supra* note 23, at 28 (“The account I am proposing, though, doesn’t depend on the impact of motivated reasoning on judges. It is directed at the impact of motivated reasoning on *citizens’* assessments of judges’ decisions.”).

This Part is divided into four subparts, starting with the least drastic measures to consideration of more drastic ones. After reviewing opinion-writing debiasing techniques for legal decisionmakers, this Part then discusses institutional debiasing strategies, including (1) magistrate models, (2) bankruptcy court models, (3) a specialized appellate court, and (4) the British employment tribunal model.

#### A. *Opinion-Writing Debiasing Techniques*

*Cultural Cognition at Work* discussed two different opinion-writing techniques for counteracting judicial cognitive bias: first, humility as a judicial habit of mind, and second, expressive overdetermination and self-affirmation.<sup>80</sup> These two concepts dovetail nicely with a third method for debiasing outlined by Cass Sunstein in his article, *Trimming*.<sup>81</sup> “Trimming” involves a legal or political process by which individuals “reject the extremes and . . . borrow ideas from both sides in intense social controversies.”<sup>82</sup> These approaches work particularly well with judges because “[t]here is . . . convincing evidence that judges, when engaged in certain tasks distinctive of their professional role, are better able to resist various forms of at least some cognitive biases than are lay people under similar circumstances.”<sup>83</sup>

##### 1. *Judicial Humility and Aporetic Engagement*

The technique of judicial humility calls for a state of mind that recognizes that judges are susceptible to making mistakes in their decisions.<sup>84</sup> More recently, Dan Kahan has also called for “judicial idioms of aporia,” or a mode of argumentation that acknowledges the complexity of many legal issues.<sup>85</sup> This approach would counter the universal tendency of judges to state their views in their legal opinions in

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80. Secunda, *supra* note 18, at 140–48.

81. Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009).

82. *Id.* at 1053.

83. Kahan et al., *supra* note 2 (manuscript at 36).

84. See Secunda, *supra* note 18, at 140–41. For a wonderful recent example of judicial humility in opinion writing by Judge William G. Young of the U. S. District Court for the District of Massachusetts, see *United States v. Massachusetts*, 781 F. Supp. 2d 1, 13–15 (D. Mass. 2011), in which Judge Young openly acknowledges the dangers of conflating fact-finding with legal explanation and admits his prior decision granting summary judgment in a Title VII disparate impact case was clearly erroneous.

85. See Kahan, *supra* note 23, at 62. Whereas “[h]umility’ connotes consciousness of one’s own limits in solving a problem; *aporia* emphasizes the limited amenability of the *problem* to a satisfactory solution, along with apprehension of the same.” *Id.* at 62 n.347.



an unequivocal manner.<sup>86</sup> A high degree of “[c]ertitude in opinions also enhances the tendency of those whose identities are threatened by the decision to suspect bias by the Court.”<sup>87</sup>

Moreover, judicial fallibility is especially possible in cases that elicit community outrage.<sup>88</sup> By recognizing the potential for community outrage and engaging in judicial humility, judges can more readily self-correct for their own cognitive biases that may bear upon how they view legally consequential facts,<sup>89</sup> while simultaneously avoiding “pronouncements of *certitude* [that] deepen group-based conflict.”<sup>90</sup> Indeed, recent research on educating judges about their own biases has shown that “more precise techniques in encouraging self-analysis” or more systematic consideration of counterarguments may be more successful than past debiasing strategies.<sup>91</sup>

Judges with the sensitivity to acknowledge potential community outrage over decisions are also better prepared to draft decisions without the appearance of partisan motivations or the denigration of the concerns held by the community group on the losing side of these cases.<sup>92</sup> Moreover, the concepts of judicial humility and aporetic engagement address one of the core pitfalls of cognitive illiberalism: that a community group can easily recognize when a community group with opposing views is engaging in cognitive illiberal bias, but cannot recognize its own.<sup>93</sup> Judges, like other individuals, are prisoners of their own worldviews and may be blind to the influence of these underlying perspectives. In short, the practices of humility and writing opinions in an aporetic manner encourage judges to self-reflect on how culturally motivated cognition may color their view of legally consequential facts

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86. *See id.* at 60. This phenomenon stems from the fact that “[j]udges . . . are likely to believe that frankly acknowledging the vulnerability of their reasoning to counterarguments will invite the suspicion that they are deciding on the basis of some personal value or interest.” *Id.*

87. *Id.* at 62.

88. Secunda, *supra* note 18, at 140–41 (noting Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 159, 183 (2007)).

89. *Id.* (citing Kahan et al., *supra* note 1, at 898).

90. Kahan, *supra* note 23, at 60.

91. Secunda, *supra* note 18, at 143 (quoting Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 436–37 (2006)).

92. *See* Kahan et al., *supra* note 1, at 898–99.

93. Kahan, *supra* note 23, at 61. Such naïve realism “lubricates the mechanisms of group conflict.” *Id.*

and, thereafter, avoid basing decisions on those biases.<sup>94</sup> To be clear, however, such approaches do not necessarily change the outcome of the legal dispute, only the manner in which the dispute is analyzed and the way in which its resolution is communicated to the larger public.<sup>95</sup>

## 2. *Expressive Overdetermination*

Expressive overdetermination is a debiasing technique that encourages judges to interpret laws in a manner that seeks to accommodate competing worldviews.<sup>96</sup> Or as Dan Kahan has explained more specifically, “*Expressive overdetermination* is a technique that embeds information bearing a potentially identity-threatening social meaning in a message frame that evocatively conveys additional, identity-affirming meanings.”<sup>97</sup>

Through this accommodation, the hope is that each community can find meanings in the decision that affirm some of its worldviews. Individuals may be able to find validation for their views in some aspect of the law because these types of legal decisions incorporate “a plurality of meanings.”<sup>98</sup> Although such an expressive overdetermination approach might not work well with judges who are ideologically committed to one way of looking at the world,<sup>99</sup> cultural cognition theory maintains that most judges are not partisan warriors.<sup>100</sup> Rather, judges “subscribe to an elaborate network of craft norms. Acquired through professional training and experience, these norms generate a high degree of convergence among judges and lawyers on what counts as appropriate decisionmaking.”<sup>101</sup> Such appropriate decisionmaking should include a “psychologically realistic

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94. Yet, “[e]ven if the Justices were themselves unaffected by cultural cognition, then, it would be essential to their function as our constitutional system’s neutral arbiters to use idioms of justification that counteract cultural cognition in the public assessment of their decisions.” *Id.* at 28.

95. *Id.* at 62 (“Aporetic engagement does not preclude a definitive outcome or resolution. But it necessarily treats as *false*—a sign of misunderstanding—any resolution of the problem that purports to be unproblematic.”).

96. *Secunda*, *supra* note 18, at 144–45.

97. Kahan, *supra* note 23, at 67 (citing Kahan, *supra* note 47, at 146).

98. Kahan, *supra* note 47, at 146–47; *see also* Kahan, *supra* note 23, at 71 (“A psychologically realistic understanding of constitutional law tells us that the Court is most likely to accomplish [the goal of assuring us of its impartiality] not through theoretical abstractions but through idioms and gestures that convey a plurality of cultural meanings.”).

99. *See* Kahan, *supra* note 23, at 76 (“Justices who deface the public image of the Court by repeated acts of rhetorical vandalism are unlikely to respond to pleas for them to stop.”).

100. *See* Edwards & Livermore, *supra* note 63, at 1964 (“There may be some judges who care little about their colleagues’ views and who are determined not to engage in collegial interactions. However, they are not in the majority.”).

101. Kahan, *supra* note 23, at 27.

understanding of how the Court should *communicate* its commitment to using [judicial interpretation] methods impartially.”<sup>102</sup>

### 3. *Trimming*

Trimming incorporates all of the techniques discussed above for combating cognitive illiberalism. Trimming, according to Sunstein, is a decision procedure that “requires close attention to all points of view, including the poles.”<sup>103</sup> Because a judicial trimmer follows a framework that considers all points of view across a spectrum, “contemporary trimmers . . . tend to end up between the extremes, in a way that makes both believe that they have gained, or not lost, something of importance.”<sup>104</sup>

Thus, expressive overdetermination is a technique that is essential to trimming due to the fact that individuals with opposite worldviews can find affirmation in the underlying basis for a judicial decision. Furthermore, the trimmer operates from a decision procedure that explores the merits of the other side’s argument and seeks to preserve what can be valuably drawn from those arguments.<sup>105</sup> To explore the merits of the other side’s argument, a judge would need to exercise a judicial habit of mind-fostering humility and utilize idioms of aporia to acknowledge that his or her worldview alone does not illuminate fully the significance of legally consequential facts and their effect on how a case should be decided.

What makes Sunstein’s concept of trimming relevant as a debiasing technique is that this approach does not just encourage judges to listen to the other side, but rather encourages judges to identify “what is deepest and most appealing in competing positions” so as to ensure that “to the extent possible, no one is, or feels, rejected or repudiated.”<sup>106</sup> This is not to say, however, that trimming involves finding the middle ground between two competing worldviews.<sup>107</sup> In fact, trimming is not analogous to a

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102. *Id.* at 59.

103. Sunstein, *supra* note 81, at 1054.

104. *Id.*

105. *See id.*

106. *Id.* at 1059.

107. Like Kahan, “I would resist the claim . . . that expressive overdetermination could or should be implemented through a Missouri Compromise pattern of results.” Kahan, *supra* note 23, at 69.

moderate political affiliation because moderates “do not much care about the competing positions, and are not trying to steer between them.”<sup>108</sup>

By engaging in a trimming experiment, judges may be able to best “capture the most plausible convictions of the adversaries.”<sup>109</sup> By engaging in a process that facilitates capturing the deepest convictions held by competing worldviews, judges can show respect for all views while avoiding decisions based on their own culturally biased motivations.<sup>110</sup> This approach will, in turn, help judges avoid being “unwittingly impelled to form perceptions of fact, interpretations of doctrines, and evaluations of legal arguments congenial to their own worldviews.”<sup>111</sup>

### *B. Institutional Debiasing Strategies*

In addition to the opinion-writing debiasing strategies discussed above, another promising method for debiasing judges in labor and employment law cases is through making them more familiar with legal doctrine in this area of law. The thought is that the more familiar judges are with a complex doctrine, the less likely they will need to fall back on culturally motivated cognition to fill in holes in their knowledge base.

The number of labor and employment law cases by itself may not obviously support the creation of a separate court system as comprehensive as that of the bankruptcy courts. Yet, when looking at the number of cases commenced in the U.S. district courts in 2009—the last year that caseload statistics were available for the federal courts in February 2011—a picture emerges of a large number of actions involving labor law cases and civil rights employment-related claims. For instance, during 2009, there were over 17,000 labor cases, including Fair Labor Standards Act hours and wages cases, traditional labor cases under the National Labor Relations Act and Railway Labor Act, and ERISA cases, and nearly 15,000 civil rights-related employment cases such as employment discrimination claims under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.<sup>112</sup> In the area of labor law alone, litigation increased by 19.08% from 2000 to

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108. Sunstein, *supra* note 81, at 1059.

109. *Id.* at 1061.

110. *See id.* at 1070.

111. *See* Kahan, *supra* note 23, at 27.

112. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2009, at 49–50 tbl.C-2 (2009) [hereinafter 2009 CASELOAD STATISTICS], available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C02Mar09.pdf>.

2009.<sup>113</sup> Furthermore, reflecting the growing complexity of labor law cases, the number of actions pending for three years or more increased by 69.25% during the same period.<sup>114</sup>

In addition to the growing number and importance of labor and employment law cases in the federal system, two arguments favor the creation of a specialized court system or specialized judges for employment-related matters within the federal court system. First, the growing complexity of labor and employment law calls for a vigorous response within the federal judiciary by creating a mechanism for the speedy, efficient, and equitable adjudication of employment actions. There is complexity in this area because (1) the decisional law is complicated, (2) there are a large number of overlapping statutes on the federal and state level, and (3) in many instances, there is an additional layer of complexity by virtue of the fact that federal and state agencies are making, enforcing, and applying the law before a case ever reaches a court.<sup>115</sup> By steering employment cases to those judges with expertise

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113. Compare ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2001, at 46 tbl.C-2 (2001) [hereinafter 2001 CASELOAD STATISTICS], available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseLoadStatistics/2001/tables/c02mar01.pdf>, with 2009 CASELOAD STATISTICS, *supra* note 112, at 50 tbl.C-2.

114. Compare JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 58 tbl.S-11 (2009), available at [http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness/2009/tables/S11Sep09.pdf](http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S11Sep09.pdf), with LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2000 JUDICIAL BUSINESS: ANNUAL REPORT OF THE DIRECTOR 60 tbl.S-11 (2000), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2000/tables/s11sep00.pdf>. Although the number seems high, the comparison does not seem so great when compared to the percentage of cases pending for three years over the number of cases commenced the same year. To illustrate this point, the number of cases filed under labor law for 2009 was 17,127 while the number of labor law cases pending for three years or more during that same year was 633, or 3.7% of the total. See 2009 CASELOAD STATISTICS, *supra* note 112, at 50 tbl.C-2; DUFF, *supra*, at 58 tbl.S-11. Contrast this with the year 2000 where the total number of actions commenced under labor law was 14,383 while actions pending for three years or more for matters falling under labor law were 374, or 2.6% of the total. See 2001 CASELOAD STATISTICS, *supra* note 113, at 46 tbl.C-2; MECHAM, *supra*, at 60 tbl.S-11. Thus the increase in the number of cases pending for more than three years in relation to the total number of actions commenced that same year results in a comparative increase of only 1.1%.

115. In this regard, labor and employment law appears to be even more complex than many other areas of the law. See Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008). Hirsch has noted that “[t]he laws and regulations governing the American workplace reveal a level of complexity and uncertainty that rivals virtually any other area of law.” *Id.* at 89. Furthermore, the

and familiarity with labor and employment law, some of this complexity may be better handled and the goals of efficiency and fairness may be realistically attained.

Second, by assigning employment-related cases to judges steeped in knowledge and familiarity of labor and employment law, the residuary goal of ensuring that a specialized cadre of judges will adjudicate labor law cases free of culturally motivated cognition will be promoted. Because these judges will not be faced with the need to fill in gaps in knowledge in the same way or to the same degree that a generalist judge would need to do, judges specialized in labor and employment law may be better equipped to fairly adjudicate cases without the corrupting unconscious influence of this illiberal bias. In turn, cognitive illiberalism will be diminished when more evenhandedly decided cases are processed by “losers” in the politico-legal wars.<sup>116</sup>

This specialized court or judge model could work in the federal court system through at least three approaches, (1) the appointment of a federal magistrate specialized in this area of the law, (2) the creation of a labor and employment law court based on the Article I bankruptcy court model, or (3) the establishment of a specialized appellate court, much like the current Federal Circuit Court of Appeals. Outside of the federal system, other countries, like the United Kingdom, provide additional examples on how administrative tribunals may be implemented to counteract the problem of cognitive illiberalism in labor and employment law cases.

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growing complexity of one type of labor and employment law case, employment discrimination cases, has been frequently and recently discussed by legal scholars. *See, e.g.,* William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 690–91 (2010) (noting the current complexity in employment discrimination law); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 858 (2010) (noting the Court’s shift away from interpreting discrimination statutes to bring about uniformity); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 75 (2011) (noting the complexity in disparate treatment and disparate impact law).

116. Indeed, the same diminishment of culturally motivated cognition in legal decisionmaking would also occur in other complex areas of the law if a similar approach were to be followed.

### 1. Magistrate Model

One of the more interesting trends in the federal system from the twentieth to the twenty-first century is the increasing number of statutory judges supplementing the role of their Article III counterparts. There are more than 550 magistrate judgeships serving at the district court level, not many short of the 678 judgeships slotted for Article III district court judges.<sup>117</sup> Article III judges, however, retain important control over statutory judges through the selection, appointment, and reappointment process itself.<sup>118</sup> This is important in that “[t]hose chosen to be constitutional judges therefore not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory judges.”<sup>119</sup>

The authorizing statute for magistrate judges specifies several requirements when district courts make appointments.<sup>120</sup> One selection criteria is that magistrate judges are required to have several years of experience as a practicing attorney.<sup>121</sup> For the selection process itself, district courts are required to use “‘merit selection panels,’ to be ‘composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons best qualified to fill such positions.’”<sup>122</sup>

The merit selection panels are also required to give “due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities.”<sup>123</sup> Finally, the Judicial Conference of the United States has issued guidelines for “both the appointment and the reappointment of magistrate judges.”<sup>124</sup> Ultimately, the final decision on the selection of candidates for magistrate judgeships resides

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117. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2008, at tbl.1.1 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table101.pdf>.

118. See 28 U.S.C. § 631 (2006 & Supp. 2010) (magistrate judicial selection); 28 U.S.C. § 152 (2006) (bankruptcy judicial selection).

119. See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 607 (2005).

120. See 28 U.S.C. § 631.

121. *Id.* § 631(b)(1).

122. Resnik, *supra* note 119, at 607 (quoting 28 U.S.C. § 631(b)).

123. *Id.* (quoting Federal Magistrates Act of 1979, Pub. L. No. 96-82, § 3(c), (e), 93 Stat. 643, 644-45 (1979) (codified as amended at 28 U.S.C. § 636 (2006))).

124. *Id.* (citing MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES (2002)).

with the Article III judges of each district court.<sup>125</sup> Article III judges are also responsible for the decision of whether to reappoint magistrate judges at the end of their eight-year term.<sup>126</sup>

Unfortunately, under current rules, magistrate judges cannot be funneled only certain types of cases, like labor and employment actions, by the district courts.<sup>127</sup> Therefore, to allow the district courts to direct labor and employment cases to a specified magistrate judge—presumably with extensive background and knowledge about labor and employment law—Congress would need to pass legislation allowing the practice.

Though the present system poses an obstacle to utilizing a particular magistrate judge within a federal district to hear labor and employment cases, it also offers an opportunity for experimentation to pilot the use of a designated labor and employment judge.<sup>128</sup> By allowing a district court to utilize, on a trial basis, a specialized magistrate for hearing labor and employment cases, more information can be gathered about the model's usefulness and the case for expanding the use of specialized labor and employment judges to effectively address the danger of cognitive illiberalism surrounding labor and employment law decisions can be further built.

## 2. Bankruptcy Court Model

The bankruptcy court system within the federal district courts offers another possible model for the development of specialized employment judges to handle labor and employment cases.<sup>129</sup> A particularly attractive aspect of the bankruptcy court model is its statutory status, obviating the

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125. See 28 U.S.C. § 631.

126. *Id.* § 631(a), (e).

127. MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 141 (3d ed. 1999).

To exercise civil consent authority, a magistrate judge must be “specially designated” by the district court under § 636(c)(1). Congress provided that the designation must be *general* in nature and cannot be limited to certain specific categories of civil cases. H.R. Rep. No. 287, 96th Cong. 1st Sess. 11 (1979).

The civil consent authority of a magistrate judge so designated is thus limited only by the general civil jurisdiction of the district court itself.

*Id.* (emphasis added).

128. Consider, in this regard, other pilot projects that courts have undertaken to improve judicial administration and efficiency. For instance, the Judicial Conference of the United States recently approved a pilot project to allow cameras in federal district court courtrooms. See *Judiciary Approves Pilot Project for Cameras in District Court*, U.S. COURTS (Sept. 2010), [http://www.uscourts.gov/news/TheThirdBranch/10-09-01/Judiciary\\_Approves\\_Pilot\\_Project\\_for\\_Cameras\\_in\\_District\\_Courts.aspx](http://www.uscourts.gov/news/TheThirdBranch/10-09-01/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx).

129. The idea would be for such courts to handle Article I labor and employment law cases over which federal courts presently have exclusive or concurrent jurisdiction. The current proposal does not contemplate interfering with the primary jurisdiction of the NLRB or other such federal or state agencies' jurisdiction.



need to create a fully separate and newly formed Article III employment court. The bankruptcy courts handle far more cases than a specialized group of employment judges would.<sup>130</sup> But despite this disparity, the bankruptcy system offers a couple of core strengths that are worth emulating: first, autonomy and independence from political pressure, and second, the overall quality of bankruptcy judges.

The selection, appointment, and reappointment of bankruptcy judges works in a similar fashion to the procedures for the selection of magistrates, except the federal courts of appeals have decisionmaking authority and are not bound by the same statutory requirements for the selection of magistrate judges.<sup>131</sup> The Judicial Conference has issued guidelines for the selection of bankruptcy judges,<sup>132</sup> but there are variations on the procedure across the federal circuits.<sup>133</sup> The following is one example of the selection process for a bankruptcy judge in the Ninth Circuit Court of Appeals.

First, a local merit-screening committee will review applications from candidates for open bankruptcy positions.<sup>134</sup> The local merit-screening committee will review the applications and recommend no more than five candidates for consideration to the Court-Council Committee on Bankruptcy Appointments.<sup>135</sup> The local merit-screening committee is made up of (1) the chief judge of the federal judicial district in which the bankruptcy judge is to be appointed; (2) the president of the state bar association; (3) the president(s) of one or more local bar associations within the district; (4) the dean of a law school located within the district; (5) the administrative circuit judge or the designee of the administrative circuit judge of the circuit geographical unit in which the bankruptcy judge is to

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130. The number of bankruptcy filings for 2009 was 1,473,675, while the aggregate total of labor law case filings together with civil rights employment-related matters was 31,763. See ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY STATISTICS: 12-MONTH PERIOD ENDING DECEMBER 2009, at tbl.F-2 (2009), available at [http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2009/1209\\_f2.pdf](http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2009/1209_f2.pdf); 2009 CASELOAD STATISTICS, *supra* note 112, at 49–50 tbl.C-2.

131. Resnik, *supra* note 119, at 607–08 (citing 28 U.S.C. § 152 (2000)).

132. See JUDICIAL CONFERENCE OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES (2006), available at [http://www.ca5.uscourts.gov/news/news/2011\\_ce\\_stx\\_qualif.pdf](http://www.ca5.uscourts.gov/news/news/2011_ce_stx_qualif.pdf).

133. Resnik, *supra* note 119, at 608.

134. JUDICIAL COUNCIL OF THE NINTH CIRCUIT, REGULATIONS GOVERNING THE APPOINTMENT OF U.S. BANKRUPTCY JUDGES § 3.03(c)(1) (2001), available at <http://www3.ce9.uscourts.gov/web/ocelibra.nsf/0/392dbd6884261adb88256afd0060030f?OpenDocument>.

135. *Id.*

be appointed; and (6) the chief bankruptcy judge of the district in which the bankruptcy judge is to be appointed, except when a resident incumbent judge is seeking appointment to an additional term.<sup>136</sup> The members of the Court-Council Committee, consisting of no more than five members with at least three being circuit court judges with voting authority, recommend to the Ninth Circuit Judicial Council, in a report, a candidate for appointment.<sup>137</sup> The Judicial Council then reviews the recommendations and either determines that the Court-Council Committee should reconsider the candidate or recommends the candidate to the Court of Appeals.<sup>138</sup> The candidate will then be appointed upon a majority vote by the members of the Court of Appeals.<sup>139</sup>

Even though bankruptcy judges lack the protections of Article III judges with life tenure and secure compensation,<sup>140</sup> bankruptcy judges are arguably more insulated from the legislative and executive branches than federal district judges.<sup>141</sup> The selection process of bankruptcy judges by the courts of appeals encourages merit-based selection of bankruptcy judges based on their professional credentials rather than their political leanings.<sup>142</sup> Because bankruptcy judges, as non-Article III judges, do not require nomination by the President with the advice and consent of the Senate, these judges are shielded to some extent from the political branches.<sup>143</sup> Instead of relying on a political appointment process, the bankruptcy appointment process relies on the bankruptcy bar.<sup>144</sup>

The bankruptcy bar encourages creativity in the management of cases and efficient resolution of complex cases.<sup>145</sup> In short, a reciprocal relationship exists between the bankruptcy judiciary and the bankruptcy bar in that both groups seek the promotion of a skilled professional bankruptcy judiciary that places a high value on “pragmatic solutions to financial distress.”<sup>146</sup> In addition, the relationship between the bankruptcy bar and bankruptcy judges promotes consensus among the groups’ members on the “general aims of bankruptcy law and the ideal workings of the process.”<sup>147</sup>

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136. *Id.* § 3.02(a).

137. *Id.* § 3.04(c)(5).

138. *Id.* § 3.05(a).

139. *Id.* § 4.01; *see also* 28 U.S.C. § 152(a)(3) (2006).

140. U.S. CONST. art. III, § 1.

141. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 793 (2010).

142. *Id.* at 793–94.

143. *Id.* at 794.

144. *See id.* at 795.

145. *Id.* at 798.

146. *Id.*

147. *Id.* at 804.

The apparatus of the bankruptcy court system may be an ideal model for formulating a comparable system of employment judges within the federal judiciary. Indeed, the appointment process for bankruptcy judges is worthy of emulation. The ultimate goal in the creation of a system of employment courts as Article I courts with a similar scope of authority as bankruptcy courts within the federal court system would be the development of a professionalized class of labor and employment judges with expertise and familiarity in labor and employment law in the adjudicatory process.

Emulation of the appointment process of the bankruptcy courts may encourage the development of a class of employment judges that can better communicate with the labor and employment bar and other employment scholars on the general aims of labor and employment law and the ideal workings of the process. Moreover, the appointment process of bankruptcy judges is also worth imitating from the standpoint of shielding a labor and employment judge from political pressures. This is a significant advantage given the highly partisan nature of labor and employment disputes between union and management or between employer and employee.

By minimizing the need to garner favor among politically connected actors, employment judges may not feel the need to curry favor from those political actors in order to obtain promotion to the federal bench or reappointment to an additional term as an employment judge. Free from these political considerations, labor and employment judges would have more freedom to focus on “professional, creative, and nonideological adjudication” of labor and employment-related cases.<sup>148</sup>

From a cognitive illiberalism perspective, the creation of Article I employment courts as an institutional debiasing strategy would also be a beneficial development. Because “[j]udges . . . report seeing different things when they make and review findings of fact akin” to most individuals,<sup>149</sup> it is important that they not only become familiar with the law, but also with the concerns and ideas of the labor and employment law bar. The upshot, as is seen when judges engage in thorough and

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148. *Id.* at 793.

149. Kahan et al., *supra* note 2 (manuscript at 37).

good faith deliberation, like on an appellate panel, is less dispositive disagreement over legally consequential facts.<sup>150</sup>

Of course one of the practical problems with establishing a labor and employment law court based on the bankruptcy model is to convince Congress to pass legislation similar to the Bankruptcy Reform Act of 1978.<sup>151</sup> Passage of such a law in the current political environment is hard to imagine. Nevertheless, because of the unhappiness of both management and union interests in the way labor and employment law cases get decided through a myriad of courts and federal and state administrative agencies, there is a possibility that the two sides could coalesce around an arrangement that allows greater access to judicial institutions with greater expertise in this area of the law and promises that future developments in this area of the law would be more predictable and uniform.<sup>152</sup> Those promises alone may make the creation of such an Article I court something that both management and union interests should consider seriously.

### 3. Article III Appellate Court Model

An even more far-reaching model on the debiasing strategy spectrum for employment courts is to adopt a separate Article III labor and employment appellate court, similar to the one established for intellectual property cases by the creation of the Federal Circuit Court of Appeals.<sup>153</sup>

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150. See Edwards & Livermore, *supra* note 63, at 1963 (“[T]he process of deliberation in a collegial environment can reduce the impact of any individual judge’s cultural cognition.”).

151. 11 U.S.C. §§ 1101–1174, 1201–1231, 1301–1330 (2006 & Supp. IV 2011). See generally Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978, Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1 (2007) (analyzing the passage of the Bankruptcy Act of 1978 as part of an extensive five-part series by the same author).

152. Indeed, a number of scholars, including myself, have already put forward federal legislative proposals seeking to harmonize the law surrounding labor and employment disputes, in different contexts, as a way to promote uniformity and predictability in the law. See, e.g., Hirsch, *supra* note 115, at 91 (proposing uniform “law of termination” that would simplify the governance of terminations); Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525 (2011) (proposing anti-retaliation law that would apply to virtually all forms of employer retaliation); Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 KY. L.J. 343, 367 (2008) (“The proposed federal Freedom of Association in the Workplace Act . . . would provide a complementary and comprehensive statutory framework for all associational rights claims in the workplace.”).

153. The Federal Circuit Court of Appeals was established in 1982. Since that time, “[a] number of commentators have concluded that . . . the [Federal] Circuit has come to embody a number of long-theorized problems with specialized courts, such as tendencies toward interest-group capture, bias in favor of an overly muscular view of the laws under its special care, and an esotericism or tunnel vision that disconnects the circuit from broader social or legal concerns.” John M. Golden, *The Supreme Court as “Prime*

Many advantages exist for a specialized labor and employment appellate court. First would be the advantage of judicial familiarity and expertise that an Article III labor and employment court system would necessarily have in adjudicating solely labor and employment matters. Second, judicial efficiency would be further enhanced because there would be less dissonance between various federal appellate courts over the meaning of controversial labor and employment laws.<sup>154</sup>

Such an appellate court would also benefit from the influence of deliberation on culturally motivated cognition.<sup>155</sup> An authority on labor and employment law, Judge Harry T. Edwards, has commented in a recent piece that “[i]n many such situations, a judge’s cultural cognition can be moderated in anticipation of a colleague’s views—a kind of tacit deliberation.”<sup>156</sup> Indeed, deliberation as a cleansing and information-filtering mechanism provides numerous opportunities to eliminate cognitive illiberalism from appellate court decisionmaking:

Judges deliberate when they raise questions during oral argument to alert their colleagues to their concerns. Judges deliberate in conference and continue to deliberate after conference when they raise issues uncovered in their research. Judges deliberate when they circulate draft opinions, receive their colleagues’ responses, and negotiate resolutions to any differences.<sup>157</sup>

In short, a good argument exists that an appellate court that specializes in labor and employment law cases may provide the best opportunity for fortifying labor and employment law theorizing from culturally motivated cognition by requiring these judges to moderate their culturally motivated cognition through deliberation with other judges.

However, the fact of the matter is that creating an appellate Article III labor and employment court would face significant political hurdles in Congress.<sup>158</sup> One only needs to review the contentious history and the

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*Percolator*”: A Prescription for Appellate Review of Questions in Patent Law, 56 UCLA L. REV. 657, 659 (2009).

154. “[T]he central purpose [of the Federal Circuit’s creation was] to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law.” H.R. REP. NO. 97-312, at 23 (1981).

155. Edwards & Livermore, *supra* note 63, at 1964.

156. *Id.*

157. *Id.*

158. Indeed, one of the more difficult questions that would need to be answered is, if there is need for a specialized labor and employment law appellate court, then why is there not a need for specialized courts dealing with everything from real estate law to products liability law? Furthermore, the District of Columbia Circuit Court already plays this role to some degree because many of the appeals it receives come from federal

considerable legislative effort required to create a separate Article I bankruptcy court system.<sup>159</sup> Nevertheless, and as argued in relation to the creation of Article I employment courts based on the bankruptcy court model, such a specialized court might have benefits concerning uniformity and predictability in this area of the law that may sufficiently outweigh any costs that opponents may see in further specializing the federal courts.

#### 4. *British Employment Tribunal Model*

The last model, and the most far-reaching one, would be to adopt a system modeled on certain international court tribunals. The British system offers a good point of reference because of some similarities in the way that British and American law approach workplace legal disputes as a theoretical matter.<sup>160</sup>

Under the British employment tribunal system, tribunals consist of a chairperson, who is an experienced attorney, and two lay members appointed from employer and employee representative groups respectively.<sup>161</sup> The

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administrative agencies like the NLRB. See Matthew Ginsburg, “A Nigh Endless Game of Battledore and Shuttlecock”: *The D.C. Circuit’s Misuse of Chenery Remands in NLRB Cases*, 86 NEB. L. REV. 595, 597 (2007) (“The D.C. Circuit, which is an alternate venue for appeals under the National Labor Relations Act of 1935 . . . , routinely hears more petitions for review of NLRB orders than any other circuit.”).

159. See generally Mund, *supra* note 151 (describing the creation of the current bankruptcy court system). Of particular interest is the fact that Congress defeated attempts to change Article I bankruptcy courts into Article III courts. See Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1611 (2006) (“When considering what came to be known as the 1978 reforms, members of Congress contemplated creating life-tenured judgeships for bankruptcy judges. The Judicial Conference took a position against that proposition, and . . . Chief Justice [Burger] was a very present lobbyist opposed to conferring Article III status on bankruptcy judges.”).

160. See Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INTL. L. 247, 267–68 (2008) (“The U.K. is a useful comparator for the U.S. in [the workplace bullying] context because both countries lack a tradition of basing harassment law on a dignity paradigm.”).

161. See *id.* at 270 (“[E]mployees may pursue their employment disputes through a specialized Employment Tribunal.”); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1431–32 (2004) (“The idea of resolving discrimination claims through tribunals can be traced to the Royal Commission on Trade Unions and Employers Associations, better known as the Donovan Commission. This group suggested in 1968 that labor tribunals’ jurisdiction ‘should be defined so as to comprise all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have against each other in their capacity as employer and employee.’” (quoting ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS’ ASSOCIATIONS 1965–1968, REPORT, 1968, Cmnd. 3623, at 156 (U.K.))); *Employment Tribunals: An Introduction*, DIRECTGOV, [http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Employmenttribunals/DG\\_10028122](http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Employmenttribunals/DG_10028122) (last visited May 14, 2012).

two lay members are not present at the hearing to represent either side in a dispute and must maintain impartiality at all times.<sup>162</sup> In addition, the tribunal tries to match a lay member to the gender or to the race of the claimant if the claim involves gender or race discrimination.<sup>163</sup>

As far as what the normal procedure is in the employment tribunals, a claimant will file an application for a hearing.<sup>164</sup> After the defendant employer has been notified of the complaint, the parties to the dispute proceed to mediation, which is administered by the Advisory Conciliation and Arbitration Service (ACAS).<sup>165</sup> During conciliation, an officer from the ACAS will explain the procedures of the employment tribunal and the points of law relevant to the claimant's claim.<sup>166</sup> Frequently, disputes are resolved during the conciliation stage so that it effectively acts as a filtering mechanism for reducing the number of claims that will ultimately be decided by the tribunal.<sup>167</sup>

If mediation is unsuccessful, the tribunal will conduct a hearing, which will typically last for a half day or less,<sup>168</sup> though discrimination cases may take two or three days.<sup>169</sup> To facilitate the speedy adjudication of disputes, the hearings are conducted informally and are not subject to the normal rules of evidence that usually apply in British law courts.<sup>170</sup>

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162. See Michael Mankes, *Combatting Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67, 89 (1994).

163. Sternlight, *supra* note 161, at 1433.

164. Mankes, *supra* note 162, at 90.

165. See Sternlight, *supra* note 161, at 1434–35; Martin Schneider, *Employment Litigation on the Rise? Comparing British Employment Tribunals and German Labor Courts*, 22 COMP. LAB. L. & POL'Y J. 261, 268–69 (2001).

166. Sternlight, *supra* note 161, at 1434.

167. *Id.* at 1435 (“According to the 2001–2002 ACAS Annual Report, 77.5% of completed discrimination claims were either settled or withdrawn, as compared to just 22.5% that were resolved at the tribunal stage.” (citing ADVISORY, CONCILIATION AND ARBITRATION SERV., ANNUAL REPORT 2001–2002: WORKING TOGETHER 26–27 tbl.8 (2002), available at [http://www.acas.org.uk/media/pdf/d/0/ACAS\\_02\\_AR\\_1.pdf](http://www.acas.org.uk/media/pdf/d/0/ACAS_02_AR_1.pdf))).

168. Mankes, *supra* note 162, at 92.

169. Sternlight, *supra* note 161, at 1434 & n.154 (citing EMPLOYMENT DEPARTMENT, RESOLVING EMPLOYMENT RIGHTS DISPUTES: OPTIONS FOR REFORM, 1994, Cm. 2707, at 27 (U.K.)).

170. Mankes, *supra* note 162, at 92 (quoting LINDA DICKENS ET AL., DISMISSED: A STUDY OF UNFAIR DISMISSAL AND THE INDUSTRIAL TRIBUNAL SYSTEM 194 (1985)); see also Sternlight, *supra* note 161, at 1433 (“The proceeding before the [tribunal] is adjudicative in nature, though it is intended to be less formal than a court proceeding.”); Joseph M. Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 120

Last, plaintiffs are limited to one of three remedies, (1) reinstatement to their previous positions, (2) rehire by the same employer or an associated employer, or (3) compensation, which does not include the possibility of compensatory or punitive damages, but merely lost wages.<sup>171</sup>

Applications for review can be made to the employment tribunal within fourteen days from the decision of the tribunal and the tribunal may only grant a review in cases of error in the decision, errors in notice to a party or parties, or other reasons warranting review.<sup>172</sup> Appeals against the decision of an employment tribunal can only be made on matters of law to an Employment Appeals Tribunal, with further appeal available to the Court of Appeals and the House of Lords.<sup>173</sup>

The British employment tribunal system was set up with the goal of creating a system that was “easily accessible, informal, speedy and inexpensive” so as to give employers and employees “the best possible opportunity of arriving at an amicable settlement of their differences.”<sup>174</sup> Because the tribunals are informal and are not bound by the rules of evidence, plaintiffs do not face the same obstacles in pursuing claims pro se as their American counterparts. Court fees are paid out of public funds and litigants do not bear the prevailing party’s costs, unlike the typical British rule that the losing party to a suit will pay the prevailing party’s costs.<sup>175</sup>

One of the notable advantages of the British employment tribunal model, aside from its accessibility, speed, and low cost for claimants and employers, is that the members of the tribunal have significant experience on employment matters.<sup>176</sup> On the one hand, the lay members of the tribunal provide impartial experience concerning the job involved or

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(1996) (“[Employment] tribunals . . . are not courts of record and their decisions have no precedential value.”).

171. Mankes, *supra* note 162, at 92. Although reinstatement is the preferred remedy in unfair dismissal cases, compensation is the most common remedy granted. See Schneider, *supra* note 165, at 278 (quoting Linda Dickens et al., *Re-employment of Unfairly Dismissed Workers: The Lost Remedy*, 10 INDUS. L.J. 160, 161 (1981)). Indeed, the proportion of reinstatements in successful unfair dismissal claims declined to the point that the remedy was granted in less than one percent of cases in 1998 and 1999. *Id.* (citing Emp’t Tribunals Serv., *Employment Tribunal and Employment Appeal Tribunal Statistics 1997–98 and 1998–99*, 107 LABOUR MARKET TRENDS 493, 494 (1999) (U.K.)).

172. Mankes, *supra* note 162, at 92–93; Schneider, *supra* note 165, at 269 (“[P]arties can apply to the tribunal for review of its decision, for example on the ground that new evidence has come to light since the hearing.”).

173. Schneider, *supra* note 165, at 269.

174. Sternlight, *supra* note 161, at 1432 (quoting ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS’ ASSOCIATIONS 1965–1968, *supra* note 161, at 156).

175. Mankes, *supra* note 162, at 94.

176. *See id.* at 89.



about the industry in which the job exists.<sup>177</sup> On the other hand, the chairperson is constantly exposed to labor and employment issues and has the opportunity to develop sophisticated expertise on labor and employment issues.<sup>178</sup> Finally, this tripartite structure of the employment tribunal panel also facilitates the legitimacy of the ultimate decision of the tribunal.<sup>179</sup>

From a cognitive illiberalism perspective, the hope is that the familiarity of the tribunal members with labor and employment law will lead to less need to fall back on cultural values congenial to the legal decisionmakers' values and thereby avoid creating unnecessary discontent with the law among "losers" in the process.<sup>180</sup> Therefore, in addition to promoting the British employment tribunal model's goal of promoting accessibility, efficiency, and economy,<sup>181</sup> the British tribunal model also represents a systemic solution to the problem of cognitive illiberalism and the delegitimization of the law. With the tribunal's three-person panel and focus on employees and employers having a representative present mirroring the claimant's and employer's perspectives, the tribunal consequently has a mechanism in place to ensure that each side of a dispute is not delegitimized by the potentially culturally motivated cognition of a sole decisionmaker.<sup>182</sup>

Put differently, the employment tribunal chairperson is well-positioned to act as a judicial trimmer, as Sunstein contemplates, because he or she must mediate between the poles represented by the two lay members of the tribunal.<sup>183</sup> What this means in the British tribunal model is that decisions are more likely "to end up between the extremes, in a way that makes both [employer and employees] believe that they have gained, or not lost, something of importance."<sup>184</sup> Therefore, such decisions will

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177. The purpose of including the two lay members is to bring "knowledge of human nature and industrial practice," to communicate in plain words the complicated legal matter to participants, and to enhance the *perceived fairness* of the hearing, thus ensuring acceptance with the outcome of the case." Schneider, *supra* note 165, at 275 (emphasis added) (quoting DICKENS ET AL., *supra* note 170, at 59).

178. *Id.* at 274.

179. *Id.* at 274–76.

180. There will also be deliberation, as in appellate panels, which may also act to counteract culturally motivated cognition. *See supra* note 150 and accompanying text.

181. *See Sternlight, supra* note 161, at 1432.

182. *Id.*

183. *See supra* Part III.A.3.

184. *See Sunstein, supra* note 81, at 1054.

also be more consistent with the ideals of humility and expressive overdetermination.

Of course, the British model may also be subject to abuses that are all too familiar in the United States. Indeed, many of the problems with both current employment arbitration practice in the United States<sup>185</sup> and with the workers' compensation model<sup>186</sup> might make a British-type employment tribunal model not ideal for those focused on workers receiving a legitimate chance to vindicate their workplace rights in an adjudicative setting. Nonetheless, its example should be taken seriously by those who believe that some form of specialized tribunal is necessary to fight against culturally motivated cognition in labor and employment legal disputes in the United States.

#### IV. SPECIALIZED COURTS AND THE PROMISE OF OPACITY

Regardless of which institutional debiasing strategy is adopted, there will be some disagreement over the relative advantages and disadvantages of having specialized labor and employment law courts, tribunals, or judges. The present Part undertakes a comparative institutional analysis, considering the arguments in favor of such specialized institutions, the arguments against such institutions, and finally, an argument based on opacity that seeks to show that the American legal system should at least experiment with some of these institutional debiasing strategies.

##### A. *The Advantages of Specialization*

Specialized judges and courts offer three recognized advantages, (1) a reduction in the caseload for generalist judges, (2) an enhancement in the quality of decisions by judges specialized in complex areas of the law, and (3) a promotion of greater uniformity of decisions in courts specialized

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185. Criticism of employment arbitration includes the fact that “[c]ompanies have greater experience with, knowledge of, and resources for litigation; they are more lucid about adjudication and better understand its rules and objectives.” Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 *CARDOZO J. CONFLICT RESOL.* 395, 413 (2009). The repeat player problem that stems from these structural deficiencies might lead to employers being unfairly advantaged in these settings. See *infra* notes 209–10 and accompanying text.

186. Although workers' compensation laws provide ready access to remedies for employee injuries in the workplace, such remedies are usually paltry. See Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 *TULSA L. REV.* 647, 667 (2009) (describing the workers' compensation model as involving “broad coverage and lower damages”). Such administrative courts are also subject to criticism because of the possibility of capture. Freeman L. Farrow, *The Anti-Patient Psychology of Health Courts: Prescriptions from a Lawyer-Physician*, 36 *AM. J.L. & MED.* 188, 201 (2010) (“Specialized courts such as tax courts and workers compensation tribunals . . . have been criticized as being subject to capture by repeat players who appear in the tribunals.”).

in particularized areas of the law.<sup>187</sup> As the case numbers mentioned earlier suggest, generalist Article III judges have been inundated with an increasing caseload while their judicial resources have not kept pace with the increased demand on the federal judiciary.<sup>188</sup> The expanded jurisdiction of and reliance on magistrates is also an indicator of the need for greater judicial resources for the federal courts.<sup>189</sup>

In addressing the case for enhanced decisionmaking by specialized judges, the crux of the theory that judges in complex areas of law will enhance the quality of decisions is that some areas of law, such as tax law or patent law, are inherently difficult for nonspecialists to understand. Thus, a specialist in the subject matter of the case will have a better opportunity to understand and formulate the law as applied to the relevant facts in a given case.<sup>190</sup>

Another perceived advantage of specialized courts is that specialization will lead to greater uniformity of decisions.<sup>191</sup> This does not necessarily have to be done only through specialized judges but also can be done through the utilization of experts, special masters, and technical advisors

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187. Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1268–69 (2005).

188. See *supra* notes 112–14 and accompanying text. Matters have been made worse by recent political polarization, which has substantially delayed the confirmation of federal judges in recent years. See RUSSELL WHEELER & SARAH A. BINDER, BROOKINGS INST., DO JUDICIAL EMERGENCIES MATTER? NOMINATION AND CONFIRMATION DELAY DURING THE 111TH CONGRESS 8–9 (Christine Jacobs ed., 2011), available at [http://www.brookings.edu/~media/Files/rc/papers/2011/0216\\_judicial\\_emergencies\\_wheeler\\_binder/0216\\_judicial\\_emergencies\\_wheeler\\_binder.pdf](http://www.brookings.edu/~media/Files/rc/papers/2011/0216_judicial_emergencies_wheeler_binder/0216_judicial_emergencies_wheeler_binder.pdf) (“In sum—and recognizing individual exceptions—the priority the Judicial Conference attaches to filling judicial emergencies was not shared (at least with regards to the district courts) in 2009–2010 by the administration in making nominations or by the Senate in confirming them (and probably not by legislators in recommending nominees.)”).

189. See Victor Williams, *A Constitutional Charge and a Comparative Vision To Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 542 (1996) (“Special emphasis is given to the institutionalization of various judicial coping mechanisms that ultimately shortchange justice, such as overreliance on staff attorneys, law clerks, and magistrates.”).

190. Damle, *supra* note 187, at 1277.

191. See Joel C. Johnson, *Lay Jurors in Patent Litigation: Reviving the Active, Inquisitorial Model for Juror Participation*, 5 MINN. INTEL. PROP. REV. 339, 355 (2004) (“More important than the number of courts that numerous states have created is the fact that the specialization has had the effect of making decisions more consistent and giving the specialist judges more credibility.”).

who can assist the judiciary.<sup>192</sup> Increased caseloads compounded with increased complexity in particular areas of the law, on the other hand, can work to further multiply the problem of nonuniformity.<sup>193</sup> In short, the hope is that the use of specialized courts or judges will lead to greater uniformity and predictability in this area of judicial decisionmaking over time.

### B. *The Disadvantages of Specialization*

Still, there are several points of concern for specialized courts. Among those concerns, the most salient are (1) “judicial ‘tunnel vision,’” (2) the risk of “judicial capture by special interests,” and (3) excessive judicial bias rooted in familiarity with the subject matter.<sup>194</sup>

First, with regard to judicial tunnel vision, there is a risk that specialized judges will lack the “‘cross-pollination’ of ideas” in the common law and other areas of law.<sup>195</sup> Furthermore, specialized judges could make their specialized area of the law even more complex, rendering it even less intelligible to a generalist judge or attorney.<sup>196</sup>

The risk of judicial capture is also an important concern.<sup>197</sup> Because of the more narrowly defined area of law on which specialized judges would necessarily be focused, the risk of capture is more accentuated due to the more narrowly defined group of interests that those judges’ decisions would potentially affect.<sup>198</sup> On the other hand, the perceived advantage of a generalist judge is that a judge will hear cases affecting a wider range of competing interest groups, thus reducing the risk of capture.

Finally, of particular concern is that the increased familiarity of judges with a particular area of law may exacerbate the problem of judicial bias:

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192. See LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 6 UCLA J.L. & TECH. 1, 25–28 (2002) (discussing the benefits of having the Board of Patent Appeals & Interferences of the U.S. Patent and Trademark Office operate as an Article I tribunal).

193. Damle, *supra* note 187, at 1277–78.

194. *Id.* at 1269.

195. *Id.* at 1281. Though this seems like it would be less of a concern in an area like employment law, where much of the law is based on the common law of contracts and torts. See, e.g., RESTATEMENT (THIRD) OF EMP’T LAW ch. 2, 4 (Tentative Draft No. 2, 2009).

196. Damle, *supra* note 187, at 1281.

197. *Id.* at 1283.

198. See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 130–31 (2002) (“As th[e] imbalance of participation increases, so does the risk of capture.”).

[W]hile the expertise that courts of limited jurisdiction provide is undoubtedly valuable, the flip side is that specialist judges might have too much familiarity with a particular area of the law. Judges who are experts in welfare law, for example, are much more likely to have particular views about the proper operation of welfare law and hence are much more likely than generalist judges to impose their own views of policy.<sup>199</sup>

Further compounding the problem from a cultural cognition standpoint is how a narrow group of specialized judges may be even more inclined to engage in cultural bias due to the community of interest that may form among a smaller cadre of employment judges.<sup>200</sup> And it is not simply about getting a decision or two “wrong”; it is also the problem of this smaller group of judges incorrectly predicting how others will see a decision and then being aggressively overconfident in defending the choice. This is the overconfidence associated with the phenomenon of *aporia*.<sup>201</sup>

Two other concerns about specialized courts also deserve mention. First, federal courts of general jurisdiction are much better suited to adapting to the changing volume of cases in different areas of the law.<sup>202</sup> From year to year, and in different areas of the law, there is unpredictability in the volume of cases.<sup>203</sup> Therefore, developing a specialized court system would entail ascertaining a predicted volume of cases to justify an allocation of federal resources to procuring staff to meet those volume demands.

Any mismatches in the allocation of judicial resources for specialized courts with volume demands for the expertise of a specialized system would either weaken the case for specialization—as in the case of allocating greater resources than demand requires—or strengthen the need for the courts—as in the case of allocating fewer resources than demand requires. Generalist judges, however, obviate the need to accurately predict volume for particular areas of the law because the focus is on the allocation of enough judicial resources to meet the overall caseload, regardless of the substantive area of law of each individual case.

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199. Damle, *supra* note 187, at 1283.

200. *See id.* Kahan notes that “[i]ndividuals generally conform their beliefs to those held by their associates—both because those are the persons from whom they obtain most of their information and because those are the ones whose respect they most desire.” Kahan, *supra* note 47, at 120–21. Consequently, specialized judges may be encouraged to conform their beliefs to accord with those held by their narrowly specialized group.

201. *See supra* notes 85–87 and accompanying text.

202. Damle, *supra* note 187, at 1284–85.

203. *See supra* notes 112–14.

Second, there may be concern that a specialized federal court, with its focus on a narrow area of law, may not be able to attract highly qualified individuals to fill these specialist judicial roles. Specialized courts have been traditionally viewed “by the bar and the public as ‘inferior,’ regardless of their place on a judicial organization chart.”<sup>204</sup> Because of this perception of specialized courts as inferior in stature among the bar and public, these courts may have more trouble attracting highly qualified individuals to serve as judges, potentially affecting the quality of decisions.<sup>205</sup>

Though the point of this subpart is not to diminish the case for creating a system within the federal judiciary to develop a cadre of specialized employment judges by pointing out the potential criticisms and pitfalls that specialized courts may have, these concerns are highlighted here so that they can be addressed if such a model were adopted. By recognizing the potential drawbacks of specialized courts, many of these concerns can be addressed through systemic solutions while also addressing the overarching issue of cognitive illiberal bias in employment-related cases. Furthermore, the potential shortcomings of specialized judges in the employment law area must be balanced against the advantages specialization can offer: increased uniformity, enhanced decisional quality, greater systemic efficiency, and decisions free from culturally motivated cognition and the associated societal problems of cognitive illiberalism.

### C. *The Promise of Opacity*

The problem of capture discussed as one of the disadvantages of having specialized judges or courts is certainly an issue with any judicial selection process. This phenomenon arises in various contexts including in situations where a federal judge may be predisposed to deciding cases in ideological conformity with his or her party affiliation.<sup>206</sup> The

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204. See Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 748 (1981). Since the Jordan article was written, however, many have come to believe that the Federal Circuit Court of Appeals has become the preeminent intellectual property court in the country. See Nicole-Marie Slayton, *Internet Business Model Patents: An Obvious Incentive To Reform the United States Patent and Trademark Office*, 21 LOY. L.A. ENT. L. REV. 123, 130 n.82 (2000) (noting the preeminence of the Federal Circuit in the patent field).

205. See Damle, *supra* note 187, at 1285. With the bankruptcy courts, for instance, it is notable that only a few judges who started on the bankruptcy courts have ended up being elevated to Article III courts. See McKenzie, *supra* note 141, at 796 (“Of the 115 bankruptcy judges who left the bench between 1995 and 2004, only 8 did so due to elevation to the Article III bench.” (citing Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the “Units” Faring?*, 47 B.C. L. REV. 105, 107 (2005))).

206. See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. (forthcoming 2012) (manuscript

concern about capture becomes more heightened when a judge only works with cases in a particular field of law, and a potential exists that parties affected by these decisions will seek to influence these specialized judges to decide in their favor.<sup>207</sup>

Capture may become even easier when a specialized judge only deals with one type of case.<sup>208</sup> Thus, employer or pro-union groups may be encouraged to curry favor with judges specialized in labor and employment law. Indeed, there is a similar issue in nonunion employment arbitration, as is seen with the “repeat player problem.”<sup>209</sup> Because arbitrators are selected by the parties and employers are more often called to arbitrate employment disputes, there is a fear that arbitrators will seek to curry favor with those employers because that is the likely source of their future business.<sup>210</sup>

Another concern for specialized judges in the area of capture is that they are perceived to not have the same degree of judicial independence as their Article III counterparts because they do not have life tenure with salary protection.<sup>211</sup> However, as discussed above, the selection process of these judges may provide its own protection for this judicial class, if

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at 45), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1942282](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1942282) (“Individuals are nominated to the Court because they are committed to the cultural perspective behind the agenda of the nominating President on salient issues, and the President nominates individuals like this to satisfy core members of his own political party.” (citing Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 450)).

207. See McKenzie, *supra* note 141, at 798–800; see also Damle, *supra* note 187, at 1283.

208. Damle, *supra* note 187, at 1283.

209. See Carbonneau, *supra* note 185, at 413.

210. *Id.* (“Not only are the corporations more aware of, and familiar with, the arbitral process, but the process and its agents are more familiar with them. This circumstance could breed either an underlying contempt or a procedural or psychological advantage.”); see also Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011) (“[R]esults [of a comprehensive empirical study] provide strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases . . . .”); David Sherwyn et. al, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 143 (1999) (“[W]e must note that the concept of repeat player bias is tenuous. . . . Despite the fact that the concept is illogical, Professor Bingham’s research supports the hypothesis that the repeat player bias does have an effect on arbitration results.” (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997))).

211. See McKenzie, *supra* note 141, at 750–51.

the process for selecting bankruptcy judges in the Ninth Circuit Court of Appeals provides an indication of how a process might work.<sup>212</sup>

For example, the selection of magistrate judges and bankruptcy judges by Article III judges from within the federal judiciary, hidden to a substantial degree from public comment, provides the protection of opacity to the Article I judiciary.<sup>213</sup> Rafael Pardo explains this counterintuitive outcome by describing how “process transparency may reduce the utility of a candidate transparency requirement and thus undermine judicial quality” while on the other hand “process opacity may prevent candidate transparency from being co-opted for political ends, thus improving judicial quality.”<sup>214</sup>

The primary controls available for ensuring judicial accountability are screening through either the appointment process of the Article III judiciary or the merit-screening process from within the federal judiciary for Article I judges.<sup>215</sup> The secondary controls are the processes for censure, reprimand, suspension, and finally removal or reappointment if the Article I judge acts in a way beyond the realm of reasonable behavior.<sup>216</sup> Pardo separates these two functions as the “ex ante accountability mechanism” and the “ex post accountability mechanism.”<sup>217</sup>

The most familiar ex ante accountability mechanism for judges is the appointment of Supreme Court Justices where candidates articulate their judicial philosophy on a variety of issues including judicial approach, the role of the courts, and the state of the law.<sup>218</sup> The ex ante method seeks

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212. See *supra* notes 134–39 and accompanying text.

213. See Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. 633 (2009). The term *opacity* is used by Pardo to describe candidate selection processes that are closed in nature, or opaque, in contrast to transparent selection processes that are open to the public. *Id.* at 633. Pardo utilizes the selection process of bankruptcy judges to illustrate how the opaque selection process facilitates the selection of highly qualified candidates that are freer from political bias than those judges selected to the Article III bench. See *id.*

214. *Id.*

215. See *id.* at 635–36; see also Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2172 (2006) (explaining that the judicial selection process can be used to hold “judges directly accountable”).

216. Pardo, *supra* note 213, at 635–36 (citing 28 U.S.C. §§ 354(a)(2)(A), 631(e) (2000); *id.* § 152(a)(1) (2000 & Supp. V 2005)); see also Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 335 (1993) (describing the removal process for Article III judges).

217. See Pardo, *supra* note 213, at 635–36.

218. Of course, given recent troubles in confirming all levels of federal court judges, see *supra* note 188, this process may not be the best one to emulate. There is also the concern that nominees try to avoid saying anything of substance in the confirmation process. See David Weigel, *The Judges Who Didn't Make It*, SLATE.COM (Dec. 23, 2010, 8:21 AM), <http://www.slate.com/blogs/blogs/weigel/archive/2010/12/23/the-judges-who-didn-t-make-it.aspx> (“Most future judicial nominees have learned the lesson that the young Barack Obama learned in the 1990s—don’t say anything interesting about the law.”).



a precommitment from the candidate regarding the manner in which he or she would carry out the duties of office . . . . If the selecting group places a great deal of emphasis on the candidate's answers as a selection qualification, and if the group is particularly adept at identifying candidates who will adhere postselection to what they have said during the selection process, then the process will function as an accountability mechanism prior to the judge taking office.<sup>219</sup>

However, the difficulty of the *ex ante* approach is that the longer a judge's term is, the opportunity for accountability becomes even less frequent.<sup>220</sup> For specialized employment judges, the importance of the *ex ante* accountability mechanism is not as substantial precisely because of their limited-tenure status and the lack of public interest in such judicial selection.<sup>221</sup> Furthermore, there is a recurring *ex post* accountability mechanism for these judges who must, if they wish to be reappointed, adhere to the standards of review for selection to a new term.<sup>222</sup>

By allowing for a degree of opacity in the selection process of candidates for specialized employment positions, courts, or tribunals, the political pressure placed upon individuals serving on selection committees to please narrow constituent groups may be mitigated.<sup>223</sup> And because the decision to select a bankruptcy or magistrate judge is ultimately made by a life-tenured Article III judge, decisionmakers are free to make decisions, ignoring the appeals of narrow constituent groups, on the basis of the candidate's professional merits rather than on whether the candidate's political affiliations match the decisionmaker's political wishes.

The hope is that insulation of specialized judges from groups to whom they have a natural cultural affinity will make it more likely that these judges will produce "trimmed" legal decisions that permit self-affirmation

219. Pardo, *supra* note 213, at 635; *see also* Fontana & Braman, *supra* note 206 (manuscript at 45) (describing the *ex ante* vetting process for Supreme Court Justices).

220. Pardo, *supra* note 213, at 636–37 (“[T]he more structural independence a judge’s term of office provides, the more important it becomes for an *ex ante* accountability mechanism to play a role in the judicial quality function.”). In this regard, consider Justices who were appointed by Republican Presidents to the United States Supreme Court who later became quite progressive in their judicial philosophies—Justices Brennan, Blackmun, Stevens, and Souter. *See, e.g.,* Lisa Keen, *Justice Stevens: A Republican Who Grew Liberal with the Times*, GA VOICE (Apr. 15, 2010, 11:16 PM), <http://www.theavoice.com/index.php/news/national-news-menu/177-justice-stevens-a-republican-who-grew-liberal-with-the-times>.

221. Magistrate judges serve for terms of eight years while bankruptcy judges serve fourteen-year terms. *See* 28 U.S.C. §§ 152(a)(1), 631(e) (2006).

222. *See id.* § 152(a)(1); 28 U.S.C. § 631(a)–(b) (2006).

223. *See* Pardo, *supra* note 213, at 635.

for those who are disfavored in a given case. Moreover, such decisions will be more legitimate to most citizens because the larger community will be assured “that those decisionmakers’ findings are genuinely untainted by cultural partisanship.”<sup>224</sup> Finally, opacity in judicial selection of these judges may provide a crucial counterweight, in addition to the expertise of these specialized judges, against legal decisionmaking tainted by cultural bias.

## V. CONCLUSION

The object of this Article has been to focus attention on the danger that cognitive illiberalism poses to legal decisionmaking in general and to the polarized field of American labor and employment law in particular. It has attempted to illustrate how legal decisionmakers are vulnerable to betraying their commitments to neutrality by unconsciously fitting their view of the legally consequential facts of a case in a manner that is congenial to their values. Cognitive illiberalism subsequently results from how legal decisionmakers explain their decisions and how those explanations are processed by “losers” in the politico-legal wars of our society. Infected by cognitive illiberalism, law becomes delegitimized as perceived by the larger community.

To address this threat to the ideal of neutrality in judicial decisionmaking,<sup>225</sup> this Article has advanced a spectrum of debiasing strategies to provide an analytical toolbox for legislators and others policymakers to consider in bolstering the legitimacy of the law. For the first time, institutional debiasing strategies have been advanced as an additional method to minimize societal conflict over labor and employment law decisions.

The hope is that these proposed institutional structures will minimize the amount of needless discontent with American labor and employment law, bring greater uniformity, clarity, and predictability to these legal decisions, and encourage the development of a professionalized group of labor and employment law judges. At the very least, such institutional experimentation would improve the public discourse on vital workplace issues in the United States.

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224. Kahan et al., *supra* note 2 (manuscript at 36).

225. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); Kahan, *supra* note 23, at 6 (“The most fundamental form of individual freedom that liberal constitutionalism secures for its citizens depends on the promise that government won’t impose legal obligations that presuppose adherence to a moral or political orthodoxy.”).