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Citation: 85 Cornell L. Rev. 313 1999-2000

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WHATEVER HAPPENED TO ANTI-SEMITISM? HOW SOCIAL SCIENCE THEORIES IDENTIFY DISCRIMINATION AND PROMOTE COALITIONS BETWEEN “DIFFERENT” MINORITIES

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PROLOGUE	315
I. INTRODUCTION	319
A. Atomized and Generalized Discrimination	320
B. The Litigant Payoff: The Lily White Organization and Intersectionality's Sibling.....	326
C. The Societal Payoff: Coalition Effects, Empathy and Prevention.....	329
D. Racism, Prejudice, and the Metaphors of Disease ...	330
E. Overview and Roadmap	332
II. GENERALIZED DISCRIMINATION AND PROOF OF DISCRIMINATION TODAY.....	333
A. Why This Article Does Not Address “Substantive” Antidiscrimination Law	334

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B.	How Concepts of Generalized Discrimination Help Prove or Disprove Discrimination in Particular Cases	338
1.	<i>Proving Discrimination and the Small Numbers Problem</i>	339
2.	<i>The Prohibition Against Ingroup Sympathy and Its Stereotyped Application</i>	343
C.	The Unexamined Assumption of Atomized Discrimination: "Logic," Burden-Shifting, and Law by Stereotype	346
1.	<i>The Separate Case of Affirmative Action</i>	349
2.	<i>Caveat Lawyer: Theoretical and Practical Limits on Evidence of Generalized Discrimination</i>	351
3.	<i>Legal Questions for Social Science Theories of Discrimination</i>	358
III.	GENERALIZED DISCRIMINATION IN THE SOCIAL SCIENCES: INGROUP AND OUTGROUP PARADIGMS	359
A.	The Overlapping Consensus That "Different" Kinds of Discrimination Often Really Reflect Generalized Discrimination	362
B.	Outgroup Hostility	364
1.	The Authoritarian Personality	364
a.	<i>From "Anti-Semitism" to "Prejudice in General"</i> ..	366
b.	<i>Quantitative Evidence of Generalized Outgroup Hostility</i>	368
c.	<i>The Ethnocentric Ideology Explanation</i>	370
d.	<i>The Independent Psychoanalytic Explanation</i>	373
e.	<i>Atomized Traces</i>	374
f.	<i>The Limits and Lessons of The Authoritarian Personality</i>	376
2.	<i>Early Cognitive Theories: Allport's Nature of Prejudice</i>	379
a.	<i>Allport's Expanded Concept of Ingroups</i>	380
b.	<i>The Generally Prejudiced Personality</i>	381
C.	Ingroup Sympathy: Social Psychology and the "We-Who?" Distinction	383
1.	<i>What Is Wrong with Ingroup Sympathy?</i>	386
2.	<i>"We" and "Them": The Minimal Group Experiments</i> . .	388
3.	<i>"They" Are All Alike: Outgroup Homogeneity</i>	392
4.	<i>"We" Versus "Them": The Status Competition Explanation</i>	394
5.	<i>Automatic Discrimination: Prototypes and the Discriminatory Nature of Normal Decision Making</i> ...	396
6.	<i>Automatic Ingroup Sympathy</i>	399
7.	<i>Experimental Evidence of Generalized Discrimination</i> .	402

8. <i>The Mix of Discrimination: Who Is “in” the Ingroup?</i>	406
D. Summary of Social Science Paradigms	409
IV. HOW SOCIAL SCIENCE THEORIES AFFECT PROOF OF DISCRIMINATION	410
A. Evidence of Generalized Discrimination in Court.....	410
1. <i>Balancing Evidence of Prior Discrimination</i>	411
2. <i>Strong Position: No Additional Hurdles to Evidence of Generalized Discrimination</i>	414
3. <i>A Moderate Position: An Additional Balancing Factor</i>	415
4. <i>Should Defendants Face Additional Hurdles?</i>	416
a. <i>Specific Employer Defenses</i>	417
b. <i>Nonspecific Defenses</i>	418
5. <i>Disparate Impact Analysis</i>	420
B. Generalized Discrimination and “Alternative” Dispute Resolution	421
V. THE PUZZLING PERSISTENCE OF ATOMIZED DISCRIMINATION: BARRIERS TO SEEING GENERALIZED DISCRIMINATION AND BROAD “COALITIONS”	426
A. Cognitive Barriers	428
1. <i>Client Barriers</i>	428
2. <i>Lawyer Barriers</i>	428
B. Strategic and “Rational” Barriers	431
1. <i>Material and Psychic Reparations and Rational Choice</i>	431
a. <i>Material Reparations</i>	432
b. <i>Psychic Reparations</i>	432
c. <i>Unlocking Reparations Logic</i>	433
2. <i>Status Barriers</i>	435
a. <i>Top-Down Resistance: “Wanna-Be” Discrimination</i>	435
b. <i>Bottom-Up Resistance: Anti-“Wanna-Be” Discrimination</i>	438
C. The Limits of Rationality Analysis.....	439
VI. CONCLUSION	441

PROLOGUE

“Gender Discrimination in Employment”

Deborah is a seventh-year associate in a small but well-established law firm. The managing partner calls her into his office. “I’m sorry,” he says. “And you know I personally think you’d be a great partner, but the consensus here is that you should look elsewhere.” “Why?”

Deborah asks. "Well, the general feeling in the building is that you don't always have the right attitude, and attitude is important to the kind of close-knit place we've always been around here." Deborah suspects that her "attitude" would be viewed differently if she were a man.

Deborah speaks to a law school classmate, Joel, who practices employment law. Joel listens to her story and says, "So you're thinking it might be gender discrimination? Well, tell me how they treat the other women in the firm."¹ Deborah tells him that she is the only woman in her associate "class," and that there are only two or three women associates in the firm. "That's a problem," Joel says. "A jury may just think you're difficult. It would be easier if we could show some type of pattern so they believe it's not you, but how the firm treats all women." Deborah is frustrated. "That's the whole point: *there are no other women*," she explains. "They always beat up on one person at a time. They're just a bunch of good old boys. I mean, last year, they said some Jewish associate was difficult, and the year before it was the 'attitude' of some African-American attorney."²

"Racism in the Courts"

After meeting with Deborah, Joel goes to a bar association committee meeting. The president is discussing a large number of studies from other jurisdictions on "racial bias" in the profession. The president asks Joel to chair the committee. Joel hesitates and states:

I don't really know enough about race. My practice deals exclusively with gender discrimination, and I'm not sure how much we can really analogize between these two problems. This calls for an African-American attorney. If we were studying sexual orientation, we'd want someone who specialized in lesbian and gay law.

"Ingroups and Outgroups": The Social Science Paradigm

Joel decides to ask his college roommate, who now teaches psychology at a major university, for help. He wants "some kind of expert on sexism" for Deborah's case, and "another expert on racism" for his bar study. The psychology professor sends him an article about ingroups and outgroups. The article surveys sociological and psychological research from the 1940s to the present. The work traces how social scientists have studied the way that ingroups have advantages that outgroups lack. Theorists have disagreed about exactly how and why outgroups are disadvantaged. Some early psychoanalytic scholars thought that individuals developed a prejudiced personality based on

¹ Joel's advice follows the conventional wisdom of attorneys. See *infra* note 84.

² See, e.g., Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 324 tbl.II.10 (1995) (finding that in the firms studied in 1992, 86% of female attorneys and 94% of male attorneys were white). The data for Jewish representation in contemporary American society is less uniform. See *infra* note 8.

authoritarian family structures; this early development embedded into their psyches an unconscious desire to act out against those perceived as weak, be they women, Jews, or foreigners.³ Others believed that, for whatever reason, some individuals have a tendency to generalize more than others, or are more likely to stick to generalizations about "others"—the various outgroups.⁴ As experimentation gained popularity in the social sciences, those scholars who termed themselves social psychologists tested the way that individuals view people like themselves as superior in a variety of ways; often if individuals had nothing in common besides being assigned to the same side of a room.⁵ Other psychologists described the way in which individuals tend to associate the label of ideal doctor, lawyer, or secretary with a particular image; those who do not fit the ideal image might simply not register on an individual's radar screen.⁶

"Ingroups and Outgroups": The Legal Translation

Joel spends hours reading the report. He sends his professor friend an urgent e-mail: "This stuff is great. It's very readable. I've heard second-hand about a lot of this stuff. So basically, you could testify before the bias commission: Lots of racism is unconscious; people aren't aware of it."

A Social Scientist's Reply: "Whatever Happened to Anti-Semitism?"

"Poor Joel," the professor might well think. "Why do lawyers see things so differently?" The professor's point is not that discrimination occurs at an unconscious level, although the professor might agree with that statement. Rather, the professor's point is that lawyers habitually dissect behaviors into "different" types of discrimination or inequality, whereas social scientists often see those same behaviors as intimately related. This inclination to connect types of discrimination is shared by a wide range of scholars over a long period of time. It typifies both scholars who emphasize personality and those who emphasize social and institutional context,⁷ it also typifies scholars who emphasize conscious discrimination and those who emphasize unconscious discrimination. It even describes scholars who use economic reasoning to describe rational discrimination.

The professor might try a more historical approach to explain related discrimination. "Whatever happened to anti-Semitism?" the professor might ask. "Why do we hear so little about Jews and discrimination?" Joel might say that Jews have "succeeded"; they no longer

³ See *infra* Part III.B.1.

⁴ See *infra* Part III.B.2.b (explaining Allport's theory of the prejudiced personality).

⁵ See *infra* Part III.C.2 (describing the minimal group experiments of social psychologists).

⁶ See *infra* Part III.C.6 (discussing theories of prototype and exemplar decision making).

⁷ See *infra* note 8.

face discrimination or unequal opportunity.⁸ The professor might agree with Joel's statement, but he could invoke a different explanation: many who set out to study "anti-Semitism" concluded that it is *often* better understood as prejudice in general. The professor might relate the story of *The Authoritarian Personality*.⁹ In the wake of the German Nazis and the Holocaust, the American Jewish Committee gave lavish funding to a study of anti-Semitism during the 1940s.¹⁰

⁸ For example, consider the following dialogue between African-American sociologist Cornel West and Jewish Rabbi Michael Lerner:

C.W. But what Black folk see is the reality of Jewish success.

M.L. There's something in the formulation of that statement that assumes that what is real is material success. The Marxists were unable to pick up on Jewish oppression, hence we were totally unprepared for the rise of fascism, which focused on anti-Semitism. Why? Because for the Marxists, the fundamental reality was economic oppression. Well, Jews seemed to be doing alright economically in 1920s' [sic] Germany, so Marxists didn't see them as a group whose interests needed to be protected. That's because Jewish oppression does not take the form of economic oppression. So does that mean they're not really oppressed? Or does it mean that Marxism's theory of what constitutes oppression is inadequate?

MICHAEL LERNER & CORNEL WEST, *JEWS AND BLACKS: LET THE HEALING BEGIN* 124 (1995). For further analyses of Jewish material success in certain fields, see RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, *DIVERSITY IN THE POWER ELITE: HAVE WOMEN AND MINORITIES REACHED THE TOP?* 39 (1998) ("Although Jews may still be underrepresented in some business sectors within the corporate community, . . . Jews are overrepresented overall in the corporate elite . . . [and] also now overrepresented in both the Senate and the House . . ."), and STUART SVONKIN, *JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES* 180 (1997) ("There were exceptions to the rule (such as the persistence of anti-Jewish discrimination in certain social clubs and at the executive level of some major corporations), but as a group, American Jews had indisputably attained a remarkable degree of success and acceptance." (footnote omitted)). Nevertheless, many Jews frequently report encounters that they perceive as anti-Semitic. See LEONARD DINNERSTEIN, *ANTISEMITISM IN AMERICA* 230-44 (1994) (reporting that Jews in America today still frequently face anti-Semitism).

Other scholars share West's emphasis on the divergence in economic interests between African Americans and Jews; some historians largely attribute the cause of the perceived split between some African-American and Jewish leaders to this type of economic explanation. See SVONKIN, *supra*, at 192 (suggesting that "[i]ntergroup relations workers tended to target the psychological roots of prejudice rather than the social, political and economic conditions that fostered inequality" and therefore failed to address "more basic problems, rooted in a lack of political power and economic opportunity").

Many of the works examined in this Article, however, attempt to use both psychological and social analyses. One of the earliest psychological scholars emphasized these social influences. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 514 (1954) (concluding that prejudice is a function of both personality and social structures). Similarly, the Frankfurt School, with its emphasis on the role of history and society, largely influenced the various authors who contributed to a series of books comprising the *Studies in Prejudice*, which were funded by the American Jewish Committee. See MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923-1950*, at 227-29 (1973) (acknowledging the widespread perception of the psychological emphasis of the *Studies in Prejudice*, but emphasizing the lingering elements of social analysis).

⁹ T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

¹⁰ See *infra* note 190.

This study culminated with the publication of *The Authoritarian Personality*. However, its authors ultimately reported that they could not study anti-Semitism except as a part of the larger question of prejudice in general.¹¹ Since the publication, academic psychology departments have de-emphasized the particularities of the authors' theories. This may have resulted in part because the theories heavily rely on Freudian psychoanalysis; psychology departments have become increasingly enamored of differences in social contexts associated with psychology,¹² and disenchanted with the studies of individual personality differences that psychoanalytic theory emphasizes. Despite these shifts, the study's focus on ingroups, outgroups, and prejudice in general still accurately describes how many sociologists, psychologists, and economists view prejudice today. These theorists continue to focus not merely on "different" kinds of discrimination but instead on how prejudice in general often privileges an ingroup at the expense of all others.¹³

I

INTRODUCTION

The stories in the Prologue depict everyday lawyering practices, but depend on deep assumptions about the nature of prejudice and the relationship between "different" kinds of discrimination. Many cases turn on the question of how lawyers themselves frame the ques-

¹¹ See ADORNO ET AL., *supra* note 9, at 3 ("[F]rom the start the research . . . supposed (1) that anti-Semitism probably is not a specific or isolated phenomenon but a part of a broader ideological framework, and (2) that an individual's susceptibility to this ideology depends primarily upon his psychological needs."). Although social scientists have continued to study prejudice in general, some Jewish organizations in the 1960s began to speak more frequently of anti-Semitism rather than prejudice in general. See SVONKIN, *supra* note 8, at 184-85. Nevertheless, many Jewish organizations still focus on prejudice in general. For example, the Anti-Defamation League of B'nai B'rith uses its polling data to emphasize that anti-Semitic Americans are more likely to be racists and be intolerant of immigrants, women, lesbians, and gays than the general public. See Anti-Defamation League, *Anti-Semitism and Prejudice in America; Highlights from an ADL Survey; Most Anti-Semitic Americans Also Tend to Be More Intolerant on Other Issues* (Nov. 1998) (visited Oct. 26, 1999) <http://www.adl.org/antisemitism%5Fsurvey/survey_iv_chart_intolerance.htm>.

¹² See generally, e.g., BOB ALTEMEYER, *RIGHT-WING AUTHORITARIANISM* 6-10 (1981) (describing the influential claim that social context is more relevant in explaining authoritarianism than differences in personality, and refuting this critique of the personality trait of authoritarianism); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991) 2-8 (presenting a more recent critique of the emphasis on personality).

¹³ See *infra* note 239 and accompanying text (discussing how contemporary statistical studies of attitudes continue to show that those who are very hostile to one outgroup tend to be very hostile to a wide range of outgroups). The relevant ingroup may be different at different times or at the same time in different contexts, such as within different institutions or within parts of an institution. See *infra* Part III.C.8 (noting that psychologists agree that discrimination is often a function of preference for an ingroup, but have not carefully studied how to define the relevant ingroup).

tion, "Who else might have faced the same situation my client faces?"¹⁴ Like Joel, the lawyers in those cases will rarely consider this question. Perhaps ironically, when social scientists study how prejudice occurs, they rarely consider the question of whether they focus on sexism, racism, or homophobia. The lawyer and the social scientist will both take the fundamental question for granted. The lawyer just "knows" that discrimination occurs in certain "obvious patterns," such as "racism," "sexism," and "homophobia." The social scientist also just "knows" that ideas like "discrimination," "prejudice," or "stereotyping" largely cut across different -isms. A lawyer working on a "race case" rarely considers examining how women are treated; a social scientist writing about stereotypes often overlooks the fact that some of the studies he cites involve experiments with women, others with gays, and others with African Americans.¹⁵

How society, social scientists, and lawyers categorize discrimination both affects how we resolve claims of discrimination and implicates profound theoretical questions in legal theory and social science. Unlike some attempts to compare law with other disciplines, this Article does not suggest that the lawyers and legal scholars "get it wrong" and other disciplines have the correct answer. Although it focuses on the limitations of current legal understandings, the Article suggests instead that both law and social science must recognize various forms of discrimination.

A. Atomized and Generalized Discrimination

Most of us, including lawyers, assume that discrimination occurs when an individual intends to harm another person whom they see as a member of a particular group, such as when an employer refuses to hire African Americans because he dislikes African Americans.¹⁶

¹⁴ See *infra* note 84 and accompanying text.

¹⁵ See *infra* note 274 (highlighting examples of current research that mixes what lawyers normally would consider different forms of discrimination).

¹⁶ In my earlier work, I identified this pervasive unquestioned assumption of atomized discrimination in legal scholarship, the structure of legal education, and the structure of legal research. See Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 247-48 (1990); see also Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITTS. L. REV. 337, 337-38 (1996) (describing a "civil rights paradigm" in which, among other things, claimants must "invok[e] a particular characteristic—such as race or gender—which has been associated with a sufficient history of stigma, concrete disadvantage, and political marginalization, as to entitle those who bear it to some degree of legal protection"). Many critical race theory scholars, who historically emphasized the condition of African Americans, have recognized that discussions of race may sometimes be too narrowly focused. See, e.g., Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 775 (1994) ("Race-crits' understanding of 'race' and 'racism' might also benefit from looking beyond the struggle between black and white."); cf. Francisco Valdes, *Foreword: Latina/o Ethnicities*,

While other authors may define the concept of "atomized" more broadly as "individualized" or "isolated," this Article uses the term in a particular way. What I call the paradigm¹⁷ of "atomized discrimination" presupposes that people discriminate against those with a particular set of traits associated with a fairly discrete group, such as African Americans, and that this is not necessarily how they would treat individuals from some "other" group, such as women, Korean Americans, older people, or lesbians.

I term this paradigm of discrimination "the theory of atomized discrimination" to emphasize several features. First, it assumes that there is some natural boundary of the group,¹⁸ just as scientists once emphasized the natural boundary of an atom. Second, this boundary may mask meaningful divisions for other purposes; for example, the so-called "intersectional" groups such as African-American women¹⁹ or gays of color²⁰ in the context of discrimination might be analogous to overlapping electron clouds between neighboring atoms. Third, like the atoms of a molecule, different instances of atomized discrimination may also be part of a larger and intrinsically related system of discrimination.²¹ Fourth, "atomized"

Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities, 9 LA RAZA L.J. 1, 24-27 (1996) (discussing the role of Latinos and Latinas in critical race theory).

¹⁷ See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 167-73 (2d ed. 1970) (explaining how paradigms frame the way we see the world).

¹⁸ See, e.g., AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 147 (1995); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8 (1991).

¹⁹ See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

²⁰ See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of 'Sexual Orientation'*, 48 HASTINGS L.J. 1293, 1296-97 (1997).

²¹ Many critical race theorists have long emphasized the way in which "different" systems of oppression, like racism and sexism, may be related; that differs from the notion that what appear to be different systems often are better understood as some type of generalized discrimination. For instance, some scholars use the Koosh ball to represent the way in which systems of oppression may be related. See STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 22-24 (1996); see also Hutchinson, *supra* note 20, at 640 ("Multidimensional analysis also reveals the multiple dimensions of social identity categories and offers a comprehensive framework for conceptualizing sexual subordination that neither 'destroys' nor 'fragments' our lives." (footnote omitted)); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) ("Cosynthesis offers a dynamic model whose ultimate message is that the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted."); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("[A]ll forms of subordination are interlocking and mutually reinforcing."); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 46-65 (1995) (discussing "inter-connectivity" of different kinds of subordination).

captures how this boundary is not "natural," but rather socially constructed.²²

This Article explores the less familiar paradigm that I call "generalized discrimination."²³ Generalized discrimination describes a situation when ingroup members, such as white Protestant males in Deborah's firm, receive unfair advantages over all others, be they African Americans, Jews, or women. (In other instances, generalized discrimination might mean only Korean Americans had a realistic opportunity to get certain jobs.) Although the ingroup will often resemble the demographic characteristics of a numerical majority, the ingroup frequently may not be so much "like us" but rather "like who we would imagine ourselves to be."²⁴ Sometimes generalized discrimination manifests itself as "generalized ingroup sympathy." Often this describes the way ingroups like white men in Deborah's firm may prefer each other. A firm's ingroup might be Irish-Americans who prefer each other. In a second form of generalized discrimination, "outgroup hostility," ingroup members despise "all of them." The Nazi Holocaust typifies such outgroup hostility.²⁵ Arguably, that behavior which people describe as ingroup sympathy is in actuality merely a cover-up for covert outgroup hostility in disguise.²⁶

Nevertheless, this Article discusses theories and evidence of ingroup sympathy separately from those of outgroup hostility. Many

²² Much of this paragraph builds on the typology of atomized and generalized discrimination that I began to develop elsewhere. See Freshman, *supra* note 16, at 244-50. However, my earlier description left unanswered several questions that this Article addresses: (1) What other forms of generalized discrimination might exist besides what this Article calls "ingroup sympathy"? (2) What support is there in social science for frameworks of generalized discrimination? (3) If social scientists see discrimination as generalized and lawyers see discrimination as atomized, what explains this difference, particularly if attention to generalized discrimination would help lawyers win cases?

²³ Again, as with the use of the term "atomized discrimination," I acknowledge that other scholars have used the term "generalized discrimination" in different ways. In particular, many have contrasted generalized discrimination in society as a whole to discrimination by a particular individual or organization. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989); Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. Rev. 811, 827-28 (1995).

²⁴ For example, Nazi Party members with brown eyes may idealize those with blue eyes. Allport's study of prejudice draws a distinction between people like ourselves, which he calls an "ingroup," and people in a group to which we would like to belong, which he calls a "reference group." See ALLPORT, *supra* note 8, at 37-38.

²⁵ See *infra* note 189.

²⁶ I am grateful to Mark Kelman and Steve Winter for pressing this point. I agree that much ingroup sympathy might mask covert outgroup hostility.

Nevertheless, ingroup sympathy and outgroup hostility are analytically distinct. Like many analytic distinctions, this division may be difficult to discern in certain scenarios. In individual situations, such as litigated cases, external behavior may be consistent with either ingroup sympathy or outgroup hostility. Similarly, either ingroup sympathy or outgroup hostility could explain many social science experiments. See *infra* notes 345-60 and accompanying text (discussing various explanations of why those exposed to negative comments about fat people subsequently tend to rate thin African Americans more negatively).

may dismiss outgroup hostility as irrelevant to the bulk of contemporary cases; they may view outgroup hostility as simply a fringe phenomenon from a bygone era, or a modern one confined to extremists like neo-Nazis.²⁷ In contrast, evidence of ingroup sympathy may seem more consistent with modern examples of inequality, particularly among elite environments such as law firms and upper-level management. Additionally, many theorists have treated ingroup sympathy as less pernicious than outgroup hostility.²⁸ This Article explicitly argues that ingroup sympathy violates both existing antidiscrimination judicial doctrine,²⁹ as well as prominent antidiscrimination theories.³⁰

To some degree generalized outgroup hostility, generalized ingroup sympathy, and various forms of atomized discrimination all involve assumptions about how discrimination operates that are difficult to test.³¹ Some circumstances will be consistent with either atomized or generalized discrimination. Alternatively, some instances will involve a combination of the two. More precisely, this type of situation may reflect some kind of generalization that connects an injustice with other injustices—a generalization within several dimensions.³² Situations reflecting various types of discrimination are particularly common when decisions require different people in an institution to render judgments or necessitate judgments made at different times. Perhaps some individuals described in the Prologue voted against making Deborah partner, because they did not like women (reflecting atomized discrimination); perhaps other partners wanted to make one of the “good ol’ boys” a partner instead (reflecting generalized ingroup sympathy discrimination).³³ Perhaps some partners even resented all of “them” (generalized outgroup hostility).

²⁷ See WILDMAN, *supra* note 21, at 12 (“‘White supremacy’ is associated with a lunatic fringe, not with the everyday life of well-meaning white citizens.”).

²⁸ See *infra* notes 150-58 and accompanying text (offering theoretical critiques of ingroup sympathy).

²⁹ See *infra* Part II.B.2 (surveying case law that treats ingroup sympathy).

³⁰ See *infra* Part III.C.1 (presenting a normative critique of ingroup sympathy).

³¹ See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059 (1990) (“A work of literature may have more than one ‘correct’ ending, mathematical systems may proceed from different unprovable postulates, and a line of constitutional decisions may fit accurately within more than one abstraction.”).

³² See *id.* at 1067 (“Although we have described the enterprise of designating fundamental rights as a question of how abstractly to portray rights, we do not posit a single dimension along which abstraction must be measured.”); see also Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 377 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (“[G]iven at least minimal knowledge and familiarity, people are probably capable of combining nearly any category with any other to create a subtype.”).

³³ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-37 (1989) (involving an employer’s decision not to promote a female senior manager to partnership based on votes

In theory, generalized discrimination may take a variety of forms. One such form involves different ingroups at different organizations within the same society. For example, an ingroup may be limited to Protestants in a Georgia law firm; an ingroup in Maryland may include Catholics; an ingroup in New York might include Jews. As seen in the Prologue, when a particular person like Deborah makes a claim against a specific firm, lawyers like Joel may need to investigate carefully before concluding (1) how to describe the relevant ingroup, and (2) whether to describe the case as involving ingroup sympathy or outgroup hostility. Despite these complications, this Article frequently analyzes ingroups that track familiar patterns, such as an ingroup defined as white, Protestant males. This analysis is necessary for two reasons. First, the Article seeks to use social science data to bolster the claim that generalized patterns of discrimination are not merely logical possibilities, but are frequently the reality in contemporary society. Second, although ingroups may theoretically take many patterns, they will *often* correspond to such recurring patterns. The notion of atomized categories such as race does provide a meaningful concept in certain circumstances, just as the atom does in natural science. But the combination of atomized categories provides another useful way to analyze discrimination, just as the relevant frame in scientific study may have to include molecules that combine atoms, or organisms that combine molecules.³⁴

These same issues of generalized and atomized discrimination also apply to various "critical" approaches to discrimination, including feminism, critical race theory, and critical legal studies. Some of these critical theorists suggest that the law more clearly ban "unconscious" discrimination; a number of these scholars advocate expanding the types of cases in which discriminatory effects, independent of proof of any discriminatory intent, are illegal.³⁵ Simi-

from predominantly male partners); *see also infra* note 394 (discussing how various individuals may affect any given court decision).

³⁴ In other circumstances, the relevant problem may combine in more complex ways. For example, in the case of some illnesses, a virus may invade parts of many cells. One will not label the virus by combining such disparate concepts as heart disease and brain disease. Similarly, a form of generalized discrimination might attack only parts of atomized categories. For example, one might imagine a prejudice that disadvantages only those who are relatively unassimilated, such as Orthodox Jews, African-American women who wear their hair in certain ways, or Hispanics who speak only in Spanish. *See generally* Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. (forthcoming July 2000) (suggesting that some members of outgroups will try to assume identity of ingroups); Kay Deaux & Kathleen A. Ethier, *Negotiating Social Identity*, in *PREJUDICE: THE TARGET'S PERSPECTIVE* 301, 316-20 (Janet K. Swim & Charles Stangor eds., 1998) (discussing "identity negotiation" in the context of Hispanic students entering elite U.S. universities).

³⁵ *See, e.g.*, David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980); *cf.* Charles R. Lawrence III, *The Id, the*

larly, others would abandon the current antidiscrimination law and mainstream legal theory's emphasis on individual actors, and instead would emphasize the history of societal and, in particular, institutional discrimination.³⁶

All of these theories, however, must still address the question of atomized versus generalized discrimination. Even if we focus on societal or institutional discrimination, we still must determine the extent to which the history of society or a particular institution reflects (1) hostility to particular groups, (2) hostility to all outgroups, or (3) excess sympathy for a narrow ingroup. Does Deborah's firm reflect institutionalized sexism or institutionalized preference for "good ol' boys"? If we focus on unconscious discrimination, we still must resolve the extent to which we see some variety of atomized or generalized discrimination. We might believe that unconscious discrimination exists, but might maintain that it is atomized against only African Americans and not Jews.³⁷ Alternatively, one might emphasize conscious discrimination, but suggest that it involved generalized hostility against all outgroups. Although Parts II and IV of this Article emphasize how a theory of generalized discrimination would supplement existing antidiscrimination law and more conventional legal theory, critical scholars will still profit from the evidence of generalized discrimination presented in Part IV, as well as the discussion of barriers to coalitions in Part V. For similar reasons, these Parts should also interest scholars with other theoretical perspectives on discrimination; these theorists believe that it may be rational to rely on statistical generalizations.³⁸ Nonetheless, they must consider whether the categories for those generalizations should be relatively generalized or atomized. Epstein thinks some groups work better together.³⁹ Does this make it

Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 324 (1987) (proposing "a new test to trigger judicial recognition of race-based behavior" that focuses on "'cultural meaning'"). Criticism of the intent requirement is also associated with both critical legal studies and critical race theory. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (advocating that law should forbid discriminatory acts because these acts create victims regardless of whether a perpetrator intended to cause harm).

³⁶ See, e.g., Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMPLOYMENT L. 639, 663 (1998).

³⁷ For example, Lawrence's classic analysis of unconscious discrimination discusses one psychological account of anti-Semitism that suggests that people who despise Jews are projecting their discomfort with their own "Ego," but those who despise African Americans are projecting their discomfort with their own "Ids." See Lawrence, *supra* note 35, at 333-34. But see *infra* note 227 (exploring various stereotyped images of Jews).

³⁸ See generally, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 790-98 (1994) (describing and criticizing the notion that it is efficient to make generalizations if the generalizations are statistically accurate).

³⁹ See *infra* note 151.

"efficient" to exclude some particular different groups (à la atomized discrimination) or to seek out "similar" people who "work well together" (à la generalized ingroup sympathy)?

B. The Litigant Payoff: The Lily White Organization and Intersectionality's Sibling

Recognizing generalized discrimination allows us to understand discrimination when other lawyerly views of discrimination fall short. The smaller the number of people "like the plaintiff" in an organization, the harder time a fact-finder will have in determining what really happened to the plaintiff. In an organization with a very few people like the plaintiff, it would be easy to assume that the plaintiff's peculiarities, rather than impermissible discrimination, really explain her misfortune. To return to the Prologue, juries may easily label Deborah as "difficult." If Deborah expands her group to include others, such as Jews or African Americans, whom her firm has likewise treated in unfair ways, juries may more easily reach an informed opinion about whether discrimination took place.⁴⁰ Even if lawyers looking for atomized discrimination find *some* comparable examples, they could often find more examples by looking for generalized discrimination; more examples in turn give factfinders more confidence in their conclusions.⁴¹

Under different circumstances, defendants may also find evidence of generalized nondiscrimination helpful. Sometimes proof that employers did not discriminate in other cases may provide some evidence of nondiscrimination. For example, if a plaintiff blames a firm for her supervisor's harassment, the employer may offer its effective antiharassment policy as an affirmative defense.⁴² In a similar way, such a policy may reduce the likelihood of an award of punitive damages.⁴³ If a white woman like Deborah in the Prologue claims that partners harassed her, and the firm has never investigated harass-

⁴⁰ Opinions vary on the question of whether these other examples justify relief or merely constitute evidence of discrimination. For a discussion of effect and intent tests under existing law, see *infra* notes 88-96.

⁴¹ See, e.g., *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 121 (2d Cir. 1997) ("The smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it."); Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. Rev. 385, 398 (1985) ("[A] subjective probability derived by a legal factfinder is more accurately described as an 'estimate' based on a small portion . . . of information rather than as a true value derived from an analysis of all possible information."). However, at a certain point, the number of examples or the way in which they are presented may be so overwhelming that they are no longer needed. See *infra* note 389 and accompanying text (discussing such limits on admission of evidence).

⁴² See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁴³ See *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2128-29 (1999).

ment involving white women, it may wish to offer evidence that the firm investigated and remedied harassment involving other groups, such as African-American men.⁴⁴ As detailed in Part IV below, however, opposing parties may still attempt to show that evidence of generalized antidiscrimination does not preclude the existence of more atomized discrimination. Nevertheless, the evidence will still have some relevance.

In many ways, the concept of generalized discrimination is a sibling paradigm of intersectionality, a term associated with critical race theory.⁴⁵ Intersectionality does not purport to be a theory of all discrimination.⁴⁶ Instead it reveals how those atomized categories might neglect individuals who fall into two atomized categories; for example, African-American women may face discrimination even if African-American men and white women do not.⁴⁷ On a theoretical level, intersectionality and generalized discrimination both depend upon the notion that patterns of discrimination that are not neatly confined within atomized categories may exist. Intersectionality divides existing classifications like race and gender into hybrid categories such as "women of color" and "black men." In contrast, generalized discrimination combines several situations often seen as different; for example, identifying how a firm prefers a white Protestant male ingroup might create generalized discrimination.

⁴⁴ In this sense, use of generalized discrimination is largely independent of one's relative sympathy for plaintiffs or defendants, or for left-wing or right-wing political views. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 3-5 (1980) (arguing that notions of judicial activism and judicial restraint do not neatly correspond to particular constitutional theories, such as interpretivism).

⁴⁵ In contrast, others have criticized intersectionality in ways that suggest that it has outlived its usefulness. Compare Kwan, *supra* note 21, at 1263-64 (asserting that theories of intersectionality may create "a theoretical barrier to and a distortion of the complex ways whereby race, gender, homosexuality, and other categorical notions are often dependent in their mutual constructive modes"), with Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 11-12 (1999) (noting that intersectionality theories have been limited to understanding patriarchy and racism, and expanding their range to include sexual identity).

⁴⁶ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1244 (1991) ("[I]ntersectionality is not being offered here as some new, totalizing theory of identity.").

⁴⁷ See Crenshaw, *supra* note 19; Crenshaw, *supra* note 46; see also Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program For Title VII After Hicks*, 23 *CAP. U. L. REV.* 241, 242-54 (1994) (identifying black men as an intersectional group neglected by the Supreme Court's disparate impact analysis in the recent Title VII cases); Melanie Kaye/Kantrowitz, *The Issue Is Power: Some Notes on Jewish Women and Therapy*, in *JEWISH WOMEN IN THERAPY: SEEN BUT NOT HEARD* 7, 15 (Rachel Josefowitz Siegel & Ellen Cole eds., 1991) (describing how Jewish men might not represent the interests of Jewish women without specifically using the term "intersectionality"); cf. *Social Security Is Accused of Job Bias*, *MIAMI HERALD*, Apr. 20, 1999, at 6A [hereinafter *Social Security*] (reporting a class-action lawsuit based on charges that black men get fewer promotions and more unsatisfactory job evaluations than warranted by their numbers at Social Security Administration headquarters).

Intersectionality and generalized discrimination are also siblings in the sense that both address different factual scenarios in which atomized discrimination fails. Specifically, intersectionality is associated with the development of large institutions that are diverse in *some* ways, such as including a substantial number of African-American men and white women. Intersectionality shows that such institutions may still harbor inequality for intersectional groups, such as African-American women. Intersectionality analysis proves less helpful when an institution is relatively homogenous, such as "lily white" or all Asian men. In these cases, generalized discrimination may reveal institutional practices by illustrating a pattern of disadvantage of all individuals who do not fit a "lily white" or other narrow mold. This result is particularly true of smaller organizations, and evidence exists that such organizations discriminate often.⁴⁸

Generalized discrimination theory may also apply in a second circumstance where an intersectionality analysis falls short. Intersectionality functions most effectively when one can identify a common history and experience among the intersectional group.⁴⁹ For example, as Jerome Culp has emphasized, many people may deem African-American men fit only for certain jobs, and African-American women fit only for other jobs.⁵⁰ On the other hand, generalized discrimination may be more illuminating when an individual differs from an in-group in a variety of ways, but those differences are not shared by

⁴⁸ See HARRY J. HOLZER, WHY DO SMALL ESTABLISHMENTS HIRE FEWER BLACKS THAN LARGE ONES? 16-17 (Institute for Research on Poverty Discussion Paper No. 1119-97, 1997), available in *Recent IRP Discussion Papers* (visited Oct. 28, 1999) <<http://www.ssc.wisc.edu/irp/dplist.htm>> (concluding that even with size-specific factors taken into account, small firms hire smaller proportion of black employees than larger firms); Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1026 (1990) ("The most significant improvement in minority/female opportunities has been with larger employers who are government contractors. But that improvement is uneven. There remain employers who have been impervious to legal pressures generated over twenty-five years to improve opportunities for minorities and women." (footnotes omitted)); Gene Koretz, *Bias Still Blocks Black Progress: Why Lawmakers Should Take Heed*, BUS. WK., July 7, 1997, at 30 (reporting study by economist Harry J. Holzer of Michigan State University that "small businesses were far less likely to hire blacks than larger companies," and that "[a]mong companies with fewer than 50 employees, blacks held only 13% of jobs requiring less than a college degree," but "[i]n companies with more than 500 employees, blacks held 26% of such jobs").

⁴⁹ See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 394-96; Dana Y. Takagi, *Maiden Voyage: Excursion into Sexuality and Identity Politics in Asian America*, in ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY AND LESBIAN EXPERIENCE 21, 22-23 (Russell Leong ed., 1996) (suggesting that identities at intersections are not merely "additive," but are a special experience).

⁵⁰ See Culp, *supra* note 47, at 252 ("Particularly in the South, it has been the tradition that some jobs were black male or female jobs. Black women were, and still are, the maids for white people and black men acted as 'bootblacks,' yardmen, and janitors."); see also Crenshaw, *supra* note 19 (emphasizing the inattention to, and theoretical erasure of, the position of African-American women as a group).

enough people to constitute a common history or widely recognized pattern of common characteristics. For example, a Jewish Israeli woman who works in the United States may face generalized discrimination as someone "different," but there may not exist history of discrimination involving Jewish Israeli women.⁵¹

C. The Societal Payoff: Coalition Effects, Empathy, and Prevention

Paying greater attention to generalized discrimination would not only affect the outcome of particular disputes, but also alter societal consideration of "analogies" between "different" kinds of discrimination and "coalitions" between "different" minorities. Deborah's experience with sexism may not be analogous to an African-American male's encounter with racism; the identical prejudice in favor of white males may hold both of these individuals back.⁵² People often see themselves as a "us" when they believe all group members share a common enemy or common source of oppression.⁵³ In the context of the Prologue, if Deborah sees how the firm's idealization of a narrow group of white Protestant males excludes not only her and other women, but also Jews and African Americans, she may view Jews, African Americans, and women like herself as part of the same group fighting the same injustice. This more inclusive mind-set will have significant impact on analysis of discrimination; it has become almost a mantra in many discussions of bias, particularly among more critical scholars, to state matter-of-factly something like, "Of course in talking about A (e.g., racism), I don't suggest it is parallel to B (e.g., sexism)."⁵⁴

⁵¹ See, e.g., *Javetz v. Board of Control, Grand Valley State Univ.*, 903 F. Supp. 1181, 1190 (W.D. Mich. 1995) (holding that there was no discrimination against a woman from Israel based on national origin, religion, or sex).

⁵² See Clark Freshman, *Re-visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad*, 22 L. & SOC. INQUIRY 97, 117-21 (1997) (reviewing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)) (arguing that describing coalitions between "us" and "them" understates differences among "us" and similarities between "us" and "them").

⁵³ Cf. Jerome McCristal Culp, Jr., *The Woody Allen Blues: "Identity Politics," Race, and the Law*, 51 FLA. L. REV. 511, 525 (1999) (claiming that if individuals "are to protect themselves from political oppression, they must form coalitions around their oppression").

⁵⁴ See, e.g., Kimberly Christensen, *"With Whom Do You Believe Your Lot Is Cast?" White Feminists and Racism*, 22 SIGNS 617, 620 (1997) ("I am not suggesting that patriarchy/sexism and white supremacy/racism are 'parallel oppressions' or anything of the sort."); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 401; cf. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1832-33 (1996) (suggesting that there might be negative reaction to analogies because they represent an attempt to appropriate the suffering of another). However, one who has suffered from discrimination has not necessarily had the same experience as someone else. It may still make sense to recognize the limits of our ability to understand

These effects should not be overstated. As Part II details, if we want to identify discrimination, we sometimes have to consider generalized discrimination. At other times, however, it still makes sense to draw distinctions between individuals that reflect atomized, subatomized, or other distinctions. Sometimes it may be appropriate to focus more on atomized categories, such as race, gender, or sexual orientation, when thinking about mediating for a particular "community,"⁵⁵ crafting voting districts,⁵⁶ or framing class actions.⁵⁷

To return again to the Prologue, imagine what would happen if Joel uses the treatment of Jews, African Americans, and other outgroups to show that the firm favors those perceived as white Protestant males. Deborah, those "other" witnesses, and jurors may see how "different" minorities suffer from exactly the same source of inequality. The experience may encourage these "different" minorities to treat each other more decently. Recognizing generalized discrimination in some instances may therefore promote future equality, the prime purpose of antidiscrimination law.⁵⁸

D. Racism, Prejudice, and the Metaphors of Disease

In a famous metaphor, Charles Lawrence called racism a disease.⁵⁹ This metaphor illustrates both the potential and the limits of

someone else's experiences and the virtue of avoiding projecting our own situation on to theirs. Nevertheless, these problems arise from the difference between individuals and individual situations. Even if we confine ourselves to an atomized view of discrimination, we may fail to recognize the different situation of others within the same atomized category as ourselves. See MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* 57 (1997) (asserting that an emphasis on identity politics may "force individuals to subordinate their own multiplicity"); IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 45 (1997) ("Even when they find their relations defined by similarly socially structured differences of gender, race, class, nation, or religion, individuals usually also find many ways in which they are strange to one another."); Mark Kelman, *Reasonable Evidence of Reasonableness*, in *QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES* 169, 180 n.10 (James Chandler et al. eds., 1994) (arguing that once one criticizes a category, such as gender, for obscuring one kind of difference, such as race, there may be "no reason why [one] wouldn't test all the sociological predictors of 'attitude' (religious belief, income, party affiliations, and so on) in deconstructing the needlessly large category, 'women'"); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 674 (1996) ("All of us have been betrayed at times by those who claim to be like us . . .").

⁵⁵ See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1695, 1760-69 (1997) (discussing "community-enabling mediation").

⁵⁶ See *infra* note 75.

⁵⁷ See *infra* note 74.

⁵⁸ See, e.g., *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2129 (1999) ("The [Title VII]'s 'primary objective' is 'a prophylactic one' . . ." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975))).

⁵⁹ In one of the earliest works associated with critical race theory, Charles Lawrence made the famous observation that "racism is . . . a disease." Lawrence, *supra* note 35, at 321. Lawrence also recognized, however, that his focus on racism might also apply to other

all paradigms of discrimination, including generalized discrimination. First, diseases vary. For example, one might cough not only when she has a cold, but also when she is developing lung cancer. Second, physicians who treat diseases usually ask questions—take a “history”—and run tests before giving a diagnosis. Third, even when patients have very clear ideas about their illness, their doctor may label their malady differently. Fourth, even the labels that doctors apply often involve a degree of ambiguity. Sometimes all doctors would dismiss minor coughing as a mere symptom of a cold, and often all physicians would agree that a stopped heart involves heart disease. Other times, doctors disagree about diagnoses, or may classify a disease differently. For instance, doctors may classify diseases by asking whether they are viral or bacterial, whether they involve a particular kind of virus, whether they attack a particular organ, or whether they can spread easily to others.

Fifth, a doctor’s classification of a disease may have important social consequences; this may affect the amount of funding available for research, or may place patients under restrictions such as a quarantine.⁶⁰ Study of any disease, however, may create conflicting goals: At times a general concept, such as bacterial infection, may help develop a general treatment method, like penicillin. At other times a more targeted approach, such as research that focuses on breast cancer, HIV infection, or prostate cancer, will better help some individuals.

When Deborah complains about not making partner, Joel and society face similar choices. First, Deborah might not have made partner for some kind of illegal discriminatory reason or for another non-discriminatory reason such as bad luck, poor performance, or her own idiosyncratic personality defects.⁶¹ Second, before Joel, the courts, or society reaches a conclusion, they will want to perform a thorough investigation, just as a doctor takes a patient’s complete history. Medical doctors recognize that this history should not narrowly focus simply on the individual patient, but must involve her family as well

kinds of discrimination such as gender discrimination. *See id.* at 322 n.22; *see also* Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 4 (1995) (acknowledging that his earlier study of unconscious racism was “part of a larger and more important project . . . of anti-subordination, and human liberation”). Lawrence also noted that “anti-semitism, like . . . racism, is best understood as a societal disease.” *Id.* at 15.

⁶⁰ *See generally* Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999) (discussing different accounts of disease and their implications in public health law).

⁶¹ *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (“Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice.”); Kahn v. United States Secretary of Labor, 64 F.3d 271, 279 (7th Cir. 1995) (“It is well-settled in this circuit and other circuits that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer’s reason is not proscribed by a Congressional statute.”).

because of relevance of her family medical history. Much of this Article suggests that the scope of investigations of discrimination should similarly expand because "other" discrimination may really be just one of additional examples of the same generalized discrimination. Third, an individual might sincerely blame her fate on one form of prejudice, such as sexism, while an outside investigation might fault a different kind of discrimination, such as a form of generalized discrimination. Fourth, classifications of prejudice vary in different contexts. The same individual may identify different forms of prejudice in different circumstances, different individuals may reach different conclusions about the type of prejudice in some of the same circumstances. Fifth, the classification of types of prejudice may have various social consequences for different individuals.

This Article highlights generalized discrimination for its potential significance in the current legal and social environment. Undoubtedly, other scholars and lawyers would describe this theory's features in different ways, just as doctors might diagnose the same patient differently. Additionally, some scholars may eventually conclude that generalized discrimination can mutate into other forms, just as disease-causing organisms may mutate.⁶²

E. Overview and Roadmap

The remainder of this Article explores several aspects of generalized discrimination. Part II shows how attention to generalized discrimination leads to improved results in individual cases, sometimes to the advantage of plaintiffs and sometimes to the advantage of defendants. Part III illustrates the way in which generalized discrimination has fit within otherwise disparate social science theories and research since at least the 1940s. Part IV considers in detail whether courts should more heavily rely upon evidence of generalized discrimination and whether the law should limit defendants' use of this evidence. Together, Parts II, III, and IV raise a very important question: If generalized discrimination fits within a vast number of social science explanations, and if this theory might enable attorneys to win a significant number of cases within existing doctrine, why has generalized discrimination attracted so little attention? Part V then consid-

⁶² This disease mutation may even occur in response to treatment, as the development of drug-resistant infections illustrates. See, e.g., Gostin et al., *supra* note 60, at 99 ("[W]idespread use of broad spectrum antimicrobial medication cultivates new forms of drug-resistant organisms."); Stephen D. Moore, *Glaxo, U.S. Firm Go on Research Blitz to Unravel Riddle of HIV's Resistance*, WALL ST. J., Feb. 7, 1997; Michael Waldholz, *Drug-Resistant HIV Becomes More Widespread*, WALL ST. J., Feb. 5, 1999, at B5 (reporting the new evidence of drug-resistant AIDS virus "as a result of the widespread . . . use of the new drug therapies, as well as . . . the virus's stubborn ability to alter its chemical structure to thwart the drugs' effectiveness").

ers barriers to recognizing generalized discrimination and, more broadly, obstacles that allow individuals to believe that different kinds of discrimination truly exist. As Part V details, individuals often resist seeing discrimination against their group as part of a pattern of generalized discrimination, because they implicitly assume that only one way exists to define groups for all purposes and for all times. Once people recognize that individuals may make conscious choices about how to define groups in different ways for various purposes, generalized discrimination may establish its rightful place as a tool for understanding the prevalence of discrimination.

II

GENERALIZED DISCRIMINATION AND PROOF OF DISCRIMINATION TODAY

This Article does not require yet another critique of Supreme Court doctrine. Lawyers for both plaintiffs and defendants could more effectively deploy evidence of generalized discrimination in trial courts regardless of the outcome of any combination of reform proposals, including the abolition of the discriminatory intent requirement. Therefore, this Article examines how the habitual fixation on atomized discrimination prevents lawyers,⁶³ like Joel in the Prologue, from seeing how concepts of generalized discrimination would help them investigate⁶⁴ or ultimately prove discrimination.

⁶³ My interviews and discussions with lawyers suggest that many lawyers do not consider the possibility of generalized discrimination; those that do entertain the possibility reject it as impractical. See Interview with Jeff Goldman, employment discrimination lawyer, in Miami, Fla. (Dec. 1, 1998); Interview with Susan Stefan, Professor, University of Miami School of Law, in Miami, Fla. (Apr. 6, 1998).

⁶⁴ Some investigators genuinely seek to discover whether discrimination occurred; others invoke their formal role as investigators simply to mask their real role as advocates—either for their employer, or for outgroup employees or potential employees. See Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers, Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GENDER & L. 323 (1996); Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 84 (1991) (discussing commitment to substantive goals of outgroup representation); *id.* at 89 (noting that some investigators see their roles as neutral, advocating neither those making discrimination claims nor their employers). In addition, some lawyers always demand to investigate cases before agreeing to defend a client against charges of discrimination. See, e.g., PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 168 (1999) (describing how an African-American attorney maintained that she would not defend a law firm against charges of racism unless she concluded the charges were in fact baseless). Compare Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 111-12 (1995) (asserting that "lawyers have a moral obligation to justify" why they represent a particular client), with Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 110 (1995) (arguing that an attorney should not have to justify his decision to represent a particular client).

Cynics might note that the skillful advocate wants to appear as if she only defends clients in whom she believes, even if in reality she concludes that they are highly culpable. See David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A The-*

This Part provides an overview of the way that courts, lawyers, and legal theorists currently view generalized discrimination, including their treatment of ingroup sympathy. It also argues that greater attention to generalized discrimination does not necessarily affect affirmative action. This Part also addresses how generalized discrimination plays an even larger role in various kinds of alternative dispute resolution (ADR), because ADR generally admits far more evidence than the courts.⁶⁵ Moreover, an increasing share of civil rights cases involve such alternative fora.⁶⁶

A. Why This Article Does Not Address "Substantive" Antidiscrimination Law

When used in court, theories of discrimination implicate at least two distinct and important sets of questions. Substantive questions define what conduct constitutes discrimination; procedural questions include how we prove such conduct. This distinction between procedural and substantive is often difficult to ascertain.⁶⁷ Substantive questions dominate civil rights scholarship: (1) Should antidiscrimination law require any proof of intent?⁶⁸ (2) If discrimination

ory of Employment Discrimination Law for "High-Level" Jobs, 33 HARV. C.R.-C.L. L. REV. 57, 66 n.38 (1998) (stating that being a majority group member may not be a matter of physical appearance, but may depend on revealed attitudes, which, "[f]or minority group members at a firm, . . . may mean pretending not to be concerned with issues of discrimination in the workplace or civil rights issues in general" (citation omitted)).

⁶⁵ See *infra* note 422 and accompanying text.

⁶⁶ Both the Civil Rights Act of 1991 and the Americans with Disabilities Act of 1990 encourage the use of ADR, see Americans with Disabilities Act of 1990, 42 U.S.C. § 12212 (1994) (encouraging the use of ADR for disabilities claims); Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (advocating the use of ADR for other civil rights claims), and the Clinton Administration has particularly supported the use of mediation. See Steven A. Holmes, *Jobs Discrimination Agency Lightening Its Load*, N.Y. TIMES, Feb. 22, 1999, at A1 (describing how the Equal Employment Opportunity Commission promotes the use of mediation and arbitration to resolve employment discrimination suits).

⁶⁷ See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 137 (1981); Freshman, *supra* note 52, at 1727 (describing how "thick procedure" refers to the way in which "procedure in practice embodies contested normative views"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2229 (1995) ("It is no secret that the Supreme Court's Title VII jurisprudence cloaks substance in the 'curious garb' of procedure.") (footnotes omitted); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070-71 (1980) ("If process is constitutionally valued, therefore, it must be valued not only as a means to some independent end, but for its intrinsic characteristics Process itself, therefore, becomes substantive.").

⁶⁸ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1242 (1995) (arguing that proof of employment discrimination should only require that an impermissible factor, such as race, played a causal role in the employer's discrimination, rather than requiring proof that racial bias motivated a particular decision maker).

must be intentional, must it also be conscious?⁶⁹ (3) Should antidiscrimination laws or constitutional principles prohibit discrimination based on a particular atomized basis, such as sexual orientation?⁷⁰ Courts typically classify such questions as legal, which means appellate courts should review these questions *de novo*.⁷¹ Concepts of generalized discrimination may help answer these questions, and they may even undermine such fundamental concepts as applying different levels of scrutiny for "different" bases of discrimination.⁷²

Generalized discrimination may shed some light on the aforementioned three questions, but such inquiries may involve additional considerations. For example, whether courts want to modify or abandon varied levels of scrutiny may depend not simply on whether groups face prejudice, but also on how well various sets of individuals may overcome prejudice in the political process.⁷³ Similarly, the coal-

⁶⁹ See, e.g., Lawrence, *supra* note 35, at 322 ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

⁷⁰ See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (developing a constitutional equal protection argument for protecting rights of gays, lesbians, and bisexuals). Courts will sometimes frame a complaint as if it were alleged on a certain basis, even when the claimants themselves did not advance that theory; in one case, a court characterized a male's claim as based on antigay discrimination even when the plaintiff never alleged that he was gay. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 156-58 (1995); see also Mary Anne C. Case, *Desegregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, (1995) (arguing that prohibitions against gender discrimination should extend to effeminate men, who are often presumed to be gay even if they are heterosexual). More recently, in light of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and several sexual harassment cases decided in 1998, the United States Department of Justice concluded that it would apply gender discrimination laws to cases in which discrimination involved plaintiffs, such as effeminate men, who did not conform to dominant gender stereotypes. See Data Lounge, *Dep't of Justice to Pursue Gay Bias Complaints* (Nov. 25, 1998) (visited Oct. 30, 1999) <<http://www.datalounge.com/templates/news/record.html?record=2928>>.

⁷¹ See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76-77 (1998) (noting that facts are irrelevant to the purely legal question of whether harassment by males of another male may constitute sexual harassment); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 271 (D. Utah 1996) (holding that the question of whether same-sex sexual harassment violates Title VII is a legal question).

⁷² See generally, e.g., Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes* 89 (Mar. 31, 1999) (unpublished manuscript, on file with author) (suggesting that courts might "apply heightened scrutiny when official discrimination targets relatively vulnerable groups for the denial of fairly important rights, even if the class is not deemed to be suspect and the right is not determined to be fundamental").

⁷³ In an employment discrimination case, a plaintiff often prevails if she can show that a particular employer ever disadvantaged her in some legally impermissible way. In constitutional cases, however, the question of whether a particular classification is suspect depends more generally on a showing that the classification often results in harm that the legislature cannot remedy. See John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST.

tion effects of reliance on generalized discrimination theory might lead to the use of larger groups, such as outgroups, as a basis for class action representation⁷⁴ or voting districting.⁷⁵ However, such uses raise additional issues. For example, both the class action and voting districting depend on the idea that individuals see themselves as sharing common interests. The potential coalition effects of generalized discrimination, however, do not guarantee that one individual today could adequately represent another group member in a class action, or that one group of individuals today could sufficiently unite to elect a representative.

In lieu of such substantive questions, this Article applies concepts of generalized discrimination to an everyday procedural practice: Using examples of the treatment of others like Deborah in the Prologue to determine whether her firm discriminated. Although the Article emphasizes how generalized discrimination limits the way in which Deborah in the Prologue and other outgroup members work, also generalized discrimination limits opportunities in renting apartments,⁷⁶ service in restaurants, and juror selection.

COMMENTARY 215, 220, 222 (1998) (noting the Supreme Court's focus in *Brown v. Board of Education*, 347 U.S. 483 (1954), on "the question whether black children generally were harmed" by school segregation, rather than on harm to the particular plaintiffs in the case); cf. David L. Hamilton et al., *Perceiving Social Groups: The Importance of the Entitativity Continuum*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 47, 64-65 (Constantine Sedikides et al. eds., 1998) (asserting a difference between the extent to which a group of individuals acts like a group, and the degree to which individuals outside that group will think that individuals in that group are alike and will otherwise discriminate against such individuals). As Part V of this Article suggests, however, the same barriers to coalitions that explain why some atomized groups resist recognizing generalized discrimination also explain how tensions within atomized groups may limit a group's ability to act within the political process.

⁷⁴ For a highly controversial application of the requirement that class action representatives represent the entire class, see *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983). See *id.* at 480 (concluding that African-American woman cannot adequately represent African-American men or white women in a Title VII class action); see also *Allen v. City of Chicago*, 828 F. Supp. 543, 549-54 (N.D. Ill. 1993) (denying class certification to a proposed class of workers comprised of African Americans, Hispanics, and older workers). For the classic critique of the *Moore* decision and other similar cases, see Crenshaw, *supra* note 19, at 143-46.

⁷⁵ See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (holding that, in order to state a claim for violation of fair districting principles, a "minority group must be able to show that it is politically cohesive," because, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests"); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 337-45 (1995) (discussing the enforcement of the Voting Rights Act of 1965 and *Thornburg v. Gingles*).

⁷⁶ See, e.g., JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 3.08, at 168-69 (2d ed. 1995) ("Evidence is admissible and often available that the defendant has engaged in other acts of discrimination . . .").

This Article focuses on procedural questions for two reasons. First, because trial courts have more leeway procedurally, generalized discrimination may offer an immediate and practical payoff to those involved in litigation. In principle, advocates have more room to argue about generalized discrimination to trial courts; courts of appeal usually state that they would review trial courts' decisions on evidence and discovery deferentially.⁷⁷ Additionally, trial courts often have the final word on evidentiary issues, because litigants rarely appeal these decisions.⁷⁸

Second, focusing on these relatively easy procedural moves allows us to analyze why lawyers and individuals describe discrimination in certain ways. For example, why does Deborah in the Prologue think, "It's because I'm a woman" rather than "It's because the firm does not see me as a straight, white, Christian man without any apparent disabilities"? Why does Joel, her lawyer, quickly agree with her view when a doctor would quite often be skeptical of a patient who concluded she had, for example, strep throat rather than a cold, flu, or some other disease? If we ask why individuals do not undertake the torturous appellate road of restructuring substantive questions, such as unconscious discrimination or reading sexual orientation into statutes, there are too many simple answers. Such litigation takes much more time and money. Private lawyers rarely have the incentive to bring such suits,⁷⁹ and public lawyers rarely possess the independence or motivation to take these cases.⁸⁰ Public interest lawyers, as we shall see in Part V, may also be too committed ideologically or professionally to

⁷⁷ See *infra* note 391 and accompanying text. In practice, appellate courts overturn such decisions more often than their stated standard of review might suggest. See *infra* note 392 and accompanying text.

⁷⁸ This point should not be overstated. Parties may settle based in part upon predictions of how the appellate court would decide the case. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) ("[M]ost [claims] are settled out of court. . . . [T]he preferences of the parties, the entitlements created by law, transaction costs, attitudes toward risk, and strategic behavior will substantially affect negotiated outcomes.").

⁷⁹ In a sense, this scenario reflects a collective action problem. The private lawyer who establishes an important legal principle only gets paid for a particular case, potentially with some premium for the difficult issues involved. Other private lawyers can become free riders on the innovative lawyer's success. For example, Thurgood Marshall cannot charge a royalty to every lawyer who brings a case based on the principles established by *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸⁰ See BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 119 (1997) ("The desire to avoid error could lead the [Civil Rights Division of the Department of Justice] into an overabundance of caution."); see also Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403 (1998) ("[T]he government has repeatedly failed in its role as a vigorous advocate for those seeking to be free from discrimination.").

organizations that often become entrenched⁸¹ along atomized lines.⁸² In contrast, if attorneys do not rely on a theory of generalized discrimination in easier discovery issues⁸³ or do not provide evidence of other acts of discrimination, the fixation with atomized concepts of discrimination becomes more curious. Regardless of their other incentives, lawyers want to win; if evidence of generalized discrimination will help lawyers win, the legal community must clearly ponder other forces that might shape the way lawyers see discrimination.

B. How Concepts of Generalized Discrimination Help Prove or Disprove Discrimination in Particular Cases

Whenever we discuss discrimination, we implicitly put an individual in one group and compare how she was treated in comparison to those outside that group.⁸⁴ In cases like *Deborah's*, lawyers try to

⁸¹ The American Jewish Committee's work against generalized discrimination, rather than solely against anti-Semitism, is a notable exception. See *infra* note 190 and accompanying text.

⁸² See *infra* notes 451-52 and accompanying text. This is not to say that public interest lawyers simply pursue careerist motives or slavishly follow the directions of organizations for which they work. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 47 (Austin Sarat & Stuart Scheingold eds., 1998) ("[W]e know remarkably little about what actually makes lawyers commit themselves to particular causes, particular people, or particular issues . . .").

⁸³ I say "easier" hesitantly, because there may be practical problems in presenting evidence of generalized discrimination even in the absence of substantial doctrinal or ideological reasons, such as the nature of liberalism. See *infra* Part II.C.2 (discussing practical and theoretical questions about limits on the ability to recognize generalized discrimination). However, I do wish to distinguish my argument here from arguments that assume that legal change requires examination of fundamental assumptions and doctrines.

⁸⁴ See, e.g., BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1147-96 (1976) (examining the type and extent of proof necessary to establish a claim of employment discrimination); 2 PAUL H. TOBIAS ET AL., LITIGATING WRONGFUL DISCHARGE CLAIMS § 1311, at 150-51 (Supp. 1997) (suggesting that interview of potential plaintiff should not only identify "[n]ames of other employees *outside* the protected group (e.g., white males, younger employees) who have received preferential or more favorable treatment than you and other members of the protected group, (e.g., blacks, females, employees over 40)," but also produce "[a]ny evidence of a pattern where members of a protected group have been . . . treated unfairly" (emphasis added)); 2 TOBIAS ET AL., *supra*, § 10:10, at 16 (advising a plaintiff's attorney to consider, among other things, "evidence of discrimination (e.g., were similarly situated employees treated differently?)" when evaluating whether to file suit).

Empirical studies confirm that many attorneys follow this conventional wisdom. In one study, 77.8% of opinions in race discrimination cases and 64.8% of the sex discrimination cases referred to past discrimination. See Vicki Schnltz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1112 n.112 (1992). This figure is a low estimate because some cases might have involved evidence of past discrimination, but judges might not have included this evidence in their written decisions. See *id.* at 1112-13 n.112.

compare how a firm treats people like her to how it treats others.⁸⁵ As the Ninth Circuit stated, “[i]t is clear that an employer’s conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer’s general hostility towards *that group* is the true reason behind firing an employee who is a member of that group.”⁸⁶ Although some theorists would disagree,⁸⁷ the same question arises when the claim is not hostile discrimination, but discrimination in favor of those in a certain group. This seemingly mundane statement of black letter law, however, begs the serious question: How do we define “that group”?

1. *Proving Discrimination and the Small Numbers Problem*

The question of how we define the group “like the plaintiff” applies to both of the principal methods of proving discrimination. To somewhat simplify, one can distinguish two general tests of discrimination: intent tests and effects tests.⁸⁸ Under intent tests, such as the Supreme Court’s interpretation of the Equal Protection Clause,⁸⁹ a defendant has violated the Constitution only if the defendant intentionally treated individuals differently based on a set of forbidden distinctions, such as race.⁹⁰ Alternatively, effects tests allow the trier of fact to worry less about the defendant’s actual intent. Under this method, a violation, or a presumption of a violation, occurs when an employer’s practice disproportionately affects a group regardless of

⁸⁵ Cf. Krieger, *supra* note 68, at 1166 (“Cases tell stories. Indeed, judicial opinions and the legal theories they expound function somewhat like a society’s core stories, structuring the interpretation of experience and providing the authors and audiences of future stories with commonly recognized plots, symbols, themes, and characters.”).

⁸⁶ *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995) (emphasis added).

⁸⁷ See *infra* Part II.B.2 (surveying case law on discrimination in favor of a group); *infra* notes 134-63 and accompanying text (offering a theoretical critique of outlawing discrimination in favor of a group); *infra* Part III.C.1 (describing why ingroup sympathy is wrong).

⁸⁸ These tests overlook distinctions that are important for other purposes, but are not crucial for the current study of how we categorize types of discrimination. For example, courts in age or gender discrimination cases often accept evidence of stereotyping alone as proof of a violation, but require further proof of intent in race discrimination cases. See Krieger, *supra* note 68, at 1168-69. Similarly, courts will find liability in both religious discrimination and disability cases if an employer fails to make reasonable accommodations; however, despite the similarity of language of their opinions, courts often reach different results on similar facts in religious discrimination and disability discrimination cases. See Susan Stefan, *Employment Discrimination, People with Psychiatric Disabilities and the Americans with Disabilities Act* (Oct. 1998) (unpublished manuscript, on file with author).

⁸⁹ U.S. CONST. amend. XIV, § I.

⁹⁰ See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (requiring proof of racially discriminatory intent to show an equal protection violation); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

whether the defendant intended such effect.⁹¹ Recently, fewer cases relied on effects tests.⁹²

Under both the effects and intent models, litigants generally address how a defendant disadvantaged others like the plaintiff. In intent cases, parties often will offer evidence of other "bad" acts, such as the passing over of other women for promotion or the turning away of other African Americans from a restaurant.⁹³ For instance, if a firm denies partnership to an African-American associate with "too few clients," the plaintiff might offer examples of white associates promoted with the same or fewer clients.⁹⁴ Sometimes, plaintiffs offer statistical evidence, such as the number of truck drivers in general and the number of male and female truck drivers promoted.⁹⁵ In effects cases, parties will always have to define the relevant group that suffers some adverse effect of a superficially neutral practice; litigants might demonstrate that a particular kind of strength test tends to exclude women and is not necessary for a job.⁹⁶

As both the Prologue and Part I suggest, the problem of small numbers may prevent meaningful analysis in cases using both kinds of proof. If Deborah tries to show that her firm only mistreated women, she will likely fail if the firm has too few women from which to draw

⁹¹ Under the disparate impact doctrine used in employment discrimination cases brought under the federal antidiscrimination law of Title VII, the effects test is complicated in two ways. First, plaintiffs must identify a specific practice, such as height and weight requirements, that has a disparate effect, such as tending to exclude females. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Second, the employer has the opportunity to escape liability if he can show that the practice in question is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁹² From January 1985 to March 1987, less than 2% of employment cases in federal courts used a disparate impact theory. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991).

⁹³ See *supra* notes 84-86 and accompanying text.

⁹⁴ See BARRETT, *supra* note 64, at 200-01.

⁹⁵ This type of statistical evidence is also admissible in cases brought as disparate treatment claims by individual employees. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) ("[S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks."); *Stratton v. Department for the Aging*, 132 F.3d 869, 876-77 (2d Cir. 1997) (relying on statistical charts to prove discrimination).

⁹⁶ Even if one confines proof to a single atomized group, such as women, the statistical analysis involves a large number of variables; these include how to define the relevant job, how to define the relevant part of the organization, how to define the time period for comparison, and how to define the pool of potential employees. See, e.g., WALTER B. CONNOLLY, JR. ET AL., *USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION* § 11.10[2], at 11-32 ("In practice, it is often physically impossible to reconstruct with exactitude the complete range of alternatives faced by the employer, or, if possible, not economically feasible. In such circumstances, one can only examine the employer's decisions with a lens more or less clouded.").

meaningful comparisons.⁹⁷ This dearth of evidence occurs when one or more of the following scenarios exist: (1) small organizations with few employees, (2) organizations of any size, but involving claims by individuals within a smaller unit of the organization, (3) situations with few persons from the same atomized category in similar positions, or (4) relatively homogenous organizations. In small organizations, there are often too few current or past employees to make persuasive comparisons. In larger organizations, a sufficient number of employees may exist, but the number of employees that give rise to (what courts will label) meaningful comparisons may be small. Under current case law, courts often restrict comparisons to employees performing similar functions, employees with similar supervisors, and relatively recent actions.⁹⁸ As one court noted, "[there] are only a limited number of potential 'similarly situated employees' when higher level supervisory positions for medical doctors are involved."⁹⁹ Therefore, the pool of potential comparisons in cases involving large organizations may be as small as those available in smaller organizations. Moreover, large organizations may have a limited pool of comparisons if the relevant part of the organization only includes those

⁹⁷ In an ADEA case against a university, the Seventh Circuit held that in order to prove age discrimination, the plaintiff needed to offer more than a single case of another older professor who was turned down for tenure. *See* Kuhn v. Ball State Univ., 78 F.3d 330, 332 (7th Cir. 1996) ("A plaintiff who wants a court to infer discrimination from the employer's treatment of comparable cases has to analyze a goodly sample. . . . What a plaintiff . . . has to do is subject all of the employer's decisions to statistical analysis to find out whether age makes a difference."); *see also* Vore v. Indiana Bell Tel. Co., 32 F.3d 1161, 1164 (7th Cir. 1994) (holding that plaintiffs did not prove racial harassment when the alleged harasser was the only African-American employee in the workplace, and the plaintiffs could not provide a parallel example where there was only one white employee, surrounded by black employees who were treated differently in the face of harassment charges); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) (admitting evidence of discrimination against other employees).

The Seventh Circuit's view, however, goes even further than that of the Supreme Court: the Court has never explicitly required statistical proof in disparate treatment cases, but rather only requires sufficient evidence of discriminatory intent from some source. *See, e.g.,* George Rutherglen, *Claims of Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, in *STATISTICAL METHODS IN DISCRIMINATION LITIGATION* 33, 53 (D.H. Kaye & Mikel Aickin eds., 1986) (concluding that the Supreme Court's disparate treatment cases only show "that the plaintiff bears the normal burden of proof in a civil case: to present evidence from which a reasonable inference of intentional discrimination may be drawn and to persuade the judge by a preponderance of the evidence to draw that inference"). In a similar way, skeptics have dismissed studies of bias in the courts and the legal profession by characterizing instances of bias as mere anecdotes. *See* Judith Resnik, *Singular and Aggregate Voices: Audiences and Authority in Law and Literature and in Law and Feminism*, in 2 *LAW AND LITERATURE* 687, 718 (Michael Freeman & Andrew D.E. Lewis eds., 1999) ("Individual stories are rebuffed as idiosyncratic or out-of-date anecdotes").

⁹⁸ *See infra* Part IV for an examination of this trend in courts, and a survey of several criticisms.

⁹⁹ *Holifield v. Reno*, 115 F.3d 1555, 1563 (11th Cir. 1997).

employees in a narrow group, such as those perceived¹⁰⁰ as able-bodied white, Protestant, heterosexual males. As studies of the glass-ceiling phenomenon suggest, this includes many high-level positions.¹⁰¹ If Deborah works for a large international firm, the partners in that firm may be largely white Protestant males, presumed to be heterosexual and free from disability. Moreover, even if she identifies problems that other women faced, the firm may convince a court that these women's experiences do not matter, because they work in other departments in the same office, or offices in other cities, or worked for the firm too long ago.

In all of these small-number scenarios, both plaintiffs and defendants often have difficulty proving their cases. It is easy for the law firm in the Prologue to claim that it denied Deborah partnership because she was truly "difficult" if Deborah is unable to point to the firm's treatment of other women because there are no other women in her partnership class.¹⁰² Similarly, if an employer faces a claim for harassment based on how a particular supervisor treated a Hispanic employee in an area with few Hispanics, for example, the employer may have trouble proving the affirmative defense of an effective anti-harassment plan if he can only show how he handled complaints by other Hispanics rather than how he handled complaints by white women and African-American males.¹⁰³ As discussed

¹⁰⁰ People may treat individuals as if they are a certain way, such as gay or disabled, even if this perception is inaccurate. See, e.g., Freshman, *supra* note 16, at 266 n.120.

¹⁰¹ See FEDERAL GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 7 (1995) (noting the general consensus that "a glass ceiling exists and that it operates substantially to exclude minorities and women from the top levels of management"); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 948 (1982) (observing that "[b]lack have made only limited progress . . . in gaining access to 'upper level' jobs"); Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 267 (1994) (remarking that "the upper reaches of most professions remain disproportionately male").

¹⁰² See Price Waterhouse v. Hopkins, 490 U.S. 228, 234-35 (1989) (involving an alleged claim that a woman was not promoted to partnership because of her difficult personality); cf. *Holifield*, 115 F.3d at 1563-64 (addressing an employer's claim that an African-American doctor who supervised other doctors "displayed unprofessional behavior" and "caused conflict," but noting the difficulty in finding "similarly situated employees").

¹⁰³ See generally *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506 (7th Cir. 1996). In *Vitug*, the Seventh Circuit gave greater weight to similar evidence when an Asian Catholic plaintiff alleged discrimination based on national origin and religion; the court noted that not only the percentage of Asians in the employer's workforce, but also the percentage of minorities in general in its workforce matched or exceeded the percentage of minorities in the national workforce. See *id.* at 514 ("[The employer's] challenged hiring practices actually have a favorable rather than a negative effect on minority applicants in general, and Asian/Pacific Islanders in particular."). As noted above, additional evidence about the presence of generalized discrimination may enhance a court's confidence about the presence of discrimination even if other atomized evidence is also available. See *supra* note 38 and accompanying text.

further below,¹⁰⁴ parties in both scenarios may try to argue that courts should give less weight to other acts of discrimination because of the possibility of atomized or subatomized (intersectional) discrimination. Evidence of generalized discrimination, or nondiscrimination, may still be helpful to make sense of these situations. As the remainder of this Part shows, many courts and lawyers rarely confront these questions directly; lawyers rarely seek to introduce evidence of discrimination on what they see as “other” bases, and courts rarely consider the possibility of generalized discrimination. In an unusually explicit discussion of this issue in the concurring opinion of an “age discrimination” case, Second Circuit Judge and former dean of Yale Law School, Guido Calabresi, went out of his way to suggest that, as he framed the question, evidence of discrimination against one minority might be evidence of discrimination against another minority.¹⁰⁵ The brief concurrence, however, did not elaborate on how he would reach this conclusion; the remainder of this Part and Part III bolster Judge Calabresi’s intuition with more specific arguments and evidence of generalized ingroup sympathy and outgroup hostility.

2. *The Prohibition Against Ingroup Sympathy and Its Stereotyped Application*

Because many recent social science perspectives discuss ingroup sympathy, a threshold question is whether the law does, and should, prohibit it. Currently, courts and lawyers treat ingroup sympathy in an odd way: Both usually assume that ingroup sympathy violates antidiscrimination law, but recognize ingroup sympathy only when some “ethnic” outgroup favors its own. The language of Supreme Court cases is crystal clear: preference for an individual based on forbidden characteristics, such as race or gender, usually violates antidiscrimina-

¹⁰⁴ See *infra* notes 270-71 and accompanying text (noting that contemporary psychological studies of discrimination recognize that there exist various theories of discrimination that best explain and describe discrimination in each different circumstance).

¹⁰⁵ See *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 202-04 (2d Cir. 1999) (Calabresi, J., concurring). Although the majority opinion in that age discrimination case dealt with differences in groups of older persons, Judge Calabresi nevertheless wrote a separate concurrence to note the potential relevance of “different” kinds of discrimination:

[I]n appropriate circumstances, evidence of discrimination against one group of people can support an inference of discrimination against another group. For example, if statistical or other evidence indicated that an employer discriminated against Asian-Americans, Asians, Chicanos, and African-Americans, it might be reasonable to deem that evidence relevant to a claim that the same employer had discriminated against a Native American or a Nigerian. This would especially be so if the available data were insufficient to establish a pattern of behavior toward the plaintiff’s class specifically, as might be the case if the plaintiff had been the only Native American or Nigerian in the defendant’s employ.

Id. (Calabresi, J., concurring).

tion laws.¹⁰⁶ Witness the Supreme Court's language describing disparate treatment discrimination in *Hazen Paper Co. v. Biggins*:¹⁰⁷ "[T]he most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.]"¹⁰⁸ Similarly, in holding that Jews and Arabs were protected under post-Civil War civil rights legislation, the Supreme Court turned to the law's legislative history; the majority quoted one representative who explained that the legislation forbade preferences such that "the States shall not hereafter discriminate against the immigrant from China and in favor of the immigrant from Prussia, nor against the immigrant from France and in favor of the immigrant from Ireland."¹⁰⁹

Religious discrimination cases also illustrate the prohibition against ingroup sympathy. A party can prove religious discrimination by demonstrating that someone preferred only members of a certain religion; a party need not show that the defendant particularly disliked members of other specific religions. For example, in *Rasul v. District of Columbia*,¹¹⁰ the court held that a prison could not limit

¹⁰⁶ There remain exceptions to this general rule. For example, religious organizations may prefer members of their own religion for certain limited jobs. See 42 U.S.C. § 2000e-1(a) (1994) (making the statutory prohibition on discrimination inapplicable to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"). Under another exception created by judicial interpretation of various treaties, foreign-owned companies may prefer their own nationals for certain important positions, even within the United States. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 188-89 (1982) (holding that the exception for foreign companies under a treaty to discriminate in favor of its own nationals in the hiring of high-level personnel only applies to companies incorporated under the laws of the foreign country signing the treaty, not to their local subsidiaries incorporated in the United States); *Papaila v. Uniden Am. Corp.*, 51 F.3d 54, 55-56 (5th Cir. 1995) (holding that a U.S. subsidiary may discriminate in favor of Japanese nationals under the treaty rights of its Japanese parent corporation); *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) (holding that, to the extent dictated by the Japanese parent corporations, that its U.S. subsidiary could discriminate in favor of Japanese nationals for certain high-level positions under a friendship treaty between Japan and the United States). See generally Tram N. Nguyen, Note, *When National Origin May Constitute A Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty as an Affirmative Defense to a Title VII Claim*, 37 COLUM. J. TRANSNAT'L L. 215 (1998) (contrasting the various approaches of the circuits to the question of when foreign companies may discriminate in favor of their own nationals, and suggesting that it should turn in part on different forms of corporate governance in different countries).

The question of affirmative action presents a separate question that does not turn on theories of atomized versus generalized discrimination. See *infra* Part II.C.1.

¹⁰⁷ 507 U.S. 604 (1993).

¹⁰⁸ *Id.* at 609 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (alterations in original).

¹⁰⁹ *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (internal quotation marks omitted) (emphasis added).

¹¹⁰ 680 F. Supp. 436 (D.D.C. 1988).

prison chaplains to Protestants.¹¹¹ Although a Muslim brought the case,¹¹² the court noted that the prison also did not employ Jews.¹¹³ The court never required a showing that the policy reflected hostility toward Muslims, Jews, or members of any other particular religion.¹¹⁴ Additionally, in *EEOC v. Kamehameha Schools/Bishop Estate*,¹¹⁵ the Ninth Circuit held that a school could not hire only Protestants; it described the plaintiff simply as "not a Protestant."¹¹⁶

Despite the clarity of this language and associated doctrine, lower court decisions present an odd pattern. On the one hand, lawyers regularly allege that members of some historic outgroup, such as Italian Americans, favor other Italian Americans to the detriment of those from anywhere other than Italy.¹¹⁷ In these cases, courts regularly accept that proof of this type of preference constitutes discriminatory motivation.¹¹⁸

On the other hand, one sees a very different picture for preferences that involve historically advantaged ingroups, such as those perceived as white, Protestant, heterosexual, able-bodied, and of Northern European origin. Few reported instances of lawyers bringing such cases exist; indeed, I have identified only two cases in which a party sought to introduce evidence of ingroup sympathy based on its belief that a defendant preferred some traditionally advantaged ingroup. In one of these cases, the district court admitted proof on generalized lines, and in the other, a different judge did not.¹¹⁹ Thus, an

¹¹¹ See *id.* at 441-42.

¹¹² See *id.* at 437.

¹¹³ See *id.* at 441 n.7.

¹¹⁴ See *id.* at 441-42.

¹¹⁵ 990 F.2d 458 (9th Cir. 1993).

¹¹⁶ *Id.* at 459; see also *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 514 (7th Cir. 1996) (considering allegation that employer preferred only "born-again Christians," but concluding that evidence did not support the claim).

¹¹⁷ See, e.g., *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1302-04 (9th Cir. 1982) (holding that a preference for Italian Americans in company's stockholder preference plan is a violation of Title VII); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 674-75 (N.D. Ill. 1984) (holding that the plaintiff's claim of employer's preference for persons of German or Swiss origin creates a Title VII cause of action). But see *Ali v. National Bank*, 508 F. Supp. 611, 613-14 (S.D.N.Y. 1981) (holding that the plaintiff's claim of the employer's preference for light-skinned Pakistanis does not establish a prima facie case of employment discrimination).

¹¹⁸ See, e.g., *infra* notes 155-56 and accompanying text (discussing Judge Posner's opinion in which he assumed that a preference for Korean Americans, if proven, would probably violate antidiscrimination law).

¹¹⁹ Both cases involve district court judges in the District of Columbia. In *Abramson v. American University*, 48 Empl. Prac. Dec. (CCH) ¶ 38,439, at 54,500 (D.D.C. 1988), the district court held that an Eastern European Jew could offer testimonies by two Muslims, one African American, and one Belgian to prove that the dean of the college wanted to "reimpose a 'Christian ethic' . . . and to create a more 'homogeneous faculty' that excluded the faculty 'who were not white, Christian and Anglo-Saxon in origin.'" *Id.* at 54,501 (quoting the plaintiff's complaint). The court explained:

analysis of the reported cases suggests that attorneys rarely argue that their clients suffered because they were outside a preferred group that resembled those who have historically been the most privileged in the most circumstances. As Part III.C shows, however, attorneys sometimes do try to use examples of discrimination involving other atomized groups to prove discriminatory motivation, but they apparently do so without offering an explanation.

C. The Unexamined Assumption of Atomized Discrimination:
"Logic," Burden Shifting, and Law by Stereotype

Several opinions deny discovery or exclude evidence of discrimination, on the ground that it involves victims of some "other" form of discrimination. For example, a court may rule that a white woman cannot rely on evidence of discrimination involving an African-American man, because it involves a "different" form of discrimination. In these cases, the courts generally reject such attempts in two ways.

In the stronger form of rejection, the courts simply assert that no relationship exists between two "different" kinds of discrimination. For example, in *Finch v. Hercules Inc.*,¹²⁰ the court stated that a plaintiff who alleged age discrimination had properly withdrawn a request for "information relevant to types of discrimination other than age," because "there is no logical connection between instances of age discrimination and instances of race or gender discrimination."¹²¹ The court simply assumed the atomized logic that discrimination occurs only against particular groups, such as persons of a certain age. Alternatively, the court could have made the equally logical assumption that discrimination tracked more generalized forms, such as discrimination in favor of younger men who were presumed vigorous and am-

Although it is true that plaintiff's witnesses are neither Jewish nor [of] Eastern European background, evidence that [the dean of the school] discriminated against other minority groups is surely relevant towards the issue of his discriminatory intent in general, since relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Id. (citation omitted).

In the second case, a white woman alleged that a hotel discriminated against her because it "thought only a certain category of people are fit to manage [its] hotel business, namely, white males—or at least non-American Negro males." Freshman, *supra* note 16, at 262 (internal quotation marks omitted). The district court nonetheless declined to accept evidence of how the employer treated African Americans. See *Rauh v. Coyne*, 744 F. Supp. 1181, 1183, 1186 (D.D.C. 1990).

¹²⁰ 149 F.R.D. 60 (D. Del. 1993).

¹²¹ *Id.* at 63 n.3; see also *EEOC v. United States Fidelity & Guar. Co.*, 420 F. Supp. 244, 247 (D. Md. 1976) (holding that because the claim alleged sex discrimination and the plaintiff was white, "information identified by race is not relevant").

bitious enough for demanding work.¹²² In certain settings, the most presumably fit group might be young African-Americans and Latinos.¹²³

Other courts simply assert that no relationship exists between different forms of discrimination, without even invoking logic.¹²⁴ In this weaker form of rejection, courts engage in unspoken burden shifting.¹²⁵ Courts suggest that plaintiffs have not shown that two atomized categories, such as women and African Americans, are related.¹²⁶ For example, when the plaintiff in *Duncan v. Maryland*¹²⁷ alleged race discrimination, the court denied a request for statistics based on gender "[i]n the absence of any explanation by plaintiff of the relevance of information by sex."¹²⁸

¹²² For a similar assumption in an otherwise carefully documented argument for the need for broader discovery in employment discrimination cases, see Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination If She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159, 192 (1996).

¹²³ See *supra* note 50.

¹²⁴ See *Smith v. Airborne Freight Corp.*, No. 95-15348, 1996 WL 509574, at *6 (9th Cir. Sept. 6, 1996); *General Ins. Co. of Am. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974) (labeling an EEOC subpoena overbroad for seeking "evidence going to forms of discrimination not even charged or alleged"); *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 63 (E.D. Pa. 1979) (stating that, in a case where an African American alleges racial discrimination, information "[w]hether [the defendant] discriminates against employees on the basis of religion, creed, gender or national origin is wholly irrelevant").

Smith is a particularly interesting case because the facts of the case hint at a possible basis for alleging generalized discrimination. The Ninth Circuit court viewed the case simply as one involving discrimination against African Americans. Testimony that the court held should have been excluded showed that one employee referred to African Americans as "they." *Smith*, 1996 WL 509574, at *4. Use of this term suggests generalized outgroup hostility: "they" are bad, and "they" might not only refer to African Americans, but to all those outside some narrow group of "we," the good guys. Nevertheless, the court also excluded evidence involving another employee by classifying that evidence as discriminatory merely "on the basis of age, which was not in issue" in the case. *Id.* at *6; see also *id.* at *6 n.3 (distinguishing a case admitting similar evidence on the ground that the other case involved "other witnesses [who] testified to the same type of discrimination (i.e., age discrimination)").

¹²⁵ See generally RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 3 (1992) ("In the current rhetorical climate, shifting the burden of proof to our opponents becomes an irresistible argument strategy.").

¹²⁶ For example, in *Prouty v. National Railroad Passenger Corp.*, 99 F.R.D. 545 (D.D.C. 1983), a plaintiff alleged race discrimination and sought information on race on the ground that the absence of such data might "distort" the statistical analysis. *Id.* at 546. However, the plaintiff did not elaborate on how it might distort the analysis, and the court denied the plaintiff's request. See *id.*

¹²⁷ 78 F.R.D. 88 (D. Md. 1978).

¹²⁸ *Id.* at 96. One line of cases, however, provides a limited exception to the general rule. In these cases, courts considered the question of whether a plaintiff can raise a claim in court on one atomized basis, such as race, when he has relied on a different atomized basis in an administrative process, typically that of the EEOC or a local equivalent. In some cases, the courts held that the failure to allege the "other" basis before the relevant administrative agency bars such additional claims; in other cases, the courts have allowed the claims. See, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-64 (5th Cir. 1970)

Both the stronger and weaker rejection of generalized discrimination reflect the selective attention by both judges and attorneys to ingroup sympathy. Lawyers regularly allege discrimination in favor of historic outgroups, and judges regularly accept such allegations. Judges, however, fail to see the possibility of ingroup sympathy for historic ingroups. Moreover, the reported decisions suggest that lawyers often cannot articulate the relationship between different kinds of discrimination.¹²⁹ Alternatively, (though it seems unlikely) lawyers may so thoroughly understand discrimination as generalized that they cannot understand that an explanation is necessary. One might blame lawyers themselves for not presenting a simple logical relationship, such as ingroup sympathy. In fairness, however, both lawyers and judges may be caught up in the far broader phenomenon of selective inattention to ingroup sympathy.¹³⁰ This selective inattention is analogous to a more familiar phenomenon of discrimination: Individuals praise the behavior by ingroup members, such as "frugality" by a Protestant, but condemn the same behavior by outgroup members, such as Jewish "cheapness." Likewise when outgroup members like Korean Americans favor their own, they are "clannish,"¹³¹ but when members of ingroups, like white males, prefer their own, this behavior remains invisible and sometimes even draws praise as "sticking to-

(allowing the plaintiff's claim, although the plaintiff checked the box labeled "sex" instead of "national origin" when filling out an EEOC administrative charge form); *Gausmann v. City of Ashland*, 926 F. Supp. 635, 639 (N.D. Ohio 1996) (holding that when a plaintiff filed an administrative claim for age discrimination, she could also sue for gender discrimination on the ground that one might reasonably expect her former claim to lead to evidence of the latter).

Additionally, in *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), the Sixth Circuit refused to let the EEOC bring suit for religious discrimination when the person filing a complaint with the EEOC did not allege that she herself had been the victim of religious discrimination. One can also analyze these cases under a theory of generalized discrimination: if much discrimination is generalized, then an allegation of discrimination before the EEOC necessarily raises the question of whether there is some kind of generalized discrimination. Under that interpretation, the additional claims are not truly additional, but are part of the same claim. Nevertheless, the cases seem to turn more on various equitable and ad hoc considerations than on abstract theories of the level of generality of discrimination. For instance, courts appear more likely to allow a plaintiff's additional claims if the plaintiff was poorly educated or unrepresented by counsel.

¹²⁹ One can see an unsuccessful attempt at creating this connection in *Welker v. Smithkline Beckman*, No. 89-866, 1989 WL 121894, at *2 (E.D. Pa. Oct. 12, 1989). In this case, an older woman alleged both age and sex discrimination. The court held that a request for information on the racial makeup of employees was "irrelevant" even though the plaintiff alleged that the employer gave less favorable termination packages to African Americans, women, and older persons. *Id.* One may infer that the court imagined that there were entirely separate explanations for why a firm would mistreat African Americans and why it would mistreat older women.

¹³⁰ See *infra* Part V.

¹³¹ See *infra* text accompanying note 221 (noting the stereotypical notion that outgroups are clannish).

gether.”¹³² Therefore, Part II turns to the simple question of determining the evidence of how different forms of discrimination are best understood as different or intrinsically related. To avoid misunderstanding, however, we must first turn to two points: the separate case of affirmative action, and theoretical and practical limits on the definition of generalized discrimination.

1. *The Separate Case of Affirmative Action*

The argument that generalized discrimination, including ingroup sympathy, deserves greater attention is largely separate from the question of how the law should treat affirmative action. Broadly speaking, antidiscrimination laws forbid preferences that track race,

¹³² This idea of invisible preferences is also described by “critical white studies” scholars who use the rhetoric of “whiteness.” See, e.g., Barbara J. Flagg, “*Was Blind, But Now I See*: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Martha R. Mahoney, *The Anti-Transformation Cases: Whiteness, Class, and Interest* (Aug. 30, 1999) (unpublished manuscript, on file with author). However, such whiteness scholarship often tends to focus on the condition of African Americans or those “of color” on the one hand, and “whites” on the other.

Again, we must remember that discrimination may occur in different patterns: sometimes it may focus on a particular outgroup at some level of relative specificity; at other times the discrimination may reflect more generalized ingroup sympathy or outgroup hostility. See, e.g., *supra* text accompanying notes 18-19, 45-47 & 59-62; *infra* text accompanying note 272. As I explained in earlier work,

[t]here is no need to choose a single theory of generalized or atomized discrimination as the appropriate description of discriminatory intent for every case. Discrimination may be directed toward members of a more particularized group, members of a certain race, for example, and may also be directed toward members of some more general group, such as those who are “different.”

Freshman, *supra* note 16, at 246. John O. Calmore also warns that to ignore the paradigm of black/white dichotomy as a “historically racialized framework” is to risk “being co-opted or converted into token, honorary white people and, as such, buy into an individualist and assimilationist worldview and orientation.” John O. Calmore, *Exploring Michael Omi’s “Messy” Real World of Race: An Essay for “Naked People Longing to Swim Free,”* 15 LAW & INEQ. 25, 62 (1997).

In other circumstances, however, the rhetoric of whiteness may obscure the presence of more generalized discrimination, including various broader kinds of ingroup sympathy. For example, while the ingroup may often be white, rather than African American or of another color, it will also often include only those seen as able-bodied and free from mental illness. If we look only to “race” and the construction of those who are “white” and those who are “of color,” we will tend to overlook the way individuals may see others as physically or mentally disabled. At a recent conference on “discrimination” and “inequality,” a speaker spoke eloquently of invisible preferences and “whiteness.” The next day, a woman who spent ten years confined to a wheelchair told me the room in which the speaker discussed invisibility was not accessible to wheelchairs. For two examples of works that avoid this problem, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 891-92 (1997), and Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237.

gender, or similar characteristics.¹³³ These principles also typically forbid ingroup sympathy, including preferences in favor of historically disadvantaged groups, such as African Americans.¹³⁴ The exception to this rule is that courts will sometimes treat preferences as benign and not actionable when they benefit victims of past discrimination or when they promote diverse representation of historically under-represented groups.¹³⁵ This Article's focus is the general rule, and thus it does not address the proper scope of an exception for benign

¹³³ See, e.g., Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination based on, among other things, race without specifying protection only for persons of certain races).

¹³⁴ See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976) (holding that a white person could maintain an action under § 1981 for discrimination in favor of an African American). However, the circuit courts disagree about how one must prove a reverse discrimination case. The Seventh Circuit applies the same burden-shifting test used in ordinary discrimination cases: if an employer fires a white person, for example, and replaces her with an African American, this raises a presumption of discrimination under the Seventh Circuit test. See, e.g., *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1178 (7th Cir. 1998) (holding that a plan to run a business division "managed by minorities" could violate civil rights law); *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (noting that "employment discrimination claims are available to employees of all races . . . so long as the discrimination is 'because of such individual's race'" (citations omitted)); *Perdomo v. Browner*, 67 F.3d 140, 144-46 (7th Cir. 1995) (holding that although the term "protected group" originally referred to minorities, any discrimination on the basis of race is unlawful, making burden-shifting appropriate in reverse discrimination cases).

Other courts assume that reverse discrimination is rare, and insist that reverse discrimination plaintiffs must meet a different evidentiary standard. See, e.g., *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992) ("[T]he presumption that unless otherwise explained, discrimination is more likely than not . . . is valid for a reverse discrimination claimant only when the requisite [unusual] background circumstances exist."); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67-68 (6th Cir. 1985) (affirming summary judgment on the ground that there was no evidence of the unusual background circumstances to suggest reverse discrimination); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (allowing no presumption on a white employee's claim of discrimination because "it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society"); *Slaughter v. Howard Univ.*, 971 F. Supp. 613, 614-15 & n.6 (D.D.C. 1997) (holding that an American-born plaintiff did not establish unusual circumstances by showing six of thirteen full-time faculty were foreign-born). But see *Ellison v. Chilton County Bd. of Educ.*, 894 F. Supp. 415, 419 (M.D. Ala. 1995) ("[Section] 1981 protects all persons, Caucasian and non-Caucasian alike [A] plaintiff may withstand summary judgment if he or she constructs a prima facie case of racial discrimination. Once the plaintiff makes such a showing, a presumption of discrimination arises . . ." (footnote omitted)).

¹³⁵ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989) (O'Connor, J.) (concluding that a stronger proof of past discrimination was necessary to justify race-conscious set-asides); *Hopwood v. Texas*, 78 F.3d 932, 945-46 (5th Cir. 1996) ("[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity . . . is unconstitutional."). Apart from the way courts treat benign preferences, many scholars, including myself, question the efficacy of changing to meritocracy from those favoring ingroup members and diversity. See, e.g., Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568, 1607-09 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)) (criticizing Judge Posner's account of merit).

discrimination; the desirability of an exception to the general rule is a separate issue.¹³⁶

Multiple arguments about affirmative action exist independent of atomized and generalized discrimination, just as various arguments about conscious and unconscious discrimination exist independent of distinctions between atomized and generalized discrimination. Some advocates of affirmative action may worry that it hurts the cause of ingroup sympathy. This fear, however understandable, should yield to the overwhelming reality that ingroup sympathy for historically advantaged groups, such as relatively privileged white, Protestant males, causes great harm to disadvantaged minorities.¹³⁷

2. *Caveat Lawyer: Theoretical and Practical Limits on Evidence of Generalized Discrimination*

At this juncture in this Article, it may seem tantalizingly easy to deploy evidence of generalized discrimination in pending cases. Many cases use such theories when the generalized discrimination involves preferences for an "ethnic" ingroup, such as recent immigrants. Few cases explicitly reject attempts to use this reasoning to show preferences for a historically advantaged ingroup.¹³⁸ Moreover, the cases that reject what one might view as evidence of generalized discrimination do not appear to explain how this evidence actually reflects generalized discrimination.¹³⁹ Thus, the solution to the problem of

¹³⁶ Proposed legislation to forbid preferences would not change antidiscrimination law, but would simply close the exception. See, e.g., Equal Opportunity Act of 1995, S. 1085, 104th Cong. § 8(2) (defining the term "grant a preference").

¹³⁷ See *infra* Part III.C.1 (describing why ingroup sympathy harms outgroups by denying material opportunities and inflicting psychic pain). One distinction between affirmative action for disadvantaged minorities and ingroup sympathy for privileged groups is that affirmative action only modestly affects the chances for success of those who would not be advantaged by an affirmative action plan. See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1608 (1992) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)) (acknowledging the documentation of unequal opportunity for historic outgroups, and criticizing Richard Epstein for "offer[ing] nothing but words in support of his view that reverse discrimination is a significant problem"). That distinction, however, remains stronger to the extent that we narrowly define those eligible for the affirmative action pool. See generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995) (discussing who should qualify for affirmative action).

Depending on how one defines ingroups in a particular setting—a thorny issue discussed in Part III.C.8 below—existing definitions of those given affirmative action may need reconsideration. One rationale for affirmative action, recently well articulated by Linda Krieger, holds that affirmative action is necessary because ingroup sympathy is too difficult to detect. See *infra* note 164. That rationale, however, may include many more different individuals than the current beneficiaries of affirmative action. A full consideration of such questions is beyond the scope of this Article.

¹³⁸ See *supra* note 117 and accompanying text.

¹³⁹ See *id.*

compelling courts to accept evidence of generalized discrimination might be to offer the type of *logical* explanation of generalized discrimination that this Article provides. To a large extent this solution may be so easy that the most interesting academic issue might be the consideration of why lawyers do not try to use generalized discrimination more often. Part V of this Article addresses this point in the context of barriers to "coalitions." There, I suggest that the phenomena often reflects a careless analysis of the costs and benefits in a particular case. Nevertheless, these explanations should not be exaggerated. There are theoretical and practical caveats limiting the use of evidence of generalized discrimination.

The first caveat addresses the potential theoretical objection: "Whoa, won't anyone be able to prove discrimination by showing that there is a preferred group out there that disadvantages him?"¹⁴⁰ The general answer is: no more readily than under our existing law. At its core, this Article makes the relatively narrow claim that those seeking to prove discrimination under an existing category, such as racism involving African Americans should be able to rely on proof of discrimination that would involve (what would seem like) a different category forbidden by existing substantive law, such as sexism involving women. Plaintiffs could then easily state a discrimination claim that is sufficient to withstand a motion to dismiss for failure to state a claim. Current law prohibits not only discrimination against minorities, but discrimination against nonminorities; any time an employee is replaced with someone from a different group on an atomized basis—a different race, age, religion, and so on—this dismissal may create a discrimination claim.¹⁴¹ The present article does not address the question whether substantive law should be interpreted (or modified) to make independently actionable bases such as class or sexual orientation, where existing substantive law would not.

Under current law, however, preferences that may not themselves be forbidden, such as nepotism, may help prove liability if they help prove a forbidden kind of discrimination or, when the relevant law allows proof by an effects test, they produce a discriminatory effect.¹⁴²

¹⁴⁰ For similar objections to the notion of intersectional discrimination, see, for example, *DeGraffenreid v. General Motors Assembly Division*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) ("[T]his lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both."), *aff'd in part and rev'd in part*, 558 F.2d 480 (8th Cir. 1977), and Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 832-34 (1994).

¹⁴¹ See *supra* note 134 (discussing proof of discrimination against nonminorities).

¹⁴² See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) ("This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities."); *Holder v. City of Raleigh*, 867 F.2d 823, 827 (4th Cir. 1989) ("[T]he presence of family preferences as a factor in a

Thus, as under existing law, some preferences may not give rise themselves to legal action but may make the odds of losing an action involving other parties more likely. But this substantive flexibility is limited. For example, an individual could not allege discrimination based on a preference for people who wash their hair before their body. Body-washing sequence is not a protected classification under antidiscrimination law. In principle, one might try to show that a preference for a certain body-washing sequence really masked some other kind of bias or had an impermissible disparate impact, but similar grooming claims have rarely succeeded.¹⁴³

A second potential theoretical objection is that theories of generalized discrimination offer a new or additional method of proof, and there are enough theories already. This objection really only reflects discomfort with broad typical principles of modern civil procedure and the common law. Unlike common law writ practice, modern procedure permits a plaintiff to allege multiple theories; similarly, a defendant may defeat a claim by offering a variety of defenses.¹⁴⁴ Apart from the nature of modern civil procedure, civil rights principles stem from open-ended concepts that welcome new theories of proof in a variety of fields.¹⁴⁵ These concepts include the commitment not to

promotion might be part of the evidence upon which an inference of invidious motive may be drawn"); *Gibson v. Local 40, Supercargoes*, 543 F.2d 1259, 1268 (9th Cir. 1976) ("Since the relatives being preferred were disproportionately white, the nepotism discriminated against blacks whether or not appellees acted with a discriminatory purpose."); *Local 53 of Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969) ("While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership."). *But cf.* *Taken v. Oklahoma Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997) (holding that favoritism does not violate Title VII unless it is based on a prohibited classification); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 119-20 (5th Cir. 1972) (holding that evidence of nepotism does not necessarily indicate discriminatory bias).

¹⁴³ See *Hollins v. Atlantic Co.*, 993 F. Supp. 1097, 1098, 1100-03 (N.D. Ohio 1997), *aff'd in part and rev'd in part*, 188 F.3d 652 (6th Cir. 1999) (finding no evidence of discrimination based on disciplining of African-American woman who wore hair "too different" to fit the company's grooming policy). Similarly, one court held that a practice that had a disparate impact on physicians trained in Mexico did not violate Title VII because physicians trained in Mexico were not a protected class under Title VII; however, the court did not consider whether physicians trained in Mexico might disproportionately be of foreign origin. See *Muzquiz v. W.A. Foote Mem'l Hosp., Inc.*, 70 F.3d 422, 429 (6th Cir. 1995).

¹⁴⁴ See FED. R. CIV. P. 8(e)(2).

¹⁴⁵ Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (rev. ed. 1978) (discussing how highly abstract right to equality "in the design and administration of the political institutions" would generate different critiques from various perspectives). Legal realists and critical legal scholars recognize similar points. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 46-47 (1987) (contrasting the realists' claim that language cannot be precise with the critical legal scholars point that one can make language more precise, but only at the risk of drawing arbitrary lines).

discriminate on various bases¹⁴⁶ and the commitment not to use unfair competition. In antitrust, for example, plaintiffs may offer a plethora of reasons why different competitive practices are unfair. Likewise, defendants may offer a variety of justifications for their practices.¹⁴⁷ Antitrust concepts, like concepts of antidiscrimination, inherently allow the evolution of many theories of proof: New practices may create new theories or new theories may be necessary to explain why old practices have become unreasonable.¹⁴⁸ Similarly, defendants might suggest why practices once deemed unreasonable have become reasonable. Microsoft recently utilized this strategy in its claim that the merger of America Online and Netscape legitimized certain of Microsoft's practices.¹⁴⁹

The final theoretical hurdle is the more complicated question of whether ingroup sympathy is normatively wrong. In particular, prominent law-and-economics scholars Richard Epstein and Richard Posner have argued that ingroup sympathy is not as bad as outgroup hostility.¹⁵⁰ Epstein takes the more consistently radical view that preferences are not bad because they may promote efficiency; individuals

¹⁴⁶ See Donohue, *supra* note 137, at 1612 (noting that "Congress has been quick to endorse the Supreme Court's expansive interpretations of antidiscrimination law" through concepts such as sexual harassment and disparate impact theory). Other scholars have noted that Congress rejected a proposed Title VII amendment to add the word "solely" to modify the list of characteristics upon which a Title VII claim may be based. See Brooks & Newborn, *supra* note 140, at 835 n.236. This legislative history is consistent with reading antidiscrimination commitments to include more than atomized discrimination; it supports recognition of both sub-atomized discrimination, such as intersectionality, and generalized discrimination.

¹⁴⁷ For example, a defendant corporation may claim that the marketplace requires such behavior.

¹⁴⁸ See, e.g., 7 PHILLIP E. AREEDA, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1501, at 369 (1986) (explaining that "the use of unelaborated common law words and references simply invested the federal courts with a new jurisdiction that inevitably required them to receive, apply, and develop the common law in the same way that a new jurisdiction customarily does . . . in the dynamic common law tradition").

¹⁴⁹ See, e.g., Benny Evangelista, *Netscape, AOL Deal Could Aid Microsoft*, S.F. CHRON., Nov. 24, 1998, at D1; Jube Shiver, Jr. & Ashley Dunn, *AOL-Netscape Deal Could Help Microsoft*, L.A. TIMES, Nov. 24, 1998, at C3.

¹⁵⁰ See *infra* notes 152-58 and accompanying text. Larry Alexander also offered a particularly dramatic account of this claim:

Our traditions and our preferences for them in large part define who we are both individually and as a community. All traditions contain some tainted history and disparately impact some groups. Thus, to ask people to repudiate such preferences is to ask them to create their preferences and thus themselves *ex nihilo*.

Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 189 (1992). If Alexander's argument proves anything, it proves too much: one may assert that outgroup hostility is also natural. As Larry Lessig has suggested, a racist may cling to his discriminatory attitudes as part of his fundamental personality. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1003 (1995) ("[I]t is not incoherent to imagine the racist saying that *he* just doesn't want to

have fewer miscommunication problems with people more like themselves.¹⁵¹ Posner, as usual, takes a more contextual view.¹⁵² In *EEOC v. Consolidated Service Systems*,¹⁵³ Posner offered a tribute to the virtues of recent immigrants who set up businesses and then hired other new immigrants from the same country.¹⁵⁴ Despite this language, Posner's opinion did not hold that preferences for Korean Americans, if proven, would be permissible.¹⁵⁵ Instead, he narrowly concluded that the district court did not clearly err in its factual conclusion that evi-

become a nonracist. That he, for example, would not be himself if he were forced to become a [non]racist.”).

¹⁵¹ See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 34, 67-68 (1992). Other economists make a related observation about screening costs: people may have trouble discerning certain intangible factors, such as reliability or persistence, and imagine they can “screen” these factors in the verbal and non-verbal cues of those from their “same-group.” Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 596, 651 (1999) (arguing that employers may be “neutral, but do have a cultural type and more readily can identify good and bad types of their own cultural type because of better information”). Notice two implications. First, similar considerations will apply beyond the employment context: people may rent to those in their “own cultural type” because they can discern characteristics like maintaining apartments. Second, decision makers may favor their own because they believe they can discern certain intangible characteristics, even if they are mistaken in this belief. (In a competitive marketplace, this mistaken confidence may survive if others have similar mistaken confidence.)

¹⁵² Posner has recently made a virtue of the way in which he avoids general, highly abstract theory in favor of what he styles as more philosophically pragmatic decisions. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* at viii (1995). Under Posner's philosophy, “overcoming law” would mean overcoming all that is pretentious in favor of more concrete considerations, including empirical and pragmatic considerations. *Id.* Others have criticized this philosophy, alleging that Posner's narrow theory is in principle undesirable, or that Posner simply fails to correctly characterize the facts in particular arguments, or both. See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 53 n.278 (1998) (noting Posner's analytical reliance on his mistaken classification of animals); Martha Albertson Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 CONN. L. REV. 503, 506 n.16 (1993) (listing examples of Posner's mistaken empirical assumptions about sexuality); Freshman, *supra* note 135; Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 603 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)) (criticizing Posner's avoidance of general theory).

¹⁵³ 989 F.2d 233 (7th Cir. 1993).

¹⁵⁴ Judge Posner stated:

In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses . . . have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring.

Id. at 237-38.

¹⁵⁵ See *id.* at 236.

dence of a preference for Koreans was insufficient.¹⁵⁶ Similarly, another Posner opinion affirmed a summary judgment that the record included insufficient evidence that a Japanese company preferred Japanese employees in its United States operations.¹⁵⁷ Posner reached this conclusion despite evidence that a high-level employee said "all Americans are stupid" and that some officials spoke Japanese in front of American employees without translations.¹⁵⁸

Despite these two opinions, a third Posner opinion demonstrates that Posner also sometimes sees how ingroup sympathy may wrongly perpetuate inequality. In *Pryner v. Tractor Supply Co.*,¹⁵⁹ Posner held that a firm could not deny individuals the right to sue for discrimination, based merely on the ground that a collective bargaining agreement said all disputes would be subject to arbitration, with the union deciding when to arbitrate and when to settle.¹⁶⁰ Posner explained:

We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.¹⁶¹

Thus, despite the current law's treatment of ingroup sympathy as discriminatory, at least in principle, Epstein, Posner, and other prominent scholars raise questions highlighting the need for the in-depth analysis of ingroup sympathy that Part II below provides.

Apart from these various theoretical questions, several practical obstacles may also limit the use of evidence of generalized discrimination. First, although in principle preferences establish discriminatory motivation, courts may narrowly view what constitutes acceptable proof of a preference. For example, in *Mungin v. Katten Muchin & Zavis*,¹⁶² an African American filed suit against a prominent law firm that denied him promotion to partnership. The District of Columbia Circuit held that the evidence that firm partners gave white associates better opportunities and mentoring does not establish discriminatory motivation.¹⁶³

¹⁵⁶ See *id.* at 237.

¹⁵⁷ See *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997).

¹⁵⁸ *Id.* at 1396. Unlike the first case, a deferential standard of review cannot explain this opinion, because a court reviews summary judgments *de novo*. Nevertheless, Posner himself acknowledged that "the case pushes against the outer boundaries of the permissible use of summary judgment under current law." *Id.* at 1397.

¹⁵⁹ 109 F.3d 354 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997).

¹⁶⁰ See *id.* at 363.

¹⁶¹ *Id.* at 362-63.

¹⁶² 116 F.3d 1549 (D.C. Cir. 1997).

¹⁶³ See *id.* at 1554-58. The record and reported decision are not particularly illuminating because the plaintiff's attorney was inexperienced in appeals and was in the midst of an

Nevertheless, it is not clear that proving preferences is much harder than proving hostility given contemporary doctrine and cultural attitudes. In an otherwise very nuanced and carefully documented study of social psychological aspects of how different groups relate, Linda Hamilton Krieger asserted that existing law may make it very difficult to prove ingroup sympathy.¹⁶⁴ In part, Krieger's skepticism about proving ingroup favoritism reflects a far larger skepticism about the ability to prove that an individual engaged in discrimination of any kind. Instead, she attempted to show that proof of individualized discrimination will leave so much discrimination unproven that society must rely upon affirmative action to remedy some of that prejudice.¹⁶⁵ Many scholars agree with this critique of the law's current focus on individual action.¹⁶⁶ Even in a system in which other remedies, such as affirmative action or proportional representation, play a larger role, the issue of atomized and generalized discrimination still arises despite these concerns. If an employer always hires the same proportion of group X as exists in the relevant population, one must still define X. Is X, for example, comprised of African-American women, African Americans, people of color, nonwhites, or some other category? To the extent that such classifications reflect the suspicion that underrepresentation of groups demonstrates bias, the law will need to address this practical hurdle of defining the existing combination of atomized and generalized bias.

A second practical hurdle remains: Once a plaintiff introduces evidence of generalized discrimination, a court may be more likely to permit a defendant to use evidence of generalized nondiscrimina-

unpleasant dissolution of his firm while the appeal was being briefed and argued. See *BARRETT*, *supra* note 64, at 262-63. At least one other case reached a conclusion similar to that of *Mungin*. See *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1178-79 (7th Cir. 1998) (holding that lack of managerial training was not a racial discrimination because firm never trained low-level employees of any race, sex, or national origin).

¹⁶⁴ See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1326 (1998) ("Ingroup favoritism manifests itself gradually in subtle ways. It is unlikely to trigger mobilization of civil rights remedies because instances of this form of discrimination tend to go unnoticed.").

¹⁶⁵ See *id.* at 1327-29 (arguing that because existing law is very ineffective at identifying much discrimination, including ingroup favoritism and other individual motivation, affirmative action should not be abandoned).

¹⁶⁶ See, e.g., Charny & Gulati, *supra* note 64, at 77-78 (arguing that antidiscrimination law will not remedy discrimination because, in response to a perceived lack of opportunities, rational minority workers will not invest in developing their human capital, and rational firms will be less likely to hire workers who have invested less in their human capital); Freeman, *supra* note 35, at 1054-55; D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311, 2360 (1994). See generally Freshman, *supra* note 16, at 271-72 (arguing that, although generalized discrimination may fit within existing doctrine and may illuminate the presence of discrimination in particular cases more effectively than atomized discrimination, some might prefer an account of generalized discrimination that goes beyond the current doctrine's individualistic focus).

tion.¹⁶⁷ Plaintiffs may reasonably fear evidence of generalized nondiscrimination: particular jurors may be less likely to find discrimination against a relatively unpopular outgroup, such as African-American males, if they see that a relatively popular outgroup, such as white women, do not face discrimination. Some jurors may infer that those who do not treat white women badly will not treat African-American men badly; other jurors may simply engage in jury nullification and disregard discrimination that only affects African-American men but not white women.¹⁶⁸

The pervasiveness of the atomized way of viewing discrimination creates a third practical hurdle. Judges and jurors may view the use of generalized discrimination as a desperate attempt to prove prejudice or as a signal that no better evidence exists.¹⁶⁹ In an analogous situation in tort law, modern procedure invites litigants to plead in the alternative. For example, a plaintiff might claim that the defendant hit him intentionally and, if not, that he hit him negligently; similarly, a defendant might assert that he never hit the plaintiff and that, even if he did, the plaintiff failed to mitigate his damages.¹⁷⁰ Nevertheless, conventional wisdom holds that juries may dislike such alternative pleading, and thus litigants may succeed more often by sticking to one story.¹⁷¹

3. *Legal Questions for Social Science Theories of Discrimination*

Overall, current legal practice both in and out of the courtroom raises two important questions. First, law tries to identify the relationship between different kinds of discrimination. For instance, attorneys desire an answer because it affects their search for relevant evidence to persuade investigators, arbitrators, courts, and adverse parties that discrimination did or did not occur based on circum-

¹⁶⁷ Indeed, an employer might still be able to offer generalized evidence of nondiscrimination even if a plaintiff did not invoke a theory of generalized discrimination. See *infra* note 405-16 and accompanying text. Nevertheless, an employer might not consider looking for this evidence until the plaintiff ventures outside the usual atomized categories.

¹⁶⁸ See generally Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877 (1999) (emphasizing the potential benefits of jury nullification in criminal cases).

¹⁶⁹ See Interview with Susan Stefan, *supra* note 63.

¹⁷⁰ See *supra* note 144 and accompanying text.

¹⁷¹ See *Javetz v. Board of Control, Grand Valley State Univ.*, 903 F. Supp. 1181, 1189 (W.D. Mich. 1995) ("Plaintiff *admits* that although she believes she is the victim of unfairly disparate treatment, she knows not whether the discrimination is based on her national origin, religion, or sex." (emphasis added)). The court did not consider the possibility that students and faculty may have labeled the plaintiff as a difficult person because she was *different*, although they may not have thought of her as Israeli, Jewish, or a woman. See *id.* at 1190. See generally THOMAS A. MAUET, *PRETRIAL* 111 (3d ed. 1995) ("Keep in mind, however, that since pleadings can be read to the jury during trial, alternative or inconsistent pleadings may cast the party in a poor light. Hence, drafting must also be done with an eye toward the impression the pleading will have on the jurors.").

stances in similar cases. This knowledge is especially important in small organizations and larger organizations with a relatively homogeneous work force. Social science not only answers, but also reframes the question: social science suggests that when a woman like Deborah faces unequal opportunity, that inequality often reflects not merely sexism but also broader patterns of inequality that harm women and all those outside a narrow ingroup. Second, law and popular discourse ask, "What is wrong with ingroup sympathy anyway?" Here, too, social science provides important evidence about how often ingroup sympathy promotes unequal opportunities even without any convincing evidence of hostility.¹⁷² The next Part of this Article explores this social science approach in depth, and Part IV returns to the legal significance of such data in greater technical detail.

III

GENERALIZED DISCRIMINATION IN THE SOCIAL SCIENCES: INGROUP AND OUTGROUP PARADIGMS

This Article departs from the usual legal scholars' stance toward social science paradigms of discrimination. Much legal scholarship taps only a relatively narrow discourse within the social sciences.¹⁷³

¹⁷² See *infra* Part III.C.1 (discussing why ingroup sympathy is normatively wrong).

¹⁷³ For example, several fine pieces of legal scholarship on prejudice and civil rights implicitly take discrimination theories with relatively narrow scope within a larger discourse about prejudice as if they constituted the universe of scientific truth. See, e.g., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Krieger, *supra* note 68.

Legal scholars in other topics also sometimes treat arguments from other disciplines, such as history and philosophy, as if they simply gave the "correct" answer that legal scholars somehow just "got wrong." See, e.g., Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563, 1571-75 (1997); Mark Tushnet, *"Everything Old Is New Again": Early Reflections on the "New Chicago School"*, 1998 WIS. L. REV. 579, 583 & n.12. See generally J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949 (1996) (discussing the problems with interdisciplinary legal scholarship).

However, as I have written elsewhere, legal scholars should not simply defer to specialists within particular disciplines; these specialists in each discipline have their own peculiar assumptions that reflect such things as the limited range of their personal experiences. See Freshman, *supra* note 135, at 1606 (when male philosophers label some intuitions "plausible," it may, at least partially, reflect their limited experiences); see also Martha Fineinan, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 764-65 (1988) (criticizing legal writers and decision makers for simply deferring to those in the helping professions for custody decision making). Moreover, writers outside law may develop theories that also respond to the professional incentives of their own academic departments. See *infra* note 332 and accompanying text (describing how cognitive psychologists may describe discrimination as normal behavior, in part because academic psychology departments will reward the study of the majority's psyches more readily than the psyches of a relatively small group of discriminators). For a detailed critique of the way that historians try to avoid serious substantive questions by raising methodological concerns, see Nomi Maya Stolzenberg, *A Book of Laughter and Forget-*

Such work often seems to assume that the law must have gotten it wrong; the solution is to mimic another discipline that got it right.¹⁷⁴ This Article instead explores how both law and various discourses within social science have struggled with the question of understanding the generality of prejudice and unequal opportunity.

Although other scholars claim that social science has always portrayed all discrimination as generalized,¹⁷⁵ it is more accurate to say that since at least the 1940s, social science has consistently recognized various kinds of prejudice.¹⁷⁶ Nevertheless, the underlying assumptions of law and social science have diverged in their balance of generalized and atomized discrimination. At least since the publication of *The Authoritarian Personality* in 1950, social science has understood that much discrimination is relatively generalized. Although other features of theories of discrimination have evolved, largely in response to more general methodological shifts such as social psychology's displacement in popularity of psychoanalysis and other theories of personality,¹⁷⁷ the attention to some type of generalized discrimination has persisted. Thus, an overlapping consensus that generalized discrimination explains much discrimination exists in social science, particularly in psychology and sociology.

As developed in political theory, the idea of an overlapping consensus offers an avenue to avoid needlessly contentious debates. John Rawls and other scholars have invited us to build a just society based

ting: Kalman's "Strange Career" and the Marketing of Civil Republicanism, 111 HARV. L. REV. 1025, 1083 (1998) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)); cf. Maurice Allais, *An Outline of My Main Contributions to Economic Science*, AM. ECON. REV., Dec. 1997, at 3, 8 ("[I]t is only through the constant questioning of 'established truths' and the blossoming of new ideas suggested both by empirical evidence and by creative intuition, that science can truly progress. . . . Dominant ideas, however erroneous they may be, end up, simply through continual repetition . . .").

¹⁷⁴ See Balkin, *supra* note 173, at 959 ("[M]uch of what people call interdisciplinary work often involves answering questions in one discipline by applying its disciplinary methods to the materials usually studied by another, or by selectively invoking techniques found in one discipline to answer questions posed wholly within another.").

¹⁷⁵ See ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 7-26 (1996).

¹⁷⁶ Allport's discussion of different approaches to prejudice also emphasizes the way in which prejudice is best understood from multiple disciplines:

The fact that we shall devote so much time to these [psychological] approaches perhaps indicates the author's psychological bias. If so, he pleads with the reader to recognize his attempt to give considerable emphasis likewise to historical, sociocultural, and situational determinants. The author hopes the present volume may be regarded as a reflection of the present tendency for specialists to cross boundaries and to borrow methods and insights from neighboring disciplines in the interests of a more adequate understanding of a concrete social problem. But even a specialist with a broad intention is likely to overemphasize his own professional field.

ALLPORT, *supra* note 8, at 206-07; see also *infra* notes 271-72 and accompanying text (asserting that more recent social psychology literature acknowledges that a variety of different theories may explain discrimination and prejudice).

¹⁷⁷ See *infra* notes 271-72 and accompanying text.

on the overlapping consensus between otherwise competing political theories, rather than becoming entangled in often intractable debates.¹⁷⁸

Although objections to an overlapping consensus remain, the consensus may still likely reflect real value since it tracks many otherwise diverse disciplines over time; building overlapping consensus is more persuasive than relying on only one discourse within a single discipline at a particular time. However, society must still be cautious because the consensus may merely further entrench bad patterns of thinking. With appropriate caution, the law, individual lawyers, and their clients may also all profit from borrowing from the overlapping consensus within the social science the idea that much discrimination is generalized.¹⁷⁹

¹⁷⁸ See JOHN RAWLS, *POLITICAL LIBERALISM* 155 (1993) (asserting that individuals may agree about particular practical questions despite their disagreement on broader conceptual issues); cf. Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503, 512-13 (arguing that one should avoid abstract debates about different methodologies, such as law and economics versus law and society, in favor of figuring out the best account of particular phenomena); Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 475-76 (claiming that one might best understand the phenomenon of decision making by drawing on a variety of complementary paradigms).

Like any methodology, the idea of an overlapping consensus has a weakness: this overlapping consensus may simply be a common mistake. In particular, the common mistake may reflect metanarratives in society that needlessly narrow many disciplines. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 145 (1995) (stating that the metanarrative of the sexual family—the idea that the family most worthy of support is a union of two adults, rather than an adult and a dependent—runs through the law, various psychological theories, and society generally, thereby preventing needed reform to care for dependents). Margaret Jane Radin's feminist pragmatism offers similar cautions. See Margaret Jane Radin, *The Pragmatist and the Feminist*, in *PRAGMATISM IN LAW AND SOCIETY* 127, 149 (Michael Brint & William Weaver eds., 1991) ("The best critical spirit of pragmatism recommends that we take our present descriptions with humility and openness, and accept their institutional embodiments as provisional and incompletely entrenched.").

¹⁷⁹ In this Article, I have chosen to address generalized discrimination primary from a relatively modernist stance. One may also read much of this Article from a perspective of postmodern discourse, such as that of Angela Harris:

A "discourse" refers both to a system of concepts—the set of all things we can say about a particular subject—and to the relations of power that maintain that subject's existence. The project of post-structuralist theory is to tell stories about how certain discourses emerge, shift, and submerge again.

Harris, *supra* note 16, at 774; see also Fineman, *supra* note 173. Barenberg also discusses the value of discourse:

Compelling recent theoretical and empirical writing suggests, however, that political interests (or any other "self-interests") cannot be reliably ascribed to a group apart from the group's contingent judgment of its interests; and the group's historically received, contested ideology shapes that judgment. Work in discourse theory, cognitive psychology, and the sociology of knowledge demonstrates that language and other symbolic systems, discursive practices, and ideological maps are not merely communicative, but in part constitutive, of individual and group perceptions, interests, and identities.

A. The Overlapping Consensus That "Different" Kinds of Discrimination Often Really Reflect Generalized Discrimination

This Part highlights the way in which generalized discrimination runs through several different social science enterprises. Early theories saw prejudice at a more general level than did the law, cutting across law's atomized boundaries such as race, religion, and national origin. However, many of these older theories had other limitations, such as blindness to how generalized discrimination affects women,¹⁸⁰ people with disabilities,¹⁸¹ and lesbians and gays.¹⁸² Roughly speak-

Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1431-32 (1993) (footnote omitted).

¹⁸⁰ See YOUNG-BRUEHL, *supra* note 175, at 67-68 (noting the Adorno group's neglect of prejudice against women, compared to its focus on racial or ethnic prejudice). In fact, THE AUTHORITARIAN PERSONALITY, ADORNO ET AL., *supra* note 9, includes a tiny and very qualified discussion of women:

Can the attitude that "women's place is in the home" be considered a prejudice? It would appear that it is, to the extent that people with this attitude have others *which are more obviously ethnocentric*. A more conclusive proof would require a detailed study of ideology regarding women, oriented within a general theory of ethnocentric vs. nonethnocentric approaches.

Daniel J. Levinson, *The Study of Ethnocentric Ideology*, in ADORNO ET AL., *supra* note 9, at 102, 107 (emphasis added). Other works in *Studies in Prejudice* also neglect stereotypes of femininity. This omission is striking given some of the data these studies contain, alluding to the potential link between stereotyped views on Jews and women. See Nathan W. Ackerman & Marie Jahoda, *Anti-Semitism and Emotional Disorder: A Psychoanalytic Interpretation* 104, 112 (1950) (describing a patient who thought that Jews were "castrated and less potent," and another patient who made an "[u]nconscious accusation[]" that Jews were "castrated"). Such a preoccupation with masculinity is clearly related to inequality for women who seem so clearly to lack masculine traits. More recent scholarship recognizes the link between stereotypes of Jews and stereotypes of women. See Jonathan Boyarin, *Another Abraham: Jewishness and the Law of the Father*, 9 YALE J.L. & HUMAN. 345, 392 (1997) ("The association of the Semitic with the feminine was a commonplace of nineteenth-century European progressive ideology.").

¹⁸¹ The *Authoritarian Personality's* list of biased statements includes only one cryptic reference to disabilities: "We are spending too much money for the pampering of criminals and the insane, and for the education of inherently incapable people." Levinson, *supra* note 180, at 106 tbl.2(IV) (listing common negative remarks toward minority groups other than Jews and African Americans). See generally Stefan, *supra* note 88 (discussing employment discrimination against people with psychiatric disabilities).

¹⁸² Some texts tended to treat homosexuality itself as a disorder, rather than treating the fear of, or hostility to, those perceived as lesbian or gay as a disorder of homophobia. See ACKERMAN & JAHODA, *supra* note 180, at 99 (utilizing a reference to an "overt homosexual"); *id.* at 103 (noting patient's "only friendship in his early adolescence, involving overt homosexual relations"); Else Frenkel-Brunswick, *The Interviews as an Approach to the Prejudiced Personality*, in ADORNO ET AL., *supra* note 9, at 291, 316 (analyzing homosexuality as a "problem" related to "the different ways of failure in resolving the Oedipal conflict and the resultant regression to earlier phases"). This attitude is not surprising given how most psychologists viewed lesbians and gays at the time. See Marshall Kirk & Hunter Madsen, *After the Ball: How America Will Conquer Its Fear and Hatred of Gays in the '90s* at 32-33 (1989) (describing the relatively recent decision by mental health professionals to stop classifying homosexual orientation as a mental disorder). Remarkably, some older texts do treat hostility to lesbians and gays as improper. See ADORNO ET AL., *supra* note 9, at 15

ing, earlier theories viewed generalized discrimination as a product of what I term outgroup hostility: many prejudiced individuals simply dislike anyone whom they do not consider as a member of their ingroup, regardless of whether a common race, gender, or religion make such outsiders different from "one of them." Subpart B describes these earlier accounts of outgroup hostility.

More recent theories similarly pay some attention to the outgroup hostility, but place greater emphasis on what I call ingroup sympathy: in which individuals have warmer feelings toward, and give better treatment to, people in their ingroup, often without any hostility. Subpart C focuses on ingroup sympathy. Again, one should not misunderstand the ingroup sympathy. Although ingroup sympathy might mask outgroup hostility, focusing on ingroup sympathy may render generalized discrimination more recognizable than when relying on outgroup hostility, which may be dismissed as a problem only for extreme fringe groups like neo-Nazis. Additionally, ingroup sympathy warrants separate treatment in order to confront theorists who treat ingroup sympathy as an acceptable, even laudable, behavior.

Subparts B and C also analyze two secondary points. First, scholars have often explicitly theorized the existence of atomized features of discrimination, despite their focus on generalized features of discrimination.¹⁸³ Second, close inspection of accounts of atomized discrimination reveals that conclusions from these accounts are far from natural or inevitable readings of the data.¹⁸⁴ Instead, such data may

(noting that people who agreed with the statement "[h]omosexuality is an especially rotten form of delinquency and ought to be severely punished" tended to agree with statement "that members of some minority group are basically inferior"); ALLPORT, *supra* note 8, at 398-99 (noting that "tolerant" personalities were "less condemnatory of social *misdeemeanors*, including violations of sexual standards" (emphasis added)); see also R. Nevitt Sanford et al., *The Measurement of Implicit Antidemocratic Trends*, in ADORNO ET AL., *supra* note 9, at 222, 244-47 & tbl.3(VII) (presenting data that reveal that the interview question regarding homosexuality generated a wide gap between those agreeing and disagreeing, corresponding to a gap between agreement and disagreement with various anti-Semitic comments). But see *id.* at 272, 278 (offering evidence that both an interviewee labeled low prejudice and an interviewee labeled high prejudice had negative attitudes about gays). Very recent studies confirm that those who score high on authoritarianism scales report more highly negative attitudes towards lesbians and gays than the general population. See *infra* note 239 and accompanying text.

¹⁸³ See ALLPORT, *supra* note 8, at 73 ("[W]e must not assume that a general psychodynamic trait of prejudice tells the whole story, though it tells a lot. Special reasons may exist for special forms of ethnocentrism in special localities."); *id.* at 408 ("We are likely to forget that there are plenty of mixed or run-of-the-mill personalities in whom prejudice does not follow the ideal pattern [of psychoanalytic prejudiced personality] here depicted.").

¹⁸⁴ One way to understand the need for an interpretive leap is to recognize the limits of language in describing groups—a perspective often associated with postmodernism and deconstruction. See, e.g., JACQUES DERRIDA, *THE POLITICS OF FRIENDSHIP* at vii (1997) ("What happens when, in taking up the case of the sister, the woman is made a sister?"). Unfortunately, critics often collapse such postmodern perspectives about the plasticity of categories into the notion that any version of postmodernism pulls every rug out from

be interpreted along different categories, such as discrimination affecting only Eastern European Jews.

B. Outgroup Hostility

1. *The Authoritarian Personality*

Although a study of generalized discrimination might begin with other sources in the United States,¹⁸⁵ or the global history of ideas,¹⁸⁶ *The Authoritarian Personality*¹⁸⁷ provides a good starting point for several reasons. First, *The Authoritarian Personality* is historically a widely influential book within both social science and the law.¹⁸⁸ Specifically, this work spurred other social scientists to consider prejudice as a generalized phenomenon. Second, the context in which the authors viewed prejudice as generalized is significant. The study took place in the wake of the brutal Nazi extermination of, among many

under every notion of justice, empathy, and compassion. See Mark Lilla, *The Politics of Jacques Derrida*, N.Y. REV. BOOKS, June 25, 1998, at 36, 39 ("If deconstruction throws doubt on every political principle of the Western philosophical tradition—Derrida mentions propriety, intentionality, will, liberty, conscience, self-consciousness, the subject, the self, the person, and community—are judgments about political matters still possible?"). As I have tried to suggest elsewhere, however, other versions of postmodernism use postmodernist insights to expand the range of possible values from a needlessly cramped set of values; for example, they open up the range of possible definitions of communities rather than merely rely on unfettered individualism. See Freshman, *supra* note 55, at 1715 & n.74. In that same manner, we may begin by noting how various atomized accounts are not natural, but we may end by using this insight to reconstruct a more useful way to understand discrimination, as this Article attempts to do.

¹⁸⁵ The African-American abolitionist, Frederick Douglass, for example, saw women's rights as intimately entwined with the plight of African Americans. See generally FREDERICK DOUGLASS, *FREDERICK DOUGLASS ON WOMEN'S RIGHTS* (Philip S. Foner ed., 1976) (providing a collection of Douglass's writings and speeches on women's issues).

¹⁸⁶ See, e.g., KARL MARX, *On the Jewish Question*, in *SELECTED WRITINGS* 39, 44 (David McLellan ed., 1977) (arguing that Jews should not merely seek emancipation from anti-Semitism, but "human emancipation"); JEAN-PAUL SARTRE, *ANTI-SEMITES AND JEW* 149 (George J. Becker trans., 1948) ("[D]istinctions between rich and poor, between laboring and owning classes . . . are all summed up in the distinction between Jew and non-Jew. This means that anti-Semitism is a mythical, bourgeois representation of the class struggle."). Moreover, *The Authoritarian Personality* acknowledged its affinity with Sartre's *Anti-Semite and Jew*. See ADORNO ET AL., *supra* note 9, at 971 n.1.

¹⁸⁷ ADORNO ET AL., *supra* note 9.

¹⁸⁸ Prior to the publication of *The Authoritarian Personality*, other theorists also presented survey evidence that discrimination might occur in relatively generalized patterns. See, e.g., GARDNER MURPHY & RENSIS LIKERT, *PUBLIC OPINION AND THE INDIVIDUAL: A PSYCHOLOGICAL STUDY OF STUDENT ATTITUDES ON PUBLIC QUESTIONS, WITH A RETEST FIVE YEARS LATER* 136-37 (1938) (claiming that "[s]ince national and racial out-groups are regarded by the majority group as 'outsiders' (or even as inferiors) it is not surprising that some students have acquired a generalized anti-out-group sentiment" and describing other subjects, who by "resisting current stereotypes in a specific case (e.g., the Negro), are found to have resisted it also in the case of other out-groups"). However, contemporary scholarship rarely discusses this earlier work.

other groups, Jews.¹⁸⁹ A prominent Jewish organization funded the study.¹⁹⁰ The authors received the funding when many of them were

189 The fact that the Nazi holocaust targeted many outgroups for extermination, including gay men and people with disabilities, is beyond dispute. See, e.g., Jack Nusan Porter, *The Yellow Star and the Pink Triangle: Sexual Politics in the Third Reich*, in ON PREJUDICE: A GLOBAL PERSPECTIVE 67 (Daniela Gioseffi ed., 1993) [hereinafter ON PREJUDICE] (discussing gay victims of Nazi persecution); Dora E. Yates, *Hitler and the Gypsies: A Genocide That Must Be Remembered*, in ON PREJUDICE, *supra*, at 103 (discussing Nazi genocide of the Gypsies); Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834 (1990) (noting that, in addition to Jews, "[t]he Nazis also targeted Gypsies, Jehovah's Witnesses, and homosexuals for persecution").

Nevertheless, many interpret the Holocaust solely as an anti-Semitic phenomenon. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 375 (1996) (emphasizing anti-Semitic ideology as the source of the Holocaust). See generally RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 123 (1998) ("Just as Jews were unwilling to share the Holocaust with other victims, so some African American leaders refused to extend the civil rights movement to gays and lesbians."). Recently, several Orthodox Jews sued to prevent the opening of a Holocaust Memorial that included memorial of gay victims of the Nazi holocaust because they were offended by "'the elevation of homosexuals to the martyred status of the six million Jews,' who died in the Holocaust." *Suit Against Holocaust Museum*, *NEWSDAY*, Sept. 7, 1997, at A50. On the obsession with learning the lessons of World War II, see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 250 (1992) ("[M]uch of post-war American thought was obsessed with identifying the 'lessons' to be learned from the spread of totalitarianism."). However, as Horwitz noted, not all scholars of the postwar era identified prejudice and discrimination as a problem; Horwitz argued that consensus theories simply did not confront the problem of racial prejudice and discrimination. See *id.* at 257.

190 The American Jewish Committee (AJC) funded the various works in *Studies in Prejudice*, including *The Authoritarian Personality*, in a number of ways. See Memorandum on Implementation of the *Studies In Prejudice* from the American Jewish Committee 3 (Nov. 8, 1951) (on file with author) (reporting that the AJC spent \$175,000 on research and publication of the *Studies in Prejudice*). The various works in *Studies in Prejudice* grew out of a "conference on religious and racial prejudice" in 1944. Max Horkheimer & Samuel H. Flowerman, *Foreword to Studies in Prejudice*, in ADORNO ET AL., *supra* note 9, at v. The AJC paid a portion of Adorno and other writers' salaries. See Letter from Samuel H. Flowerman, Associate Director, Institute of Social Research, to R. Nevitt Sanford 1-2 (June 14, 1946) (on file with author) (discussing salary payments); Letter from Samuel H. Flowerman, Associate Director, Institute of Social Research, to Else Frenkel-Brunswik 1 (Apr. 4, 1946) (explaining that the AJC already had spent \$49,000 on the Berkeley Adult Project, which became part of *The Authoritarian Personality*, and that the Committee was anxious for results of the project).

Considering the amount of money involved, there is surprisingly little written record of any attempt to manipulate the final report. See Memorandum from Samuel H. Flowerman to John Slawson 2 (May 28, 1951) (on file with author) ("[T]he point needs to be made that the [American Jewish] Committee allowed its collaborative investigators considerable academic freedom, almost as much academic freedom as it allows *Commentary* magazine."). However, one letter in the AJC records shows tension between understanding prejudice in general and putting anti-Semitism at the center of attention:

During my visit, arrangements have been made to include into the summary part a special chapter about the function of the Jew in the psychological make-up of the Fascist character. Since this is, after all, the center of our interest, it deserves a treatment of its own. On the one hand, the chapter will show that the Antisemites' aggressiveness and projectivity is largely unspecific and can be shifted to any other minority group. This can be corroborated by many interview quotations. On the other hand, it will be

particularly desperate for financial resources.¹⁹¹ Thus, one might have predicted that the authors would have narrowly focused on anti-Semitism. However, the final version of the book¹⁹² instead treats generalized discrimination as an uncontroversial fundamental truth. As discussed below, the book received widespread popular and academic acclaim, but also quickly drew methodological critiques. More recent scholarship confirms the study's central thesis of generalized discrimination and avoids methodological critiques.¹⁹³ Although one could not responsibly conclude an analysis of the extent of generalized discrimination with a study of attitudes nearly half a century old, this influential work still remains a useful starting point.

a. *From "Anti-Semitism" to "Prejudice in General"*

The Authoritarian Personality plainly understands discrimination as generalized discrimination: "Evidence from the present study confirms what has often been indicated: that a man who is hostile toward one minority group is very likely to be hostile against a wide variety of others."¹⁹⁴ The study claimed to focus on generalized discrimination from its inception: "[I]t was supposed [by the authors] that anti-Semitism probably is not a specific or isolated phenomenon but a part of a broader ideological framework. . . ."¹⁹⁵ The evidence supporting this

demonstrated that certain specific features of the stereotypical imagery of the Jew make for a "priority of hatred."

Letter to Sandy 1 (Nov. 6, 1946) (on file with author); see also JAY, *supra* note 8, at 234 ("[R]elations with officials of the AJC [and the authors of *The Authoritarian Personality*], especially near the end of the project, were anything but smooth. Personal frictions played a role, but theoretical disagreements certainly existed as well.").

¹⁹¹ See JAY, *supra* note 8, at 220-21.

¹⁹² References to "the book" and "the authors" require an important qualification. The book was a collective work with individual chapters drafted by different authors. See *id.* at 234-35. But cf. Max Horkheimer, *Preface* to ADORNO ET AL., *supra* note 9, at ix, xi-xii ("The main concepts of the study were evolved by the team as a whole."). Although the introduction to *The Authoritarian Personality* paints discrimination in largely unqualified generalized terms, certain individual authors introduced varying degrees of nuance. Indeed, sometimes the same authors emphasized at various points not only the generality of ethnocentrism and prejudice, but also particular examples, such as anti-Semitism. Compare Levinson, *supra* note 180, at 102 (stating that ethnocentrism focuses on prejudice in general, not against particular groups), with Daniel J. Levinson, *The Study of Anti-Semitic Ideology*, in ADORNO ET AL., *supra* note 9, at 57 ("[A]nti-Semitism is particularly important and revealing." (emphasis added)).

¹⁹³ See *infra* Part III.B.1.f. (discussing the methodological critique and response of more recent studies).

¹⁹⁴ ADORNO ET AL., *supra* note 9, at 9. As Young-Breuhl has observed, *The Authoritarian Personality* further developed the generality of prejudice that Adorno and Horkheimer had developed in their earlier, more theoretical book, *Dialectic of Enlightenment*: "Antisemitism has virtually ceased to be an independent impulse and is now a plank in the platform." YOUNG-BRUEHL, *supra* note 175, at 60 (citation omitted).

¹⁹⁵ ADORNO ET AL., *supra* note 9, at 3. The unusual phrasing reflects the theoretical orientation of the Frankfurt School with which the authors were affiliated. Some early statements by adherents suggest that the authors were misguided in trying to test research

assertion and subsequent argument take three principal forms: (1) quantitative studies of polls of prejudiced attitudes, (2) theories of ethnocentric ideology, and (3) analysis of interviews.¹⁹⁶ On the basis of these theories and evidence, *The Authoritarian Personality* recommends a broad attack on prejudice rather than the contemporary fixation on atomized forms of discrimination, particularly those based on classification such as race: "[I]t follows directly from our major findings that countermeasures should take into account the whole structure of the prejudiced outlook. The major emphasis should be placed . . . not upon discrimination against particular minority groups, but upon such phenomena as stereotypy [sic], emotional coldness, identification with power, and general destructiveness."¹⁹⁷

against hypotheses. See JAY, *supra* note 8, at 221 ("[T]he Frankfurt School was critical of the reductionist tendencies implicit in inductively oriented, empirical social science. In the exploration of social phenomena, it placed theory prior to the gathering of 'facts' . . ."). The language of *The Authoritarian Personality*, however, often reads like familiar social science: there is a hypothesis—anti-Semitism cannot be studied apart from prejudice in general—and the studies that follow seem to test this hypothesis. Subsequent studies of the central theories of the book indeed follow that kind of methodology; and they confirm with better techniques the central thesis that discrimination often involves hostility to all outgroups, not merely anti-Semitism. See *infra* text accompanying note 239. After writing *The Authoritarian Personality*, however, Adorno claimed that he still adhered to the methodology of critical theory that held that one did not simply use experiments to test hypotheses:

[W]e never regarded the theory simply as a set of hypotheses but as in some sense standing on its own feet, and therefore did not intend to prove or disprove the theory through our findings but only to derive from it concrete questions for investigation, which must then be judged on their own merit and demonstrate certain prevalent socio-psychological structures.

JAY, *supra* note 8, at 240 (internal quotation marks omitted) (citation omitted). Psychiatrists gathered at a 1945 meeting to discuss further research on the psychology of anti-Semitism displayed similar views: "We know essentially the psycho-dynamics of the minority problem; we also know the social dynamics. *We just have to collect the empirical data.*" Sandor Rado, Remarks at the Meeting of Psychiatrists and Psychoanalysts for Consideration of a Research Project on Psychology of Anti-Semitism 4 (Apr. 19, 1945) (unpublished transcript, on file with author) (emphasis added).

¹⁹⁶ The interviews included what the study called projective questions: questions designed to shed light on what the individual projected from his own personality onto the world. See Betty Aron, *The Thematic Apperception Test in the Study of Prejudiced and Unprejudiced Individuals*, in ADORNO ET AL., *supra* note 9, at 489, 489-90; Daniel J. Levinson, *Projective Questions in the Study of Personality and Ideology*, in ADORNO ET AL., *supra* note 9, at 545, 545-47.

¹⁹⁷ ADORNO ET AL., *supra* note 9, at 973. In particular, because the study locates the source of the prejudiced family in a deep personality structure forged during childhood, it emphasizes changes in child training. See *id.* at 975. Although it expresses considerable skepticism that there are resources available for individual psychotherapy, the study also expresses a hope that some "[t]echniques[,] . . . developed mainly in the field of individual psychotherapy, can be improved and adapted for use with groups and even for use on a mass scale." *Id.* at 976.

b. *Quantitative Evidence of Generalized Outgroup Hostility*

The quantitative data about generalized outgroup hostility are stunning: a person who agrees with a particular anti-Semitic statement is nearly as likely to agree with an anti-African-American statement as another anti-Semitic statement.¹⁹⁸ Moreover, since the surveys let individuals agree or disagree on a scale, the results of the surveys suggest that individuals who dislike one group, such as Jews, not only dislike another, such as African-Americans, but also dislike them as intensely.¹⁹⁹ Hence, these data indicate not only that someone who expresses an anti-Semitic belief would possibly express an anti-African-

¹⁹⁸ See *infra* text accompanying notes 199-201.

¹⁹⁹ Daniel Levinson explained:

The fact that [the anti-Semitism, African-American, and minority scales] involve items dealing with so great a variety of groups and ideas suggests again that ethnocentrism is a general frame of mind, that an individual's stand with regard to one group such as Negroes tends to be similar in direction and degree to his stand with regard to most issues of group relations.

Levinson, *supra* note 180, at 113. In addition, this outgroup hostility also correlates strongly with what I call ingroup sympathy. In terms of ingroup sympathy and outgroup hostility, the quantitative study recognized that the exact contours of like and dislike would vary somewhat for a given individual. Levinson reported,

While there are probably considerable sectional, class, and individual differences regarding which groups are regarded as outgroups, it would appear that an individual who regards a few of these groups as outgroups will tend to reject most of them. An ethnocentric individual may have a particular dislike for one group, but he is likely nonetheless to have ethnocentric opinions and attitudes regarding many other groups.

Id. at 147.

One important limitation to quantitative data is that it does not allow one to identify how many prejudiced individuals fit a particular kind of generalized discrimination. (I am grateful to Ellen Saks for pressing me on this point.) The data show the correlation between the average scores on various scales; they do not show the correlation between any given individual's score on one scale, such as racism, and his score on another scale, such as anti-Semitism. See *infra* note 206. Although *The Authoritarian Personality* claims that the majority of subjects did not display the extreme version of the generally prejudiced personality, see ADORNO ET AL., *supra* note 9, at 976, it does not precisely address a question lawyers may find important: Of those engaged in illegal discrimination, how many fit the generally prejudiced personality, as opposed to some narrower set of prejudices? Nevertheless, the study strongly hints that a large number of persons share such a generally prejudiced personality. Indeed, it takes pains to avoid suggesting that prejudice is merely a problem with isolated, dysfunctional individuals:

Personality patterns that have been dismissed as "pathological" because they were not in keeping with the most common manifest trends or the most dominant ideals within a society, have on closer investigation turned out to be but exaggerations of what was almost universal below the surface in that society. What is "pathological" today may with changing social conditions become the dominant trend of tomorrow.

Id. at 7.

More recent studies using a modified version of the authoritarianism scales show that, in a 1995 survey of college students, 1.2% scored very high, 18.1% moderately high, and 46.9% slightly high. See BOB ALTEMEYER, *THE AUTHORITARIAN SPECTER* 90 tbl.3.1 (1996). This suggests that a large number of individuals today are hostile to a large number of seemingly different outgroups.

American belief, but also that such a person would be roughly as likely to disagree with another set²⁰⁰ of anti-Semitic statements.

Overall, *The Authoritarian Personality* groups various anti-Semitic statements into several subscales: "Offensive," "Threatening," "Attitudes," "Intrusive," and "Seclusive."²⁰¹ Three sets of intercorrelations between these subscales are either .74 or .75: offensive and seclusive (.75), attitudes and seclusive (.74), and intrusive and seclusive (.74).²⁰² The correlation of negative attitudes about African Americans²⁰³ and negative attitudes about Jews is .74;²⁰⁴ the correlation of negative attitudes about Jews and negative attitudes about other minorities (such as religious sects that do not salute flags, foreigners, Japanese, "Okies," and Filipinos)²⁰⁵ is .76.²⁰⁶ Similarly, the correlation of negative attitudes about African Americans and other minorities is .74.²⁰⁷ Although the text does not supply the exact quantitative data of correlations, it also indicates that individuals who condemn lesbians and gays tend to condemn other outgroups and vice versa.²⁰⁸ Subsequent follow-up interviews confirmed all of the quantitative data based on the surveys. These interviews were similarly rated; with few exceptions, interviewers rated those who scored high on the ethnocentrism and anti-Semitism scales as high in prejudice in general. As discussed below, more recent studies continue to show similar kinds of

200 The study conceived of various subscales in a relatively crude way: Several subscales were formed in order to insure systematic coverage of the various aspects conceived and in order to test certain hypotheses. The subscales cannot be thought of as dealing with *components* of anti-Semitism in any statistical sense; they are not based on statistical treatment of prior results, nor was any intensive correlational analysis of the present items made. The subscales are, rather, convenient ways of conceiving and grouping items.

Levinson, *supra* note 192, at 62.

201 *Id.* at 75 tbl.8(III).

202 *See id.* Certain other subscales have a stronger correlations: offensive and threatening (.85), offensive and attitudes (.83), and threatening and attitudes (.84). *See id.*

203 The study included a subscale devoted solely to African Americans, "[s]ince [African Americans] . . . are a large and severely oppressed group and since imagery of [the African American] . . . has become so elaborated in American cultural mythology." Levinson, *supra* note 180, at 106.

204 *See id.* at 122 tbl.11(IV).

205 *See id.* at 106 tbl.2(IV). The minority subscale also includes what the study considered as "moral minorities or outgroups": "[z]ootsuiters, criminals, the insane, 'inherently incapable people' and 'undesirable elements.'" *Id.* at 107.

206 *See id.* at 122 tbl.11(IV).

207 *See id.* at 113 tbl.6(IV).

208 *See* ADORNO ET AL., *supra* note 9, at 15 (noting that people who agreed with the statement, "Homosexuality is an especially rotten form of delinquency and ought to be severely punished" tended to agree with the statement "that members of some minority group are basically inferior").

close correlations, although the exact degree of the correlations differs.²⁰⁹

These data undermine the atomized viewpoint and bolster the generalized viewpoint in two ways. First, the statistics undermine the atomized approach because they show that an atomized viewpoint such as anti-Semitism includes variation; people who agreed with one anti-Semitic statement do not always agree with another. Second, the data show that this variation within atomized groups is often approximately the same as the variation in prejudice against different atomized groups, such as African Americans. Therefore, to determine how an alleged discriminator has behaved in the past, looking at his treatment of outgroups in general is often as illuminating as looking at some narrowly constructed atomized group such as Jews.

c. *The Ethnocentric Ideology Explanation*

The quantitative data also support the powerful theory that various kinds of prejudices are often different facets of a common ideology²¹⁰ of ethnocentrism. The distinction that *The Authoritarian Personality* draws between the ways in which ethnocentrism and prejudice are "commonly regarded" parallels this Article's distinction between generalized and atomized understandings of prejudice:

Prejudice is commonly regarded as a feeling of dislike against a specific group; ethnocentrism, on the other hand, refers to a relatively consistent frame of mind concerning "aliens" generally. Usually, in discussions of prejudice against groups there is specific reference to "race prejudice" or "prejudice against racial and religious minorities." This terminology is used even by people who know that "race" is a socially harmful idea as ordinarily understood, and who know that many groups (zootsuiters, "Okies," and so forth) are discriminated against on neither racial nor religious grounds.²¹¹

²⁰⁹ See *infra* note 239 and accompanying text (discussing more recent authoritarianism studies).

²¹⁰ The study purported to treat ideology as a neutral, descriptive term: Since the term "ideology" has acquired many negative connotations, particularly in the realm of political thought, we wish again to emphasize that this concept is used here in a purely descriptive sense: "ideology" refers to an "organized system of opinions, values, and attitudes." Any body of social thought may, in this sense, be called an ideology, whether it is true or false, beneficial or harmful, democratic or undemocratic.

Daniel J. Levinson, *Politico-Economic Ideology and Group Memberships in Relation to Ethnocentrism*, in ADORNO ET AL., *supra* note 9, at 151, 151 n.1. See generally J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 110 (1998) (describing the power of society's ideology as simultaneously empowering and constraining).

²¹¹ Levinson, *supra* note 180, at 102. As the quotation indicates, one can define in-groups by more dimensions than what the narrow framework of race would accommodate: The term "group" is used in the widest sense to mean any set of people who constitute a psychological entity for any individual. If we regard the individual's conception of the social world as a sort of map containing various

This theory of ethnocentrism does not claim to fully describe every individual in every interaction.²¹² No theory of prejudice or of any human behavior can plausibly accomplish this task; indeed, we would have nothing but a mess of unsorted details if we rejected a theory because it did not describe every individual or predict every interaction.²¹³ Instead, *The Authoritarian Personality* describes how many people act much of the time.

For the purposes of this Article, the most important feature of the ethnocentric individual is the individual's need to distinguish between an ingroup and everyone outside that ingroup. This dichotomization reflects a basic view of the world that bifurcates the world "from the parent-child dichotomy to the dichotomous conception of sex roles and of moral values, as well as to a dichotomous handling of social relations as manifested especially in the formation of stereotypes and of ingroup-outgroup cleavages."²¹⁴ A prejudiced individual identifies himself with an ingroup;²¹⁵ because only the individual's self-identification matters, the prejudiced individual may imagine himself a mem-

differentiated regions, then each region can be considered a group. This sociopsychological definition includes sociological groups such as nations, classes, ethnic groups, political parties, and so on. But it also includes numbers-of-people who have one or more common characteristics but who are not formal groups in the sense of showing organization and regulation of ways. Thus, it is legitimate in a sociopsychological sense to consider as groups such sets of people as criminals, intellectuals, artists, politicians, ec-centrics, and so on.

Id. at 146.

²¹² In describing the summary of interviews, Frenkel-Brunswik made clear that the theory represents something of an abstraction from the range of individual cases:

It should . . . be kept in mind that the summary which follows deals with composite pictures of these patterns, abstracted from the study of groups, rather than with individual cases. Were we to lay greater stress on concrete personalities, the most frequent syndromes or combinations of trends within single individuals would have to be determined as an intermediate step, leading to the definition of subtypes within the prejudiced and the unprejudiced patterns.

Else Frenkel-Brunswik, *Comprehensive Scores and Summary of Interview Results*, in ADORNO ET AL., *supra* note 9, at 468, 473. The text does identify such subtypes elsewhere. For the purposes of this Article, however, these subtypes are of relatively little interest: each of the subtypes engages in generalized discrimination. See T.W. Adorno, *Types and Syndromes*, in ADORNO ET AL., *supra* note 9, at 744, 751 ("It is one of the outstanding findings of the study that 'highness' [of prejudice and ethnocentrism] is essentially *one* syndrome, distinguishable from a variety of 'low' syndromes.").

²¹³ However, the claim that there is a need for abstract theory does not mean that rich, detailed empirical work is not valuable as well. Compare POSNER, *supra* note 152, at 427 (describing Willard Hurst's book as "a dense mass of description . . . so wanting in a theoretical framework—in a perceptible *point*—as to be unreadable, almost as if the author had forgotten to arrange his words into sentences"), with ABEL, *supra* note 189, at ix-x (emphasizing the value of collecting numerous examples to illustrate "the limits of generalization").

²¹⁴ ADORNO ET AL., *supra* note 9, at 971. As discussed below, cognitive theorists such as Allport began to treat these habits as cognitive. See *infra* note 253 and accompanying text.

²¹⁵ See Levinson, *supra* note 180, at 104.

ber of an ingroup even if others would never describe him as part of that group.²¹⁶ Additionally, the individual has "uncritically supportive attitudes" toward the ingroup.²¹⁷ Nearly all individuals outside that ingroup comprise outgroups;²¹⁸ "[a] primary characteristic of ethnocentric ideology is the *generality* of outgroup rejection."²¹⁹ But what makes this theory one of outgroup hostility, rather than mere ingroup sympathy, is that the prejudiced personality regards outgroups as "antithetical to the ingroups," thus leading the individual to have "negative opinions and hostile attitudes" about them.²²⁰ Moreover, these attitudes are often stereotypical; for example, the same behavior may be viewed favorably by members of the ingroup as loyalty, but negatively by members of an outgroup as clannishness.²²¹ The final stage in the development of a discriminatory personality occurs when the

²¹⁶ For instance, a brown-haired, brown-eyed man may idolize Nordic "Aryans." Many surveys in these studies show that most women accepted that women should only work in "feminine positions, such as nursing, secretarial work, or child care." *Id.* at 117 tbl.8(IV); *see id.* at 121. However, when the researchers asked this question again, college and professional women tended to disagree and college men had a "slight tendency to agree." *Id.* at 121; *see also id.* at 146-47 (suggesting that the key to concepts such as ingroups and outgroups is self-identification, not formal membership).

²¹⁷ *Id.* at 104.

²¹⁸ *See id.*

²¹⁹ *Id.* at 147; *see also id.* at 122 ("Anti-Semitism is best regarded . . . as one aspect of this broader frame of mind; and it is the total ethnocentric ideology, rather than prejudice against any single group, which requires explanation.").

²²⁰ *Id.* at 104. Although I classify *The Authoritarian Personality* as an example of a study of outgroup hostility, the study also contains traces of understandings of ingroup sympathy. *See id.* at 102 ("Ethnocentrism refers to group relations generally; it has to do not only with numerous groups toward which the individual has hostile opinions and attitudes but, equally important, with groups toward which he is positively disposed.").

The Authoritarian Personality still fits within an understanding of outgroup hostility in two ways. First, at a mechanical level, much of its discussion and analysis emphasizes negative attitudes toward outgroups. The ethnocentrism scale focuses on negative attitudes about particular groups. For example, a statement about African Americans describes African Americans as "irresponsible, lazy, and ignorant," rather than describing whites as responsible and well-informed. *Id.* at 105 tbl.1(IV); *cf.* Levinson, *supra* note 192, at 58 (describing anti-Semitism as "negative opinions" about Jews and "hostile attitudes toward them," without discussing positive attitudes regarding Gentiles); *id.* at 59 (attempting to explain why only negative items were used).

Second, and more fundamentally, the theory treats preferences for one group as inevitably linked to negative views about another group; the idea that individuals simply overlook an outgroup is not seriously considered. *See* Levinson, *supra* note 180, at 147 ("It is as if the ethnocentric individual feels threatened by most of the groups to which he does not have a sense of belonging; if he cannot identify, he must oppose; if a group is not 'acceptable,' it is 'alien.'").

There are few exceptions to the tendency to ask about negative attitudes. One statement about women in the ethnocentrism scales does conform more closely to ingroup sympathy: "Although women are necessary in the armed forces and in industry, they should be returned to their proper place in the home as soon as the war ends." *Id.* at 106 tbl.2(IV); *see also infra* Part III.C.1 (explaining why ingroup sympathy and outgroup hostility may have similar effects).

²²¹ *See* Levinson, *supra* note 180, at 149.

prejudiced individual builds these attitudes into a vision of society: "[O]utgroups should be socially subordinate to ingroups."²²²

d. *The Independent Psychoanalytic Explanation*

Apart from the hard data that support the descriptions of both the prejudiced personality and the ethnocentric ideology, *The Authoritarian Personality* also offers a theory of the origins of the ethnocentric ideology; it posits that the ethnocentric ideology infects individuals on the basis of their psychology of personality.²²³ However, the description of the ethnocentric ideology above is easily severable from the currently less trendy psychoanalytic theory. The ethnocentric ideology describes both the quantitative data and the interviews; the psychoanalytic gloss speculates about how this ideology might have developed, and to a much lesser extent, how it might be remedied.

The law of evidence requires only a description of an individual's current world view and his current motivation to act against all outgroups. However, legal scholars may nonetheless be interested in thinking about the origins of this behavior for other reasons, such as to reduce prejudice in society. Despite this interest, attorneys generally need not concern themselves with proof of the origins of motivation in proving discrimination.²²⁴ Moreover, although subsequent studies repeatedly confirm the idea that much discrimination is generalized, they offer little support for the psychoanalytic emphasis on family upbringing.²²⁵

²²² *Id.* at 104. To some extent, the theory suggests a remarkable consistency and hierarchy in the treatment of outgroups:

The social world as most ethnocentrists see it is arranged like a series of concentric circles around a bull's-eye. Each circle represents an ingroup-outgroup distinction; each line serves as a barrier to exclude all outside groups from the center, and each group is in turn excluded by a slightly narrower one. A sample "inap" illustrating the ever-narrowing ingroup would be the following: Whites, Americans, native-born Americans, Christians, Protestants, Californians, my family, and finally—I.

Id. at 148.

²²³ The text rejects any crude economic determinism of motivations. Nevertheless, periodic fragments—not obviously necessary to the rest of the text—remaining intimating that an ethnocentric ideology has some rational economic or class interest origin. See ADORNO ET AL., *supra* note 9, at 8 (asserting that "the tendency of the small businessman to side with big business in most economic and political matters cannot be due entirely to a belief that this is the way to guarantee his economic independence" and that "the individual seems not only not to consider his material interests, but even to go against them") These fragments may well reflect some of the Marxist origins of some of the authors. See JAY, *supra* note 8, at 228.

²²⁴ For other legal purposes, the origins of discrimination may matter to the extent they establish effective policies to combat discrimination; such policies may reduce an organization's liability for discriminatory acts of its personnel.

²²⁵ See ALTEMEYER, *supra* note 12, at 254.

e. *Atomized Traces*

Although *The Authoritarian Personality* consistently and pervasively depicts a generalized view of discrimination it also recognizes that prejudice sometimes assumes other forms. First, Daniel Levinson emphasized that even when ethnocentric persons have negative views of various outgroups, these negative views—what we would now call stereotypes—vary to some degree for different outgroups: “What is the *content* of ethnocentric ideology regarding outgroups? There are, of course, individual differences here, and the same individual has different conceptions of, and attitudes toward, different outgroups. Nevertheless, certain common trends seem to exist, and these are generally the same as those found in anti-Semitic ideology.”²²⁶

Although this language suggests that anti-Semitism may be an example of atomized discrimination, the underlying data support alternative conclusions as well. The variety in types of prejudices includes various views about even an atomized group such as Jews. The stereotyping goes beyond an individual’s viewing Jews as hyper-competitive or African Americans as irrational and wildly sexualized. As the quantitative scales show, even the same individuals may see Jews as seemingly contradictory stereotypes. Additionally, prejudice involving Jews might be limited to Jews of certain backgrounds or Jews who trigger certain stereotypes, such as uncleanness or hyper-competitiveness. In the case of Jews, the reason for the existence of seemingly contradictory stereotypes perhaps comes from the distinction between stereotypes of Eastern European Jews and more well-established German Jews in people’s minds.²²⁷ Likewise, in contemporary times, discus-

²²⁶ Levinson, *supra* note 180, at 176. Levinson also noted:

[T]he correlations among the initial Negro, Minorities, Patriotism, and Anti-Semitism scales indicate that these trends are closely related, that people are notably consistent in their acceptance or rejection of *general* ethnocentrism. To attempt to measure this ideology as a totality, however, is not to deny that it has components with respect to which individuals may vary.

... It would be erroneous, then, to regard high scorers as “all alike”; they have in common a general way of thinking about groups, but there are wide individual differences in the imagery and attitudes regarding various groups.

Id. at 145-46.

²²⁷ See, e.g., ACKERMAN & JAHODA, *supra* note 180, at 79-82 (distinguishing “Jewish anti-Semitism,” from “the anti-Semite who is overtly committed to an ideology of political liberalism”). Additionally, an examination of the data from reports of the psychoanalysis of various patients suggest how one might reconstruct different categories from these data based on the stereotypes of Jews. These stereotypes include considering Jews as being “social climbers” and “fakes,” *id.* at 97, “associat[ing] Jews with low status and inferiority,” *id.* at 102, and believing that Jews are “dirty, . . . generally low class,” and “castrated,” *id.* Other stereotypes treat Jews as being “greedy and promiscuous,” “intellectually superior,” *id.* at 100, and “too serious” and as “hav[ing] too much drive,” *id.* at 106. These data, as well as the quantitative data in *The Authoritarian Personality*, show that many of the same individuals held these seemingly contradictory stereotypes about Jews; but the data do not really ex-

sion of atomized categories such as Hispanics or Asians may mask similar differences; relatively wealthy and well-educated Cuban, Chinese, or Japanese immigrants may evoke markedly different reactions than more recent and poorer Cuban and Vietnamese refugees.²²⁸

Second, the authors of *The Authoritarian Personality* periodically suggested that anti-Semitism might have some other sources in addition to general ethnocentrism. On the quantitative side, the study found that the various minority and African-American scales correlate slightly better than any correlates with the anti-Semitism scales. Levinson noted that this might merely be a result of the relatively short anti-Semitism scales.²²⁹ Additionally, he hypothesized that "it appears likely that there are certain specific determinants of anti-Semitism apart from those which hold for general ethnocentrism."²³⁰ However, these statements about the special quality of anti-Semitism may be in part a reflection of the preoccupation of some of the researchers and their research methods. For example, the protocols for structured interviews of individuals included a laundry list of questions about Jews, but only a handful of questions about other specific outgroups.²³¹ Likewise, although anti-Semitism received its own set of questions, the protocols lumped together all other minorities in the minorities scale.²³²

Ultimately, then, we reach a plausible conclusion that prejudice may not always be generalized. However, this conclusion does not inexorably lead to the assumption that discrimination exists on atomized lines. The discovery of atomized discrimination is sometimes a direct result of the particular way in which the researchers conducted their experiments. Moreover, even if discrimination is not a result of generalized outgroup hostility, it is not necessarily a result of atomized racism or anti-Semitism.²³³ Discrimination may be subatomized, such as against German Jews. Discrimination may also be generalized in

plore whether individuals held these contradictory stereotypes about the same group of Jews. Instead, it might have been that some Jews, such as relatively recent immigrants, were viewed as dirty, and others, such as relatively assimilated Jews, as too ambitious. More recent surveys of anti-Semitism, however, have tended to only consider stereotypes that track the hypercompetitive stereotypes rather than the "dirty" and "low class" stereotypes. See Anti-Defamation League, *Anti-Semitism and Prejudice in America: Highlights from an ADL Survey; Differences Between the Views of the Most Anti-Semitic Americans and the Rest of the Public*, Nov. 1998 (visited Nov. 7, 1999) <http://www.adl.org/antisemitism%5Fsurvey/survey_ji_chart-Differences_in_views.htm>.

²²⁸ See, e.g., Valdes, *supra* note 16, at 24-27 (discussing diversity among Latinas/os).

²²⁹ See Levinson, *supra* note 180, at 122.

²³⁰ *Id.*

²³¹ See Frenkel-Brunswick, *supra* note 182, at 323-25.

²³² See *supra* note 203 (describing how the minorities subscale includes questions about several different outgroups).

²³³ See *supra* text accompanying note 34 (noting how an individual understands discrimination in a variety of ways by generalizing along various dimensions).

ways that encompass parts of several atomized groups, such as hostility to recent immigrants or the unassimilated be they Jews who wear traditional dress or Latinos who keep their accents.²³⁴ In the end, however, these caveats speak to the exact balance between various forms of relatively generalized discrimination and various forms of relatively atomized discrimination. The evidence nonetheless reveals a strong basis for seeing much discrimination as generalized; at least, it expresses some skepticism about the extent to which one can understand the remainder using atomized categories.

f. *The Limits and Lessons of The Authoritarian Personality*

Despite its widespread citation in law review articles,²³⁵ and even some direct citation in cases,²³⁶ *The Authoritarian Personality* has a complicated history in social science. In the narrowest sense, *The Authoritarian Personality* and other volumes in the *Studies In Prejudice* series have fallen from grace in some academic departments on methodological grounds. Shortly after its publication, critics launched what became a sustained assault on the quantitative F-scales method that tried to show that individuals who answered "yes" to one prejudiced statement tended to answer "yes" to other prejudiced statements. The methodological critics showed that these questionnaires were suspect on an elementary level; although the long survey identified prejudice with "yes" answers to various statements, basic survey principles suggest that those who answer "yes" to some questions tend to automatically answer "yes" to other questions.²³⁷ This is a familiar problem

²³⁴ See generally Carbado & Gulati, *supra* note 34 (describing the frequent issues that various outsiders confront in trying to decide when and how to "fit in").

²³⁵ See, e.g., Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1081 n.280 (1992) ("The monumental work on the topic, however, building on the work of Erich Fromm and others, was the experimental study of American authoritarianism completed by Adorno and his colleagues in 1950."); Charles W. Collier, *The New Logic of Affirmative Action*, 45 DUKE L.J. 559, 568 & n.22 (1995); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1376 & n.118 (describing *The Authoritarian Personality's* theory of a "personality structure . . . particularly susceptible to ethnic prejudice."); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 507 n.27 (1991).

²³⁶ See *Frazier v. Heebe*, 788 F.2d 1049, 1058 n.5 (5th Cir. 1986) (Goldberg, J., dissenting), *rev'd*, 482 U.S. 641 (1987); *Crawford v. Bounds*, 395 F.2d 297, 314 n.2 (4th Cir.) (Sobeloff, J., concurring), *vacated*, 393 U.S. 76 (1968) (per curiam); *Miller v. United States*, 320 F.2d 767, 772 n.11 (D.C. Cir. 1963) (per curiam); *People v. Gonzales*, 426 P.2d 929, 940 n.10 (Cal. 1967); *People v. Henderson*, 145 Cal. Rptr. 751, 755 n.5 (Cal. Ct. App. 1978).

²³⁷ See, e.g., Jos D. Meloen, *The F Scale as a Predictor of Fascism: An Overview of 40 Years of Authoritarianism Research*, in STRENGTH AND WEAKNESS: THE AUTHORITARIAN PERSONALITY TODAY 47, 65 (William F. Stone et al. eds., 1993) [hereinafter STRENGTH AND WEAKNESS]. For a full survey of various methodological critiques, see generally STUDIES IN THE SCOPE AND METHOD OF "THE AUTHORITARIAN PERSONALITY": CONTINUITIES IN SOCIAL RESEARCH (Richard Christie & Marie Jahoda eds., 1954); STRENGTH AND WEAKNESS, *supra*; Bob Altemeyer,

with evaluation of employees or professors. If asked all questions on the same scale, students and supervisors tend to answer them either "yes" or "no." Such answering masks potentially real distinctions, such as general approval of a teacher's lectures versus underlying skepticism about their analytic depth.²³⁸

In a broader sense, however, the generalized gaze of *The Authoritarian Personality* remains intact in three significant ways. First, studies susceptible to fewer methodological objections confirm that many prejudiced persons harbor prejudice against numerous outgroups rather than against particular outgroups.²³⁹ One historian remarked:

Reducing Prejudice in Right-Wing Authoritarians, in 7 THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 131, 131-32 (Mark P. Zanna & James M. Olson eds, 1994).

Although the results of *The Authoritarian Personality* were initially suspect because of the questionnaire form, more recent studies disagree as to the effect of such formats. Compare Meloen, *supra*, at 66 (noting that more recent uses of the F-scale "did not show much difference in authoritarianism level whether this level was measured by unidirectional or balanced F scales"), with ALTEMEYER, *supra* note 199, at 61 (describing "[t]he power of yeasaying and naysaying to introduce massive amounts of error into a test's scores [including scores in *The Authoritarian Personality*], while at the same time making it look good"). Moreover, one must recall that *The Authoritarian Personality* attempts to corroborate its theory of ethnocentrism—generalized discrimination—by also having extensive interviews with subjects, which were in turn rated. However, this also raises the problem of a biased interpretation by the raters—a problem the study acknowledged. See Frenkel-Brunswick, *supra* note 182, at 333-34.

²³⁸ See Richard L. Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 431-33 (1990).

²³⁹ [A]uthoritarians do tend to be bigots. Indeed, ["right wing authoritarian"] scale scores among White North Americans have correlated with prejudice against so many different minorities (Blacks, Hispanics, Jews, aboriginal peoples, Sikhs, Japanese, Chinese, Pakistanis, Filipinos, Africans, Arabs, feminists, homosexuals . . .) that one could say right-wing authoritarians are "equal opportunity bigots."

Altemeyer, *supra* note 237, at 136 (citation omitted); see also Geoffrey Haddock & Mark P. Zanna, *Authoritarianism, Values, and the Favorability and Structure of Antisocial Attitudes, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 82, 91 (Gregory M. Herek ed., 1998) (finding particularly negative attitudes toward homosexuals among authoritarians with strong prejudice against minorities); Jos D. Meloen et al., *A Test of the Approaches of Adorno et al., Lederer and Altemeyer of Authoritarianism in Belgian Flanders: A Research Note*, 17 POL. PSYCHOL. 643, 651-53 (1996) (concluding that scores on various authoritarianism scales, including the older scales of *The Authoritarian Personality* and more recently revised scales, all equally predict anti-Semitic, antifeminist, and antiminority attitudes). More recently, modified versions of authoritarianism scales have shown that persons with high scores on authoritarianism may also view human life as an ingroup; such persons have less favorable attitudes toward animals and the environment. See Hardeo Ojha, *The Relationship of Authoritarianism to Locus of Control, Love of Animals and People, and Preference for Political Ideology*, 42 PSYCHOL. STUD. 32, 33-35 (1997); cf. Sam G. McFarland et al., *Russian Authoritarianism Two Years After Communism*, 22 PERSONALITY & SOCIAL PSYCHOL. BULL. 210, 211 (1996) (showing that high scorers on authoritarianism scale tend to have more negative attitudes toward environmentalists). For purposes of this article, I do not address the question of why "we" might want to define humans as our ingroup and other animals as an outgroup. But cf., e.g., Carol J. Adams, *Comments on George's "Should Feminists Be Vegetarians?"*, 21 SIGNS 221, 223 (1995) ("[Feminist theorists of vegetarianism] recognize the interlocking nature of the oppression of women and the other animals. Eating animals is one aspect of patriarchal violence . . .").

The most important consequence of the sociopsychological studies [such as *The Authoritarian Personality*] was the "scientific" legitimization of one of the intergroup relations movement's cardinal tenets: the conviction that all forms of ethnic, religious, and racial prejudice were integrally related. . . . These findings suggested that any attempt to strike at the roots of anti-Semitism would require participation in a general campaign against prejudice.²⁴⁰

In 1993, Richard Christie, one of the leading methodological critics of *The Authoritarian Personality*, wrote, "Viewed in a more balanced way than some of its past critics have viewed it, [*The Authoritarian Personality*] seems to us to be strikingly relevant in today's world."²⁴¹

Second, the generalized gaze continues to mean that social scientists both explicitly presume that discrimination is a general phenomenon, regardless of the particular stereotypes or particular groups involved, and implicitly presume that discrimination is a general phenomenon by interchangeably writing about what others would see as different forms of prejudice.²⁴² As Christie explained, critics "think that the authoritarian personality syndrome's essential core is that the person fawns before admired authority (representing strength) and loathes weakness—in Jews, women, homosexuals, or other outgroups."²⁴³

The third and more specific way in which the generalized theory remains viable is via researchers' loyalty to the ingroup/outgroup paradigm; only the notion of exactly what animates the ingroup/outgroup dynamics has changed.²⁴⁴ Thus, Young-Bruehl suggested:

Although numerous studies continue to confirm that those who express negative attitudes toward one atomized outgroup tend to express negative attitudes toward other atomized outgroups, the number of such studies has declined since its peak in the 1950s. See John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in *PREJUDICE, DISCRIMINATION, AND RACISM* 1, 12-13 (John F. Dovidio & Samuel L. Gaertner eds., 1986). However, this decline largely reflects an even deeper and more fundamental theoretical picture of how the same individuals tend to show greater sympathy for those in their ingroup and greater hostility toward those in outgroups. As detailed further below, a larger portion of research discusses processes of stereotyping and prejudicing often with little attention to differences between particular outgroups. See *id.* at 13-14.

²⁴⁰ SVONKIN, *supra* note 8, at 37-38.

²⁴¹ William F. Stone et al., *Introduction: Strength and Weakness*, in *STRENGTH AND WEAKNESS*, *supra* note 237, at 3, 4.

²⁴² See *infra* note 274 and accompanying text (noting how current psychological research discusses prejudice by citing studies involving what lawyers might consider as different forms of discrimination).

²⁴³ Stone, *supra* note 241, at 4.

²⁴⁴ See *id.* at 4-5 (suggesting that we can understand why people are attracted to fascism in terms of "admired" groups and "outgroups," and that, although no longer a personality explanation of authoritarianism in the modern context, the similar analysis "taken in a more relativistic and sociological context . . . can help us to understand [authoritarianism] in the modern world").

[T]hese recent psychological theories of prejudice] represent a new way of claiming that all prejudices are alike. . . . Even though [these theories] repudiate psychoanalysis and deny any of the depth psychological dimensions that the Adorno group had tried to consider, they come to *The Authoritarian Personality's* conclusion: all prejudices are ethnocentrism. All are instances of the attitudes and practices members of in-groups—any in-groups—hold with respect to their out-groups.²⁴⁵

2. *Early Cognitive Theories: Allport's Nature of Prejudice*

Allport's *The Nature of Prejudice*,²⁴⁶ published shortly after *The Authoritarian Personality*, remains one of the most frequently cited psychological works on prejudice in both social science and law. Several court decisions,²⁴⁷ as well as the works of prominent constitutional theorists such as John Hart Ely,²⁴⁸ invoke Allport's work. For example, Linda Hamilton Krieger's study of the implicit psychology of Title VII jurisprudence implies that Title VII largely reflects Allport's account of discrimination, an account that Krieger deemed inadequate in light of more recent developments in cognitive psychology.²⁴⁹ However, when it comes to atomized versus generalized discrimination, courts and the overwhelming majority of legal scholarship show little appreciation of Allport's work. Allport's *The Nature of Prejudice* is a generous work, encompassing many different accounts of prejudice. On the whole, however, it treats much prejudice as generalized.²⁵⁰

²⁴⁵ YOUNG-BREUHL, *supra* note 175, at 74.

²⁴⁶ ALLPORT, *supra* note 8.

²⁴⁷ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 n.16 (1985) (Marshall, J., concurring in part and dissenting in part); *Castaneda v. Partida*, 430 U.S. 482, 503 n.2 (1977) (Marshall, J., concurring); *Dukes v. Waitkevitch*, 429 U.S. 932, 933 (1976) (Marshall, J., dissenting); *Frazier v. Heebe*, 788 F.2d 1049, 1058 n.5 (5th Cir. 1986) (Goldberg, J., dissenting), *rev'd*, 482 U.S. 641 (1987); *Stevens v. Dobs, Inc.*, 483 F.2d 82, 83 n.2 (4th Cir. 1973) (per curiam); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 157 (2d Cir. 1973); *Miller v. United States*, 320 F.2d 767, 772 n.11 (D.C. Cir. 1963) (per curiam); *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1160 (Cal. 1976), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

²⁴⁸ See ELY, *supra* note 44, at 252 n.73, 254 nn.77, 79, 257 n.96.

²⁴⁹ See Krieger, *supra* note 68, at 1176-77 (discussing how Title VII jurisprudence reflects Allport's understanding of discrimination).

²⁵⁰ Like those in *The Authoritarian Personality*, these accounts prominently include examples of how prejudice affected those perceived as Jews. For example, Allport reported how only 52% of hotels replied to the letters by "Mr. Greenberg" asking for room reservations, presumably on the assumption that he was Jewish, compared to 95% who replied to the letters by "Mr. Lockwood." See ALLPORT, *supra* note 8, at 5; see also *id.* at 65 ("Of 1000 rumors collected and analyzed in the war year 1942, 10 percent were anti-Semitic . . .").

However, more recent statistics suggest that self-reported negative attitudes toward Jews have declined. See, e.g., Anti-Defamation League, *Anti-Semitism and Prejudice in America; Highlights from an ADL Survey; How Prevalent Is Anti-Semitism in America?* (Nov. 1998) (visited Nov. 8, 1999) <http://www.adl.org/antisemitism_survey/survey_i.html>. According to one survey, for example, the number of Americans holding many anti-Semitic beliefs declined

Like *The Authoritarian Personality*, *The Nature of Prejudice* explicitly reveals its understanding of prejudice early on: "Some cultures, like our own, abjure prejudice; some do not; but the fundamental psychological analysis of prejudice is the same whether we are talking about Hindus, Navahos, the Greeks of antiquity, or Middletown, U.S.A."²⁵¹ Moreover, as in *The Authoritarian Personality*, Allport's emphasis on generalized discrimination flows inexorably from his understanding of a common prejudiced personality; this type of personality draws sharp distinctions, especially the distinction between the individual's ingroup and all individuals outside his ingroup.²⁵² But Allport did not merely rephrase *The Authoritarian Personality* and other works in the *Studies in Prejudice* series; Allport also related the prejudiced personality to a relatively embryonic cognitive psychology.²⁵³

a. *Allport's Expanded Concept of Ingroups*

Allport's view of discrimination as generalized begins with the notion of ingroups versus outgroups: "Perhaps the best that can be done [to define an ingroup] is to say that members of an in-group all use the term *we* with the same essential significance."²⁵⁴ Allport's understanding of ingroups expands on the concept of ingroups in *The Authoritarian Personality*. First, Allport distinguished between an ingroup and a reference group. An individual's ingroup includes only those groups that would include that individual as a member; a reference group additionally includes groups to which an individual aspires, but is not fully accepted.²⁵⁵ Allport gave the example of the African American who "may wish to relate himself to the white majority in his community."²⁵⁶ Second, Allport further expanded what may define an ingroup by placing gender on equal standing with other group

from 29% in 1964 to 12% in 1998. See *id.* Nevertheless, in 1998, 35% of those surveyed agreed with two to five of 11 anti-Semitic statements. See *id.*

²⁵¹ ALLPORT, *supra* note 8, at 12.

²⁵² See *infra* text accompanying notes 254-62.

²⁵³ See Fiske, *supra* note 32, at 361 (describing Allport's analysis of social categorization as a "core insight" that "still sustains most current theories of stereotyping, prejudice, and discrimination," and noting his argument that, "[j]ust as people categorize furniture into tables and chairs, putting their drinks on one and sitting on the other, so, too, people categorize each other into ingroups and outgroups, loving one and . . . hating the other"); David L. Hamilton et al., *Social Cognition and the Study of Stereotyping*, in SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 291, 291-92 (Patricia G. Devine et al. eds., 1994) [hereinafter SOCIAL COGNITION].

²⁵⁴ ALLPORT, *supra* note 8, at 31.

²⁵⁵ See *id.* at 37-38.

²⁵⁶ *Id.* at 37. Some will notice the resemblance between reference groups and the phenomenon often described as "passing." See generally Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 128-39 (1998) (describing trials held to determine whether an individual was white or African American as reflecting fear "that these of . . . [African-American] blood were passing as white"). The danger of individuals within a particular outgroup identifying with an ingroup rather than

boundaries.²⁵⁷ Third, Allport recognized that ingroups and outgroups may vary by context. For example, employers who would hire someone identified as a member of a certain group might not want their relatives to marry someone from that group.²⁵⁸ In that case, the ingroup for employees would not necessarily be equivalent to the ingroup for social colleagues—an analytic account of the sell-to-you-but-not-eat-with-you distinction that Shakespeare's Shylock drew so poetically.²⁵⁹

b. *The Generally Prejudiced Personality*

In addition to the implications of his ingroup/outgroup framework, including a tendency to generalize based on ingroups, Allport also recognized generalized discrimination in his account of prejudice as a "*trait of personality*."²⁶⁰ According to Allport, engaging in prejudice is a general way of viewing the world that cannot be cabined neatly into a narrow, atomized discrimination. Allport explains: "When [prejudice] takes root in a life it grows like a unit. The specific

with other outgroups limits the analysis of generalized discrimination. See *infra* text accompanying note 482 (discussing peripheral group discrimination).

²⁵⁷ See ALLPORT, *supra* note 8, at 33-34. In his preface to the 1954 edition of *The Nature of Prejudice*, Allport elaborated on the wide range of characteristics that could define an ingroup:

The concept of race so popular today is in reality an anachronism.

. . . .
For most purposes the term "ethnic" is preferable to the term "race." Ethnic refers to characteristics of groups that may be, in different proportions, physical, national, cultural, linguistic, religious, or ideological in character. Unlike "race," the term does not imply biological unity, a condition which in reality seldom marks the groups that are the targets of prejudice. It is true that "ethnic" does not easily cover occupational, class, caste, and political grouping, nor the two sexes—clusters that are also the victims of prejudice.

Id. at xv to xvi.

²⁵⁸ Allport noted:

Discrimination leads to all sorts of curious patterns. As a traveler I may sit willingly next to a Jew and, if I am a Northerner, next to a Negro; but I may draw the line on living next door to either one. As an employer I may admit the Jew but not the Negro to my office; but at home I may welcome a Negro to work in my kitchen, but not a Jew. However, a Jew but not a Negro may sit in my parlor.

Id. at 55. Allport also recognized that patterns of prejudices and stereotypes might change over time. See *id.* at 202-04. Although Allport did not discuss the point explicitly, one of the changes might be the ability of individuals to identify members of an outgroup by appearance. At the time of Allport's publication, there were some data that in 55% of cases, individuals could identify Jews by their appearances alone. See *id.* at 133. Similarly, Allport reported that many people would associate certain names, such as Greenberg, with stereotypes of Jews. See *id.* at 180. See generally Charny & Gulati, *supra* note 64, at 66 n.38 ("'Looking' like a majority group member does not necessarily require a physical resemblance. Rather, the reference is primarily to adopting the attitudes, beliefs, and interests of the majority.").

²⁵⁹ See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3.

²⁶⁰ ALLPORT, *supra* note 8, at 73.

object of prejudice is more or less immaterial. What happens is that the whole inner life is affected; the hostility and fear are systematic."²⁶¹

The Anatomy of Prejudice emphasizes a specific version of the prejudiced personality that Allport named "safety-islanders": they are fiercely loyal to their ingroups and view all "who live outside the ethnocentric circle of safety . . . with suspicion."²⁶² Much of Allport's principal evidence for this perspective, which, as shown below, is not his only perspective, arises from survey research on the correlation between what other theorists might see as different kinds of discrimination. This research includes favorable and extensive citation of the ethnocentrism scales from *The Authoritarian Personality*.²⁶³ Additionally, Allport also cited other research that demonstrated that individuals who reported negative attitudes toward Jews were also likely to report negative attitudes when asked about imaginary groups that researchers invented for the surveys, such as "Pireneans" and "Wallonians."²⁶⁴ Allport noted that "[t]he fact that scapegoats of different breeds are so often harnessed together shows that it is the *totality* of prejudice that is important rather than specific accusations against single groups."²⁶⁵ Individuals with prejudiced personalities usually generalize more often than others, and they cling to their generalizations more tenaciously in the face of contrary evidence.²⁶⁶

Although *The Nature of Prejudice* focuses on hostile attitudes toward those outside the ingroup, Allport also briefly but romantically recognized that some individuals might display ingroup sympathy, which he likened to Spinoza's "love prejudice," without outgroup hos-

²⁶¹ *Id.*

²⁶² *Id.* at 72.

²⁶³ *See id.* at 69-73.

²⁶⁴ *See id.* at 68.

²⁶⁵ *Id.* at 69.

²⁶⁶ Allport also recognized that some individuals are reluctant to generalize—the condition Allport called "*habitual open-mindedness*." *Id.* at 24. He explained:

There are people who seem to go through life with relatively little of the rubricizing tendency. They are suspicious of all labels, of categories, of sweeping statements. They habitually insist on knowing the evidence for each and every broad generalization. Realizing the complexity and variety in human nature, they are especially chary [sic] of ethnic generalizations. If they hold to any at all it is in a highly tentative way, and every contrary experience is allowed to modify the pre-existing ethnic concept.

Id. Allport identified a second possible reason for individuals' resistance against generalizations: "*self-interest*." *Id.* "For example, [a person] may not have known the right classification for edible mushrooms and thus find himself poisoned by toadstools. He will not make the same mistake again: his category will be corrected." *Id.* Later psychologists have developed more elaborate and complicated models to explain why some individuals attempt to overcome their initial stereotyped interpretations of others. *See* Krieger, *supra* note 164, at 1285.

tility.²⁶⁷ For these people, "[t]he familiar is *preferred*. What is alien is regarded as somehow inferior, less 'good,' but there is not necessarily hostility against it."²⁶⁸

C. Ingroup Sympathy: Social Psychology and the "We-Who?" Distinction

Although the theories of Allport and *The Authoritarian Personality* continue to influence social scientists and remain influential in legal scholarship and court decisions, the direction of psychological research on discrimination has shifted more toward cognitive social psychology. This field of psychology builds on earlier theories of ethnocentrism and prejudiced personality in two important ways. First, it provides additional empirical support for the central tenet of both *The Authoritarian Personality* and Allport's theories that individuals often disadvantage all those outside their particular ingroup. Specifically, a great deal of the newer work is starkly empirical and does not attempt to construct grand theories like those found in *The Authoritarian Personality*.²⁶⁹ Second, some of the modern theories also provide alternative explanations for the descriptive empirical data.

Many scholars continue to recognize the importance of personality factors, including the psychodynamic factors emphasized in *The Authoritarian Personality* and Allport's work.²⁷⁰ However, the newer works offer additional possible explanations, including status competition, "normal" cognitive processes of categorization, and prototype models of decision making.²⁷¹ Even ardent proponents of these new theories do not claim that they preempt the earlier theories; rather, like the earlier theorists, they recognize that one may understand prejudice from a variety of perspectives.²⁷² These scholars assert that dif-

²⁶⁷ See ALLPORT, *supra* note 8, at 25.

²⁶⁸ *Id.* at 42. Additionally, the next section discussing ingroup sympathy more thoroughly examines developed notions of ingroup sympathy. See *infra* Part III.C.1 (discussing how ingroup sympathy violates antidiscrimination principles).

²⁶⁹ See Richard D. Ashmore & Frances K. Del Boca, *Conceptual Approaches to Stereotypes and Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1, 30 (David L. Hamilton ed., 1981) (offering various theoretical orientations that "have been for the most part implicit," because "[in]ost workers have taken a strictly empirical approach").

²⁷⁰ See, e.g., Dovidio & Gaertner, *supra* note 239, at 17 (noting that much of the contemporary theories of prejudice are still "based on a Freudian psychoanalytic model"); David L. Hamilton et al., *Social Cognition and Classic Issues in Social Psychology*, in SOCIAL COGNITION, *supra* note 253, at 1, 9-10 (discussing Allport's influence); Fiske, *supra* note 32, at 380-81 (discussing the psychoanalytic strands in Allport's *The Nature of Prejudice* and Bettelheim and Janowitz's contribution to the *Studies in Prejudice* series).

²⁷¹ See *infra* Part III.C.4-5.

²⁷² See Ashmore & Del Boca, *supra* note 269, at 31-32 (suggesting that understanding of various theoretical "orientations" will make it possible "to integrate the sociocultural, psychodynamic, and cognitive viewpoints into a more complete picture of stereotypes and intergroup behavior"); Fiske, *supra* note 32, at 374-75 (documenting two types of discrimi-

ferent theories may better explain the prejudices of different individuals and that even a single individual's prejudices may spring from a number of different sources. Overall, although there remain pockets of work that focus on an atomized perspective,²⁷³ a large share of preeminent work continues to emphasize generalized discrimination.²⁷⁴ Although some of the recent work replicates the ear-

nation: "‘hot prejudices’ . . . [or] ‘hot discrimination,’ based on disgust, resentment, hostility and anger," and "‘cold discrimination,’ based on stereotypes of an outgroup's interests, knowledge, and motivation" without the emotional overlay); Hamilton et al., *supra* note 270, at 6 (noting that their focus on the contribution of cognitive psychology to the field of social psychology does not mean to imply that the "‘old’ social psychological theories are wrong or even forgotten"); Hamilton et al., *supra* note 253, at 316 (explaining how cognitive psychological perspective does not preempt psychodynamic theories, but may complement them by, for example, making it possible "to analyze and investigate more specifically how threats to the ego influence one's attention to various pieces of information or the inferences and elaborations made from it"); Myron Rothbart & Scott Lewis, *Cognitive Processes and Intergroup Relations: A Historical Perspective*, in *SOCIAL COGNITION*, *supra* note 253, at 347, 376 ("It is our view that most of the stated causes of group hostility have some validity under some circumstances . . .").

²⁷³ See Ashmore & Del Boca, *supra* note 269, at 10-11 "[S]tereotypes of a wide variety of social groups have been studied."). A number of scholars do continue to emphasize kinds of discrimination that seem to track atomized categories. In the most recent edition of *The Handbook of Social Psychology*, for example, two authors titled their contribution as "Gender." See Kay Deaux & Marianne LaFrance, *Gender*, in 1 *THE HANDBOOK OF SOCIAL PSYCHOLOGY*, *supra* note 32, at 788. Nevertheless, unlike other works on atomized categories their article in *The Handbook* reveals how discrimination cannot easily be confined in one atomized category. First and foremost, the article notes that the tendency to see "others" in polarized terms is not only peculiar to gender, but also tracks nationality groups and perceived sexual orientation. See *id.* at 795; see also *id.* at 815 ("Gay men and lesbians are also minorities and as such encounter reactions similar to that of other outgroups."). Second, the authors noted that what they called "constructionist" perspectives emphasize the need to question all categories, including gender. See *id.* at 817 ("From these [constructionist and postmodern] perspectives, all categories must be questioned and no truths are independent of the social-political system from which they emerge."). Finally, the article is also quite different from many legal texts for what it does *not* include: the frequently pro forma incantation that one must be "careful" about "analogizing" between what one assumes to be "different" kinds of discrimination. See *supra* note 54 and *infra* notes 468-72 and accompanying text.

²⁷⁴ See Dovidio & Gaertner, *supra* note 239, at 14 (noting that "much of the research [on prejudice] since the late 1960s emphasizes general processes involved in prejudice rather than the social issues related to specific prejudices," and reporting that the percentage of references to specific racial and ethnic issues declined from 56% in 1969 to 39% in 1985); see also Kevin W. Allison, *Stress and Oppressed Social Category Membership*, in *PREJUDICE: THE TARGET'S PERSPECTIVE*, *supra* note 34, at 145, 146 ("[T]he present examination of the role of prejudice and discrimination on stress will use an inclusive approach, broadly focusing on 'oppressed groups' . . ."); James M. Jones, *Psychological Knowledge and the New American Dilemma of Race*, 54 J. SOC. ISSUES 641, 655 (1998) (discussing "racism," but citing a study of attitudes toward gays); *id.* at 656 ("The American Dilemma rested upon a paradigm of interracial conflict dominated by the Black-White two-dimensional model. The New American Dilemma must necessarily encompass a more general paradigm of diverse sources of conflict between and among groups."). The newest edition of *The Handbook of Social Psychology* presents a similar picture; two of its chapters on prejudice also focus on generalized discrimination. Fiske frankly explained that her chapter in *The Handbook* "examines basic stereotyping, prejudice, and discrimination processes more generally." Fiske, *supra* note 32, at 392 n.1. Although Fiske went on to claim that her work emphasizes "race,

lier emphasis on outgroup hostility, it also focuses on the more subtle phenomenon of ingroup sympathy. Individuals with ingroup sympathy do not harbor the ugly negative attitudes canvassed in *The Authoritarian Personality*, but rather simply view those in their own ingroup in a more sympathetic light, thereby disadvantaging all those outside that narrow group.²⁷⁵

As discussed further below, several aspects of these newer theories describe generalized discrimination. First, experiments involving minimal group situations show that individuals often discriminate in favor of their ingroup rather than against particular outgroups.²⁷⁶ Second, experiments confirm that individuals often see those outside their ingroup as an undifferentiated mass.²⁷⁷ Both of these data illustrate generalized discrimination: individuals prefer those within their relatively narrow ingroup. Furthermore, not only do individuals often not discriminate against particular outgroups, but they do not even focus enough on "them" to differentiate into distinct outgroups. There are at least two possible ways to understand why such patterns of generalized discrimination occur.²⁷⁸ One explanation emphasizes status competition; individuals favor their own group, or disadvantage others, because they benefit when their group is seen more favorably.²⁷⁹ A second explanation treats ingroup favoritism as a "normal" cognitive process that may develop even in the absence of competition or hostility.²⁸⁰ More specifically, this explanation implicates decision making; individuals make decisions in ways that reflect positive images of ingroups, or negative images of outgroups. Ultimately, each of

gender, and age," *id.*, her version of these categories would also include the treatment of Hispanics, Jews, and, to a lesser extent, gays and lesbians, *see id.* at 377-80. Once again, it is important to notice that the social science scholars have tipped the balance of research in favor of generalized discrimination rather than atomized discrimination. One may criticize this change in emphasis. *See, e.g.,* James M. Jones, *The Concept of Race in Social Psychology: From Color to Culture*, in 4 *REVIEW AND SOCIAL PSYCHOLOGY* 117, 127 (Ladd Wheeler & Phillip Shaver eds., 1983) ("While [the study] obviously does not prove that an increased emphasis on experimental rigor is responsible for the recent decline in race-relevant studies, the results are compatible with that interpretation."); *cf.* Allison, *supra*, at 146 (arguing that, although the stress caused by discrimination may create a common reaction in various oppressed groups, "it is necessary to acknowledge the challenges and limitations presented by the variable, distinctive, and specific histories of oppression and discrimination experienced by members of different social categorical groups"). But one must remember that it is merely a change in the relative mix of theories and research, not a complete rejection of atomized or subatomized discrimination altogether.

²⁷⁵ *See infra* Part III.C.1.

²⁷⁶ *See infra* Part III.C.2.

²⁷⁷ *See infra* Part III.C.3.

²⁷⁸ *See* Rothbart & Lewis, *supra* note 272, at 366 (surveying different explanations for the ingroup bias in the minimal group experiments, and concluding that "[a]t present there does not appear to be any single compelling explanation for in-group bias demonstrated in the minimal group paradigm").

²⁷⁹ *See infra* Part III.C.4.

²⁸⁰ *See infra* Part III.C.5.

these theories suggests a notion of generalized discrimination that involves either ingroup sympathy or outgroup hostility or both. Although these newer theories offer novel explanations for the key findings of generalized discrimination studies in the tradition of *The Authoritarian Personality*, they do not clearly define the ingroup-outgroup boundary.

1. *What Is Wrong with Ingroup Sympathy?*

The recent attention to ingroup sympathy reflects in part a conscious shift in theorists' understanding of the harmful effects of ingroup sympathy. As we saw earlier, *The Authoritarian Personality* does not conceive of ingroup sympathy without outgroup hostility. Allport recognized *some* ingroup sympathy,²⁸¹ but romanticized it as love prejudice.²⁸² However, other scholars have considered ingroup sympathy²⁸³ as a dangerous phenomenon. When ingroup and outgroup members compete for scarce resources, such as jobs or housing, ingroup sympathy and outgroup hostility produce many of the same harms.²⁸⁴ As some leading scholars on psychological theories of discrimination explained, "[u]ltimately, many forms of discrimination and bias may develop not because outgroups are hated, but because positive emotions such as admiration, sympathy, and trust are reserved for the ingroup and withheld from outgroups."²⁸⁵

Additionally, the Nobel-prize-winning economist Gary Becker identified other problems with ingroup sympathy:

²⁸¹ Allport implicitly recognized both ingroup sympathy and outgroup hostility, but explicitly devoted *The Nature of Prejudice* to outgroup hostility. See ALLPORT, *supra* note 8, at 7 ("In this volume . . . we shall be concerned chiefly with prejudice *against*, not with prejudice *in favor of*, ethnic groups."). Allport claimed that he made this decision because "ethnic prejudice is mostly negative." *Id.* at 6.

²⁸² See *id.* at 25.

²⁸³ Note that a great deal of the psychology literature refers to ingroup favoritism. However, I feel that the term "sympathy" often better captures the phenomenon. Favoritism implies that the individual self-consciously favors his own kind; although this might sometimes be true, individuals often manifest this phenomenon by simply construing ambiguity in favor of the ingroup. The notion of favoritism may describe our judgment of the act, but the notion of sympathy better captures the actor's own sense of his actions. For example, those who believe that "we stick together" but "we are not clannish," may exhibit ingroup sympathy, but not necessarily as the result of their self-conscious favoritism.

²⁸⁴ See Dovidio & Gaertner, *supra* note 239, at 79-80 ("It is important to note that both the anti-outgroup bias of high authoritarian subjects and the pro-ingroup orientation of low authoritarians disadvantage blacks relative to whites."); Fiske, *supra* note 32, at 370 (noting that a study of inter-ethnic comparisons suggests that the relative advantage of the ingroup "revolves around ingroup favoritism more than outgroup derogation, although the net effect may be the same in practical terms"); see also MARILYNN B. BREWER & NORMAN MILLER, *INTERGROUP RELATIONS* 48 (1996) ("Preferential treatment of those who share a common category membership produces biases that benefit the ingroup over noningroup members even without any negative prejudices against outgroups.").

²⁸⁵ Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY*, *supra* note 32, at 554, 575.

Allport makes a distinction between negative and positive prejudice He asserts . . . that "we hear so little about love [positive] prejudice" because "prejudices of this sort create no social problem." In this he is mistaken, since the social and economic implications of positive prejudice or nepotism are very similar to those of negative prejudice or discrimination.²⁸⁶

For example, if an individual cannot get the job she wants, she may care little whether the employer likes a manly atmosphere or actively thinks women are inept. Some individuals find it more vexing to be the unjustified object of scorn,²⁸⁷ but others may find little consolation in such "ignore-ance."²⁸⁸ (In economic vocabulary, both ingroup sympathy and outgroup hostility impose search costs for finding work elsewhere as well as "dignitary harms."²⁸⁹) In other circumstances, ignore-ance, if not bliss, may prevent some pains; those who ignore outgroups may not contribute to the epidemic of hate crimes,²⁹⁰ but

²⁸⁶ GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 15 n.3 (2d ed. 1971) (alteration in original).

²⁸⁷ See, e.g., OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (explaining the limitations of early common law cases that focused exclusively on intentional wrongs, and remarking, "[E]ven a dog distinguishes between being stumbled over and being kicked").

²⁸⁸ Laura Vasataro, Note, 26 N.Y.U. J. INT'L L. & POL. 418, 421 (1994); see also ABEL, *supra* note 189, at 3 (noting that when people use stereotypes or show insensitivity, this may not "excuse" but might even "aggravate" the harm). After reading an earlier version of this Article, Ellen Saks, a law professor at the University of Southern California, asked if there is research on whether individuals suffer more psychological harm if they think they have been the object of outgroup hostility or the victim of ingroup sympathy. Apparently, no one has addressed the problem. See Letter from Susan Fiske, Professor of Psychology, University of Massachusetts at Amherst, to Clark Freshman (Feb. 22, 1999) (on file with author) ("Although there is a growing literature on targets' reactions, I don't know of any studies on targets' reactions as a function of whether they think they are victims of outgroup derogation or ingroup favoritism."); E-mail from Ellen Langer, Professor of Psychology, Harvard University, to Clark Freshman (Feb. 16, 1999) (on file with author). In part, the lack of attention to such distinction is understandable because many individuals tend to think that any discrimination they experience must reflect some kind of hidden hostility. See, e.g., *infra* note 316 (discussing how the police officers must have been prejudiced against Jeffrey Dahmer's Asian victim rather than sympathetic to the apparently normal Dahmer).

²⁸⁹ See Donohue, *supra* note 137, at 1609 (stating that "the discriminatory firm imposes dignitary harms and search costs on minority citizens"); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1243-45 (1991) (discussing deontological objections to discrimination).

²⁹⁰ Scholars disagree about the extent of the growth of hate crimes. Compare LU-IN WANG, *HATE CRIMES LAW* § 1.01, at 1-1 to 1-3 (1998) (reporting yearly increase in the incidence of various hate crimes, including those against Jews, lesbians and gays, African Americans, and Asians), and Kendall Thomas, *Beyond the Privacy Principle*, in AFTER IDENTITY: A READ IN LAW AND CULTURE 277, 286 (Dan Danielsen & Karen Engle eds., 1995) (arguing that statistics on hate crimes against lesbians and gays may underestimate the full extent of such violence, because victims may fear that police will be unsympathetic and thus fail to report incidents), with JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 6 (1998) (acknowledging "a long history of bigoted violence against Native Americans, African-Americans, Jews, Catholics, immigrants, Mexicans, Asians, women,

ingroup myopia may still make it difficult to get the public and legislators to focus on relief for victims of hate crimes.²⁹¹

2. "We" and "Them": The Minimal Group Experiments

In the late 1960s, a number of theorists began to study minimal group situations in an effort to analyze how individuals evaluate and interact with outgroups.²⁹² In early experiments, researchers divided

homosexuals, and many other groups," but claiming "there is no reliable evidence . . . that the incidence of such crimes is greater now than previously, or that the incidence is increasing").

²⁹¹ However, the contrast between "ignore-ance" and violence should not be exaggerated. Ignore-ance may indeed cause real pain. See WILLIAMS, *supra* note 18, at 61 ("The attempt to split bias from violence has been this society's most enduring and fatal rationalization. Prejudice does hurt, however, just as absence of it can nourish and shelter."). Similarly, ignoring outgroups may render us insensitive to the way others treat them violently. The message that others are unworthy of attention may even contribute to the selection of those others as targets of violence. Cf. Thomas, *supra* note 290, at 290 (remarking that statutes embodying negative attitudes toward lesbians and gays, such as sodomy statutes, "work in tandem" with violence against lesbians and gays).

Consider, for example, a recent report on the sixtieth-year class reunion from the class of 1938 in Stone Mountain, Georgia. Among other things, Stone Mountain was the site of some of the worst hate crimes in American history. The town includes a memorial to Confederate officials who fought to keep African Americans enslaved. In addition, Stone Mountain was the site of the 1915 lynching of Leo Frank and the rededication of the modern Ku Klux Klan. See, e.g., JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 468-72 (1984); Clark J. Freshman, *By the Neck Until Dead: A Look Back at a 70 Year Search for Justice*, AM. POL., Jan. 1988, at 29. However, the nostalgic account of the class reunion at Stone Mountain neglects this tragic aspect of the setting and reports only that "the Avondale Class of '38 is a microcosm of its generation, if you look at federal statistics: It was a group who married young, worked hard and stayed out of trouble." Chelsea J. Carter, *Class of '38 Worked Hard, Kept Out of Trouble, Stayed Married*, MIAMI HERALD, June 12, 1998, at 17A (emphasis added). The report further quotes a member of the class of 1938: "We [the classmates] were a close-knit group'. . . 'If anybody needed help, somebody always would help.'" *Id.* In other words, to these people "staying out of trouble" apparently means overlooking the plight of those outside their ingroup; neither the African Americans restricted to the back of the bus nor the Jew kept out of a downtown law firm apparently did not qualify as a somebody who deserved help.

Similarly, the article nonchalantly reports that many of the classmates came from "one of the first planned communities in the United States." *Id.* The article does not report how such planned communities often included only white Christians with the help of racially restrictive covenants or racially restrictive lending policies. See KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 44-50 (1998); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1669-70 (1995) (arguing that lending policies of government agencies made it difficult for banks to loan money to those who wanted to purchase homes in racially mixed neighborhoods). In short, the nostalgic references to being "close-knit" and "staying out of trouble" simply overlook the way in which close-knit societies denied opportunities to others; staying out of trouble meant acquiescing in a segregated society. Perhaps one may discount these criticisms of the article; this was a feature article about a reunion, and people at reunions would naturally rather reminisce about the prom than the lynching on the street. With those caveats, however, the article does illustrate the way in which our ingroup sympathy often lead us to overlook everyday disadvantages around us.

²⁹² For useful summaries of the studies on minimal group situations, see Brewer & Brown, *supra* note 285, at 566-67; Rothbart & Lewis, *supra* note 272, at 364-68.

otherwise similar children into different camps. Despite the lack of any history of competition before the experiments, the researchers discovered that the two groups soon developed hostile and competitive attitudes toward each other.²⁹³ Subsequent researchers found that ingroup favoritism can develop even without extensive competitive activities, such as sports. In a series of minimal group experiments, researchers told subjects that they had been divided into two groups either arbitrarily or based on performance on some mundane task.²⁹⁴ The studies revealed two persistent patterns. First, those in one group consistently rated others in their group more highly than they rated those in the other group. Second, when asked to allocate resources in prisoner's dilemma-type games, individuals gave more to those in their own group.²⁹⁵

The majority of these studies have two features that are more consistent with ingroup sympathy than with the type of outgroup hostility that Allport's work and *The Authoritarian Personality* depict.²⁹⁶ First, when individuals are asked to rate both ingroup and outgroup members before and after their interaction with these members, their ratings of ingroup members tend to increase after the interaction, but their ratings of outgroup members remain the same.²⁹⁷ Second, the extent of ingroup bias depends more on characteristics of the ingroup than on those of the outgroup. Specifically, when researchers lead individuals to believe that the members of their ingroup have more in common with each other than with outsiders, ingroup members rate each other more highly. However, information about the cohesiveness of the outgroup does not have the same effect.²⁹⁸ As one major review of these studies concludes, "[t]he results in general . . . are consistent with the conclusion that in-group bias rests on the perception that one's own group is better, although the out-group is not necessarily depreciated."²⁹⁹ Hence, individuals tend to focus their

²⁹³ See MUZAHER SHERIF ET AL., *THE ROBBERS CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION* 96-119 (Wesleyan Univ. Press 1988) (1961).

²⁹⁴ See sources cited *supra* note 284.

²⁹⁵ See *id.*

²⁹⁶ See Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307, 321 (1979).

²⁹⁷ See *id.* Unfortunately, in many studies it is not possible to distinguish ingroup sympathy from outgroup hostility because studies only present choices that simultaneously advantage the ingroup and disadvantage the outgroup. See *id.* A more recent survey work shows that many individuals report feelings of national pride without harboring hostile attitudes toward other nations or nationalities. See Brewer & Brown, *supra* note 285, at 559.

²⁹⁸ See Brewer, *supra* note 296, at 321-22.

²⁹⁹ *Id.*; see also Fiske, *supra* note 32, at 365 (suggesting that more recent studies confirm Brewer's conclusion and concluding that, "[f]or now, the more robust finding is ingroup advantage" rather than outgroup hostility); *id.* at 370 ("The ingroup advantage [in studies of interethnic comparisons] took the form of ingroup protection, more than . . . outgroup derogation.").

attention on the ingroup; those outside the ingroup are seen as "an undifferentiated group of others."³⁰⁰ Other researchers have found that this ingroup sympathy characterizes some individuals, particularly those who score low on authoritarianism scales.³⁰¹ But they have also found that other individuals display outgroup hostility as well.³⁰²

Thus, the minimal group experiments complement the way in which earlier theorists understood patterns of generalized discrimination. The earlier theories predicted that individuals develop hostile attitudes toward all those outside their narrow, ethnocentric world. As noted above, similar recent surveys confirm this pattern.³⁰³ These surveys bolster theoretical frameworks such as John Hart Ely's famous we-they paradigm.³⁰⁴ Moreover, recent psychology experiments con-

³⁰⁰ Brewer, *supra* note 296, at 322.

³⁰¹ In their most recent survey of intergroup relations and ingroup bias, Brewer and Brown concluded:

Ingroup members are given the benefit of the doubt in ways that are not extended to outgroup individuals. These beliefs, in turn, sustain and justify other forms of intergroup discrimination. Intergroup attribution biases justify differential outcomes that favor the ingroup. In effect, ingroups are credited more for successes and positive actions than are outgroups, and they are less likely to be held accountable for failures or negative actions.

Brewer & Brown, *supra* note 285, at 561.

³⁰² For example, in one experiment subjects played mock jurors in criminal trials. In all cases, experimenters told subjects to ignore certain inadmissible evidence that pointed towards guilt. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION AND RACISM*, *supra* note 239, at 61, 79. The experiment allowed each subject to view white and African-American defendants, sometimes with the inadmissible evidence and sometimes without the inadmissible evidence. See *id.* High authoritarians—those who scored high on a test of authoritarian attitudes—gave white defendants the benefit of the instruction: they reported as much certainty of the guilt of white defendants when there was the inadmissible evidence as when it was absent. See *id.* On the other hand, when it came to African-American defendants, the high authoritarians reported that they had more confidence in their guilty verdict when they considered the inadmissible evidence. See *id.* Low authoritarians showed a different pattern: they had the same level of confidence in the guilt of black defendants whether or not there was inadmissible evidence. See *id.* However, they reported anger when the prosecution sought to introduce the inadmissible evidence against white defendants; they also expressed less certainty about the guilty verdict when the prosecution attempted to introduce the inadmissible evidence. See *id.* "Thus, low authoritarian subjects demonstrated a pro-ingroup bias." *Id.*

³⁰³ See *supra* note 239 (discussing more recent studies on authoritarianism).

³⁰⁴ See ELY, *supra* note 44, at 159. The assumption that every preference is really a mask for underlying hostility is also typical of Ronald Dworkin's work. See John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 963. Ely quoted Dworkin's assertion that "except in very rare cases a white student prefers the company of other whites because he has racist, social, and political convictions, or because he has contempt for blacks as a group." *Id.* (citation omitted). Ely also argued that, to be consistent, Dworkin must also believe that all such persons "must wish for Blacks fewer goods and opportunities than are available to Whites." *Id.* A similar assumption that discrimination always involves an intent to harm or an intent to subordinate a group is prominent in other constitutional theories. See, e.g., J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2366 (1997) (stating that whether classifications based on a trait should be suspect depends on "whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people," and cit-

firm that the mere use of the terms "we" and "they" bias individuals.³⁰⁵ The minimal group experiments explore the favorable attitudes toward ingroups that both *The Authoritarian Personality* and Allport explicitly chose not to study.³⁰⁶ Overall, this approach reveals a world view less of "we" and "they" than of "we" and "who?"³⁰⁷ The ingroup booster is not constantly sizing up the competition; "they" are not even on his radar screen.³⁰⁸

ing "status-based discrimination against religious groups" as an example (emphasis added)); Note, *Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 HARV. L. REV. 1542, 1545 (1998) (asserting that the term "invidious," in the constitutional prohibition on invidious discrimination "can be equated with an intent to cause harm").

Nor is this assumption limited to mainstream constitutional theorists. Many writers associated with accounts of "whiteness" and its "construction" make the same assumption. See, e.g., BRODKIN, *supra* note 291, at 151 ("The construction of Jewishness as a model minority is part of a larger American racial discourse in which whiteness, to understand itself, depends upon an invented and contrasting blackness as its evil (and sometimes enviable) twin."). However, as early as 1957, Louis Lusk recognized that discrete and insular minorities might lack power even if they are not detested. See Louis Lusk, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982). Paraphrasing his earlier work, Lusk stated that "[i]n my opinion, the phrase 'discrete and insular' applies to groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power." *Id.* (citation omitted).

³⁰⁵ See Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 475, 479 (1990). Further research showed that this verbal effect largely reflects preference for ingroups rather than any hostility toward outgroups. See John F. Dovidio & Samuel L. Gaertner, *Stereotypes and Evaluative Intergroup Bias*, in AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION 167, 175 (Diane M. Mackie & David L. Hamilton eds., 1993) ("This interpretation [of the way we-they language primes biases] is consistent with Brewer's (1979) conclusion that intergroup biases, at least in the minimal intergroup situation, are more a product of ingroup favoritism than of outgroup derogation.").

³⁰⁶ See *supra* note 267 and accompanying text (remarking on Allport's rather cursory discussion of "love-prejudice").

³⁰⁷ Some experiments suggest that the more the individuals become aware of the negative consequences of their behavior on outgroup members, the less they will treat ingroup and outgroup members differently. See Brewer & Brown, *supra* note 285, at 567. However, the extreme conditions used in one of the studies may limit the conclusion: subjects were asked to send what they were told would be an unpleasant noise to ingroup or outgroup members. See *id.* Outside the laboratory, individuals may be more willing to blame victims for their own suffering. See, e.g., Christian Crandall & Monica Biernat, *The Ideology of Anti-Fat Attitudes*, 20 J. APPLIED SOC. PSYCHOL. 227, 240 (1990) ("[D]isliking fat people is a manifestation, along with disliking other less fortunate out-groups . . . [that] can be summarized with one central ideological tenet: 'You are responsible for everything that happens in your life.' This belief provides a 'logical' basis for the denigration of those less fortunate.").

³⁰⁸ See, e.g., WILLIAMS, *supra* note 18, at 55 ("My abiding recollection of being a student at Harvard Law School is the sense of being invisible.").

3. "They" Are All Alike: Outgroup Homogeneity

In addition to the minimal group studies, a great deal of other research³⁰⁹ confirms that ingroups,³¹⁰ especially historically powerful ingroups, often view everyone outside their narrow group as a relatively³¹¹ undifferentiated mass.³¹² All this means is that the individual who, for example, treats white Protestants as his ingroup, often develops prejudices that make distinctions between his ingroup of white Protestants and all others. Although no single process explains the outgroup homogeneity effect,³¹³ one prominent explanation tracks

³⁰⁹ As the minimal group experiments suggest, a great deal of psychological research aspires to discover abstract principles of human relations. One aspect of this goal is to find the way in which the vocabulary of ingroup and outgroup implies a parity of power. This vocabulary suggests that men generalize about women, but women may generalize about men as well. However, research on the outgroup homogeneity effect suggests otherwise. For example, both men and women see women as more homogeneous. One explanation for this attitude may be that women, as a historically less powerful group, do not have an adequate incentive to pay attention to other women. See Patricia W. Linville & Gregory W. Fischer, *Group Variability and Covariation: Effects on Intergroup Judgment and Behavior*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR, *supra* note 73, at 123, 132 ("[B]oth males and females tend to see females as more homogeneous, which may be interpreted in terms of men's greater status and power." (citation omitted)); Marilyn B. Brewer, *Social Identity, Distinctiveness, and In-Group Homogeneity*, 11 SOC. COGNITION 150, 150-51 (1993) (arguing that the "difference between [her five-year-old daughter]'s perception of girls and boys in her class" is an illustration of "relative out-group homogeneity," as well as an illustration of "in-group differentiation").

³¹⁰ In at least two narrow circumstances, individuals will view their own ingroup as more homogeneous. First, in smaller groups, individuals are more likely to see their own group as homogeneous. See Patricia W. Linville, *The Heterogeneity of Homogeneity*, in ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 423, 446 (John M. Darley & Joel Cooper eds., 1998). Second, individuals within the group will perceive greater homogeneity related to "attributes center to the group's identity." *Id.* For example, traditionally disadvantaged groups of individuals, such as African-Americans, may view themselves as more homogeneous on aspects that those individuals see as crucial to group identity. See *id.* at 447. See generally Brewer & Brown, *supra* note 285, at 558 ("In general, minority groups show ingroup homogeneity effects, while equal-size or majority groups show outgroup homogeneity effects.").

³¹¹ "Relatively" is the key qualifier. One sees others in his or her own ingroup in relatively nuanced detail, if not always as distinct individuals. Different theories express this idea in slightly different terms; one way to express the relative homogeneity of outgroups is to say that ingroup members sort all those outside their group into a few types. For example, men will often see the few women within a male-dominated firm as one of four types: "mother," "seductress," "pet," or "iron maiden." ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 233-36 (1977). Additionally, individuals recognize more subtypes for their own ingroup. See Linville, *supra* note 310, at 436. Moreover, individuals ordinarily perceive that those within their ingroups vary more within the listed types. See *id.* at 430.

³¹² For recent review of the studies on out-group homogeneity, see, for example, Linville, *supra* note 310.

³¹³ See Fiske, *supra* note 32, at 368 ("Although reviewers disagree about the cognitive mechanisms involved, outgroup homogeneity, when it occurs, sets the stage for stereotyping; for example, people who believe there is little outgroup variance also make stereotypic judgments about specific, real outgroup members with greater confidence than those who believe there is much outgroup variance." (citations omitted)); Linville, *supra* note 310, at 439 ("None of the categorization models alone directly produces the [out-group homogeneity] effect. . . .").

the we-*who*? distinction. It perceives the outgroup homogeneity effect as a consequence of ingroup members paying more attention to distinctions among themselves.³¹⁴ Indeed, from the perspective of an ingroup member, outgroup member may simply be "outsiders" or "others,"³¹⁵ not finely categorized into Jews, Catholics, and African Americans. From the perspective of any particular outsider to the ingroup, this may readily be interpreted as atomized bias. For example, the person who identifies himself as an Asian may be tempted to conclude, "This white male guy thinks all of us Asians are alike." Often, however, the white male simply overlooks all of "them"—all those not white and not male—and never really focuses long enough to classify the other as an Asian.³¹⁶

neity effect]."); Diane M. Mackie, *Integrating Social and Cognitive Processes Underlying the Out-Group Homogeneity Effect: The Homogeneity of Homogeneity*, in *ATTRIBUTION AND SOCIAL INTERACTION*, *supra* note 310, at 471, 472-73 (noting that "a full explanation of the [out-group homogeneity effect] remains intriguingly illusive" and reciting Linville's observation).

³¹⁴ See Mackie, *supra* note 313, at 479-80. This theory is consistent with the interpretation that ingroup members see outgroup members as homogeneous on both positive and negative dimensions. See Brewer, *supra* note 309, at 157.

³¹⁵ See Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479, 479 (1997) (stating that discrimination "is mainly about the 'other'"); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 71-74 (1987) (arguing that law should recognize the perspective of those that society deems "different").

³¹⁶ Peter Kwan's complex reading of the Jeffrey Dahmer case illustrates this assumption. See Kwan, *supra* note 21. Kwan tried to make sense of the police's decision not to intervene when Dahmer told them that a naked, bleeding Asian teenager who ran from him was just his "boyfriend." *Id.* at 1258. Kwan offered a complex hypothesis that the officers must have seen the situation through multiple biased lenses of what they perceived Asians are like; his theory is a rich and literary elaboration of Ely's we-they paradigm:

From the perspective of [the two officers], Konerak was *clearly* an Asian male. Dahmer's explanation to the officers thus presented Konerak to them as *fully and simultaneously constructed in terms of his race, class, gender, and sexual orientation*. This explanation caused the officers to disregard the signs of abuse because it was consistent with their notions of what to expect in terms of the cosynthesis of the operational categories in play and the power distribution they implicate. Dahmer's explanation offered the officers a way of stabilizing an otherwise extremely unstable situation, namely racial and domestic violence. That stabilization was possible because of the cosynthetic nature of the categories that Dahmer invoked along with those that were already presented to [the officers].

Dahmer lied to the officers about Konerak's name: he informed them that Konerak's last name was "Hmong." It is open to speculation whether or not either Dahmer or the officers were, in fact, conscious of the significance of the term "Hmong." However, from a critical point of view, one cannot ignore the fact that "Hmong" signifies not just an Asian ethnic group, but one of the poorest groups of Asian Americans in the United States. That Dahmer used a term that signified a whole group or community of Asians, that he called into view a separate Asian identity, would be consistent with a strategy of denying Konerak his subjectivity, subjugating Konerak's individual autonomy to the will of the dominant group, of which Dahmer and the officers are members. The racial effect of calling Konerak "John Hmong" is equivalent to the nineteenth century anti-Chinese epithet "John Chinaman."

4. "We" Versus "Them": The Status Competition Explanation

Although theories of ingroup sympathy and outgroup homogeneity are well-established, there are several different explanations for why these phenomena occur.³¹⁷ Henri Tajfel, who conducted many of the minimal group experiments, viewed the results as an aspect of symbolic status competition. His social identity theory posits that individuals attempt to enhance the status of the group to which they belong by associating that group with positive values; this theory is consistent with the way in which individuals rate people in their own group more highly, even when that "group" is arbitrarily designed.³¹⁸ One example of status competition is the attempt to improve a school's reputation. Alumni may support attempts to make their alma mater's admissions policy more selective, because they believe this change will increase the value of their own degree.³¹⁹

Notice that the theory of status competition suggests that discrimination will often occur in very generalized patterns. An individual who wants to maximize his status through association with an elite group will want that group to be smaller rather than larger.³²⁰ Against the pull of elitism and exclusivity, Allport wondered whether one

Id. at 1281-2 (emphasis added).

The *we-who?* explanation instead suggests that the officers identified with Dahmer as part of some common ingroup—perhaps white, English-speaking males—and simply overlooked his Asian companion—a member of an outgroup. This explanation seems more plausible than the insinuation that Dahmer or the officers knew the specific meaning of "Hmong"; it is certainly more plausible than the notion that the term "Hmong" in the late twentieth century taps into an available stereotype as readily as "John Chinaman" did in the nineteenth century.

³¹⁷ See Rothbart & Lewis, *supra* note 272, at 366 ("At present there does not appear to be any single compelling explanation for in-group bias demonstrated in the minimal group paradigm.").

³¹⁸ See Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 19-23 (S. Worchel & W.G. Austin eds., 1986).

³¹⁹ This familiar status competition arises not just among relatively well-established groups, like classmates or fellow alumni, but also in quite minimal groups. See Rothbart & Lewis, *supra* note 272, at 366 ("There is no evidence to date that the experimenter's *ad hoc* classifications of subjects into Blues and Greens . . . were internalized by them into their self-concepts. If so, their self-concepts must be extraordinarily malleable." (citation omitted)). I am grateful to Martha Mahoney for suggesting that the use of colors, such as blue and green, to name "minimal groups" may invoke a sense of racial overtone from the groups, thereby making it likely that individuals view these groups more seriously.

³²⁰ A great deal of social theory, particularly utilitarianism and economic theory, assumes that individuals maximize their own interest, including their status. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1007 (1995). For a concise comparison of McAdams's emphasis on status production with the neoclassical approach associated with the Chicago School, see John J. Donohue III, *Discrimination in Employment*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 615, 618 (Peter Newman ed., 1998). On the other hand, the hypothesis that individuals always try to maximize their own status by joining a high status group is not always true. See Marilyn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 475, 477 (1991).

could imagine an ingroup that consisted of all of humanity.³²¹ Allport reasoned that despite the inherent difficulties, this all-encompassing view might be possible if humanity was an ingroup for a limited number of purposes.³²² Marilynn Brewer's recent optimal distinctiveness theory offers a middle course between the extremes of ingroup sizes. According to her theory, individuals do not simply maximize status, but try to balance two contradictory needs. Brewer theorized that individuals "have two powerful social motives: a need for *inclusion*, which is satisfied by assimilation of the self into larger collectives; and an opposing need for *differentiation*, which is satisfied by distinguishing the self from others."³²³ Therefore, she emphatically posited that ingroups are not open to everyone: "Groups that are exclusive rather than highly inclusive . . . satisfy both of these needs simultaneously."³²⁴ Conversely, Brewer concluded that individuals tend to avoid wide-open groups because these groups fail to satisfy one's need for inclusion.³²⁵ We will return later to the dilemma of how much and when

("In the real world, individuals who belong to disadvantaged minorities do not consistently reject their group identity despite its possible negative implications . . .").

³²¹ See ALLPORT, *supra* note 8, at 43-46. Allport believed that even the most cosmopolitan diplomat would still feel a pull toward favoring some narrow sense of his own group. "Even if this diplomat believes ardently in One World, still he cannot escape a sense of strangeness in his encounters. His own model of propriety and rightness is his own culture. Other languages and customs inevitably seem outlandish and, if not inferior, at least slightly absurd and unnecessary." *Id.* at 43.

³²² See *id.* at 44-46.

³²³ Brewer & Brown, *supra* note 285, at 564.

³²⁴ *Id.*

³²⁵ See Brewer, *supra* note 309, at 158 ("Equilibrium, or optimal distinctiveness, is achieved through identification with social categories at that level of inclusiveness where the degree of satisfaction of the need for differentiation and the need for assimilation is exactly equal."). Although this Article discusses the appeal of various kinds of groups, Brewer's theory includes two basic tenets that suggest that different individuals in different contexts may feel attracted to groups of varying degrees of exclusivity. First, she recognized that each individual feels different degrees of attraction to assimilation and differentiation: some love the life of the hermit, some love the mass movement. "For any individual, the relative strength of the two needs is determined by cultural norms, individual socialization, and recent experience." Brewer, *supra* note 320, at 478. Second, she recognized that an individual's sense of his group identity is "context-specific." *Id.* "It depends on the frame of reference within which possible social identities are defined at a particular time, which can range from participants in a specific social gathering to the entire human race." *Id.*

The implications of optimal distinctiveness theory for individual's choice of his identity in a given context, such as in a firm, are unclear for two reasons. First, and most importantly, this theory does not offer a full account of why an individual defines himself on some dimensions, such as race, rather than others, such as ethnicity or professional task (for example, scholar versus teacher, or litigator versus transactional lawyer). See Freshman, *supra* note 55, at 1705-06, 1757-60 (describing the difficulty of identifying the relevant community). To use one of Brewer's examples, she did define varying levels of inclusiveness "within the occupation domain." Brewer, *supra* note 320, at 476. For example, she may identify herself with her department, colleagues with her interests, and scholars in her academic field. See *id.* at 481 n.2. She did not explain why she would see an "occupational domain" rather than, say, a caring domain, in which one identifies herself with others who

we can shift individuals' sense of groups when we explore obstacles to seeing generalized discrimination.³²⁶

5. *Automatic Discrimination: Prototypes and the Discriminatory Nature of Normal Decision Making*

The second explanation turns on the nature of categorization. In its most exaggerated form, this theory suggests that the very nature of "normal" cognitive processes, including categorization, leads to distorted perceptions of outgroups.³²⁷ Before analyzing this theory, we must remember that psychologists and lawyers use the term *normal* in different ways. Normal, in its legal sense often connotes something that is proper, or at least not something about which one will win a lawsuit. In tort law, for example, if it is normal, or typical, for doctors to use a certain procedure, then evidence that a doctor followed that procedure creates a presumption that it was not malpractice to do so.³²⁸ However, when psychologists say phenomena such as ingroup

care about disadvantaged groups, be they lawyers, other academics, or social activists. See generally Freshman, *supra* note 52, at 117-21 (arguing that it is often not clear why individuals think of themselves as only husbands or wives rather than as children, parents, or caretakers). Second, high differentiation in one dimension may not necessarily compensate for low differentiation in a different dimension. Again relying on one of Brewer's examples, she may narrowly identify herself as a scholar of optimal difference theory, but may compensate for this narrow identity by, for example, actively participating in the larger academic community. See Brewer, *supra* note 320, at 476. Brewer acknowledged disagreement on this issue, but suggested that the balance between assimilation and differentiation may vary not just for a given individual at a given time for different groups, but also over time. See Marilyn B. Brewer & Wendi Gardner, *Who Is This "We"? Levels of Collective Identity and Self Representations*, 71 J. PERSONALITY & SOC. PSYCHOL. 83, 91 (1996) ("When needs for intimacy at the interpersonal level are not being met, collective identities may become more important; prolonged periods of immersion in a depersonalized collective may enhance the importance of recognition of the personal, individuated self, and so forth."). Thus, the evolution of the overall mix of identities over time is apparently optimal, but we cannot know about any particular identity at any particular time. Therefore, in the employment context, we cannot know which groups qualify as ingroups for specific positions at a given firm. See *infra* Part III.C.8 (asserting that contemporary psychology tells us little about why individuals may categorize along some dimensions rather than others).

In other work, Brewer suggested that there may be ingroups without the need for intergroup comparisons. See Brewer & Brown, *supra* note 285, at 564-65. Nevertheless, it is unclear whether groups formed without reference to intergroup comparisons tend to harbor latent ingroup sympathy. Even if individuals pick fellow Sunday school participants as law partners without consciously comparing them with individuals who do not attend that Sunday school, they may nonetheless tend to overlook the value of those others.

³²⁶ See *infra* Part V.B.2.a (discussing peripheral group discrimination).

³²⁷ See Hamilton et al., *supra* note 253, at 307 ("Perceptions, judgments, and decisions that are seemingly unjustified, given the information available, are no longer routinely viewed as irrational or as by-products of motivational forces. They may simply reflect biases in our normal cognitive functioning.").

³²⁸ See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 193-96 (5th ed. 1984) (explaining that evidence of "the usual and customary conduct of others under similar circumstances" is evidence of the standard of care, but it is not dispositive). Some legal writers, such as Richard Epstein, describe a process as normal to suggest

sympathy and outgroup homogeneity are normal, they mean something entirely different. First, the processes are normal in the sense that categorization of information may be a functional³²⁹ way for an individual to manage a tremendous amount of information. Second, psychologists may use the term normal to express that certain patterns do not necessarily reflect outgroup hostility.³³⁰ Instead, individuals may absorb stereotypical expectations from society and then automatically interpret information through these biased lenses.³³¹ More generally, this difference of meaning may reflect the way in which lawyers and academic psychologists respond to different professional and political incentives. Academic psychologists may feel tempted to link discriminatory attitudes and behavior to normal behavior because academic psychology rewards those studying mainstream topics more than those studying peripheral phenomena that affect the relatively powerless. Similar incentives exist for practicing lawyers and legal aca-

that it is either very difficult to change, normatively desirable, or both. In his critique of antidiscrimination law, Epstein suggested that people naturally work more easily with people like themselves. See EPSTEIN, *supra* note 151, at 32. He suggested that overcoming this tendency would be difficult; allowing ingroup sympathy would be in reality the better option, because it creates efficiency gains. See *id.* at 33-34.

³²⁹ The psychologists' concept of functionality falls short of the economist's ideal of efficiency. When psychologists say that it is functional to categorize rather than sort through a great deal of information, they mean that it fulfills a need from the point of view of a single individual. The psychologists do not explore, from the point of view of groups of individuals, or even the sum of all individuals, whether particular kinds of generalizations will affect other needs, including the needs of other individuals. But see generally John A. Bargh, *The Four Horsemen of Automaticity: Awareness, Intention, Efficiency and Control in Social Cognition*, in 1 HANDBOOK OF SOCIAL COGNITION 1, 1-2 (Robert S. Wyer, Jr. & Thomas K. Srul eds., 2d ed. 1994) (discussing whether various kinds of automatic judgment are, among other things, efficient). Thus, when a psychologist states that it is normal to generalize, this does not consider the kind of careful analysis that Jody Armour made in concluding that racial generalizations are often inefficient when one considers their cost to African Americans. See Armour, *supra* note 38, at 793-96. In the authoritative 1998 edition of *The Handbook of Social Psychology*, Fiske noted that stereotypes "preserve[] mental resources" and may even "enable[] people to perceive stereotypic traits more efficiently." See Fiske, *supra* note 32, at 367. Fiske elsewhere recognizes that stereotypes are often inaccurate or intrinsically bad. See *id.* at 382 ("scientific, social, and political judgment are involved in the very definition of accuracy, so stereotype accuracy is a problem unlikely to go away.")

³³⁰ See Hamilton et al., *supra* note 253, at 306 ("[D]istortions in perception and seemingly irrational judgments do not necessarily reflect motivational influences.")

³³¹ See, e.g., *id.* at 300-03. For an excellent summary of this particular discourse within psychology, see Krieger, *supra* note 68, at 1186-1217. Many have found it tempting to describe the cognitive explanation as nonmotivational; even people devoid of ill motives may view outgroups in distorted ways. However, this interpretation of the data and theory is not the only possible interpretation. In terms of the underlying data, it is difficult to tell whether persons who claim to be unbiased but nonetheless display bias, are simply lying or being subject to some power genuinely beyond their awareness. Some studies attempt to correct for this self-censorship in various ways; one example is testing for stereotyping by observing the amount of time taken to recall an association, inferring that quicker association involves stronger stereotyping. See, e.g., Steven J. Stroessner, *Social Categorization by Race or Sex: Effects of Perceived Non-Normalcy on Response Times*, 14 SOC. COGNITION 247 (1996).

demics as well because the field attaches less prestige to those who deal with the relatively powerless, such as members of the bar practicing family law.³³²

³³² Cf. Balkin, *supra* note 173, at 954 (arguing that what individual scholars study is partly a "product of a set of social forces of normalization and education, reward and punishment, through which the academic's head gets constructed"); Fineman, *supra* note 173, at 759-60 (arguing that lawyers may prefer mediation because it allows them to think of themselves not as mere partisan advocates, but as "counsel for the situation").

When psychologists claim that ingroup preferences and discrimination may be part of "normal" cognitive processes, they are responding to different incentives. To be sure, many psychologists do believe that overcoming prejudice is difficult for some individuals, although they disagree about just how difficult it is. Compare Hamilton et al., *supra* note 253, at 315 (claiming that because cognitive theories of stereotyping assume that stereotypes are self-fulfilling expectations, "[t]he clear implication is that changing stereotypes will not be easy"), and Margo J. Monteith et al., *Prejudice and Prejudice Reduction: Classic Challenges, Contemporary Approaches*, in *SOCIAL COGNITION*, *supra* note 253, at 323, 334-35 (noting that even people with low-prejudiced attitudes would have difficulty overcoming biases because these biases arise from automatic "default" responses), with Jacques-Philippe Leyens & Susan T. Fiske, *Impression Formation: From Recitals to Symphonie Fantastique*, in *SOCIAL COGNITION*, *supra* note 253, at 39, 57 ("[W]hen it is important to people, they can control the processes by which they form impressions of others."), and Fiske, *supra* note 32, at 391 ("[P]eople can sometimes control even apparently automatic biases, if appropriately motivated, given the right kind of information, and in the right mood."). Some psychologists avoid labeling stereotyping as bad on an aesthetic ground: it would not be parsimonious to include a value judgment. Ashmore & Del Boca, *supra* note 269, at 16. See generally Tibor R. Machan, Kuhn, *Paradigm Choice and the Arbitrariness of Aesthetic Criteria in Science*, 8 *THEORY & DECISION* 361, 361-62 (1977) (agreeing with Kuhn that scientists use aesthetic criteria "to select from among competing ideas, including paradigms," but disagreeing with the proposition that "the close relationship between aesthetic qualities and decisions about the acceptability of some proposed competing idea . . . renders the decision at issue necessarily irrational or a-rational").

In addition, academic psychologists may also want to label stereotyping as normal to connect their work to mainstream psychological research, rather than having scholars treat their research as an isolated specialty. See Hamilton et al., *supra* note 270, at 4. In part, this desire to connect with researchers who study other cognitive processes such as expert decision making dovetails with a more general movement in psychology to see behavior as a continuum. See Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 4-9 (Mark P. Zanna ed., 1990). Nevertheless, one wonders if the desire to connect the study of stereotypes of relatively powerless groups with mainstream psychological theory also reflects the status dynamics familiar to lawyers; surveys of lawyer prestige rank lawyers for the indigent lower than, for example, corporate lawyers. See, e.g., *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 66 (John P. Heinz & Edward O. Laumann eds., rev. ed. 1994) (showing lawyers ranked family poverty law and consumer debtor law less prestigious than securities, tax, and antitrust). Therefore, perhaps the desire to see stereotyping as normal reflects, at least in part, an effort to force mainstream psychologists to focus on the problems of stereotyping and discrimination, rather than dismiss them in the way that, for example, elite corporate lawyers might dismiss family lawyers as inferior. Cf. Jennifer L. Eberhardt & Susan T. Fiske, *Motivating Individuals to Change: What Is a Target to Do?*, in *STEREOTYPES AND STEREOTYPING* 369, 398 (C. Neil Macrae et al. eds., 1996) (advising targets of discrimination to try to make themselves to be seen as members of a larger, less marginalized ingroup). See generally Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 *N.Y.U. L. REV.* 1682 (1991) (discussing how the notion that federal courts do not "do family law" may reflect undervaluing of work traditionally done by women). In any event, there is an understandable temptation to try to identify cognitive psychology as a

6. *Automatic Ingroup Sympathy*

Frequently, if not normally, individuals make decisions based on automatic processes that reflect ingroup sympathy or outgroup hostility. Different theorists use slightly different vocabulary, but largely juxtapose two different ideal types of ways in which individuals see others.³³³ On the one hand, individuals sometimes make decisions by consciously applying relatively detailed criteria, such as hiring the plumber who unclogs the drain the fastest. On the other hand, individuals sometimes make quick, relatively automatic decisions.³³⁴ These automatic processes often reflect and perpetuate ingroup sympathy and outgroup hostility. In a relatively simple version of a theory of automatic processes, individuals have a prototype, for example, of

grand unified theory of all information processing, rather than merely a description of the abnormal processing by a deviant group of bigots. David Hamilton and his coauthors noted:

Social cognition is not defined by any particular content or substantive issue, but rather by an *approach* to one's content or issues. As already discussed, that approach rests on an information processing analysis that guides one's conceptual and empirical investigation of the cognitive processes underlying one's topic. As such, its application is not constrained by content; it can be adopted in the study of any topic in social psychology.

Hamilton et al., *supra* note 270, at 5.

³³³ See Robert P. Abelson, *A Personal Perspective on Social Cognition*, in SOCIAL COGNITION, *supra* note 253, at 15, 24-31.

³³⁴ Two qualifications apply. First, the distinction between automatic and detailed decision making, like the distinction between generalized and atomized discrimination, simplifies discrimination in several ways. Just as discrimination can be generalized or atomized on different dimensions, so too can some aspects of decisions be automatic and others detailed. In particular, the fundamental conception of the nature of work, or merit, can be automatic, even if tests of whether individuals meet certain criteria to perform the work may be relatively detailed. For example, one may assume that a police officer does enormous amounts of physical work and then ponder various ways to test for attributes such as strength. See Case, *supra* note 70, at 85-94. Assumptions that one automatically recalls about the nature of various types of work may, as is the case for police, turn out to be wrong. In reality, police engage in large amounts of negotiation and persuasion. Moreover, our automatic assumptions about the nature of work, as Mary Anne Case suggests, may have more to do with what we imagine to be typical qualities of ingroups and outgroups, such as men and women, than with typical differences in the nature of various kinds of jobs. See *id.* at 91-92. Thus, higher status jobs may often track the qualities associated with people in various ingroups and outgroups, such as men and women, rather than differences in the nature of work. See *id.* at 34 (noting that doctors in the former Soviet Union, where the field is considered less prestigious, are predominantly female and in the United States, where physicians are well-respected, they are predominantly male). Likewise, as Radin argued, we may associate "tough-minded" traits with maleness; although early pragmatists thought that qualities such as skepticism and uncertainty were truly tough-minded traits, today we may associate such contextual thinking more with women. See Radin, *supra* note 178, at 137-44.

The second important qualification to the distinction between automatic and detailed decision making is that a range of ease may exist in how well one can construct processes that match an individual's abilities with the criteria for a position. See, e.g., Krieger, *supra* note 68, at 1231-32 (discussing how validation of various employment practices to prove that they are job-related may be difficult). A full consideration of job-test validation is beyond the scope of this Article.

an ideal plumber. Rather than showing a potential plumber to various kinds of drains, an employer may try to match potential plumbers to the picture of a plumber in his head. Unfortunately, that picture will often include markers for relatively narrow ingroups: the typical plumber may be white and male.³³⁵ Thus, this relatively narrow picture makes it hard for employers to see the virtues of plumbers who do not fit that prototype.

Alternatively, a person may first analyze the individual applicant to see if that person seems to be "the type for the job" or, in evaluating a prospective neighbor, "like the family next door." Anthropologist Mark Cohen noted:

At a more subtle level, recruitment usually involves a comfort factor. Whatever criteria are used to narrow down a long list of applicants, and however fairly they are applied, we often select from among our applicants people we feel "in our gut" will be good associates, and friends, or at least people who will "get along" with their supervisors and coworkers. There are, of course, always legitimate intangibles and unmeasurable judgments in any selection. But until people have a chance to get to know women or members of minority groups as good colleagues, and even friends, the comfort factor will favor white males.³³⁶

This phenomenon does not apply only to employers and employees. Recent statistics show that women entrepreneurs receive a very small share of venture capital; one explanation for this phenomenon, which a *Wall Street Journal* article cites, is the lack of comfort male venture capitalists have with women entrepreneurs.³³⁷

Some psychologists use the slightly different vocabulary of "exemplars" to describe why ingroup members have more opportunities.³³⁸ These scholars claim that individuals tend to carry more exemplars for ingroups.³³⁹ All else being equal, if one looks at an ingroup applicant, picturing that person in a variety of roles will be easier. For example, a longtime college friend, who happens to be Asian, is also an ex-championship debater and graduated at the top of his class from one of the best law schools in the world. Naturally, the firm at which he

³³⁵ See, e.g., Fiske, *supra* note 32, at 366 ("[G]iven no other information, the word 'person' apparently brings to mind a white, heterosexual, able-bodied, youngish man; these are the U.S. cultural default values . . .").

³³⁶ MARK NATHAN COHEN, *CULTURE OF INTOLERANCE* 266-67 (1998).

³³⁷ See Paulette Thomas, *When Venus Seeks Funding from Mars*, WALL ST. J., Feb. 24, 1999, at B1. One business woman reported that "[i]t's not a discrimination issue," but rather "a question of education and opening up those networks." *Id.* (internal quotation marks omitted). If these remarks reflect the woman's true views, as opposed to a fear of backlash from using the framework of discrimination, then she cannot see discrimination, because she understands discrimination only as outgroup hostility.

³³⁸ See Linville, *supra* note 310, at 430-32.

³³⁹ See *id.*

spent a summer made him a permanent job offer. "Of course," the hiring partner said, "you can write your own ticket, whatever department you want. But frankly I just can't see you as a litigator." In cognitive psychology terms, the partner had exemplars of the hard-working Asian lawyer, perhaps in something like tax law, but not in a rough-and-tumble litigation practice. In his mind, the exemplar of the real litigator, as opposed to the female family-law specialist or the minority employment lawyer who creates a good impression at the defense table,³⁴⁰ may exist only for a certain narrow type of white male.

Cognitive theorists predict that, however we think of these stereotypes, they will often be self-fulfilling in a profound way: The expectation of the typical plumber will shape the initial impression of a person.³⁴¹ Moreover, in a more complicated way, stereotypes may become self-fulfilling, because targets of prejudice themselves respond to their encounters with bias: The person who sees others in "her group" being treated badly may decide that trying to pursue further education is worthless.³⁴² Similarly, the larger range of exemplars for ingroup members will make individuals initially believe that they "fit in" a wider, and often more prestigious, range of positions. In this model, there exists no pure impression which will later be contaminated by prejudice, but rather only stereotype-tainted experiences. More complicated and nuanced variations on this theme exist, as illustrated by the debate on whether a sharp distinction exists between these two ways of making decisions or whether they fall along a continuum.³⁴³ Nonetheless, the fundamental specter of generalized discrimination remains.

³⁴⁰ See Barrett, *supra* note 64, at 166-69 (describing an African-American woman attorney who generally practiced as a criminal defense lawyer, but agreed to defend a law firm against charges of race discrimination).

³⁴¹ For a discussion of the self-fulfilling nature of stereotypes, see generally Lee Jussim & Christopher Fleming, *Self-Fulfilling Prophecies and the Maintenance of Social Stereotypes: The Role of Dyadic Interactions and Social Forces*, in STEREOTYPES AND STEREOTYPING, *supra* note 332, at 161. Sometimes prophecies are self-fulfilling because ingroup members look to confirm the stereotyped expectations of society. See *id.* at 165-75 (describing such effects with stereotypes of ethnicity, gender, class, physical attractiveness, and hyperactivity in children). Sometimes outgroup members themselves will confirm stereotypes "to facilitate smooth social interactions." *Id.* at 175; see also Devon W. Carbado & Mitu Gulati, Working Identity 11-12 (June 1, 1999) (unpublished manuscript, on file with author) (observing that outsider individuals often confront moments when they may be tempted to compromise their identities to make insiders feel comfortable, such as laughing at jokes that play on stereotypes).

³⁴² In economic terms, outgroup members generally do not invest in developing their human capital. See Charny & Gulati, *supra* note 64, at 78-83.

³⁴³ Compare Fiske & Neuberg, *supra* note 332, at 12 (describing "a continuum of impression formation"), with Marilyn B. Brewer, *A Dual Process Model of Impression Formation*, in I ADVANCES IN SOCIAL COGNITION 1, 2-6 (Thomas K. Srull & Robert S. Wyer, Jr. eds., 1988) (arguing for "two modes of person perception" (typeface altered)).

7. *Experimental Evidence of Generalized Discrimination*

Although studies in the tradition of *The Authoritarian Personality* provide a wealth of evidence of generalized outgroup hostility, few recent social science experiments clearly address the exact contours of ingroups and outgroups. This dearth of research is largely responsible for lawyers' and courts' assumption that atomized categories of discrimination exist; psychology so thoroughly sees biases as related that it may not test that assumption.³⁴⁴

A very recent series of experiments, however, suggests that negative attitudes about members of one presumably distinct group, such as fat people, will reduce the chances that members of another presumably distinct group, such as thin African Americans, will receive a position.³⁴⁵ In a series of experiments, Crandall, Thompson, and Sakalli explored the way in which prejudiced comments would affect the decision about how to evaluate "fat" and African-American candidates for a graduate program in counseling psychology.³⁴⁶ A group of subjects were told to rate candidates on a one-to-seven scale.³⁴⁷ In the "Black Prejudice" group, the confederate said, "I would definitely not pick the black guy. I don't think black people make good counselors. I know I wouldn't go to a black guy. Personally I just don't like black people."³⁴⁸ In the "Fat Prejudice" group, the confederate made the similarly negative comments about fat people.³⁴⁹ As an atomized-prejudice perspective would predict, subjects who heard the Black Prejudice remark gave lower ratings to the thin African-American male than control-group subjects did.³⁵⁰ However, the atomized-prejudice perspective would not have anticipated that subjects who heard the Fat Prejudice remark gave the thin African-American male even lower ratings than those who heard the Black Prejudice remark, as the experiment showed.³⁵¹

Crandall, Thompson, and Sakalli interpreted their data by explaining how prejudiced remarks may change the norms that a group

³⁴⁴ See *infra* Part III.C.8 (claiming that social psychology does not explore why individuals use some categories rather than others).

³⁴⁵ See Christian S. Crandall et al., *Creating Hostile Environments: Name-Calling and Social Norms* (1998) (unpublished manuscript, on file with author).

³⁴⁶ See *id.* at 9-12.

³⁴⁷ See *id.* at 12.

³⁴⁸ *Id.* at 11.

³⁴⁹ See *id.*

³⁵⁰ See *id.* at 35 (showing that subjects who heard no biased remarks gave the thin African-American male a 5.58, while subjects who heard the Black Prejudice remark gave the thin African-American male a 5.32).

³⁵¹ See *id.* (showing that subjects who heard the Black Prejudice remark rated the thin African-American male 5.32, while subjects who heard the Fat Prejudice remark rated the thin African-American male 4.73).

applies.³⁵² The authors share a common view that Americans have ambivalent views about many outgroups, both a belief in abstract equality and negative beliefs about outsiders.³⁵³ For many years, scholars have noted that Americans may hold commitments both to justice and to prejudiced attitudes.³⁵⁴ One version of the aversive racism theory, which researchers developed in a series of experiments, posits that we are more likely to act in accordance with our biases when no norm makes our behavior seem biased.³⁵⁵ Crandall, Thompson, and Sakalli theorized that bias involving any particular outgroup legitimizes the more biased values involving an outgroup.³⁵⁶ As the authors of the study theorized, "[t]he ethnic slur serves to validate intolerance in general, and so this should extend to ethnic groups as well as non-ethnic stigmatizing conditions, (e.g., physical disabilities,

³⁵² See *id.* at 25-27.

³⁵³ See *id.* at 26-27.

³⁵⁴ *The Authoritarian Personality* identifies such ambivalence in several places. For instance, it notes that people often qualify their statements of prejudice with disclaimers such as "Jews have their rights." Levinson, *supra* note 180, at 60. Levinson took this at least somewhat seriously:

The concern with democratic values, and the resistance to antidemocratic ones, must be considered as psychologically and socially important facts in any attempt to understand prejudice, American variety. Undoubtedly very many people who are now pseudodemocratic are potentially antidemocratic, that is, are capable in a social crisis of supporting or committing acts of violence against minority groups. Nevertheless, it is important to understand the attempted compromise with democratic values: because it may reveal a democratic potential which might, if supported and strengthened, ultimately gain the upper hand . . .

Id. at 61; see also Else Frenkel-Brunswick, *Comprehensive Scores and Summary of Interview Results*, in ADORNO ET AL., *supra* note 9, at 468, 484 (noting that "American culture" includes both emphasis on status and "identification with the underdog" and that even prejudiced individuals may include some mix of both). See generally SAMUEL HUNTINGTON, *AMERICAN DEMOCRACY: THE POLITICS OF DISHARMONY* 39 (1981) (claiming that government can never completely close the gap between the American ideals and American institutions); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944) (discussing how American ideals that all people are equal may coexist with very unequal treatment of African-Americans). Contemporary psychological theories of aversive racism make such ambivalence crucial, albeit without reference to *The Authoritarian Personality*. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 239, at 61, 64.

³⁵⁵ See, e.g., Gaertner & Dovidio, *supra* note 354, at 76-77 (examining when individuals will help an African American in an emergency situation). When individuals believed that they were the only person who might help, they assisted African-American victims 94% of the time and white victims 81% of the time. See *id.* at 77. But individuals helped African-American victims only 38% of the time and whites 75% of the time when they believed someone else might be able to help. See *id.* One explanation for this result is that as the only bystander, an individual faces a clear norm to help out or risk condemnation—even from himself—as a bigot; when others are available to help, the norm may appear less clear. See *id.* at 85 ("When norms are clear, bias is unlikely to occur; when norms are ambiguous or conflicting, discrimination is often exhibited.")

³⁵⁶ See Crandall et al., *supra* note 345, at 8 ("When competing motives or values vie for expression in a social situation, the perception of social norms about which may be appropriately expressed will determine whether discriminatory behavior is emitted.")

facial attractiveness, fatness, homosexuality, etc.).³⁵⁷ Additionally, outside of the experimental context, the buzz word "political correctness," for example, may insinuate that we really see a quite general truth: It may be politically correct to pretend that people are equal, but the correct answer ("politics" aside) is that people are *not* equal.

The previous discussion of ingroup sympathy offers a second way to understand the experiment. The specific context is admission to a program in counseling psychology, and the confederate raises questions about whether she would go to an African-American or a fat therapist. This issue may quickly provoke the participants to consider the type of therapist they would prefer. Therefore, the question may trigger a relatively narrow prototype of the comforting therapist: In our society, that prototype will often be a thin and white therapist.³⁵⁸ With this image of a thin, white therapist in mind, the fact that one would rank both thin African Americans and fat whites as less fit for a counseling training program is not surprising.

A third way to understand such generalized discrimination is based on the distinction between automatic and controlled responses. Many psychologists believe that our negative views of outgroups are encoded early in life and later recalled automatically; our views about equality, on the other hand, may be learned later and may be accessible only when actively recalled.³⁵⁹ When we hear a negative attitude about one atomized group, this statement may activate our automatic negative attitudes, but it may also force at least some of us to engage in controlled processes to see if we are acting in a biased way. Because of the atomized way in which we think about discrimination, however, these automatic processes may often fail. Thus, when we hear the Fat Prejudice condition, we may automatically think of our narrow prototype of the comfortable therapist; however, because we did not hear about race, we may not check to see if we are acting in a way that disadvantages thin African Americans. Additionally, we may be less likely to check for bias, because we may possess a less firmly held belief

³⁵⁷ *Id.*

³⁵⁸ In another article, I discussed how individuals may feel tempted to seek comfort from a therapist or someone performing a partially therapeutic role such as a mediator. See Freshman, *supra* note 55, at 1730-32. I briefly noted that such consultation sometimes creates a legal problem. See *id.* at 1732 n.128. I now regret for not noting at the time that, apart from any legal objection, an ethical and policy objection to such identity-matching of mediator to patient may exist: This practice perpetuates the discomfort that itself causes much discrimination.

³⁵⁹ See Patricia G. Devine & Margo J. Monteith, *The Role of Discrepancy-Associated Affect in Prejudice Reduction*, in AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION, *supra* note 305, at 317, 330 (describing a study in which individuals read a workshop proposal that discussed "why it is difficult to avoid negative responses toward homosexuals").

that bias, involving fat people is wrong.³⁶⁰ This theory explains why the most significant negative effect on the ratings of African Americans occurs with the Fat Prejudice condition.

Overall, Crandall, Thompson, and Sakalli's research illustrates three important points about contemporary psychological understandings of prejudice. First, like the research in *The Authoritarian Personality's* tradition, it provides additional evidence that discrimination often reflects generalized patterns. Second, as the previous discussion suggests, the research may also be consistent with a variety of generalized discrimination models: outgroup hostility unleashed by a change in the sense of norms about discrimination, ingroup sympathy consistent with a prototype of the ideal therapist, or the limitations that atomized discrimination places on our ability to control prejudiced responses. Third, the research further supports the original argument of *The Authoritarian Personality*: One of the best ways to overcome the prejudice that we see narrowly, such as anti-Semitism or racism, may be to establish a broad commitment to equality.³⁶¹

³⁶⁰ See Crandall & Biernat, *supra* note 307, at 240-41 ("Unlike the expression of negative attitudes toward other out-groups, social sanctions do not seem to be invoked against those who express anti-fat attitudes. Expressing them is a prevalent, accepted form of social prejudice . . ."). See generally Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self-Interest*, 66 J. PERSONALITY & SOC. PSYCHOL. 882 (1994) (comparing prejudice against fat people with symbolic racism).

³⁶¹ Those who study and teach prejudice reduction today often suggest that we remind individuals of their nonprejudiced beliefs. Although one might imagine that individuals could be told, "Remember, gays are people too," the studies instead emphasize reminding people of general propositions, such as a commitment to equality. See Devine & Monteith, *supra* note 359, at 318. Such literature often emphasizes abstract themes, such as generalized nondiscrimination. See Monteith et al., *supra* note 332, at 328 (describing how Rokeach's prejudice reduction program depended on making individuals aware of conflicts between their prejudiced responses and their views of themselves as "fair, tolerant, democratic and the like").

Similarly, recent prejudice-reduction strategies focus on attempts to make individuals view outgroups as part of some larger group that includes both the ingroup and various outgroups. For example, one experiment tried to show how African Americans and whites might think of themselves as being fans of a common school. Experimenters tested how often people at a college athletic event would answer questions from various African-American and white interviewers. When the African-American interviewers wore the same university insignia as the people they approached, they were much more likely to receive a response than if they had a different university affiliation (59% versus 36%). See John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism, in Confronting Racism: The Problem and the Response* 3, 27 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998). Both the evidence of ingroup sympathy—rather than outgroup hostility as the source of discrimination—and the experiments on generalized discrimination support these prejudice-reduction strategies.

Some scholars will note that these strategies, like the focus of this Article, generally emphasize psychological processes as a means of overcoming prejudice. Others will emphasize the importance of institutional and structural changes, such as actual redistribution of resources, or the redefinition of desert and merit. Although I have written about the importance of questioning concepts of merit, such as what constitutes good legal schol-

8. *The Mix of Discrimination: Who Is "in" the Ingroup?*

The more recent social psychological literature tells us that large cleavages divide ingroups and outgroups, but it pays little attention to the differences between outgroups; we still need to know the definition of the ingroup in a given context, such as Deborah's firm in the Prologue.³⁶² If the ingroup included all groups but African Americans, for example, then the current preoccupation of the law and legal scholarship with racism would make a great deal of sense. Some of the best data for understanding the bases of generalizations and ingroups are in the tradition of *The Authoritarian Personality*. These data, as we saw, suggest that individuals often see differences along dimensions of perceived race, religion, nationality, and sexual orientation.³⁶³ More recent data also show how dimensions related to disability and physical appearance such as obesity may delineate ingroups.³⁶⁴ Although meaningful differences may appear in some populations and in some contexts, often the ingroup is quite familiar: lily-white, Christian (usually Protestant), seemingly without mental or physical disability, and male.³⁶⁵ Additionally, the ingroup is of the appropriate age, but the age range may vary more in some contexts.³⁶⁶

In short, Deborah may be correct to hypothesize that those perceived as "good ol' boys" constitute her firm's ingroup. In other firms, however, the ingroup may include Jews rather than Protestants, Asians rather than whites, sometimes even women rather than men. Social science cannot conclusively identify the specific ingroup in

arship, see Freshman, *supra* note 135, at 1586-1607, the concern with the psychological origins of bias is also important. Some scholars will agree with one approach, but not the other; others insistently recommend more fundamental legal change because they assume that no sufficient legal tool exists to prove individual bias. See, e.g., Krieger, *supra* note 68, at 1246 (emphasizing the importance of affirmative action on the ground that identifying bias in particular cases would be too difficult without it).

³⁶² See, e.g., Brewer, *supra* note 309, at 158 ("Distinctiveness of a given social identity is context-specific. It depends on the frame of reference within which possible social identities are defined at a particular time, which can range from participants in a specific social gathering to the entire human race.").

³⁶³ See *supra* notes 198-208 and accompanying text.

³⁶⁴ See *supra* notes 345-57 and accompanying text.

³⁶⁵ See Fiske, *supra* note 32, at 366 ("[G]iven no other information, the word 'person' apparently brings to mind a white, heterosexual, able-bodied, youngish man; these are the U.S. cultural default values (some defaults, such as heterosexual, may be supported by real-world probabilities, but others, such as male gender, are not)."); Hamilton et al., *supra* note 253, at 312 ("Information that denotes membership in a group that differs from the 'white male norm' is likely to be salient and receive extra attention, and hence will likely be the basis for categorizing a person.").

³⁶⁶ In many professions, the ideal age is somewhere past "inexperienced" and shy of "over the hill." The precise ingroup age range will vary: The ingroup ages for music video production and for law school faculties probably do not overlap. Emphasizing that "we" may discriminate against older persons although "we" may likely live to that age is important; "we" may also mistreat those younger than us even though "we" were once "their" age. See *infra* text accompanying notes 491-92.

every setting. But it can tell us two very important things: First, we will often encounter discrimination by looking for generalized discrimination. Second, ingroup formation will often follow certain patterns.

Unfortunately, the majority of cognitive psychology literature does not identify more precisely the ingroup in a given context. At the most fundamental level, the literature so thoroughly assumes that stereotyping is a common process regardless of the content of the stereotypes; therefore, it often does not ask why we stereotype along particular dimensions.³⁶⁷

Much of the recent literature on subtyping and subgrouping suggests that we may group other individuals in many ways.³⁶⁸ Some scholars theorize that, as a general rule, contemporary Americans pay more attention to some combination of race, gender, and age.³⁶⁹ However, this general claim must be strongly qualified. First, the concepts of race and gender are expansive; such discussions often designate Latinas/os or Jews as a race, and classify at least some persons perceived as gay or lesbian under "gender."³⁷⁰ Second, as with any

³⁶⁷ Hamilton explained:

The social cognition approach brought about a shift in emphasis from content to process. Given the focus on process, it is assumed that all stereotypes, as cognitive structures, function in the same way and have similar effects on information processing. Consequently, to identify how stereotypes affect information processing, the specific content of the stereotypes used in any given study usually has been of only secondary concern. So in recent literature, one can find studies of stereotyping not only about significant stereotyped groups, like blacks and women, but also about fraternity members, librarians, and even Groups A and B.

Hamilton et al., *supra* note 253, at 309; see also *id.* at 313 ("[W]e lack an adequate framework for understanding the bases of social categorization, an area that promises to be a focus of continuing research and theoretical debate.").

³⁶⁸ See, e.g., ALLPORT, *supra* note 8, at 259 ("While psychological principles help us to understand the process of prejudice, they cannot by themselves fully explain why one group and not another should be selected as objects of hate."); R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE, *supra* note 361, at 54, 56-58 (discussing the "probabilistic view of category formation"); Fiske, *supra* note 32, at 377 (noting that people "use multiple social features to create subtypes"). Many acknowledge that an individual's categorization of others depends on the cultural context. See *id.* at 376.

³⁶⁹ See, e.g., Fiske, *supra* note 32, at 375-76; see also Myron Rothbart & Marjorie Taylor, *Category Labels and Social Reality: Do We View Social Categories as Natural Kinds?*, in LANGUAGE, INTERACTION AND SOCIAL COGNITION 11, 12 (Gün R. Semin & Klaus Fiedler eds., 1992) (theorizing that a tendency exists among people "to infer deep essential qualities on the basis of surface appearance").

³⁷⁰ Fiske included Jews under her discussion of race while acknowledging that others would discuss Jews as an ethnic category. See Fiske, *supra* note 32, at 379-80. Fiske also included "Latino Americans" in this race discussion without any similar caveat. See *id.* at 379. Similarly, in her discussion of gender, Fiske also noted how some women will be typed lesbian regardless of their actual sexual orientation or practices. See *id.* at 378 (discussing "gender stereotypes" of "the feminist/athlete/lesbian"). Fiske's analysis does not give any significant attention to disabilities, although disabilities seem to readily fit her criteria for her emphasis on race, gender, and age categories: visibility, social significance,

generalization about prejudice, some individuals more quickly tend to classify along some lines rather than others.³⁷¹ Third, as with *The Authoritarian Personality*, much of the evidence points to atomized discrimination because of the cramped nature of particular studies. Just as the anti-Semitism scales of *The Authoritarian Personality* included more items for Jews than for various minorities lumped together into the minorities scale, some recent studies track only differences between African Americans and non-African Americans. For example, one series of studies showed that whites were more likely to help a white with an auto problem than an African American.³⁷² It would be tempting to cite the study for the proposition that whites have more sympathy for other whites. Unfortunately, because there exists no report of data on gender, disability, ethnicity, or other traits, such conclusion would be premature.

Likewise, many continue to cite Kanter's important work, *Men and Women of the Corporation*,³⁷³ for the idea that institutional context matters: The majority within a given organization, like a firm, focuses its attention on the minority.³⁷⁴ The limitation of this insight, however, is that the theory cannot predict which features individuals will use to sort people into minority and majority. In the United States today, many people frequently assert that Jews and gays are mostly invisible or concealable minorities.³⁷⁵ In 1946, however, an experiment by Allport and Kramer showed that many individuals were quick to label individuals along Jewish and non-Jewish lines—often quite accurately.³⁷⁶ Later attempts to replicate the experiment produced varying results.³⁷⁷ Although drawing stark contrasts between visible and invisible minorities may be fashionable, Erving Goffman may have best characterized the problem when he said that those with some stigmatized trait often fall between these extremes.³⁷⁸

and effect on interactions. See *id.* at 375-76. But see *id.* at 366 (asserting that the word "person" in the United States conjures up an image of someone who is, among other things, "able-bodied").

³⁷¹ See Brewer & Brown, *supra* note 285, at 556-58 (discussing studies that show that some individuals will be more attentive to gender, and some more attentive to Jewishness).

³⁷² See Gaertner & Dovidio, *supra* note 354, at 68-72; see also John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 239, at 91, 92 (explaining that a Modern Racism Scale merely "asks subjects or survey respondents to agree or disagree with a set of beliefs that whites may or may not have about blacks").

³⁷³ ROSABETH MOOS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

³⁷⁴ See Brewer & Brown, *supra* note 285, at 557.

³⁷⁵ See, e.g., Halley, *supra* note 70, at 945.

³⁷⁶ See *supra* note 258 (noting that many people are able to identify Jews by sight).

³⁷⁷ See Brewer & Brown, *supra* note 285, at 557-58.

³⁷⁸ See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 74 (1963). Goffman noted:

Given these several possibilities that fall between the extremes of complete secrecy on one hand and complete information on the other, it would seem

D. Summary of Social Science Paradigms

Despite the various changes in methodology and terminology, much of the social science perspective on discrimination since the 1940s tells a remarkably coherent story. First, no single account of discrimination explains why every individual discriminates in every single incident. Second, much discrimination is so generalized that to speak of racism, sexism, anti-Semitism, or homophobia will be misleading. Instead, discrimination often revolves around a general contrast between an individual's ingroup and everyone else. In cases of outgroup hostility, an individual despises all of "them"—even an imaginary "them."³⁷⁹

The more recent emphasis on ingroup sympathy points toward the same conclusion. Individuals often feel better about people in their ingroup without sorting them into any category at all.³⁸⁰ Ingroup preference often means that an individual simply overlooks those outside his ingroup.³⁸¹ Finally, evidence exists that, in addition to generalized outgroup hostility and ingroup sympathy, some prejudice may be focused on smaller groups: some along atomized lines, some along subatomized or intersectional lines, and some along various other subtypes.³⁸² Thus, in combination, these conclusions suggest that courts and lawyers are not justified in simply assuming that discrimination is usually atomized and that other patterns of generalized discrimination are unusual; indeed, perhaps the usual case might be generalized.

As we have seen, anti-Semitism has faded from our consciousness, in part because theorists began to view anti-Semitism as part of a larger phenomenon of prejudice. What does this mean to us now? One lesson may be that we should view discrimination and civil rights struggles very differently from the way that the fixation with atomized discrimination too often frames them. We need not assume that some natural difference exists between race and gender; furthermore, we need not apologize for seeing whether, for some purposes, generalized discrimination operates such that we may speak of discrimination and prejudice rather than atomized "isms" such as racism, sexism, and others. Despite these caveats, we need not assume that generalized discrimination is the best explanation for discrimination in every possible circumstance and issue of public policy. Even theorists who

that the problems people face who make a concerted and well-organized effort to pass are problems that wide ranges of persons face at some time or other.

Id.

³⁷⁹ See *supra* Part III.B.1.

³⁸⁰ See *supra* Part III.C.

³⁸¹ See *id.*

³⁸² See *supra* Part III.B.1.e.

studied generalized discrimination did not suppose that any single theory of discrimination provided a blanket explanation of all discrimination by all persons. Additionally, historic context leaves open the possibility that some forms of discrimination may arise in some contexts in ways that the historic theories of generalized discrimination might not have fully anticipated. At this point, however, generalized discrimination has slipped so far from our consciousness, both as lawyers and as individuals swept up in narrow conversations about race and gender, that we have ample room to consider generalized discrimination without worrying that it will preempt attention to other understandings of discrimination. The next Part considers in greater detail how lawyers and courts might take evidence of generalized discrimination more seriously in a large number of cases.

IV

HOW SOCIAL SCIENCE THEORIES AFFECT PROOF OF DISCRIMINATION

Part One showed that courts and lawyers often assume that discrimination occurs in atomized patterns. Those dealing with allegations of discrimination will frequently want to use evidence of how defendants treated others like the victim,³⁸³ but the assumption of atomized discrimination often leaves both plaintiffs and defendants without a meaningful basis for comparison. The essential lesson the social science studies of discrimination teach is that lawyers should not merely investigate discrimination by searching for how defendants treated those in identical atomized groups as particular plaintiffs. Likewise, courts should abandon the atomized presumption that those seeking to introduce evidence of generalized discrimination always bear a burden to prove the logical relevance of such evidence. This Part addresses the more technical consideration of how various dispute resolution mechanisms should use evidence of generalized discrimination, including an analysis of formal evidentiary rules that govern courts and the various less formal considerations that govern alternatives to litigation, such as mediation, arbitration, and investigations of discrimination.

A. Evidence of Generalized Discrimination in Court

Courts might take one of three approaches to evidence of generalized discrimination. Although I describe these three positions as simple rules, the use of generalized discrimination, like any evidence of discrimination, may vary widely, because courts often leave such questions to trial courts to determine under an open-ended balancing

³⁸³ See *supra* note 84 and accompanying text.

test.³⁸⁴ The first and strongest position would treat evidence of generalized discrimination exactly like evidence of atomized discrimination, without applying any additional hurdle. The second, more moderate position would treat the relatively generalized nature of discrimination as one factor in balancing the use of such evidence: The less atomized the discrimination, the less likely it would be admitted, much as courts are less likely to admit evidence of older acts. Third, independent of how one chooses between the first two positions, one might question whether defendants should not ordinarily have the opportunity to offer evidence of generalized discrimination unless and until the plaintiff alleges generalized discrimination or offers such evidence first.

1. *Balancing Evidence of Prior Discrimination*

In discrimination cases, courts admit evidence of other acts of discrimination based on the interplay between the broad rules for admissible evidence, the often baffling tension between various rules governing admission of other acts of discrimination, and the rules against unfair prejudice or jury confusion. Those offering other-acts evidence frequently claim that such evidence meets the very broad standards for relevant evidence.³⁸⁵ How a defendant treated someone similar to the plaintiff in the past makes it more likely that the person was similarly motivated to treat the plaintiff for the same reason. On the other hand, opponents of this evidence would invoke the equally well-known standard that evidence of how one acted in the past ought not to be admitted for the purpose of proving that one acted the same way on some other occasion. This is the so-called anti-propensity rule.³⁸⁶ The anti-propensity rule, however, often crumbles in re-

³⁸⁴ I acknowledge in advance that individual judges may decide evidentiary rulings based on ideas other than evidence of generalized discrimination outlined in Part III and the formal evidentiary framework outlined in this Part. See Freshman, *supra* note 16, at 258 n.77 (acknowledging the criticism of doctrinal analysis on the ground that trial judges use instinct, not logic, to make evidentiary rulings).

³⁸⁵ See FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). For examples of relevant evidence, see *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) ("As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent."); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97-98 (7th Cir. 1985) (ruling that statements by other employees that the defendant decreased their duties and made them feel unwelcome, causing them to retire, are relevant to the issue of whether the defendant wished to eliminate its older employees); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983) (determining that testimony of another employee was relevant to prove employer's discriminatory motive); and *Harpring v. Continental Oil Co.*, 628 F.2d 406, 409 (5th Cir. 1980) (explaining that "the testimony of the similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of age discrimination").

³⁸⁶ See FED. R. EVID. 404(b).

sponse to two other typical evidentiary moves. First, courts admit evidence of past acts for some purposes, including proving motivation and the absence of mistake.³⁸⁷ This proof-of-motivation exception is a key factor in discrimination cases. Second, when evidence is admitted for one purpose, such as proving motivation, but not for another, such as propensity, courts may then admit the evidence, but instruct the jury to consider such evidence only for the permissible purpose.³⁸⁸ Ultimately, however, those resisting such evidence have one final standard to invoke: the rule against admission of evidence that may cause undue prejudice or jury confusion.³⁸⁹

Overall, these competing evidentiary standards produce both frequent litigation and some broad guidelines. Plaintiffs often offer evidence that defendants treated people other than the plaintiff in a discriminatory manner. Defendants typically attempt to show that they treated others in a nondiscriminatory manner. Plaintiffs may try to prove that defendants had a policy of discrimination; defendants may want to prove policies of *nondiscrimination* through official statements, diversity training, and the hiring of equal opportunity officers.³⁹⁰ Courts of appeals frequently state that they defer to trial courts when they balance the value of evidence for proving motivation against the risk of provoking unfair prejudice and jury confusion.³⁹¹ Nevertheless, the appellate courts overturn such decisions more fre-

³⁸⁷ See *id.*

³⁸⁸ See FED. R. EVID. 105.

³⁸⁹ See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). This concern with juries is of little import in trials without a jury; many discrimination claims were so litigated under Title VII prior to 1991. See, e.g., PAUL H. TOBIAS & SHARON SOBERS, *LITIGATING WRONGFUL DISCRIMINATION CLAIMS* § 2:10, at 33 (1998). However, the 1991 amendments granted parties the right to a jury trial on issues of compensatory damages, such as emotional distress or pain and suffering, punitive damages under 28 U.S.C. § 1981(a)(c) (1994), and, by judicial interpretation, factual issues overlapping with such issues even if they relate to other claims. See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998). Additionally, this rationale continues to have little application to arbitrations, in which the arbitrators, as discussed in greater detail below, consider large amounts of evidence for what it is worth. See *infra* note 422 and accompanying text. Nevertheless, even if this reasoning does not affect the admission of evidence when arbitrators or judges consider cases, the arguments below about admissibility should track how arbitrators or judges may think about the *weight* given to evidence of generalized discrimination.

³⁹⁰ See Edelman et al., *supra* note 64, at 75 (describing these "symbolic structures, which serve as visible efforts to comply with law").

³⁹¹ See, e.g., *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 202 (2d Cir. 1999) ("A district court's discretion in choosing whether or not to admit [statistical] evidence [of discrimination] is broad."); *Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999) (holding that trial court did not abuse its discretion in excluding evidence of discrimination against two other employees after plaintiff left the job, on the ground that the potential for unfair prejudice outweighed the probative value).

quently than such a standard of review suggests.³⁹² The courts of appeals are more likely to hold that such evidence should be excluded if it is old,³⁹³ or if it involves a person less directly connected with a decision or victims in different positions.³⁹⁴ The net result is that courts often run through the various factors in a kind of balancing test; judges then label the result as a fact-dependent outcome.³⁹⁵ In addition to other distinctions, courts are far more likely to grant requests for discovery than requests for admission of evidence. In principle, at least, parties may discover not only facts that courts would ultimately admit into evidence, but also facts likely to lead to the production of admissible evidence.³⁹⁶

³⁹² See, e.g., *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988) (reversing trial court's decision to allow testimony from two former employees in a discrimination case on the ground that they testified about incidents that were too old).

³⁹³ See, e.g., *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079 (6th Cir. 1996) (ruling that a remark made several years prior to the decision in question was not relevant); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995) (deciding that an older incident in which a coworker threatened to shove a "shotgun up [plaintiff's] 'black ass' was too tenuously related" to create a material issue of fact).

³⁹⁴ See, e.g., *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1398-1401 (7th Cir. 1997) (affirming summary judgment that Japanese employer did not discriminate in favor of Japanese employees, partly on the ground that another employee's statement that "all Americans are stupid" was not entitled to great weight, because the person did not have the authority to fire the employee); *Tolerson v. Auburn Steel Co.*, 987 F. Supp. 700, 713 (E.D. Ark. 1997) (holding that evidence that an employee disliked the plaintiff was irrelevant, because that employee was not a decision maker, and dislike of plaintiff did not touch on race), *aff'd*, 131 F.3d 1255 (8th Cir. 1997); cf. *Spicer v. Virginia, Dep't of Corrections*, 66 F.3d 705, 710-11 (4th Cir. 1995) (determining that the employer was not liable for harassment by another employee, when the employer took prompt action upon discovering harassment); *Allen v. City of Athens*, 937 F. Supp. 1531, 1543 (N.D. Ala. 1996) (deciding that jokes about African Americans were not direct evidence of discrimination, because decision makers did not make them and because the remarks could have been over 10 years old). But cf. *Kneibert v. Thomson Newspapers, Mich. Inc.*, 129 F.3d 444, 455-56 (8th Cir. 1997) (ruling that a statement by a person who was not a decision maker was relevant, because that person may have known the true reasons behind an employment decision). For criticism of the distinction between particular decision makers at a particular moment, see Sturm, *supra* note 36, at 662-63. Cf. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593-94 (1980-1981) (suggesting that courts may reach different results by adopting a narrow or broad time frame). Such criticisms, although also based on social science data, are similar to criticisms of the intent requirement, independent of the argument that we should pay more attention to generalized discrimination. Generalized or atomized discrimination evidence may exist whether the time frame is short or long and whether the scope of decision makers is narrow or broad.

³⁹⁵ See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 50 (1983) (mentioning the use of balancing tests).

³⁹⁶ Parties are entitled to discovery of facts if they are "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1); see also Grebeldinger, *supra* note 122, at 174-75 (explaining the mechanics of Rule 26(b)(1)).

2. *Strong Position: No Additional Hurdles to Evidence of Generalized Discrimination*

The strongest application of generalized discrimination occurs when evidence of generalized discrimination faces no additional hurdles other than the open-ended balancing already applied to any evidence of prior discrimination. However, not all evidence of generalized discrimination would be admissible. Under current case law, courts might exclude such evidence if it (1) involved incidents in the distant past, (2) implicated individuals with less clear authority to make particular decisions, or (3) involved victims in different kinds of jobs.³⁹⁷ However, courts cannot continue to presume that evidence ordinarily fits only atomized patterns.³⁹⁸ This strong position makes more sense to the extent that one believes that generalized discrimination accounts for a larger share of the total number of incidents of discrimination. If most discrimination reflects outgroup hostility or ingroup sympathy, then analyzing evidence without regard to atomized distinctions between examples of race and sex discrimination makes sense. For example, both race and sex discrimination may be understood as inevitable consequences of the exact same ingroup sympathy for white males.

Short of the strongest position, two other relatively strong positions are available. First, courts might admit evidence of generalized discrimination when parties plead or otherwise articulate the logical relevance of generalized discrimination. This approach might not change the result in older cases; their reported decisions claim that parties did not allege any explanation to show how different kinds of discrimination were related, such as ingroup sympathy or outgroup hostility.³⁹⁹ Second, courts might simply flip the presumption: Evidence of generalized discrimination is not subject to additional hurdles unless the party opposing its admission can articulate some special reason to believe that the discrimination at issue could not have been generalized.⁴⁰⁰

³⁹⁷ See Grebeldinger, *supra* note 122, at 191-96, 201-03; *supra* notes 393-94 and accompanying text.

³⁹⁸ See *supra* Part II.C (describing how courts sometimes assert that discrimination, as a matter of logic, is always atomized, and how courts at other times hold that the parties have not explained how different forms of discrimination are related).

³⁹⁹ See *supra* notes 125-28 and accompanying text. I qualify this statement with "might" because of the usual risks of inferring precisely what parties did or did not argue from a reported decision. See, e.g., Valdes, *supra* note 70, at 154-58 (describing a case in which the plaintiff claimed sex discrimination based on effeminacy, but in which the court treated the claim as being one for sexual orientation discrimination and thus not actionable).

⁴⁰⁰ This requirement reflects the evidentiary principle that the burden of proof falls on the party trying to prove the less likely event. The less likely one sees atomized discrimination, the more reason a court should impose such a burden.

Courts might examine the particular nature of stereotypes in a specific case. In some scenarios, defendants might claim that any discrimination that occurred only reflected atomized discrimination. For example, a woman might allege that she was denied a construction job because a foreperson told her that she "didn't look strong enough." In that case, the defendant might argue against admitting evidence that an African-American male was told "you wouldn't fit in around here." The employer might say that such racist remarks, however wrong, did not relate to the more innocuous statistical stereotype that women tend to be weaker than men.⁴⁰¹ Of course, the court might not accept this characterization of the examples; the plaintiff might argue that both examples could also prove that the employer acted consistently on ingroup sympathy for white males, but later articulated different pretextual rationalizations.

In other cases, plaintiffs might try to draw distinctions to exclude evidence of generalized nondiscrimination. An African-American woman, for example, might allege that an employer did not adequately investigate her claims that a supervisor or co-worker threatened to fire her if she did not have sex with him. The employer could offer evidence that it did investigate two prior incidents when a white woman alleged such sexual harassment. The African-American female plaintiff might discount such examples by claiming that African-American women have historically been stereotyped as sexually available seductresses and that such stereotyping caused employers to investigate allegations against "pure" white women, but to readily presume that a woman of color consented to any sexual advances.⁴⁰² Again, the court might not necessarily accept these arguments; the defendant might persuade the court that a jury ought to hear these distinctions and make up its own mind in light of the totality of evidence.

3. *A Moderate Position: An Additional Balancing Factor*

Courts might also treat the relatively atomized or generalized nature of evidence as yet another factor in determining when to admit evidence. Just as courts are more likely to admit more recent evidence, courts might tend to admit more atomized evidence if all other factors are equivalent. This does not mean that courts would exclude

⁴⁰¹ See, e.g., *EEOC v. Spokane Concrete Prods.*, 534 F. Supp. 518, 522 (E.D. Wash. 1982) (describing a scenario in which a female applicant for a construction job was rejected based on an "eyeball" test of strength).

⁴⁰² See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, 28 HARV. C.R.-C.L. L. REV. 395, 400-01, 401 n.22 (1993) (asserting that "women of color constitute a distinct political subject"); Marder, *supra* note 168, at 939 n.274 (citing sources that discuss the distinct identity of women of color); cf. Freshman, *supra* note 55, at 1724-26 (discussing stereotypes of gays and lesbians).

all evidence of generalized discrimination or generalized nondiscrimination. For example, if a white woman alleges failure to investigate harassment, a court might be equally inclined to admit evidence of how a firm investigated allegations of harassment by a white woman two years ago or by an African-American male one month ago. This relatively moderate position is more plausible to the extent one believes that generalized discrimination often motivates discrimination, but that the atomized theory more often explains discrimination today. Based on this same assumption, courts might be more likely to admit relatively generalized evidence when better atomized evidence was not available. When "better" atomized evidence is available, courts might reason that the "attenuated" generalized evidence would confuse the jury.⁴⁰³

Similarly, if courts see generalized discrimination as a significant phenomenon, but one which occurs less frequently than generalized discrimination, they might sequence discovery differently: Courts might delay discovery of generalized discrimination until after parties have exhausted discovery of atomized discrimination. Courts, however, should be careful about drawing such a distinction. Parties may not be able to fashion their theories and strategies for a case until they have been able to consider the potential patterns in a broader number of examples.⁴⁰⁴

4. *Should Defendants Face Additional Hurdles?*

Regardless of how one resolves the evidentiary questions above, one might also ask whether employers should face additional hurdles to admitting evidence of generalized discrimination.⁴⁰⁵ Plaintiffs

⁴⁰³ This moderate position might be consistent with Judge Calabresi's concurrence in *Hollander*, in which he stated that "in appropriate circumstances, evidence of discrimination against one group of people can support an inference of discrimination against another group," such as when there were only a small number of employees like the plaintiff. *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 204 (2d Cir. 1999) (Calabresi, J., concurring). However, because Judge Calabresi's very brief concurrence did not address the various theories of generalized ingroup sympathy and outgroup hostility presented in this Article, one should be careful not to imply too much from the opinion. Judge Calabresi might agree that, in at least some circumstances, generalized discrimination exists such that "different" kinds of discrimination are better understood as different consequences of the same discrimination.

⁴⁰⁴ See *supra* note 396 and accompanying text (discussing how the standard for discovery is broader than the standard for evidence).

⁴⁰⁵ In earlier work, I suggested that defendants could never admit generalized evidence of nondiscrimination unless and until a plaintiff invoked a theory of generalized discrimination. See Freshman, *supra* note 16. Since then, I have revised my views in light of a more thorough consideration of psychological accounts of discrimination discussed above, which indicate that generalized discrimination often explains discrimination. I have also altered my views after consideration of the Supreme Court's decision to recognize a specific affirmative defense based on effective anti-harassment policies. See *supra* notes 42-43 and accompanying text.

might argue that courts should exclude evidence of generalized *non-discrimination* unless the plaintiff offers such evidence.⁴⁰⁶ This analysis may differ depending on whether employers seek to offer evidence as part of a particular defense, such as evidence of an effective anti-harassment policy. Under well-established law, a defendant cannot rely on evidence of nondiscrimination involving persons other than the plaintiff as a complete legal defense. For example, an employer who discriminates against a single African American is liable even if the proportion of African Americans in the workplace mirrors the percentage of African Americans in the relevant population.⁴⁰⁷ Recently, however, the Supreme Court explicitly established a specific defense in one context: If an employer faces charges based on the harassment that a supervisor committed, it may avoid liability by an affirmative defense that it had an effective antiharassment policy.⁴⁰⁸

a. *Specific Employer Defenses*

When a specific defense is available, a requirement that a plaintiff initiate the use of evidence of generalized discrimination is hard to justify. For at least some purposes, evidence of any nondiscrimination policy may be relatively interchangeable for different plaintiffs. For example, if an employer wants to establish that employees knew about an established antiharassment policy with accessible investigators, it might make sense not to distinguish between employees who knew that such policies covered sexual harassment rather than racial harassment and employees who were not aware of the distinction; the fact that employees knew that there was an investigator of harassment or discrimination claims might be relevant.

On the other hand, the relevance might be less weighty if the effectiveness of such policies and investigations is an issue. As we have seen, both legal decisions and legal discourse often track atomized patterns. Women might believe that their firm investigated complaints by African-American men, but doubt that such investigation meant that the firm took sexual harassment seriously. Again, however, a court might accept such distinctions and argue that a jury could manage them without becoming confused or overwhelmed.

⁴⁰⁶ By extension, plaintiffs might also bar discovery of generalized nondiscrimination unless a plaintiff alleges generalized discrimination, seeks such discovery, or intends to offer such evidence.

⁴⁰⁷ See *Connecticut v. Teal*, 457 U.S. 440, 454 (1982); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978). An employer accused of discrimination may offer evidence of a minority presence in her workforce to help disprove discriminatory motivation. See *Waters*, 438 U.S. at 580. But “[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.” *Id.* at 579.

⁴⁰⁸ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 775 (1998).

To the extent an employer relies on generalized nondiscrimination to defeat a claim for punitive damages, a simpler solution is possible. In general, courts often bifurcate trials so that information relevant only to punitive damages does not infect decision making on other issues. To use the most prominent example, courts typically do not allow juries to hear information about a defendant's wealth, which is irrelevant to liability but highly relevant to the amount of punitive damages, until after the jury has determined liability. Similarly, courts might well hold that employers may not offer evidence of generalized nondiscrimination to limit punitive damages until the punitive damages phase of a trial.

b. *Nonspecific Defenses*

When defendants do not invoke the kind of specific defense available in supervisor harassment cases or punitive damages cases, plaintiffs may offer different arguments. For at least two reasons, plaintiffs might seek to limit defendants' evidence of generalized nondiscrimination until a plaintiff tries to prove generalized discrimination. First, the plaintiff might invoke the general fact that modern civil procedure gives plaintiffs the ability to prove their case in a variety of ways. Courts refer to the plaintiff as the master of her own complaint.⁴⁰⁹ At common law, a plaintiff had to adopt one factual and legal theory early in her case; modern procedure allows the plaintiff to prove her case on multiple theories and to prevail if she can succeed on at least one theory.⁴¹⁰ However, these arguments may also suggest why a defendant should not face any more hurdles to offering evidence of generalized discrimination than a plaintiff. Plaintiffs already face certain procedural advantages, so why stack the deck in favor of plaintiffs further? In addition, defendants might likewise argue that modern procedure also lets defendants plead multiple and inconsistent defenses, such as an employer's claims that (1) a supervisor never made any racist remarks, (2) if he did, they were too infrequent to constitute harassment, and (3) if they constituted harassment, the employer should not be responsible for the supervisor's harassment. Moreover, when a party tries to show that it made a decision for a nondiscriminatory reason, the range of acceptable reasons is exceptionally wide.⁴¹¹

⁴⁰⁹ See, e.g., *Powell v. Zoning Bd. of Appeals*, No. 94C 1113, 1994 WL 130766, at *2 (N.D. Ill. Apr. 14, 1994) (holding that a plaintiff could elect to allege a due process violation under the state constitution and avoid federal question jurisdiction, because "the party who brings a suit is master to decide what law he will rely upon" (internal quotation marks omitted) (citation omitted)).

⁴¹⁰ See *supra* note 144 and accompanying text.

⁴¹¹ See, e.g., *Marder*, *supra* note 168, at 941 (asserting that prosecutors who "use their peremptory challenges to remove . . . jurors . . . could probably offer various seemingly unrelated reasons").

The sole remaining argument that plaintiffs might advance is that the evidentiary scales should be tipped in their favor. Whether a court tips those scales in one direction or another hinges on both empirical and philosophical questions. The empirical question depends on a court's overall judgment of whether the existing set of antidiscrimination laws falsely labels innocent persons as discriminatory more frequently than it falsely exonerates discriminators.⁴¹² Experts disagree about this question.⁴¹³ The conclusion that existing law seriously underestimates discrimination might be a reason to prevent employers from offering evidence of generalized discrimination when the plaintiff has not alleged generalized discrimination.⁴¹⁴ The philosophical question is whether a false label of discrimination produces more disutility than a false label of nondiscrimination, which leaves a genuine victim of discrimination without relief. As with any comparison of utility between persons, disagreement on this question exists as well.⁴¹⁵

The question also depends on philosophical debates about the degree to which employers and housing owners have a type of property right to make business decisions as compared to the degree to which employees have the right to be free from discrimination.⁴¹⁶ Ultimately, the question of whether defendants face an additional hurdle in using evidence of generalized discrimination turns in large part on a separate and more general debate about the nature of antidiscrimination law. The question does not go to the heart of the theoretical argument about the value of recognizing generalized discrimination and its use in the courts, other dispute resolution devices, and studies of bias. As a practical matter, however, courts and

⁴¹² In statistical language, this distinction corresponds to the question of Type I and Type II errors. See, e.g., Culp, *supra* note 47, at 242-43.

⁴¹³ Compare *id.* at 242-46 (stating that current antidiscrimination law is overly biased against victims), and Krieger, *supra* note 68 (suggesting the same), with Malamud, *supra* note 67, at 2254 (acknowledging that "wrongful . . . employer actions are significant problems in the American workplace," but cautioning that it is impossible to fix the exact share of employer decisions that are wrongful).

⁴¹⁴ On the other hand, employers might question why the scales should be balanced by imposing an evidentiary disadvantage on this particular kind of question. In principle, a particular employer who wants to introduce evidence of generalized discrimination might argue that any overall underenforcement of discrimination claims should be remedied by adjusting some other principle. For example, one might tip the scales in favor of plaintiffs by expanding the reach of effects tests. In a sense, this employer would be like any economic actor who would resist paying a particular tax regardless of the benefit, on the ground that some general tax-and-transfer scheme should remedy the problem.

⁴¹⁵ The question of whether one may compare very different goods on a single scale of utility has produced a large literature on incommensurability. See, e.g., Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 170, 182 (Ruth Chang ed., 1997) (describing the problem as one "where people make decisions between rather different goods").

⁴¹⁶ Compare EPSTEIN, *supra* note 151, at 32-41 (emphasizing employers' rights), with Kelman, *supra* note 289, at 1243-45 (emphasizing employees' right to be free from discrimination).

commentators may be more likely to accept evidence of generalized discrimination if evidence of generalized discrimination and evidence of generalized nondiscrimination seem to be treated in superficially neutral ways, even if the considerations discussed above would support limiting employers' ability to initiate the use of evidence of generalized nondiscrimination.

5. *Disparate Impact Analysis*

The same arguments outlined above about the admission of relevant acts of prior discrimination also track arguments about disparate impact. In one sense, when we ask how to define the relevant group as being advantaged or disadvantaged by a particular practice in a disparate impact case, we are considering the same questions about the plausibility of different mixes of generalized and atomized discrimination discussed earlier. Just as courts limit evidence about individuals according to job category and location, courts consider such factors when examining statistical evidence.⁴¹⁷ The more strongly we believe that a larger share of discrimination tracks generalized patterns, the more we are willing to allow statistical analyses that compare, for example, the effects of general-ability job testing on white males versus all others, rather than merely whites versus African Americans or whites versus Latina/os. If we are more skeptical of the existing amount of generalized discrimination, then we may allow such generalized statistical comparisons only if we find that a better analysis using atomized patterns does not exist; if an atomized group contains too few members to make statistically significant comparisons, then we will more likely look at the statistics involving generalized groups.⁴¹⁸ Between these extremes, we may use the relatively atomized or genera-

⁴¹⁷ See, e.g., *Holifield v. Reno*, 115 F.3d 1555, 1563 (11th Cir. 1997) (ruling that nationwide statistics were not probative of what happened at a specific location); *EEOC v. Texas Instruments Inc.*, 100 F.3d 1173, 1185 (5th Cir. 1996) ("The probative value of statistical evidence ultimately depends on all the surrounding facts, circumstances, and other evidence of discrimination."); cf. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1992) ("Particularly in age discrimination cases where innumerable groupings of employees are possible according to ages and divisions within the corporate structure, statistics are easily manipulated and may be deceptive.").

⁴¹⁸ There also exists an argument that disparate impact analysis should use generalized discrimination *more*. To the extent that disparate impact analysis, like strict scrutiny analysis in constitutional law, is a means by which we arrive at the conclusion of intentional discrimination, the arguments indeed parallel the disparate treatment analysis above. But if courts apply disparate impact analysis to some inequality that might not result from intentional discrimination, courts should be even more willing to use generalized discrimination in disparate impact cases. This conclusion is ambiguous under current law and legal theory. Compare *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."), with *Malamud*, *supra* note 67, at 2324 (claiming that the legitimacy and meaning of disparate impact evidence are not beyond challenge).

lized nature of discrimination as one factor in our case, just as courts now use factors like time, job type, and job location.

B. Generalized Discrimination and "Alternative" Dispute Resolution

Our discussion thus far has emphasized how courts should treat theories of discrimination and relevant evidence, but we must also address how other dispute resolution processes should treat such evidence. We need to discuss other processes not merely because other processes have value or because other processes in general occur in many cases; rather, alternative processes are particularly significant in the employment discrimination context.⁴¹⁹ Many firms include arbitration clauses in their employment agreements; however, the issue of exactly when courts will enforce those agreements has split the circuits in ways that the Supreme Court has yet to resolve.⁴²⁰ Additionally, the

⁴¹⁹ In general, only a small percentage of disputes end up in court. The proportion is even smaller for discrimination claims than for tort claims. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & Soc'y REV. 525, 537 tbl.2 (1980-1981); see also *id.* at 561 ("Discrimination problems generate an unusually low number of claims . . ."). Of those cases filed in court, only a very small percentage are resolved by trial. See JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 218 (2d ed. 1996) ("Almost 95% of the cases filed in court are terminated before a full trial and judgment."). Decisions short of a verdict, however, do affect a substantial number of cases. See *id.* (noting that courts dismiss about one-third of cases on a motion to dismiss or a motion for summary judgment); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 9 n.21 ("Empirical research shows that in approximately one-third of the cases that settle, settlement comes *after* a definitive ruling of some type by the court (typically on pretrial motions)."). Overall, so few discrimination claims ever reach the courtroom, and so few get resolved by a judge or jury, that to describe other dispute resolution mechanisms as alternatives is somewhat of a misnomer. Moreover, many discrimination claims are dismissed on summary judgment. See *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997) (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: REPORT OF THE DIRECTOR—1995, at 163 (1995)). See generally Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997) (referring to ADR as "'appropriate' dispute resolution" and surveying new disputes arising out of the ADR context).

⁴²⁰ The major unresolved split is whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1994), requires arbitration of contracts involving employment. The plain language of sections 1 and 2 of the Act seems to exclude all employment contracts. See *id.* § 1 (stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). The majority of circuits, however, have concluded that this clear language does not exclude arbitration of employment contracts from the strong federal policy in favor of enforcing arbitration agreements. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467 (D.C. Cir. 1997) ("We agree with the District Court that section 1 of the FAA does not exclude all contracts of employment from the coverage of the FAA."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 602 (6th Cir. 1995) (holding that a consultant's employment agreement did not fall within the scope of the FAA's exclusionary clause). The Supreme Court has expressly refused to consider this question, and in the one case raising the issue, it took the position that the contract at issue was not an employment contract, because the arbitration provision was contained in the employee's registration with securities regulators. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). The ques-

Clinton Administration has emphasized other forms of ADR, including mediation, as a primary device for the Equal Employment Opportunity Commission (EEOC) to use in handling discrimination claims.⁴²¹

In arbitration, theories of discrimination have an even greater impact than they do in court both for procedural reasons and, less clearly, for substantive reasons. As a procedural matter, arbitrators need not follow evidentiary rules and tend to admit evidence "for what it is worth."⁴²² As a substantive matter, at least to the extent that

tion therefore remains unresolved. See JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 68-69 (1997) (noting that questions remain about when courts will enforce agreements to arbitrate employment disputes). The Equal Employment Opportunity Commission (EEOC) opposes arbitration as a condition of employment, and it has argued in policy statements and in court that such agreements are not enforceable. See EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 10, 1997) <<http://www.eeoc.gov/docs/mandarb.txt>>.

Whether the FAA excludes employment contracts has significant consequences. If the FAA does not compel arbitration, state laws on the enforceability of such contracts would apply, and many states might not enforce such agreements. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (holding that the FAA preempts a California law prohibiting arbitration of claims for wages). But see *Cole*, 105 F.3d at 1472 (assuming that state courts would enforce arbitration agreements in employment disputes even if the FAA would not require them to do so).

⁴²¹ See *supra* text accompanying note 65.

⁴²² See, e.g., 3 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 35.1.2.1, at 35:5 (1999) ("[N]either the Federal Rules of Evidence nor other judicial evidentiary rules as such govern arbitrators, unless the parties so agree. Generally, arbitrators are bound only by their own concept of relevancy."). An arbitrator's tendency to admit more evidence than courts follows in part from the incentives that the FAA provides. See *United States Arbitration Act*, 9 U.S.C. §§ 1-16 (1994). Under the FAA, courts may refuse to enforce arbitration awards only in certain, very narrow circumstances. See *id.* §§ 10-12. One such circumstance is when arbitrators refuse to admit relevant evidence. See *id.* § 10(a)(3) (allowing courts to vacate awards "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"). Courts interpreting this language in reported decisions have given arbitrators considerable leeway before setting aside arbitration awards. See, e.g., *Marshall & Co. v. Duke*, 941 F. Supp. 1207, 1211 (N.D. Ga. 1995). Nevertheless, arbitration training materials frequently emphasize the interest in avoiding the risk of having an award set aside by encouraging arbitrators to admit evidence for what it is worth. See, e.g., *In re Rohr Indus. Inc.*, 93 Lab. Arb. Rep. (BNA) 145, 156-57 (1989) (Goulet, Arb.) ("As the advocates for both sides in a labor arbitration often are not lawyers, the arbitrator must give them wide latitude in making their cases. So this arbitrator, like many others, will permit almost anything presented at the hearing to be admitted 'for what it is worth.'"); Marvin F. Hill, Jr. & Tammy M. Westhoff, *"I'll Take It for What It Is Worth"—The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal*, 1998 J. DISP. RESOL. 1, 9 ("There is no altruism in this; an arbitrator who adopts more restrictive standards runs a higher risk of being overturned by a reviewing court." (quoting an arbitrator) (internal quotation marks omitted)); Videotape: *Managing the Arbitration Process* (American Arbitration Association 1993) (on file with author) (suggesting that arbitrators admit evidence for "what it is worth"). But see MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *EVIDENCE IN ARBITRATION* 3-5 (2d ed. 1987) (recognizing the rationale of limiting evidence by rules of "fairness and due process"). In the long term, no arbitrator receives future arbitration assignments in this manner. An overturned award means the parties have to pay for the whole arbitration again, including the arbitrator's fees.

discrimination claims are contractual, arbitrators may fashion their understanding of the law by applying the "common law of the shop."⁴²³ More recently, courts and others have suspected that arbitrators may do this in discrimination claims based on statutes. The Supreme Court has stated emphatically that, to the extent arbitrators are permitted to consider statutory employment discrimination claims, they must try to apply the same legal principles that the courts apply.⁴²⁴ Nevertheless, arbitrators may have some de facto leeway in this area because of the lax standards courts have generally applied to arbitration awards before confirming them as judgments. Therefore, an arbitrator may be so insulated from effective review that different arbitrators may apply different legal principles.⁴²⁵

In mediation, judging the consequences of evidence of generalized discrimination is more difficult for several reasons. In its purer forms, mediation involves a neutral mediator who facilitates an agreement between the parties; the mediator lets the parties raise any facts they desire.⁴²⁶ Because these issues need not concern legal remedies

⁴²³ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."). Some commentators believe that arbitrators may attempt to make substantive law even outside the context of labor law. See Freshman, *supra* note 55, at 1706-08, 1750-57 (offering examples of privatizing family law through ADR to reflect the substantive principles of various communities, including Jews, Muslims, lesbians, gays, and bisexuals); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 707-27 (1999).

⁴²⁴ See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396 (1998) (stating that if a statutory question is submitted to arbitration, then "the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires").

⁴²⁵ The exact degree to which arbitrators may differ from judges and juries in employment discrimination cases is currently evolving. Two recent decisions by the D.C. Circuit and the Second Circuit suggest that arbitration awards will be subject to more searching review when allegations of employment discrimination arise. See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (reversing an arbitration panel's finding of no age discrimination based in part on the failure of arbitrators to provide a written explanation of their decision, even though arbitrators typically do not provide such a written opinion), *cert. denied*, 119 S. Ct. 1286 (1999); *Cole*, 105 F.3d at 1487 (stating that courts must determine that arbitrators used the correct legal standard, although courts need not review factual determinations). Additionally, securities regulators have recently amended their rules to state that employees of securities firms may take their statutory discrimination claims to court. See Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SEC Release No. 34-40109, File No. SR-NASD-97-77 (June 22, 1998).

⁴²⁶ See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 104-08 (1994) (noting that mediators must let parties play an active role in mediation and not limit the range of discussion); Freshman, *supra* note 55, at 1732-34 (arguing that mediators in principle should let parties decide cases according to the parties' own values, but in practice often play a more directive role).

or legal outcomes,⁴²⁷ such as the request for an apology that a court would never order,⁴²⁸ the mediator need not make evidentiary rulings at all. According to many academic theories of mediation and a great deal of training materials, parties may readily discuss evidence of generalized discrimination, nondiscrimination, or any other topic with which they are concerned at the time.⁴²⁹ In practice, however, mediators often set the topics for discussion and decide when to move negotiations along.⁴³⁰ Therefore, mediators must often consider whether to allow discussion of evidence of generalized discrimination or simply to move the process along.

Whether evidence of generalized discrimination will have an impact on settlement is a more complicated question. Many predict that settlement in mediation largely reflects an estimation of what courts themselves would do.⁴³¹ To the extent that this theory is accurate,

⁴²⁷ For example, in some states, mediators discuss the law at the risk of losing their court certification as mediators; without certification, individuals are not eligible for appointment by courts as mediators. See, e.g., Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 960-70 (1997) (describing Florida statute). I earlier criticized the way that many mediators pay too much attention to legal values and too little attention to other values, such as community values that the parties may find meaningful. See Freshman, *supra* note 55, at 1732-42.

⁴²⁸ Negotiation scholars often discuss the way that parties in negotiation may reach win-win or integrative solutions that better serve both parties' needs than what a court might order as a remedy. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2d ed. 1991) (discussing how parties may reach agreements that meet both parties' interests); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (discussing how parties may reach solutions in negotiation that better meet both parties' needs). Exactly how often such solutions are possible is a controversial question. Compare Menkel-Meadow, *supra*, at 794 (arguing that problem-solving negotiation focuses on solutions rather than strategy), with Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 369-72 (1996) (arguing that many negotiations end with one party winning at the expense of another).

⁴²⁹ See BUSH & FOLGER, *supra* note 426, at 2 (positing that individuals may develop "moral growth" through mediation).

⁴³⁰ A leading study of various mediators concludes that, in practice, mediators play a much more active role than theories of mediation and training materials for mediators might suggest:

[W]e turn the spotlight on the mediators as the pivotal players. Mediators are not passive participants in any sense. Rather they actively construct the ways a dispute will be handled They participate in the definition of the problem, choreograph the agenda and meetings, [and] exercise control over communication and information

Deborah M. Kolb, *Preface* to WHEN TALK WORKS: PROFILES OF MEDIATORS at xiv (Jeffrey Z. Rubin ed., 1994); see also MARJORIE CORMAN AARON, *EVALUATION IN MEDIATION* in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 267, 270 (1996) (recognizing that even mainstream mediation theorists say that mediators may engage in "reality-testing" and "asking difficult questions").

⁴³¹ See AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* 126 (1995) (noting that if lawyers can predict what courts will do, it "relieves both lawyer and client of the moral responsibility for figuring out what is fair and of communicating that in a persuasive way to the other side"); Leonard L. Riskin, *Mediation and Lawyers*, 43

generalized discrimination will have significance in mediation only if it would affect the outcome in court. On the other hand, others recognize that while a court's hypothetical behavior is an important influence on settlement in mediation, it is not the only determinant. At least in theory, parties might settle in mediation based instead on a sense of the wrongness of their conduct, even if the evidence of that wrongness would not be admissible in court. Employers, for example, may settle based on how their clients might react. Thus, for several reasons, parties may settle in mediation based on evidence of generalized discrimination even if courts might not admit that evidence.⁴³²

Similarly, theories of discrimination may matter to equal employment officers and investigators on behalf of organizations to varying degrees. Like mediators, various in-house investigators of discrimination follow a variety of practices. Because few formal rules and influential professional organizations exist for such investigators,⁴³³ they may enjoy a broader discretion to use evidence of generalized discrimination. For example, some investigators at one extreme see their role as tracking the liability that a court would impose.⁴³⁴ Other investigators do not track the law exclusively; they instead view nondiscrimination and diversity as valuable in themselves in the sense that diverse employees may both better predict the tastes and more adequately service the needs of a diverse customer base.⁴³⁵ Still other investigators may seek to be advocates for minorities and rely on theories of discrimination, such as an emphasis on proportional representation of minorities, that courts may not use.⁴³⁶ Those sincerely concerned with identifying discrimination will find concepts of generalized discrimination helpful even if courts would not admit evidence of generalized discrimination.

Finally, although we often see dispute resolution as the resolution of individual disputes between parties, we may also view studies of bias by the bar, the judiciary, and the legislature as other kinds of preventive dispute resolution. In many jurisdictions, courts and bar associa-

OHIO ST. L.J. 29, 35 (1982) (arguing that parties may base "their judgments during mediation upon inaccurate assumptions about what result would follow from adversary processing"); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 13 (1986) ("When parties resist settling, mediators often make statements about the parties' alternatives. Since most cases were referred by the court, it is the logical alternative to a mediation settlement.").

⁴³² Cf. Freshman, *supra* note 55, at 1736 (arguing that parties might settle based partly on what members of some community they value would do).

⁴³³ See, e.g., Edelman et al., *supra* note 64, at 78.

⁴³⁴ See *id.* at 89 (discussing the professional who seeks to remain neutral and to not advocate for either management or employees); *id.* at 89-90 (describing the duties of the technician, who merely gathers required data).

⁴³⁵ See, e.g., David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 79, 79-80.

⁴³⁶ See Edelman et al., *supra* note 64, at 80-82.

tions have tried to study the origin of bias in the legal profession. With tiny exceptions, these studies have followed a profoundly atomized framework: Some committees study gender bias,⁴³⁷ others study race bias,⁴³⁸ and still others study sexual orientation bias.⁴³⁹ Few even acknowledge how subatomized groups, such as women of color, may face greater or more complicated burdens.⁴⁴⁰ The studies have also suffered from a lack of attention to the role of generalized discrimination. For example, a Texas study on gender discrimination referred to the difficulty women face because of an "'old boy' network."⁴⁴¹ Generalized discrimination would allow us to consider how this type of network affects not only women, but also all those individuals outside that rather small ingroup.

Generalized discrimination may shed light on similar enterprises by the Legislature and the Executive. The congressionally mandated study on "the glass ceiling" expanded its focus beyond women, but might have expanded the focus further had it applied the concepts of generalized ingroup sympathy and outgroup hostility.⁴⁴² Similarly, by applying these concepts, President Clinton's advisory board on race might have focused less intensely on African Americans or race discrimination, and more broadly on generalized discrimination.⁴⁴³

V

THE PUZZLING PERSISTENCE OF ATOMIZED DISCRIMINATION: BARRIERS TO SEEING GENERALIZED DISCRIMINATION AND BROAD "COALITIONS"

This Article has thus far led us to a riddle: If a greater focus on generalized discrimination would potentially help litigants (sometimes plaintiffs and sometimes defendants) in a significant number of cases, and if it is consistent with an overlapping consensus in the social

⁴³⁷ See, e.g., Procter Hug, Jr. et al., *Ninth Circuit: The Gender Bias Task Force*, 32 U. RICH. L. REV. 735 (1998).

⁴³⁸ See, e.g., Judith Resnik, *Gender Matters, Race Matters*, 14 N.Y.L. SCH. J. HUM. RTS. 219, 222 (1997) (studies considering race or gender bias but not the combination or other forms of bias).

⁴³⁹ See, e.g., AD HOC COMM. ON SEXUAL ORIENTATION BIAS, LOS ANGELES COUNTY BAR ASS'N, THE LOS ANGELES COUNTY BAR ASSOCIATION REPORT ON SEXUAL ORIENTATION BIAS, reprinted in 4 S. CAL. REV. L. & WOMEN'S STUD. 295 (1995).

⁴⁴⁰ See Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 974-75 (1996) (arguing that studies have largely ignored the way that discrimination may affect groups at the intersection of various categories, such as African-American women).

⁴⁴¹ Wayne N. Outten & Jack A. Raisner, "Glass Ceiling" Lawsuits Threaten "Old Boy" Network, EMPLOYMENT L. STRATEGIST, Nov. 1996, at 1, 1.

⁴⁴² See, e.g., FEDERAL GLASS CEILING COMM'N, *supra* note 101 (reporting the results of research revealing artificial barriers to the advancement of minorities and women in the private sector).

⁴⁴³ See, e.g., Editorial, *Race Panel's Lost Chance*, L.A. TIMES, Sept. 21, 1998, at B4 (criticizing "President Clinton's race initiative"); Michael A. Fletcher, *Clinton Gets Race Report, Rejects Criticism*, WASH. POST, Sept. 19, 1998, at A8 (describing criticism of the report by President Clinton's advisory board on race from civil rights activists and others).

sciences, then why is more attention not given to generalized discrimination? Of course, the ease with which generalized discrimination could help parties in particular cases should not be exaggerated, because some practical limitations may exist.⁴⁴⁴ In addition, in particular scenarios or institutions, the best explanation for discrimination may be the hostile attitudes of one historic outgroup, such as Koreans, toward another historic outgroup, such as African Americans. Nevertheless, a startling gap still remains between the significant role generalized discrimination might play in courts, arbitrations, mediations, investigations of discrimination in many cases, and our national conversations about racism, on the one hand, and the highly atomized nature of those practices, on the other hand. This riddle also raises more general questions about how individuals come to understand whom they care about: their sense of identity, empathy, and coalition. Why do we label discrimination affecting us as, say, race discrimination rather than as a byproduct of some historic ingroup sympathy that holds back individuals outside a narrow group?

One way to think about this riddle is to look to barriers to seeing generalized discrimination and barriers to empathy and coalition. In looking to such barriers, this Article borrows from scholars of negotiation who often ask why individuals do not reach agreements, particularly settlements in litigation.⁴⁴⁵ That search makes sense for two reasons: First, most cases settle out of court, raising questions about the minority of cases that do not.⁴⁴⁶ Because atomized discrimination is the usual discourse in law and society generally, that question makes less sense here. Second, negotiation scholars also look to barriers to agreement because of a presumption that agreement, rather than litigation, will often lead to better outcomes—outcomes that make both parties better off than the likely court outcome.⁴⁴⁷ That rationale does apply here, because greater attention to generalized discrimination may have both valuable proof effects and coalition effects.

This Part explores several kinds of barriers. First, it explores barriers that may simply be cognitive phenomena, largely bad habits that become entrenched habits and prisms (and prisons) for viewing the world. These barriers apply to both clients and lawyers. Second, it explores the use and limits of rational-choice models of barriers to seeing generalized discrimination.

⁴⁴⁴ See *supra* Part II.C.2.

⁴⁴⁵ See, e.g., BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991). But cf. Judith Resnik, *Trial as Error: Transforming the Practice of Judging and Federal Judicial Power* (Oct. 1999) (unpublished manuscript, on file with author).

⁴⁴⁶ See Gross & Syverud, *supra* note 445, at 320.

⁴⁴⁷ See *supra* note 428.

A. Cognitive Barriers

1. *Client Barriers*

Clients think about why discrimination occurred; they will think about atomized discrimination for two kinds of reasons: First, like all of us, they live in a society in which the metanarratives⁴⁴⁸ of discrimination—from media discussions to many civil rights organizations to presidential commissions on race—reinforce the idea that discrimination is atomized. All metanarratives convey the assumption that discrimination occurs against particular groups. Periodic exceptions to the rule exist, of course, such as discussions of “rainbow coalitions” or the more generalized discussions of race that generally contrast people of color with whites, rather than specifically contrasting African Americans with whites. Second, individuals also make assumptions about solidarity with a single identity: They must think of themselves for all purposes as African American, as women, or as disabled, rather than imagining different kinds of identities for different purposes.⁴⁴⁹ Indeed, to speak of different loyalties other than a single loyalty may seem traitorous.⁴⁵⁰ Both reasons reveal why clients might want to tell lawyers that they suffered discrimination on some atomized basis; likewise, both explanations suggest why clients might not volunteer examples of generalized discrimination to lawyers, even when such examples could bolster their case.

2. *Lawyer Barriers*

Lawyers also face at least some of the same cognitive barriers that clients face. Like clients, lawyers live in a world that constantly supplies images of atomized discrimination. And lawyers may face some of the same loyalties to atomized communities that individuals do. Out of a sense of automatic empathy with the client’s world view, some lawyers driven by incentives to maximize income may absorb cli-

⁴⁴⁸ For a discussion of metanarratives, see *supra* note 173.

⁴⁴⁹ That critical scholars so frequently protest to the contrary is a testimony to the pervasive nature of this assumption. See, e.g., FINEMAN, *supra* note 178, at 54; Freshman, *supra* note 52, at 103 (arguing that “[t]he fantastical story and the everyday tale—the metanarrative of the sexual family—present a world of cramped choices” and that “[w]e may surrender the whole of our life—alone, forgoing even the romantic loves of our life—or we must separate, fleeing to a distant land or sending our parents to a distancing institution”); Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL’Y REP. 207, 212 (1995) (“[I]dentities are always fluid, dynamic, and multiple . . .”); James M. Jones, *Psychological Knowledge and the New American Dilemma of Race*, 54 J. SOC. ISSUES 641, 656 (1998) (“By accommodating the possibilities for multiple simultaneous group identities, one does not have to barter one’s racial identity for the instrumental value of a larger social identity.”).

⁴⁵⁰ See Freshman, *supra* note 52, at 119 (arguing that to imagine invoking one’s identity as a child of an older parent rather than solely as a spouse may seem disloyal to the spouse); *infra* Part V.B.2.b.

ent loyalties to atomized communities and the assumption that such loyalties must be total for all situations. Other lawyers may make a more strategic decision not to challenge such world views on the often automatic assumption that such challenges may alienate a client and cost potential business.⁴⁵¹ Others may make a more self-conscious and principled argument that lawyers should not challenge claims by relatively disadvantaged persons who bring discrimination claims, because lawyers may violate client autonomy by overwhelming these persons' choices about their own values.⁴⁵²

Lawyers, however, also face another set of cognitive barriers, because they are experts trained and socialized by legal education. Law school pervasively teaches lawyers about atomized discrimination. First, the largest exposure to discrimination occurs in required courses in constitutional law. These courses teach students about different levels of scrutiny for different kinds of classifications.⁴⁵³ This structure may make much sense in teaching how the majority of the Supreme Court has considered equal protection cases. Law schools want lawyers to know that making a constitutional claim of discrimination based on a racial classification subject to strict scrutiny⁴⁵⁴ may be much easier than making a claim of discrimination based on an age classification that is subject only to minimal rationality review.⁴⁵⁵

Likewise, at a more profound level, some commentators would defend the classification on the merits as a reasonable response to the "problem" of judicial review that so preoccupied legal scholars in the wake of *Lochner v. New York*.⁴⁵⁶ Many commentators found the notion of judicial review troubling and took comfort in the idea that review would be confined to isolated cases rather than a regular practice of second guessing a democratically elected legislature.⁴⁵⁷ To these commentators, thinking of discrete and insular minorities⁴⁵⁸ as politically powerless was easier. Of course, in principle, one might argue that the view that various sets of individuals are powerless because they themselves see no solidarity with other discrete and insular minorities

⁴⁵¹ Cf. Clark Freshman, Is There a Market for Autonomy: Arbitration and Barriers to Informed Consent 6-7 (Apr. 1999) (unpublished manuscript, on file with author) (arguing that lawyers have little incentive to discuss how clients might customize arbitration).

⁴⁵² See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

⁴⁵³ See Freshman, *supra* note 16, at 247-48.

⁴⁵⁴ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

⁴⁵⁵ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

⁴⁵⁶ 198 U.S. 45 (1905). On the "problem" of judicial review, see, for example, ELY, *supra* note 44, at 14 (referring to the Fourteenth Amendment's Due Process Clause as "the clause to which the Court has tended to refer to 'support' its sporadic ventures into across-the-board substantive review of legislative action").

⁴⁵⁷ See, e.g., Ely, *supra* note 44, *passim*.

⁴⁵⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

is not inconsistent with the view that discrimination that disadvantages many such outgroups may occur.⁴⁵⁹ Nevertheless, as a cognitive phenomenon, the emphasis on different kinds of discrimination in required law classes and required introductions to theories of judicial review makes it easy for lawyers to fall into the habit of only seeing atomized discrimination.

This kind of habitual and automatic tunnel vision is consistent with recent cognitive psychology and economic theory. Both show how experts may get stuck in certain patterns of viewing the world even when such patterns are not rational in an individual case. Cognitive psychology that models expert decision making, such as decision making by experienced lawyers, suggests that these experts often make strategic decisions by recalling a similar previous pattern; this kind of decision-making process often saves time, but it leaves open the possibility that lawyers will recall a pattern without considering more effective alternatives.⁴⁶⁰ Two economic theories point to a similar direction. The theory of bounded rationality suggests that individuals do not carefully weigh the costs and benefits of many different strategic alternatives as decision analysis might suggest, but instead make automatic decisions by comparing in a gestalt way with previous similar decisions.⁴⁶¹ Similarly, path-dependence theories suggest that

⁴⁵⁹ Lusky, however, usefully reminds us that even a numerical majority may be powerless:

The minorities problem springs from the existence of fairly well defined "out-groups" disliked by those who control the political and other organs of power in society. Such dislike arises not because the members of the groups have done or threatened acts harmful to the community, but because membership in the group is itself considered a cause for distrust or even hostility. These unpopular groups are often called "minorities," and the dominant group "the majority"; and for the sake of convenience that terminology is followed here, even though the "minority" can be and sometimes is a numerical majority.

Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 2 (1942).

⁴⁶⁰ See Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 347-48 (1995).

⁴⁶¹ Consider one recent description of bounded rationality:

In the literature on evolutionary game theory, players do not explicitly deliberate; rather, each player's action is determined by an automatic behavioral rule that may change over time as a result of evolutionary forces. The theory explores the implications of such automatic behavior and relates the outcomes to those that emerge under conventional game-theoretic solution concepts.

Martin J. Osborne & Ariel Rubinstein, *Games with Procedurally Rational Players*, 88 AM. ECON. REV. 834, 837 (1998). At least since Gary Becker, this phenomenon has been treated as rational because of the cost of obtaining and processing information:

The making of decisions is costly, and not simply because it is an activity which some people find unpleasant. In order to make a decision one requires information, and the information must be analyzed. The costs of searching for information and of applying the information to a new situation are such that habit is often a more efficient way to deal with moderate

once a particular practice, such as a particular kind of corporate governance or a particular way of gathering evidence in discrimination claims, is established, that practice will become entrenched over time.⁴⁶² This applies even when there might originally have been many other effective practices and even though, over time, changes may make the original choice of practices less desirable.⁴⁶³

B. Strategic and "Rational" Barriers

1. *Material and Psychic Reparations and Rational Choice*

One large barrier to using generalized discrimination is a set of phenomena that I group as reparations logic. Reparations logic includes claims for resources today that are based upon evidence that individuals are members of groups that were harmed in the past.⁴⁶⁴ From the logic of that kind of claim, rational-choice theory would predict that an individual will want to make the group look smaller and more like him. The smaller the group, the fewer the ways in which reparations need to be split.⁴⁶⁵ If the group is more like him, then he has a greater chance of qualifying as a member of the group and

or temporary changes in the environment than would be a full, apparently utility-maximizing decision.

George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 82 (1977). Although this explanation has considerable appeal, it neglects the possibility that an individual obtains utility from the confidence that his decision reflects the best choice and from the satisfaction that he has exercised deliberative judgment or deep autonomy in making this decision. See Freshman, *supra* note 55, at 1764-66; Freshman, *supra* note 451, at 4-5.

⁴⁶² See Jack Knight & Douglass North, *Explaining Economic Change: The Interplay Between Cognition and Institutions*, 3 LEGAL THEORY 211 (1997). Knight and North argued:

Explanations of economic performance should place primary emphasis on social context as opposed to failures of individual cognition or rationality. The important point to note here is that this should be the priority not only in the cases in which the institutional framework is the central feature of the explanation, but also in those instances in which cognition and beliefs are the primary source of explanation.

Id. at 224.

⁴⁶³ See, e.g., Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1281 (1999) (noting that corporate governance patterns may be inefficient, because they were adopted in the past, and that there are inadequate incentives to change them); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (arguing that "[t]oday's road, dependent on the path taken" in the past, may be kept even if it would not be chosen today).

⁴⁶⁴ Reparations arguments may be appealing, because ingroups today recognize past injustices. See Mahoney, *supra* note 132, at 26 ("Reparations-oriented . . . justifications for affirmative action fit well with positioned white perception . . . [R]acism is something a second party does to a third party."). Reparations arguments also may seem appealing because they suggest that forgiveness can simply be purchased like any other commodity. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 131 (1998) ("[R]eparations elevate things over persons, commodities over lives, money over dignity.").

⁴⁶⁵ See generally Minow, *supra* note 464, at 132 (describing how Eric Yamamoto argued that reparations may often "perpetuate or deepen social divisions").

thereby of making a claim for compensation. As we will see next, this reparations logic covers not just a narrow sense of reparations, such as monetary payments, but a far broader range encompassing both material reparations and psychic reparations.

a. *Material Reparations*

Material-reparations claims refer broadly to backward-looking justice claims for tangible goods. Material reparations include the actual payments to Japanese Americans interned during World War II, payments to Israel by Germany for the Nazi Holocaust, and proposed payments to the descendents of slaves.⁴⁶⁶ Probabalistic material reparations refer to programs that do not guarantee payments to particular individuals, but rather increase the chances of material benefits. One example is affirmative action; one rationale for affirmative action is that members of a particular group suffered discrimination in the past that justifies some compensatory preference for members of that group today.⁴⁶⁷

b. *Psychic Reparations*

Psychic-reparations claims include claims based on past injustice, but not made on any particular material resources. The best example of this kind of claim is reflected in a vignette describing the experience of an African-American woman, Trina Grillo, who received cancer treatment in a hospital.⁴⁶⁸ In the vignette, Grillo recalled vomiting from chemotherapy for the cancer that would eventually take her life; a nurse told her that she "understood" because she once had morning sickness from a pregnancy.⁴⁶⁹ The implication is that comparing racism to other "isms," like sexism, is like comparing the tragedy of cancer to the relative inconvenience of pregnancy; the former marks the end of life and the latter often heralds the beginning of a new one.⁴⁷⁰

In national discourse more generally, we glimpsed a similar kind of psychic-reparations mentality in the hostility of some⁴⁷¹ prominent

⁴⁶⁶ See, e.g., *id.* at 91-117 (describing various efforts to get reparations); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 *ASIAN PAC. AM. L.J.* 33, 39 (1995) (discussing reparations by Asian-American churches to natives of Hawaii).

⁴⁶⁷ See *supra* Part II.C.1 (discussing current litigation of affirmative action cases).

⁴⁶⁸ See Grillo & Wildman, *supra* note 54, at 397.

⁴⁶⁹ *Id.* at 408 n.36.

⁴⁷⁰ A former student of mine once noted that cancer patients might be offended by Grillo's assertion that the pain inflicted by racism is as bad as the pain suffered by a cancer patient receiving chemotherapy treatment.

⁴⁷¹ "Some" is a key qualifier, because Archbishop Desmond Tutu recently said while visiting the United States that he saw treatment of lesbians and gays as a major civil rights problem. See Karen Lee Ziner, *Brown University Public Affairs Conference Overflow Crowd Hears Nobel Laureate*, PROVIDENCE J., Feb. 22, 1999, at A1, available in 1999 WL 7330170 (reporting

African Americans to the use of the repeal of the military's exclusion of African Americans as a rationale for the repeal of exclusions of those deemed by the military to be lesbian, gay, or bisexual.⁴⁷² Similarly, various attacks by certain extreme Jewish groups on recognizing non-Jewish victims of the Nazi Holocaust also reflect an appeal of psychic reparations.⁴⁷³ One might also glimpse some form of psychic reparations in the resistance of some backers of the Civil Rights Act of 1964 to the inclusion of people with disabilities in that legislation.⁴⁷⁴

c. *Unlocking Reparations Logic*

Reparations logic seems debilitating to genuine coalitions. Nevertheless, several arguments might dilute, if not displace, the spell of reparations logic. First, the reparations spell seems to depend on the assumption that there may be only one sense of identity for all purposes; even if one wanted to maximize one's claim to reparations, one could still try to define groups for other purposes at other times.⁴⁷⁵ For example, even if one wanted to argue that African Americans retain a special claim on affirmative action,⁴⁷⁶ one might also use a notion of generalized discrimination to prove discrimination in other instances. To some extent, then, reparations logic may seem like a cognitive mistake similar to the mistake that lawyers may make when they automatically apply one sense of group identity and discrimina-

that Archbishop Desmond Tutu denounced hate crimes including the killing of Matt Shepard, who was gay). Also, many African-American organizations back efforts to amend Title VII to explicitly prohibit discrimination based on sexual orientation. See Human Rights Campaign, *Nationwide Support for the Employment Non-Discrimination Act (ENDA)* (visited Nov. 14, 1999) <<http://www.hrc.org/issues/leg/enda/support.html>> (listing Coretta Scott King's support for such an amendment); Human Rights Campaign, *Organizations Endorsing the Employment Non-Discrimination Act (ENDA)* (Mar. 1999) (visited Nov. 14, 1999) <<http://www.hrc.org/issues/leg/enda/endaorg.html>> (listing support by National Black Caucus of State Legislators and National Conference of Black Mayors).

⁴⁷² See John Sibley Butler, *Homosexuals and the Military Establishment*, Soc'y, Nov.-Dec. 1993, at 16 ("Powell scoffed at the idea that the historical suffering and exclusion of blacks could serve as a metaphor for changing the official policy of excluding homosexuals from the military."). For an important critique of such arguments, see Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights: The Deployment of Race/Sexual Orientation Analogies in the Public Debates About Don't Ask, Don't Tell*, _____ J. GENDER, RACE & JUST. (forthcoming _____) (criticizing gay rights employment of race/sexual orientation analogies and the antiracist responses to those analogies).

⁴⁷³ See *supra* note 189.

⁴⁷⁴ See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 44 (1984) (revealing that opposition to bills that proposed protection for the disabled came not from "conservatives blocking change for ideological reasons," but "apparently came from those who were committed to protecting the groups already covered by Title VI of the Civil Rights Act, notably blacks").

⁴⁷⁵ See *supra* text accompanying note 450.

⁴⁷⁶ See, e.g., Brest & Oshige, *supra* note 137, at 900 ("[N]o other [minority] group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.").

tion from constitutional law cases to all potential considerations of discrimination. This argument is the simplest and perhaps most promising reply to reparations logic.

Other commentators may make the more extreme claim that reparations logic falsely assumes that a fixed set of positions forces various outgroups to fight with each other over tiny portions of crust, rather than working together to redistribute the pie. To use a familiar scenario, some may say that faculty diversity programs should not pit one group against another for a few limited diversity slots, but should work to redefine merit in general. Some might even say that we should abolish tenure in order to free more slots for hiring.⁴⁷⁷

Though they suggest interesting proposals for reform, these critiques do not entirely displace reparations logic as a rational choice. Individuals may accept the possibility that competition for scarce goods might not exist in an ideal world, but may discount the possibility of profound reform so much that, at least in the short term, paying attention to reparations logic seems rational. Indeed, the assault on affirmative action, which might seem to reduce the appeal of one kind of material reparations, may also act to reinforce the appeal of psychic reparations. One result of the assault on affirmative action may be the further resignation that law and society will provide no meaningful response to claims of injustice;⁴⁷⁸ therefore, the fight over psychic reparations becomes all the more appealing: "If we can't get better jobs, we should at least get people to acknowledge that we've suffered."

Furthermore, people may doubt the extent to which we can use one notion of identity for one purpose, such as outgroups to prove discrimination, and another sense of identity for another purpose, such as African American for certain reparations claims. Once the search for different identities for different purposes begins, some may fear that it may be difficult to confine; discussion about outgroups in general may degenerate into a discourse about how we are all victims.⁴⁷⁹ Even if this result does not wipe out narrower reparations claims everywhere, predicting where such a move may be used may be difficult. The reparations mentality may retain some of its appeal.

⁴⁷⁷ Cf. Freshman, *supra* note 52, at 103 (arguing that focusing on extreme possibilities "leave[s] unexamined other possibilities").

⁴⁷⁸ Cf. Culp, *supra* note 53, at 520 (criticizing as simplistic the view of "academic colleagues who agree . . . that the [Supreme Court] is wrong" when it ignores evidence of discrimination, but who argue that "if we correctly applied rules of standing in these cases, our current jurisprudence could be saved"); Jones, *supra* note 166, at 2318 (arguing that "Title VII is the judicial equivalent of the last fading smile of a Cheshire cat of social justice that has long since disappeared").

⁴⁷⁹ Cf. Freshman, *supra* note 55, at 1767 n. 244 (arguing that some may criticize the idea of informed consent in various kinds of ADR, because informed consent may be associated with efforts to restrict the ability of women to exercise their reproductive rights).

2. *Status Barriers*

Psychological research suggests that two other general phenomena may make it hard for individuals who see themselves within atomized groups to see themselves as part of some larger outgroup defined by generalized discrimination. These two related phenomena focus on the relatively advantaged and the relatively disadvantaged within a particular atomized group. Often, the relatively advantaged in any particular outgroup includes those individuals who have physical traits that let them pass for ingroup members, such as relatively light-skinned African Americans.⁴⁸⁰ Other relatively advantaged individuals have made efforts to assimilate into an ingroup, such as minority religious members who give up their religion, immigrants who try to shed their accent, and those who use cosmetic surgery to look more like a dominant ingroup member. For the relatively advantaged, the phenomenon of peripheral group discrimination describes how those who barely fit within an ingroup, such as the most advantaged of an outgroup, often have the most negative views about various outgroups. For the relatively disadvantaged, the phenomenon of horizontal hostility describes how relatively disadvantaged individuals within a particular atomized outgroup may themselves display hostility against the relatively advantaged within their group, particularly those who might be seen (by themselves or others) as having "escaped" their particular outgroup.

a. *Top-Down Resistance: "Wanna-Be" Discrimination*

Peripheral-group discrimination helps explain why those on the cusp of acceptance by some ingroup often have the most negative views of those outside the ingroup.⁴⁸¹ Pledges to fraternities, on the periphery of full fraternity membership, have far more negative views of other fraternities than do members or officers of a particular fraternity.⁴⁸² Peripheral group members may, in part, express negative views of outgroups in order to prove that they are truly ingroup members and not "one of them."⁴⁸³ In a similar way, the popular maxim

⁴⁸⁰ The types of physical traits that mark individuals as "in" or "out" vary with time. See, e.g., Case, *supra* note 70, *passim* (arguing that men with physical features or habits that seem feminine may be labeled gay, but that the features and habits that seem feminine will vary in time and place).

⁴⁸¹ See Jeffrey G. Noel et al., *Peripheral Ingroup Membership Status and Public Negativity Toward Outgroups*, 68 J. PERSONALITY & SOC. PSYCHOL. 127 (1995).

⁴⁸² See *id.* at 134 ("[P]eripheral-public subjects, relative to those in all other conditions, were the most directly derogatory toward the outgroup on trait adjective ratings.").

⁴⁸³ Some theorists have supposed that peripheral group members could express such negative views to comfort themselves about their status. See HENRI TAJFEL, *THE SOCIAL PSYCHOLOGY OF MINORITIES* 15 (Minority Rights Group Report No. 38, 1978). Experiments, however, show that peripheral ingroup members express negative views in public, but do not report them in private. See Noel et al., *supra* note 481, at 136.

about the zeal of the convert also suggests that those more recently or more tentatively within an ingroup are most vigilant and extreme about drawing contrasts with the very groups with which they themselves previously identified.

Many African Americans, for example, might argue that Justice Thomas's alleged hostility to the plight of poor African Americans, including his criticism of his own sister, reflects his own attempt to secure his status.⁴⁸⁴ Some would also extend these insights to the lack of sympathy that some immigrants or descendants of relatively recent immigrants have for more recent immigrants. More settled immigrants from Cuba, for example, may display less sympathy for or even hostility toward more recent immigrants from Cuba.⁴⁸⁵ Earlier this century, relatively prosperous and settled German Jews also often displayed hostility toward more recently arrived Eastern European Jews.⁴⁸⁶ In a very contemporary example, lawyers seeking recognition for HIV-positive status as a disability argued in their briefs that recognizing such a "physical" disability did not raise any of the supposed complications of "mental" disabilities.⁴⁸⁷ In a sense, those with physical disabilities, on the periphery of acceptance, sought to solidify themselves within an ingroup by construing the mentally disabled as an outgroup. In a broader sense, because the line between mental illness and mental health seems so tenuous, many of us may prove our "sanity" or "normalcy" through hostility to those labeled mentally ill—even though some of us may have very similar traits.⁴⁸⁸

Often the discrimination involved in peripheral group discrimination is not so much an attempt at discriminating against some physically distinct other person, but rather an internal struggle within the same person. As Abel astutely noted, "straights are terrified of their homosexual feelings, and all of us know we are only temporarily able-

⁴⁸⁴ See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 40 (1994) (reporting how Justice Thomas "publicly singled [his sister] out as a case study of the kind of dependence that public assistance breeds").

⁴⁸⁵ Cf. Valdes, *supra* note 16, at 25 (arguing that Latinos must "cultivate a sense of sophisticated commonality, or post-postmodern pan-ethnicity, among the 'different' groups of Latinas/os in American society").

⁴⁸⁶ Cf., e.g., BRODKIN, *supra* note 291, at 157 (noting that for German Jews in the United States, "the desire to assimilate brought with it a reluctance to fight the growing anti-Semitism directly for fear of jeopardizing their place in society"); *infra* Part V.B.2.b (noting the lack of sympathy between different kinds of Jews).

⁴⁸⁷ See Interview with Susan Stefan, *supra* note 63. Exactly how we distinguish a physical disability from a mental disability is often not clear. Cf., e.g., Freshman, *supra* note 52, at 122 (arguing that many of the symptoms arising from dementia may sometimes be deemed a mental illness and other times a physical illness resulting from brain deterioration).

⁴⁸⁸ For an excellent study of societal attitudes toward those labeled mentally ill, see Stefan, *supra* note 88.

bodied.”⁴⁸⁹ Similarly, even though we will all eventually grow old, we may nonetheless want to prove our youth so desperately that we avoid thinking of the problems of the elderly—reflecting our ingroup sympathy for the younger—or even become hostile to the old.⁴⁹⁰ At the opposite end of the age spectrum, we were all once children, but nonetheless lack empathy with children, in part, because of our desire to prove our adult status.⁴⁹¹ Moreover, to whatever extent one can distinguish between physical and mental disabilities, we may also avoid thinking of our own deterioration in mental abilities as we age by avoiding consideration of people with mental disabilities.

All such peripheral group discrimination impedes our ability to recognize generalized discrimination. Clients do not want to describe the hardships of other atomized groups out of fear of undermining their own sense of themselves. Indeed, part of the reason many people do not describe their experience of discrimination of any kind is that they prefer not to think of themselves as part of any outgroup, however atomized or generalized it might be defined.⁴⁹² If individuals have to be part of an outgroup, they would at least like to think of themselves as “virtually” part of an ingroup; if they cannot figure out a way to deny membership in some atomized group, they would at least like to disclaim that their group has anything to do with some other outgroup.⁴⁹³ Lawyers in private practice may not want to question this

⁴⁸⁹ ABEL, *supra* note 189, at 123.

⁴⁹⁰ A large number of commentators assume that we will not discriminate on the basis of age, because some physical part of each of us was once young and will someday be old. See, e.g., Charny & Gulati, *supra* note 64, at 58 n.4 (“Age discrimination is fundamentally different from other types of discrimination since aging is something that occurs for all of us.”). This assumption, however, fails to account for the problem of peripheral group discrimination. Just as those who were once part of, or might still be named by some as part of, some outgroup such as African Americans may be the most vociferous critics of African Americans, those of us who hope to grow old may be the least empathetic to other older people. The younger “we” of today may simply have no empathy with the old “we” of tomorrow. See RICHARD POSNER, *AGING AND OLD AGE* 320-21 (1995).

⁴⁹¹ Again, we may also have a lack of empathy because we cannot deal with the pain we experienced as children. See, e.g., ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD* 6 (1981) (noting that psychoanalytic patients often “recount their earliest memories without any sympathy for the child they once were”).

⁴⁹² For many successful members of outgroups, it seems like a kind of ritual of admission as a “good” minority to deny that one ever experienced discrimination. When I was traveling as an adviser to a student team, I heard an African-American student saying that he had never experienced racism. As it happened, a colleague told me that one of the other judges in the school competition said “that black boy he needs to work on his English.” I then told the student this, and he immediately recognized that this might be a stereotyped response to him, because many people see African Americans as poor in grammar. Nevertheless, one year later I heard from yet another teacher that the same student still claimed to have never experienced discrimination.

⁴⁹³ Andrew Sullivan’s notion of “virtually normal” gays and lesbians, for example, may appeal to those relatively privileged lesbians and gays who fear a “rainbow coalition” will drag them “down.” See Andrew Sullivan, *The Conservative Case, in SAME-SEX MARRIAGE: PRO AND CON* 146, 154 (1997) (“[T]he notion of stable gay relationships might even serve to

preference. In addition, lawyers themselves—by some measures often on the periphery of elite status—may be even more blinded by peripheral group discrimination than their clients. Moreover, lawyers for advocacy organizations may be influenced by the peripheral group discrimination by the relatively advantaged who fund and dominate some of these organizations.⁴⁹⁴

b. *Bottom-Up Resistance: Anti-“Wanna-Be” Discrimination*

Horizontal hostility also describes a similar pattern of resentment and hostility: Whereas peripheral-group discrimination shows how individuals closest to an ingroup may distance themselves from the outgroup, horizontal hostility describes how individuals further from the ingroup may resent outgroup members closer to the ingroup. When groups are divided between relatively assimilated or mainstream and relatively unassimilated, then individuals who identify with the less assimilated frequently have more resentment toward those who are slightly more mainstream. Among Jews, for example, nonpracticing Jews are more assimilated than Reform Jews, Reform Jews more than Conservative Jews, and Conservative Jews more than Orthodox Jews. Conservative Jews have more negative views of Reform Jews than of Orthodox Jews, and Reform Jews themselves have more negative views of nonpracticing Jews than of Conservative Jews.⁴⁹⁵ In a number of different contexts, hostility exists against “wanna-be’s”—those outgroup members who seem closer to the ingroup.⁴⁹⁶ In a very contemporary illustration of this phenomenon, residents in the last leper colony in the United States opposed letting those who left the colony earlier return to the colony to use its facilities.⁴⁹⁷

buttress the ethic of heterosexual marriage, by showing even those excluded from it can wish to model themselves on its shape and structure.”). For criticisms of such gay and lesbian theory, see, for example, Hutchinson, *supra* note 20, at 566. During protests over then Governor Pete Wilson’s veto of a bill to ban sexual orientation discrimination, I witnessed such peripheral group discrimination directly. An acquaintance who graduated from a fancy law school turned to me in a relatively upscale gay video bar and said, “What’s wrong with these Republicans? Don’t they realize how wealthy we are and how we’d vote for all of them if it weren’t for this one thing?”

⁴⁹⁴ Within gay rights organizations, some leaders describe their mission as promoting gay rights (or combatting homophobia *per se*) as if that could neatly be separated from generalized discrimination. At an American Association of Law Schools meeting on gay and lesbian legal issues, for example, one law professor asked Elizabeth Birch, Director of the Human Rights Campaign (HRC), about why HRC did not do more for poor lesbians and gays. Birch replied that the organization was about gay issues, not about issues of poverty, however worthwhile those might be.

⁴⁹⁵ See Judith B. White & Ellen J. Langer, *Horizontal Hostility: Relations Between Similar Minority Groups*, 55 J. Soc. Issues 537, 549-50 (1999).

⁴⁹⁶ See Judith Bess White, *Horizontal Hostility: Relations Between Similar Minority Groups* 6 (1998) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

⁴⁹⁷ Barry Shlachter, *Complex Where Lepers Were Treated is No Longer Needed; Louisiana Center’s Researchers Discovered Cure*, MIAMI HERALD, Feb. 19, 1999, at 25A.

Horizontal hostility helps explain yet another barrier to recognizing generalized discrimination. Judith White and Ellen Langer, pioneers in theorizing about horizontal hostility in psychology, theorized that horizontal hostility may arise because outgroup members may view the distinctiveness of their group, such as Jewishness, as valuable in itself; therefore, the outgroup members may resent anyone who may undermine that distinctiveness by appearing relatively assimilated to the mainstream.⁴⁹⁸ From this perspective, attention to generalized discrimination would arouse particular suspicion; generalized discrimination may undermine group identity based upon the idea of suffering peculiar to a group, such as the idea that we are Jews because we have suffered from anti-Semitism, not from some more generalized form of discrimination.

C. The Limits of Rationality Analysis

Often, the discussion of barriers in negotiation and economic theory eventually leads to a conclusion that the barriers are irrational and suggests ways to overcome these barriers.⁴⁹⁹ Therefore, to suggest that evidence of generalized discrimination somehow proves that grand coalitions are rational and that fighting between various sets of individuals outside an ingroup is simply irrational would be tempting. First, to the extent that the discussion is about how one actually experiences utility, there is nothing rational in the first instance about the experience itself. A key insight of feminist theory is the discovery that many people, including women, vicariously experience harm to others, such as children, as if the harm had happened to them.⁵⁰⁰ But

⁴⁹⁸ See White & Langer, *supra* note 495, at 556 ("Distinctiveness is not a tangible good, and therefore it is easily overlooked. But if we assume that the distinctiveness of a minority group identity has value and treat it as we would a more tangible resource, then an intuitive understanding of horizontal hostility is possible."). While much of the discourse on the psychology of discrimination may seem very modern and scientific, postmodernist scholars allude to similar ideas. See, e.g., Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* 34-35 (1995) (discussing how the breakdown of communities based on a sense of a particular place may lead people to "resort to fierce assertion of 'identities' in order to know/invent who, where, and what they are"); cf. Jonathan Simon, *Inevitable Dependencies: A Comment on Martha A. Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 5 COLUM. J. GENDER & L. 152, 165 (1995) (book review) ("It is difficult to imagine how Durkheim would even locate 'France' today, with its economy determined by German bankers, and its increasingly multicultural and multilingual population.").

⁴⁹⁹ Cf. BARRIERS TO CONFLICT RESOLUTION, *supra* note 445, at 6 ("Strategic barriers can cause rational, self-interested disputants to act in a manner that proves to be both individually and collectively disadvantageous.").

⁵⁰⁰ For a general discussion of women's emotional experiences, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). One of my closest friends also shows how this applies to nonhuman animals as well. One day, my friend came back crying after a walk. I asked what was wrong, but he sobbed without answering for a while. Finally, he said, "It's the worst thing that ever happened to me."

limiting this insight on rational choice terms to the first instance is important. Arguably, individuals would have more utility if they felt greater solidarity with a wider group; the development of sympathies might prove to be a general stance that leads to greater utility.⁵⁰¹ Second, if one returns to some narrow sense of the group about whom one cares, then the questions of risk seeking and risk aversion still remain. Individuals who speak of inevitable coalitions often make the worthwhile point that one strategy to maximize success would be for various relatively disadvantaged persons to unite to make a more generally egalitarian world.⁵⁰²

Although this is one strategy, it does not address the "Archie Bunker" objection: What if an individual prefers a world of vast inequality, in which he might "win the lottery" (literally or metaphorically) and occupy a high status position? On strictly rational terms, we might say that the expected value of such a strategy, much like the expected value of winning the lottery, is low. But we cannot call pursuit of lotteries irrational until we know more about the individual's relative risk aversion. Indeed, even if we were to say that the expected utility would be greater from some other strategy, such as Black Jack, we cannot eliminate the possibility that defying the odds is itself a source of utility.⁵⁰³

If we expand the analysis from the individual person outside an ingroup, we can see that an individual might rationally seek only to redefine an ingroup so that it would include him or only a few others like him on some relatively atomized basis. The individual might have a better chance of remedying his own condition with a more generalized commitment to nondiscrimination, but he might cling to his strategy, much like the fictional Archie Bunker who fought the very kind of progressive politics that might have offered the best chance of improving his position.⁵⁰⁴ Moreover, this strategy might be rational,

Eventually, it became clear to me that the worst thing that ever happened "to him" was seeing a cat that had been brutally abused.

⁵⁰¹ Some critics of utilitarianism probably would want to reply with the paradox of hedonism: one cannot maximize happiness by trying to be happy, but rather by being involved in worthwhile projects. See, e.g., Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 75, 125-35 (1973).

⁵⁰² See, e.g., Nancy Ehrenreich, *Beyond Intersectionality* 23-24 (Nov. 7, 1998) (unpublished manuscript, on file with author); Mahoney, *supra* note 132, at 64-85. Ehrenreich suggested that "an individual's investment in his privileged status blinds him not only to others' subordination, but to his own as well . . . [because] a failure to see the inequities in another's situation actually prevents the individual from recognizing some aspect of her own." Ehrenreich, *supra*, at 23.

⁵⁰³ See Edward J. McCaffery, *Why People Play Lotteries and Why It Matters*, 1994 *Wis. L. Rev.* 71, 90-91 (explaining that the idea of people entering the lottery with hopes of "winning big" is only a partial explanation for why they do so).

⁵⁰⁴ Moreover, to the extent that a person maintains constant preference for higher position and status, the individual tends to take risky strategies to achieve preferred posi-

as McCaffery suggested of lotteries in general,⁵⁰⁵ because many individuals lack information about various alternatives. Just as individuals may play the lottery in part because they lack information about other investment opportunities,⁵⁰⁶ individuals may pursue atomized strategies rather than a general commitment to nondiscrimination because of a lack of information about the possibilities of generalized nondiscrimination. In the end, the overlapping consensus in social science suggests that the exclusive fixation with atomized discrimination is a particularly bad bed.

VI

CONCLUSION

We should pay more attention to the potential for recognizing generalized discrimination. Greater attention to generalized discrimination points to new directions for everyday lawyering, legal theory, and our public discourse. At the most mechanical level, greater attention to generalized discrimination may provide lawyers with new tools for identifying and remedying discrimination in contexts in which older tools, including even intersectionality, may fall short. Many cases, like Deborah's in the Prologue, will arise in which attention to generalized discrimination will highlight bias; fixation with atomized discrimination will often leave us with so few points of comparison that we will be unable to reach either a meaningful conclusion or a conclusion with the same degree of confidence. On a far more theoretical level, generalized discrimination prompts theorists to think more carefully about when it may be appropriate to speak of various "isms" and when it may be appropriate to think about more generalized notions of discrimination. Within the academy, this consideration may give us pause when others habitually warn against making analogies between different forms of discrimination. The framework of generalized discrimination shows how often there will not be analogies, but rather different consequences of exactly the same generalized ingroup sympathy or outgroup hostility. In terms of public life, the framework also suggests that we should open up our national dis-

tion or status. *See id.* at 94 (suggesting that one explanation for why individuals play lotteries involves "'elevation effects,' [so named] because they explain risk preference by a desire to exalt oneself into a different social status"). According to McCaffery, individuals act to change their social status because this changes their utility far more than helping the lot of their entire group:

[I]ncreases in income that raise the relative position of the consumer unit in its own class but do not shift the unit out of its class yield diminishing marginal utility, while increases that shift it into a new class, that give it a new social and economic status, yield increasing marginal utility.

Id. at 95 (citation omitted) (alteration in original).

⁵⁰⁵ *See id.* at 90-91.

⁵⁰⁶ *See id.* at 107.

course on race to include discussion of generalized discrimination as well.

In all of these contexts, we must think hard about how various concepts of discrimination—atomized, generalized, and every other combination—may shed light on particular cases, problems, and conversations. Perhaps some social scientists have been too quick to assume that so much discrimination is generalized. Perhaps the authors of *The Authoritarian Personality* went too far in forgetting anti-Semitism and in studying prejudice in general. One attractive feature of the atomized-discrimination model is its comforting message that we already know the best concept for any particular instance of discrimination. But with its complicated message, the generalized-discrimination model also offers us some hope that many of us may come together to somehow completely dismantle the division of worlds into ingroups and outgroups, rather than simply trying to make room in the ingroup for people narrowly like “us.”

Our challenging and sometimes imprecise tasks in battling discrimination resemble some of the difficulties in tackling other ills we consider diseases. We must persevere even when we recognize the difficulties of defining and treating diseases, be they cancer or racism, illness or prejudice. We may undoubtedly gain some solace from the way that natural scientists balance their focus between general research, on diseases that target parts of a body, and research on particular viruses, such as HIV. This Article should no more suggest that we divert all attention to generalized discrimination and cease consideration of atomized frameworks, such as racism and sexism, or subatomized frameworks, such as intersectionality, than a medical article should suggest that we study only the general nature of disease but not its more specific features. Instead, this Article makes a far more modest claim that lawyers, courts, legal scholarship, and much of our social discourse have become too fixated on atomized categories. Just as the focus on subatomized frameworks, such as women of color, yielded some insights and concrete results in some areas, generalized discrimination deserves more attention that may lead to concrete results in other areas. Our task—for an “us” that “we” have yet to become—is to make our world free of disease, be it the Alzheimer’s disease that corrupts the physical cells of our brains or the prejudice that warps our minds and degrades our souls.