

# MEDIA MISREPRESENTATION: TITLE VII, PRINT MEDIA, AND PUBLIC PERCEPTIONS OF DISCRIMINATION LITIGATION

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## I. A TYPICAL CASE? *CLIFTON V. MASSACHUSETTS BAY TRANSIT AUTHORITY*

In September 1999, a *Boston Globe* headline announced: “Black T Employee Wins \$5.5m in Bias Suit.” The article went on to report that an African-American employee was awarded \$5.5 million by a state Superior Court jury for racial discrimination by his employers at the Massachusetts Bay Transportation Authority (MBTA).

[T]he Massachusetts Bay Transportation Authority was ordered yesterday to pay \$5.5 million to a black employee who endured nearly a decade of racist jokes, taunts, and pranks by his supervisors and was ignored when he turned to management for help. After 2 1/2 weeks of testimony and 1 1/2 days of deliberations, a Suffolk Superior Court jury awarded Hiram Clifton, a

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longtime foreman in the MBTA's Charlestown equipment yard, \$500,000 for emotional pain and suffering and \$5 million in punitive damages.<sup>1</sup>

The article argues that this case marked the end of an era of racial and sexual discrimination in the MBTA. According to a follow-up editorial written by one of the witnesses in the case, the significant sum of damages awarded to the plaintiff was an appropriate form of justice given the culture of discrimination that the MBTA employees endured for countless years. The editorial states:

The verdict reached in Clifton's case is the result of the old administration's decision to ignore the complaints and cries for help from those who were abused . . . . I have to admit that I have feelings of great pride when I think of the positive changes implemented at the MBTA as a result of the many, many letters, meetings, and phone calls made by myself and others . . . .<sup>2</sup>

But this case had its naysayers, who argued publicly that the suit was useless and that it involved needy, fickle employees who were not strong-willed enough to withstand teasing.<sup>3</sup> In fact, one "member of the MBTA board of directors who is a minority has advised management not to deal with a group of unhappy minority employees, calling them 'disgruntled minority employees.'"<sup>4</sup> According to the cynics, Clifton and others were manipulating the American justice system and were yet another example of the "litigation explosion" that has invaded American courts.

Was the award in *Clifton* just? Did the *Clifton* case result in a more equitable working environment at the MBTA?<sup>5</sup> We may not know the answers to these questions, but systematic empirical analysis can teach us whether the *Clifton* case is representative. Or, stated differently, what the *Clifton* case represents.

This Article compares media coverage of anti-discrimination lawsuits with the dynamics and outcomes of such lawsuits in U.S. District Courts. This

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<sup>1</sup> Sacha Pfeiffer, *Black T Employee Wins \$5.5m in Bias Suit*, BOSTON GLOBE, Sept. 18, 1999, at A1; see also *Clifton v. Mass. Bay Transp. Auth.*, 11 Mass. L. Rptr. 316, 316 (Mass. Super. Ct. 2000).

<sup>2</sup> Craig J. Dias, *Justice at Last, and Now There's Hope for the MBTA*, BOSTON GLOBE, Sept. 26, 1999, at E6.

<sup>3</sup> See generally Thomas C. Palmer, Jr., *Minority T Group Criticized: AG Investigating Racial Bias Charges*, BOSTON GLOBE, Sept. 8, 1996, at B1.

<sup>4</sup> Palmer, *supra* note 3.

<sup>5</sup> As two reporters indicate, complaints of discrimination have persisted:

A Suffolk County jury awarded \$7.6 million in damages yesterday to a former executive of the Massachusetts Bay Transportation Authority who accused the agency of firing her four years ago after she complained of discrimination.

The award to Roberta Edwards was the largest ever for discrimination against the 6,500-employee transit agency. Edwards offered last year to settle the case out of court for \$625,000, but the MBTA's board of directors rejected the offer.

Raphael Lewis & Thomas C. Palmer, Jr., *Woman Wins \$7.6m Award in T Bias Suit*, BOSTON GLOBE, June 9, 2001, at A1. The underlying case is *Edwards v. Mass. Bay Transp. Auth.*, 12 Mass. L. Rptr. 395 (Mass. Super. Ct. 2000).

analysis is important in its own right as a study of the sources of popular conceptions (or misconceptions) about law and legal remedies. But it is also important for our understanding of current patterns in claiming behavior under anti-discrimination law and of the contested discourses about the significance of these trends.

The Article proceeds in seven Sections. Section I is the Introduction. Section II describes two divergent perspectives on anti-discrimination law: academics' empirically based pessimism about the effectiveness of anti-discrimination law and policy analysts' claims of American litigiousness run amok.<sup>6</sup> Section III summarizes what is already known about the ways in which the media represents the civil litigation system generally and considers what the literature leads us to expect about media reports of anti-discrimination law. Sections IV and V describe and report the results of our empirical study, which compares a sample of media accounts about employment civil rights cases to data on Title VII<sup>7</sup> claims in federal court.

According to our analysis of 645 print media accounts<sup>8</sup> of employment discrimination claims from 1990 to 2000, the courts are not as favorable to plaintiffs as the media depicts. This analysis demonstrates that *Clifton v. MBTA* is in fact representative, but not of the "typical" Title VII case. Instead, *Clifton* is representative of the way the media portrays anti-discrimination litigation, which is itself dramatically misrepresentative of the dynamics of the federal court system. Section VI of the paper considers the relationship between media coverage, public perceptions, and workplace ramifications of anti-discrimination law. The final section summarizes our conclusions.

## II. COMPETING CLAIMS ABOUT ANTI-DISCRIMINATION LAW

Employment discrimination on the basis of race is illegal and, in some

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<sup>6</sup> For a concise account of the American "hyperlexis" explosion, see Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6-11 (1983). Empirical examinations of the American litigation explosion in the legal academy started in the 1970s. See generally JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); WALTER K. OLSEN, *THE LITIGATION EXPLOSION* (1991); John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972).

<sup>7</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2000) (originally enacted as Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964)).

<sup>8</sup> We define a print "media account" as the media's description of a particular employment discrimination case, claim, or potential case. This is not the same as a news article, as more than one media account may be found in any one article. For example, a newspaper article on a landmark sexual harassment case may discuss two previous benchmark cases, and we would code all three as "media accounts" and include each in the sample.

cases, unconstitutional.<sup>9</sup> A variety of federal, state, and municipal laws and regulations offer seemingly broad legal protections from workplace discrimination for minorities,<sup>10</sup> women,<sup>11</sup> the disabled,<sup>12</sup> working parents,<sup>13</sup> and the aged,<sup>14</sup> among others. Government agencies and government lawyers, as well as for-profit and public interest plaintiffs' lawyers, seek to enforce these protections in state and federal courts. On the surface, it is a system that is actively pursuing its mandates. Charges of discrimination made to the Equal Employment Opportunity Commission (EEOC) increased 11% between 1992 and 2000.<sup>15</sup> Similarly, employment discrimination lawsuits filed in federal court rose 154% between 1990 and 2000.<sup>16</sup>

Increased statutory protection and rising rates of complaints do not tell the entire story, however. Many employers, insurance industry analysts, and commentators suggest that anti-discrimination law is a potent source of workplace rights and potential costs due to threatened or actual litigation.<sup>17</sup> For them, the passage of the Civil Rights Act of 1991,<sup>18</sup> which gave plaintiffs additional remedies and more frequent access to jury trials, has resulted in the creation of an increasingly active plaintiff's bar. These lawyers are said to be orchestrating new litigation strategies and generating larger awards against

<sup>9</sup> See U.S. CONST. amend. XIV; 42 U.S.C. § 2000e-2.

<sup>10</sup> See, e.g., *id.*; CAL. GOV'T. CODE § 12940 (West 1992); 775 ILL. COMP. STAT. 5/2-102 (2003); MASS. GEN. LAWS ch. 151B, § 4 (2003); 4 PA. CODE § 1.161 (2000).

<sup>11</sup> See Title VII, *supra* note 7.

<sup>12</sup> See, e.g., Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

<sup>13</sup> See, e.g., ALASKA STAT. § 18.80.220(a)(1) (2000); CONN. GEN. STAT. §§ 46(a)-60(a)(9) (2001); District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1400 (2001); ASPEN, COLO., MUN. CODE § 13-98 (2000); ATLANTA, GA., CODE OF ORDINANCES, NO. 2000-79, 1 (2000); CHICAGO HUMAN RIGHTS ORDINANCE, CHICAGO, ILL., MUN. CODE § 2-160-020 (1990); DADE COUNTY, FLA., CODE OF ORDINANCES § 11A-26 (1997); TACOMA, WASH., MUN. CODE, ch.1.29.050(A) (1993); see also Ending Discrimination Against Parents Act, S. 1907, 106th Cong. (1999). All state laws and municipal ordinances in this Article are as cited in Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, nn.92-102 (2002).

<sup>14</sup> See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); CAL. GOV'T. CODE §§ 12901-12906 (West 1992); 775 ILL. COMP. STAT. 5/2-102 (2003); MASS. GEN. LAWS ch. 151B, §4 (2003); 4 PA. CODE § 1.161 (2000).

<sup>15</sup> See EEOC, Charge Statistics, FY 1992 Through FY 2002, at <http://www.eeoc.gov/stats/charges.html> (last modified Mar. 8, 2004).

<sup>16</sup> This calculation is derived from statistics found in MARIKA F.X. LITRAS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 2000, at 1 (2002) [hereinafter CIVIL RIGHTS 2000] and in MARIKA F.X. LITRAS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98 (2000) [hereinafter CIVIL RIGHTS 1990-98].

<sup>17</sup> See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates For Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

<sup>18</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000).

employers.<sup>19</sup> Focusing on a few major awards, such as Hiram Clifton's, these actors portray anti-discrimination law as a "windfall for plaintiffs."<sup>20</sup>

In contrast, some social scientists, legal scholars, and potential plaintiffs view anti-discrimination law as largely ineffective in redressing employment discrimination, as biased in favor of defendants, and as providing very weak remedies for those who actually experience workplace discrimination. More skeptical still are those who see anti-discrimination law as legitimizing workplace inequality.<sup>21</sup> Social scientists point to the relative lack of progress in recent decades (that is, after major gains in the early years following the passage of the Civil Rights Act of 1964)<sup>22</sup> made by women and minorities in closing the earnings gap and in overcoming patterns of occupational segregation by sex and race.<sup>23</sup> Research on the prevalence of discrimination in the workplace shows a striking disjuncture between the perceptions of white women and people of color in the workplace and those of their white colleagues and supervisors.<sup>24</sup> The same research demonstrates that more than one-third of those who reported unfair treatment took no further action, and only 3% reported suing their employer.<sup>25</sup>

Still other scholarly research elaborates on significant barriers confronting plaintiffs, including evidence that potential plaintiffs are reluctant to complain,<sup>26</sup> that those who do complain in their organization find a

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<sup>19</sup> See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law and Practice*, 26 FLA. ST. U. L. REV. 959, 960 n.4 (1999); John J. Donohue & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: An Empirical Investigation* 15 n.27 (2002) (unpublished manuscript, on file with authors).

<sup>20</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 103-10 (1999).

<sup>21</sup> ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY* (1999).

<sup>22</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>23</sup> See generally Jerry A. Jacobs, *Evolving Patterns of Sex Segregation*, in SOURCEBOOK OF LABOR MARKETS 535 (Ivar Berg & Arne L. Kallerberg eds., 2001); Barbara F. Reskin, *Employment Discrimination and Its Remedies*, in SOURCEBOOK OF LABOR MARKETS, *supra*, at 567.

<sup>24</sup> See, e.g., HELDRICH CTR. FOR WORKPLACE DEV., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* (2002).

<sup>25</sup> *Id.* at 15.

<sup>26</sup> See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); see also F. Crosby et al., *The Denial of Personal Disadvantage Among You, Me, and All the Other Ostriches*, in GENDER'S THOUGHT: PSYCHOLOGICAL PERSPECTIVES 79 (M. Crawford & M. Gentry eds., 1989); C.R. Kaiser & C.T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227 (2003) [hereinafter *Derogating the Victim*]; C.R. Kaiser & C.T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254 (2001) [hereinafter *Stop Complaining!*]; Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in RIGHTS AND REALITIES: LEGAL AND SCIENTIFIC APPROACHES TO EMPLOYMENT DISCRIMINATION (forthcoming Fall 2004) (on file with authors).

managerialized version of dispute processes that favors the organization,<sup>27</sup> that the EEOC turns away almost 80% of complainants with no relief,<sup>28</sup> that victims are unlikely to file suit,<sup>29</sup> that plaintiffs who file lawsuits face low chances of success,<sup>30</sup> and that plaintiffs who manage to win at trial are likely to lose on appeal.<sup>31</sup> Based on findings like these, some social scientists are wary of plaintiffs' prospects for success in anti-discrimination employment law cases.

Despite the recent advances in research on discrimination claims, the myth of litigiousness is still pervasive in popular culture and in politics. The news media's misrepresentation<sup>32</sup> of tort claims significantly affects policy reform.<sup>33</sup> Haltom and McCann have shown that the 1995 congressional debates on the Republican "Contract with America" were dominated by discourse about hyperlexis presented in the news media.<sup>34</sup> Legislators and policy reformers seize upon the narratives constructed by the media to justify limitations on claims and awards and to diminish the plaintiff win rate through institutionalized control mechanisms, including damage caps and restrictions on contingency-fee arrangements that allow plaintiffs to pursue their claims in the first place.

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<sup>27</sup> See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

<sup>28</sup> See EEOC, *supra* note 15.

<sup>29</sup> See CIVIL RIGHTS 1990-98, *supra* note 16; CIVIL RIGHTS 2000, *supra* note 16.

<sup>30</sup> See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67 (1999).

<sup>31</sup> See Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. ECON. REV. 125 (2001); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989).

<sup>32</sup> Although we use the idea of "misrepresentation" to describe how the media incorrectly communicates the dynamics of antidiscrimination law to its readers, a similar notion is that of "miscognition," espoused most notably by the French sociologist Pierre Bourdieu. Bourdieu uses the term miscognition to describe a misunderstanding by the lay public induced by elites through their ability to control action, social relationships, and language. These representations by the elites are communicated through institutionalized media and thus are legitimized. Bourdieu argues that it is in part through the process of miscognition that social domination and thereby social order are reproduced. See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1972); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

<sup>33</sup> See Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

<sup>34</sup> See William Haltom & Michael McCann, *Distorting the Law: Reform Politics, Mass Media, and the Cultural Production of Legal Knowledge* (2003) [hereinafter *Distorting the Law*] (unpublished manuscript, on file with authors).

How can such dramatically different characterizations of employment discrimination law co-exist? One possible explanation lies in the media's coverage of Title VII lawsuits. By portraying employment discrimination lawsuits as those in which plaintiffs consistently and uniformly prevail, the media may be contributing to its readership's formation of an expectation of a certain outcome that is rarely met.

### III. MEDIA REPRESENTATIONS OF CIVIL LITIGATION

There is no empirical evidence about the media representation of processes and outcomes in employment civil rights claims, but there is a large and growing body of research that demonstrates the bias in media representation of the dynamics and outcomes in tort litigation<sup>35</sup> and, more specifically, how product liability litigation<sup>36</sup> is represented by the news media.

In the aggregate, the media represents plaintiff victories in tort cases far more frequently than they actually occur and jury awards as far greater than they actually are. Additionally, the media accounts are inaccurate regarding the types of torts litigated.<sup>37</sup> The national media devotes greater attention to product liability and medical malpractice cases than would be expected based on actual rates of accidents, litigation, or trial. And although in the judicial system only 3% of tort cases are disposed of through jury trial,<sup>38</sup> 63% of the cases in Bailis and MacCoun's national media sample resulted in a trial verdict of some kind,<sup>39</sup> with 38% of these cases adjudicated by a jury and 10% by a judge.<sup>40</sup> Bailis and MacCoun also found that in 85% of all the reports that clearly indicated complete adjudication—that demonstrated winners and losers—plaintiffs won.<sup>41</sup> Haltom and McCann similarly found that 78% of the stories in their national media sample detailed a plaintiff victory.<sup>42</sup>

Another dynamic component of the media representation of law is the

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<sup>35</sup> See *id.*; Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996); Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001).

<sup>36</sup> See Bailis & MacCoun, *supra* note 35; Neal R. Feigenson & Daniel S. Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCHOL. PUB. POL'Y & LAW 444 (2001); Steven Garber & Anthony Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 LAW & SOC'Y REV. 93 (1999).

<sup>37</sup> See Bailis & MacCoun, *supra* note 35; *Distorting the Law*, *supra* note 34.

<sup>38</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TORT CASES IN LARGE COUNTIES 1 (1995).

<sup>39</sup> Bailis & MacCoun, *supra* note 35, at 424-25.

<sup>40</sup> *Id.* at 425.

<sup>41</sup> *Id.*

<sup>42</sup> *Distorting the Law*, *supra* note 34, at 22.

extent to which the media overrepresents jury awards. Bailis and MacCoun's examination revealed a mean of \$1,547,000 and a median of \$318,000 for jury awards in all stories about tort litigation,<sup>43</sup> compared to a mean of \$408,000 and a median of \$51,000 for jury awards in state courts, as reported by DeFrances et al.<sup>44</sup> Haltom and McCann indicate that 93% of all settlements reported were greater than \$100,000, and 70% of all awards reported were greater than \$1 million.<sup>45</sup>

In their examination of the media's representation of automotive product liability litigation, Garber and Bower<sup>46</sup> confirm Bailis and MacCoun's<sup>47</sup> and Haltom and McCann's<sup>48</sup> findings and also systematically examine the newsworthiness of their media sample. They examine the dynamics of a case that make it worthy of coverage. Garber and Bower argue that while larger awards increase newspaper coverage, other factors also affect coverage. These include whether the newspaper is published in the same area where the trial was held, whether the reported case is punitive, whether the accident involved one or more fatalities, and whether the vehicle had previously been recalled for a reason related to a defect alleged in the trial.<sup>49</sup>

By reporting only newsworthy complaints—the small minority of claims that make it past a rigorous pre-trial process, those trials with well-known defendants, or suits with large awards or settlements—the media paints a portrait of the “civil jury [that] is biased in a manner that has important implications for . . . disputing and predispute decision making.”<sup>50</sup> They present to the American public a norm of anti-corporate, highly punitive behavior. Research on the media's representation of the law has three focal points: the factual dynamics of representation, the discourses and ideologies of that representation, and theories that explain how the first two categories affect judicial action and discourse.

This notion of newsworthiness is similar to the oft-cited typology posited by Lance Bennett: personalization, dramatization, fragmentation, and normalization.<sup>51</sup> Personalized news stories emphasize individual actors and moral stories. This emphasis on the individual frames the story as autonomous

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<sup>43</sup> Bailis & MacCoun, *supra* note 35, at 426.

<sup>44</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 5 (1995); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (1999).

<sup>45</sup> William Haltom & Michael McCann, *Hegemonic Tales and Everyday News: How Newspapers Cover Civil Litigation* 23 (1999) (unpublished manuscript, on file with authors).

<sup>46</sup> Garber & Bower, *supra* note 36.

<sup>47</sup> Bailis & MacCoun, *supra* note 35.

<sup>48</sup> Haltom & McCann, *supra* note 45.

<sup>49</sup> Garber & Bower, *supra* note 36, at 95.

<sup>50</sup> Bailis & MacCoun, *supra* note 35, at 421.

<sup>51</sup> *See* LANCE W. BENNETT, *NEWS: THE POLITICS OF ILLUSION* 21-64 (1996).



of any external environment, fragmenting the stories from broader institutional or organizational contexts. That news stories are dramatized should not be surprising—they are sensationalized to secure an audience. Finally, by normalizing, Bennett means that the outcome of the first three processes—the stories they generate—are typified. They thus become part of the reality that the news media disseminates.<sup>52</sup>

But what of the ideological characteristics of these stories? Galanter argues that these trends of misrepresentation about tort litigation allow the media to unwittingly disseminate a “jaundiced” view of the law—their disillusionment with both the hyperlexis of the justice system and juries’ capricious awarding of large sums to claimants.<sup>53</sup> The jaundiced view that the media disseminates is a particularly wicked conception of tort dynamics—sweeping generalizations of atrocity stories.<sup>54</sup> According to Galanter, the “calculating instrumentalism”<sup>55</sup> of the advocates of the jaundiced view is framed by the intersection of a set of factors,<sup>56</sup> which include lack of access to systematic knowledge about the dynamics of tort litigation and a resultant cognitive bias that ignores baseline frequencies and thus misattributes representativeness to easily remembered events.<sup>57</sup> These discourses are perpetuated and institutionalized in the popular media through both media proclivities and professional tort reformers.<sup>58</sup>

This notion coincides with Haltom and McCann’s description of the four “recurring specifics” of tort tales—media stories advanced by tort reformers.<sup>59</sup> Tort tales almost always “distinguish bogus victims from true victims to reproduce disputes as actions calculated to put off audiences.”<sup>60</sup> They almost always depict litigants as immoral and enrichment as unjust. They claim, without justification, that their stories are representative of a larger trend and “shortchange length and facts,” preferring brevity over factual accuracy.<sup>61</sup>

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<sup>52</sup> *Id.* at 23-24.

<sup>53</sup> See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) [hereinafter *Oil Strike*]; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) [hereinafter *Litigation Explosion*].

<sup>54</sup> See *Oil Strike*, *supra* note 53, at 717-21.

<sup>55</sup> *Id.* at 740-51.

<sup>56</sup> See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM ch. 1 (1995); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda Building*, 52 LAW & CONTEMP. PROBS. 269 (1989); Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71.

<sup>57</sup> D. Kahneman & A. Tversky, *On the Study of Statistical Intuitions*, 11 COGNITION 123, 124 (1982), reprinted in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 494 (D. Kahneman et al. eds., 1982).

<sup>58</sup> McCann et al., *supra* note 35; Haltom & McCann, *supra* note 45.

<sup>59</sup> Haltom & McCann, *supra* note 45, at 7.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 8.

These data are definitive. The media's representation of tort claims, litigation dynamics, and outcomes is a distortion of what really happens in courtrooms. And this misrepresentation is not a benign artifact. The bias of overrepresenting plaintiff victories and awards has a particular effect on how ordinary people think about tort victims and claimants.

This literature is important for our purposes but is not definitive with respect to anti-discrimination law. The stigma associated with claiming that one has been the victim of discrimination is not the same as that of claiming that one has been injured in a car accident.<sup>62</sup> Nonetheless, studies about civil litigation and media coverage provide an important set of questions for our analysis: Do media accounts of anti-discrimination lawsuits accurately represent what happens in courts? If not, what are the nature and magnitude of the misrepresentations? What, if any, are the effects of this bias on ordinary people, business elites, and policy makers? To return to the story with which we began, is the media account of *Clifton v. MBTA* representative of employment civil rights cases in general, or is it representative only of the media's coverage of such cases?

#### IV. METHODS AND DATA SOURCES

To answer these questions, we designed a research strategy to compare a representative sample of media accounts with accurate data about litigation dynamics and outcomes in employment civil rights cases. Content analysis of news media takes various forms in scholarly literature. Researchers interested in the media representation of law perform analysis tailored to their questions. In the studies considered in Section III, fundamental methodological issues such as sample size, sample selection, and even analytic design are treated differently. For example, in these studies, sample sizes ranged from 249<sup>63</sup> to 3,802,<sup>64</sup> and analytic methods ranged from basic cross tabulations<sup>65</sup> to nonlinear multiple regressions.<sup>66</sup> Since content analysis is a multidisciplinary method and our research is embedded in an interdisciplinary context and intended for an interdisciplinary audience, we did not adhere to one specific regimen. Like those before us, we chose a theoretically motivated and informed approach in designing our study. Our examination of media representation of employment discrimination lawsuits is informed by relevant studies but is fundamentally rooted in, and shaped by, the specific research questions we hope to answer.

We drew a random probability sample of the universe of relevant articles

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<sup>62</sup> BUMILLER, *supra* note 26, at 52-78.

<sup>63</sup> Bailis & MacCoun, *supra* note 35, at 425.

<sup>64</sup> Haltom & McCann, *supra* note 45, at 18.

<sup>65</sup> See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 772 (1995).

<sup>66</sup> See Garber & Bower, *supra* note 36, at 106.

from ten periodicals in the LexisNexis database over an eleven-year period (January 1, 1990 to December 31, 2000). It is important to note that we searched these periodicals individually using options provided by the LexisNexis online service; we did not search the entire LexisNexis news database and control for these periodicals.<sup>67</sup> The periodicals we sampled reflect a roughly equal distribution of national daily publications (*The New York Times*, *Los Angeles Times*, and *The Washington Post*), regional dailies (*The Atlanta Journal-Constitution*,<sup>68</sup> *The Boston Globe*, and *The Chicago Tribune*), and national weekly business and news magazines (*Business Week*, *Fortune*, *Newsweek*, and *Time*). This stratified list provides a reasonably accurate measure of trends in national and local media and also includes media that cater to business elites.

Electronic searches for newspaper and magazine articles can be problematic for a variety of reasons. The LexisNexis databases can be wildly arbitrary—they can yield different results when the same standardized search is performed over subsequent days. According to LexisNexis, there is always the potential for differing results from the same search.<sup>69</sup> Despite these limitations, our searches yielded the same results for our ten periodicals using the same keyword search<sup>70</sup> for five consecutive days (October 10-14, 2002). That is, each search yielded the identical number of articles. Although this test does not demonstrate the infallibility of the LexisNexis database, it satisfies our basic requirement of reliability. After selecting a random sample of 130<sup>71</sup> articles from each set of search results, we read each article for relevance to employment discrimination litigation and eliminated irrelevant articles. This filtering process ultimately generated a working sample of 532 media articles;

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<sup>67</sup> If we searched the entire news database, we would have missed each paper's coverage of Associated Press articles, as LexisNexis excludes those accounts from the general news database to avoid multiple replications of the same article.

<sup>68</sup> LexisNexis coverage of the *Atlanta Journal-Constitution* begins on January 1, 1991. The coverage of all other sources in our sample begins on January 1, 1990.

<sup>69</sup> Personal communication with LexisNexis customer service representative (May 16, 2003). LexisNexis will often take down files from its website for maintenance. It also adds new news sources every day and sometimes removes sources when contracts with news sources expire. LexisNexis also had to systematically remove articles from freelance writers pursuant to *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>70</sup> We used the following LexisNexis keyword search: BODY(("TITLE VII" OR "AMERICAN WITH DISABILITIES ACT" OR (allcaps (eoc)) OR "EQUAL EMPLOYMENT OPPORTUNITY ACT" OR ((JOB OR WORK OR WORKPLACE OR EMPLOYMENT OR SEX OR SEXUAL OR GENDER OR RACE OR RACIAL OR AGE OR OBESITY OR DISABILITY OR "SEXUAL ORIENTATION" OR "SEXUAL PREFERENCE") W/1 DISCRIMINATION) OR ((SEX OR SEXUAL OR GENDER OR DISABILITY) W/1 HARRASMENT))) AND (LAWSUIT OR JURY OR LITIGATION OR SETTLEMENT) AND (EMPLOYEE))).

<sup>71</sup> All newspaper searches yielded more than 130 results, while all magazine searches yielded fewer than 130 results. In the latter cases, we included the universe of media accounts yielded by the search.

Table 1 indicates the distribution of articles for each periodical in our sample.

We then coded each media account in the articles according to the following variables: discrimination type, plaintiff, procedural posture, adjudication outcome (if reported), award (if reported), and appellate outcome (if reported). This coding process yielded 645 media accounts of employment discrimination cases or potential cases.<sup>72</sup> It is this sample of 645 media accounts that we analyze in the following Sections.

Variation in the number of articles about employment discrimination lawsuits among the different periodicals in the study—for example, ninety-two relevant articles from *The Atlanta Journal and Constitution* and only one from *Fortune*—may mean this analysis is less uniform across periodicals. But it also demonstrates where stories of antidiscrimination lawsuits largely are told. For example, regional newspapers yielded significantly more articles than the national newspapers and magazines. This highlights the cultural availability of these media representations.

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<sup>72</sup> We obtain more “media accounts” than articles because, as stated in note 8 above, a single article from a newspaper may contain a discussion of multiple cases. Each case mentioned in an article is coded as an “account.”

TABLE 1			
Distribution of Media Sample by Periodical <sup>1</sup>			
Periodical	N News Articles	N Media Accounts	Date Collected
The Atlanta Journal and Constitution	92	112	September 25 and October 2, 2002
The Boston Globe	86	98	October 9, 2002
Chicago Tribune	82	94	October 14, 2002
Los Angeles Times	72	92	October 16, 2002
The New York Times	73	97	October 16, 2002
The Washington Post	65	67	October 16, 2002
Business Week	33	48	October 21, 2002
Fortune	1	1	October 21, 2002
Newsweek	15	19	October 21, 2002
Time Magazine	13	17	October 21, 2002
<b>Total</b>	<b>532</b>	<b>645</b>	
<sup>1</sup> We define a print media account as the media's description of a particular employment discrimination case, claim, or potential case. This is not the same as a news article, as more than one account can be found in any one article. For example, a newspaper article on a landmark sexual harassment case may discuss two previous benchmark cases, and we would code all three accounts for inclusion in our sample.			

National newspapers tend to have a readership with a greater proportion of cultural and socioeconomic elite than those of more regional newspapers. We can only speculate on what this may mean. Perhaps this trend indicates that the elite play less of a role in the construction and ultimate dissemination of cultural ideas about employment discrimination litigation. Or perhaps elites demand more sophisticated analysis of the legal system in the media outlets they patronize.

In order to be meaningful, our analysis of media accounts must be compared to "baseline" data about employment discrimination lawsuits in federal and state court. Locating reliable data proved very difficult. The dearth of reliable data about the litigation dynamics of anti-discrimination law merits serious scholarly attention; we are not the first scholars of discrimination to indicate as much. Aside from the data collected and analyzed by Donohue and

Siegelman in their earlier work, there is precious little data about court filings.<sup>73</sup> Donohue and Siegelman lament the lack of reliable data on tort litigation in both the state and federal courts and found it even more difficult to obtain reliable data on the dynamics of employment discrimination lawsuits. They also point out that some of the most comprehensive existing data about trial awards may be flawed.<sup>74</sup>

After examining a number of datasets for comparison, we ultimately determined that the most accurate dataset for our purpose is the one underlying a Bureau of Justice Statistics (BJS) special report: *Civil Rights Complaints in U.S. District Courts, 1990-98*<sup>75</sup> and its updated version, *Civil Rights Complaints in U.S. District Courts, 2000*.<sup>76</sup> The data reported for purposes of comparison are drawn from these reports as well as from our independent analyses of the BJS data.<sup>77</sup>

The BJS reports were initially problematic because for some variables the reports analyze data about *all* civil rights claims in federal court. Thus, the reports include employment (Title VII) claims as well as civil rights claims such as housing, voting, welfare, and "other" civil rights complaints.<sup>78</sup>

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<sup>73</sup> See John J. Donohue & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993) [hereinafter *Employment Discrimination*]; John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) [hereinafter *Employment Discrimination Litigation*]; Donohue & Siegelman, *supra* note 19.

<sup>74</sup> Donohue and Siegelman write:

We note our reservations about the quality of the Administrative Office data on award size. Specifically, the data tape is supposed to indicate the award in thousands of dollars (so that an entry of "4" means \$4000). We were therefore surprised to learn that 95 cases were deemed to have awards in excess of \$10 million! To assess the accuracy of the data tape, we searched LEXIS for all 95 of these cases and for 34 other cases drawn from the sample of awards listed as being between \$1 million and \$10 million (the highest possible entry). Of these 129 awards, the published opinions contained information about the dollar award in 28 cases (22%). In every case, the amount of the award shown on the tape vastly overstated the actual amount awarded by the court. For example, in one case the tape listed the award as "3863" (in thousands), while the correct number for attorney's fees was 38.63. (The damages award in that case was actually \$106,635; costs of \$12,452 were also awarded.) In another case, the tape listed "2700" when the true number in thousands was 27 (\$27,000). In another case, an award that should have been 70 (\$70,000) appears as 7000 (which we would have interpreted as \$7 million). As a result, we were forced to delete 301 awards (of a total of 4581 positive awards) listed as having been larger than \$1 million. Our tests of awards less than \$1 million thankfully revealed a higher degree of accuracy, which persuaded us to repose confidence in the regression process to screen out the effects of what we hope are randomly distributed errors.

*Employment Discrimination*, *supra* note 73, at 760 n.98.

<sup>75</sup> CIVIL RIGHTS 1990-98, *supra* note 16.

<sup>76</sup> CIVIL RIGHTS 2000, *supra* note 16.

<sup>77</sup> We obtained the BJS raw data and worked with a statistician from BJS to replicate the findings reported by BJS. Once we gained mastery of the data set, we performed our independent replication of the BJS report data and also conducted analyses for employment civil rights claims only. The authors gratefully acknowledge Ryon Lancaster's assistance with the data.

<sup>78</sup> [T]he primary source of data presented in . . . [*Civil Rights Complaints*] is the

Throughout this Article, all analyses using data from the BJS reports refer to employment civil rights complaints only. Where BJS reported aggregated civil rights data, we conducted and relied on our analyses of the Administrative Office U.S. Courts (AOUSC) data to show results from our analysis of the data based on employment claims only.

The dearth of reliable claiming and outcome data is worth noting here. From a purely research-oriented perspective, this lack of data precludes more reliable research on the dynamics of the court system. We are left with few resources to confront the fact that “policymakers and industry leaders have been operating from questionable, if not false, premises.”<sup>79</sup> The “sense that America is uniquely cursed by rampant community-destroying legalism”<sup>80</sup> is difficult to confront without reliable data.

## V. RESULTS

The media accounts portray greater win rates and higher award amounts in employment discrimination lawsuits than is the case in federal court outcomes. Portrayals of the dynamics of litigation are skewed as well. Representation of adjudicatory methods and settlement rates are closer to the actual rates, but the media dramatically overrepresents class action suits. Our results are summarized in Table 2.

### A. Win Rates

In our media sample, plaintiffs prevailed in 85% of all adjudicated cases, meaning that of those media accounts in which a victor was announced, plaintiffs won 85% of the time. This rate of plaintiff victory is dramatically higher than the actual 32% plaintiff win rate in U.S. District Court cases during the same time period (1990-2000).<sup>81</sup> Media accounts of adjudicated cases present a plaintiff win rate that is more than double the actual win rate for plaintiffs in federal court.

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Administrative Office U.S. Courts Civil Master File . . . The Federal civil rights categories used in this report are based on the codes established by the Administrative Office of the United States Courts (AOUSC). Case level information is provided by individual U.S. district courts, which submit data to the AOUSC.

CIVIL RIGHTS 1990-98, *supra* note 16, at 11.

<sup>79</sup> James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 481 (1990). See generally Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

<sup>80</sup> *Litigation Explosion*, *supra* note 53, at 38.

<sup>81</sup> Administrative Office of the U.S. Courts, Civil Master File, 1999-2000 [hereinafter Civil Master File].

**TABLE 2**  
**Media Account and Court Reports of Employment Discrimination Complaints**  
**January 1, 1990 – December 31, 2000**

	Media Accounts of Cases <sup>1</sup>	U.S. District Court Cases <sup>2</sup>	Significance <sup>3</sup>
<b>Plaintiff Win Rate</b>			
Overall win rate	85.34% (116)	32.04%	***
Jury win rate	97.87% (47)	40.81%	***
Bench win rate	67.50% (40)	20.42%	***
<b>Plaintiff Awards<sup>4</sup></b>			
Mean award of jury trials	\$2,579,289 (45)	\$1,114,396	**
Median award of jury trials	\$1,100,000 (45)	\$150,000	NA
Mean award of terminated cases	\$5,156,933 (270)	\$1,077,953	**
Median award of terminated cases	\$3,640,000 (270)	\$125,000	NA
<b>Method of Adjudication</b>			
Jury trial	54.02% (82)	61.05%	***
Bench trial	45.98% (82)	33.43%	***
<b>Settlement Rate</b>	60.55% (357)	58.03%	—
<b>Plaintiff</b>			
Government	15.08% (398)	3.38%	***
Class Action	33.67% (398)	0.26%	***
* p<.05, ** p<.01, *** p<.001			
Note: Data represents individual media reports of cases, not individual cases. N in parentheses. The values for the district court cases were drawn from the Administrative Office of the U.S. Courts, Civil Master File, annual.			
<sup>1</sup> The number of cases varies because not all media accounts report all data.			
<sup>2</sup> Source: Administrative Office of the U.S. Courts, Civil Master File, annual. Data represents employment discrimination claims.			
<sup>3</sup> Two-tailed t-test of the equality of the means for the media accounts of cases and the U.S. District Court cases.			
<sup>4</sup> Plaintiff awards are capped at \$10 million to allow comparison with the U.S. District Court data, which capped the reporting of awards at \$10 million.			

When media accounts cover jury trials specifically, the discrepancy is equally dramatic. Of all the jury trials discussed in our media sample, an astonishing 98% of them described a victorious plaintiff, while in reality only 41% of U.S. District Court plaintiffs won at jury trial.<sup>82</sup> Media accounts thus overrepresent plaintiff victory in jury cases by more than a factor of two.

<sup>82</sup> *Id.*



Media accounts of bench trials depicted successful plaintiffs in 68% of all reports on terminated cases, whereas only 20% of bench trials in U.S. District Courts ended in plaintiff victories.<sup>83</sup>

#### B. Awards

The media's inflation of awards in employment discrimination lawsuits is also dramatic. As Table 2 indicates, the median jury award reported in media accounts is \$1,100,000, while the actual figure in U.S. District Courts from 1990-2000 was \$150,000.<sup>84</sup> Thus, readers of print media are exposed to a representation of Title VII awards that is over seven times greater than the actual median award in federal employment discrimination cases. This trend also holds for all terminated cases. (Terminated cases are those that are concluded without an award by a jury or judge, although they may result in a settlement.) The median award for all terminated cases is \$3,640,000 in our media sample, while the actual median award in U.S. District Courts is \$125,000.<sup>85</sup> Readers see an average award or settlement that is almost thirty times greater than what plaintiffs in federal district court are actually awarded.

#### C. Dynamics of Litigation: Plaintiffs, Fact-Finders, and Settlement Rates

The media is somewhat more accurate in presenting the dynamics of adjudication for employment civil rights claims, but is still misleading nonetheless. The rate of settlement makes up a comparable proportion of both our sample and the one examined by the BJS (around 60%). However, jury trials constitute 61% of all terminated cases in federal courts, but occur only 54% of the time in our media sample. Bench trials, on the other hand, are overrepresented in the media, occurring 46% of the time compared to 33% of the time in federal court.

Plaintiffs tend to be misrepresented in the media as well. Media accounts represent the government (meaning the EEOC) as the plaintiff 15% of the time, but this number is only 3% in federal district court. This gives readers the impression that the EEOC is far more active in pursuing claims to court than is actually the case. Class action suits are also disproportionately represented in our media sample. Plaintiffs who were part of a class action made up 34% of all plaintiffs in media accounts, yet constituted only a fraction of 1% of actual cases in U.S. District Courts.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; see also CIVIL RIGHTS 2000, *supra* note 16, at 2. In this sample of media accounts, the mean jury award is \$2,579,289. The discrepancy between the median and mean in our sample can be attributed to the fact that jury trials that award plaintiffs particularly large damages are disproportionately reported.

<sup>85</sup> Civil Master File, *supra* note 81; see also CIVIL RIGHTS 2000, *supra* note 16, at 2.

*D. Report-level vs. Case-level Data: The Effect of Large Awards*

In this examination, we compare media accounts to case outcomes and dynamics. Our sample of media accounts analyzed thus far includes multiple media accounts of a single case. Some newspaper readers, however, may notice that a lawsuit they read about today is the same one they read about yesterday. Because some astute readers may conduct such detailed analysis of the news they consume, we determined that it was necessary to repeat our analysis of the media accounts at the case level, excluding all but one media account for any particular named case.

Analyzing the data by case also allows for an examination of the extent to which the media's coverage of anti-discrimination lawsuits is driven by over-reporting on a few very large cases. Given the level of media coverage of large cases, counting each case only once (as opposed to how frequently they actually appear in news publications) should result in a decline in the average jury awards in media accounts if coverage is dominated by a limited number of large cases.

To test this, we recoded the sample of media accounts by case (when mentioned), collapsing the data for cases about which more than one media article appeared and calculating the mean of all variables.<sup>86</sup> To create mean awards for each case, we averaged all the reported awards for the case. As Table 3 indicates, the trends discussed above hold even when multiple accounts of a single case are merged into one.

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<sup>86</sup> For example, if there was an award against Company P for \$3,000,000 that generated fourteen media accounts, it was entered in the new database only once. If different award amounts were reported in the media accounts, we calculated the mean from all reported award amounts.

<b>TABLE 3</b> <b>Media Accounts (at Case Level) and Court Reports of Employment Discrimination Complaints</b> <b>January 1, 1990 – December 31, 2000</b>			
	<b>Media Accounts of Cases<sup>1</sup> (Individual Cases)</b>	<b>U.S. District Court Cases<sup>2</sup></b>	<b>Significance<sup>3</sup></b>
<b>Plaintiff Win Rate</b>			
Overall win rate	82.80% (93)	32.04%	***
Jury win rate	97.44% (39)	40.81%	***
Bench win rate	61.29% (31)	20.42%	*
<b>Plaintiff Awards<sup>4</sup></b>			
Mean award of jury trials	\$2,131,757 (37)	\$1,114,396	**
Median award of jury trials	\$990,000 (37)	\$150,000	NA
Mean award of terminated cases	\$3,025,335 (140)	\$1,077,953	***
Median award of terminated cases	\$902,500 (140)	\$125,000	NA
<b>Method of Adjudication</b>			
Jury trial	55.72% (61)	61.05%	—
Bench trial	44.28% (61)	33.43%	*
<b>Settlement Rate</b>	46.38% (207)	58.03%	***
<b>Plaintiff</b>			
Government	14.98% (207)	3.38%	***
Class Action	17.87% (207)	0.26%	***
<p>*p&lt;.05, ** p&lt;.01, *** p&lt;.001</p> <p>Note: Data represents media reports of individual cases, not individual media accounts. N in parentheses. The values for the district court cases were drawn from the Administrative Office of the U.S. Courts, Civil Master File, annual.</p> <p><sup>1</sup> The number of cases varies because not all media accounts report all data. <sup>2</sup> Source: Administrative Office of the U.S. Courts, Civil Master File, annual. Data represents employment discrimination claims.</p> <p><sup>3</sup> Two-tailed t-test of the equality of the means for the media accounts of cases and the U.S. District Court cases.</p> <p><sup>4</sup> Plaintiff awards are capped at \$10 million to allow comparison with the U.S. District Court data, which capped the reporting of awards at \$10 million.</p>			

When any individual legal case is counted only once, the overall plaintiff win rate and the plaintiff win rate in bench and jury trials remain roughly the same as in the previous analysis. Thus, even the sophisticated news consumer who discounts multiple reports on the same case is exposed to a plaintiff win rate over two times higher than it is in fact.

The means of the jury trial awards and awards from all terminated cases are, as was expected, lower in this analysis, although not by a large margin. We attribute this trend to the fact that very large awards are considered more newsworthy and thus generate more news coverage. Even after controlling for multiple accounts, however, the median jury award presented in the media (\$990,000) remains over six times higher than the median jury award in federal courts (\$150,000). Similarly, the median award of all terminated cases when the media accounts are analyzed at the level of the case (\$902,500) is over seven times larger than the median award of \$125,000<sup>87</sup> of all terminated cases in U.S. District Courts.<sup>88</sup>

As a further, very conservative check on our data, we performed a final reanalysis of the effect that a few very large cases may have on jury award reports in the media. To do so, we reanalyzed the data after completely eliminating all cases that were the subject of multiple media accounts. In other words, if a particular case was mentioned more than once, it was excluded. This refinement totally eliminates what surely are the most “newsworthy” (and often the largest) cases. Although it is no longer representative of the news media’s representation of employment anti-discrimination lawsuits, we hypothesized that coverage of everyday lawsuits that merit only one story in the paper may be more representative of the typical case in federal court. But they are not.

Even limiting our analysis to include only cases that occur in one media account in our sample, jury awards remain dramatically inflated. The mean jury award using this method of analysis is \$2,114,000 and the median jury award is \$765,000 (results not shown in tables). The discrepancy between the mean and the median demonstrates that, even with this very conservative analysis, the media disproportionately covers high award cases, even if they

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<sup>87</sup> Civil Master File, *supra* note 81.

<sup>88</sup> It is also informative to compare the difference between the mean and the median awards for the media and district court data. The absolute difference between the mean and median for media reports (Table 2) and for media accounts of cases (Table 3) is larger than the absolute difference between the mean and median for terminated district court cases (the same values are present in both Table 2 and Table 3). However, the proportional difference between mean and median is smaller for the media reports, and cases are made up of a sample of larger cases across the distribution. Indeed, the median of terminated cases in the media accounts (Table 2) is three and one-half times larger than the mean award for the terminated cases in the district court file.

are only covered once. Furthermore, the median award reported in the media (\$765,000) remains almost five times greater than the median award in courts (\$125,000) (data not shown in tables).<sup>89</sup>

These data demonstrate dramatic differences between media accounts of employment discrimination cases and the actual dynamics and outcomes of litigation. These dramatic differences are not simply random variations. Instead, the differences arise from the systematic portrayal of plaintiff-victors that receive large awards. Moreover, our analysis demonstrates that the misrepresentation cannot be explained away as an artifact of over-reporting on a few, very large cases. The media representation of employment discrimination litigation and outcomes can only be described as a *misrepresentation* of what happens in courts.

As is clear with regard to media coverage of tort claims, employment discrimination claims similarly are portrayed as a windfall for plaintiffs. However, the ramifications of media misrepresentation of employment discrimination are very different from the ramifications of media misrepresentation of tort claims.

As we show in the Section that follows, the media misrepresentation of employment discrimination claims has significant effects on ordinary citizens' understanding of the law as well as business elites' formation of workplace policies and practices that have important consequences for employment equality in the United States.

## VI. MEDIA ACCOUNTS, PUBLIC PERCEPTIONS, AND WORKPLACE RAMIFICATIONS

The results presented in the preceding Section demonstrate the enormous discrepancy between what actually happens to Title VII plaintiffs in federal court and what the print news media presents. Why is this discrepancy important? If the media's portrayal of anti-discrimination law affected nothing but newspaper sales, the discrepancy would be of no importance. But this is not the case. This Section argues that this discrepancy is important on two levels.

First, there is a large body of research demonstrating that the media affects how people understand the law. We argue that the media is an important source of laypeople's understanding of the law. Using a theory of "legal consciousness," we show how individuals' understanding of and decisions about law are shaped by interactions with individuals and objects (such as media reports). In other words, Americans' beliefs and expectations are shaped, in large part, by media portrayals. If the media paints a distorted picture, Americans come to have a distorted view. The dramatic misrepresentation of plaintiffs as universally victorious recipients of large

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<sup>89</sup> Civil Master File, *supra* note 81.

awards undoubtedly affects popular conceptions, which may translate into juror beliefs and partially account for some of the rise in claims documented in Section II.

A second reason to fully understand the nature of the media misrepresentation of anti-discrimination law is that these media accounts are used by a variety of business and policy professionals to justify practices affecting the American workplace. The media's creation of a dramatically over-inflated fear of employment discrimination lawsuits has concrete effects in the workplace. Some scholars argue that the fear of liability in employment civil rights cases may in fact be undermining equality in American workplaces.

#### A. *Public Perception and Legal Consciousness*

How do individuals incorporate information they garner from the news media into their everyday understanding of the world and the way law works? And how does this translate into decisions about whether or not to look to law to solve problems in the workplace?

The media are a powerful source of information for lay citizens.<sup>90</sup> "Much of what Americans know, or only think they know, about legal issues comes from media portrayals."<sup>91</sup> These media portrayals are often distorted, and "[o]n many crucial legal issues, folklore readily passes for fact, and serious research plays not even a walk-on role."<sup>92</sup>

Empirical research demonstrates that media accounts affect which issues their audiences take seriously.<sup>93</sup> In a series of articles, Iyengar and his colleagues have demonstrated the many ways in which television news affects its viewers' attitudes towards social and political issues. For example, Iyengar, Peters, and Kinder demonstrate "that by ignoring some problems and attending to others, television news programs profoundly affect which problems viewers take seriously. This is so especially among the politically naïve, who seem unable to challenge the pictures and narrations that appear on their television sets."<sup>94</sup> Put another way, media accounts provide the basis

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<sup>90</sup> See JOHN FISKE, *MEDIA MATTERS: EVERYDAY CULTURE AND POLITICAL CHANGE* (1994).

<sup>91</sup> Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1347 (2002).

<sup>92</sup> *Id.*

<sup>93</sup> Shanto Iyengar et al., *Experimental Demonstrations of the "Not-So-Minimal" Consequences of Television News Programs*, 76 AM. POL. SCI. REV. 848, 855 (1982). Iyengar and Kinder argue that network news influences agenda-setting: "[T]hose problems that receive prominent attention on the national news become the problems the viewing public regards as the nation's most important." SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* 16 (1987). See generally Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949 (1994).

<sup>94</sup> Iyengar et al., *supra* note 93, at 848.

from which ordinary citizens develop cognitive scripts<sup>95</sup> or systems of understanding that characterize a set of real-life expectations<sup>96</sup> on a variety of subjects, including law.<sup>97</sup> The media is thus one powerful source that shapes individuals' "legal consciousness."<sup>98</sup>

Simply put, "legal consciousness" is the way people think about and understand the law. It is meant to be more than a set of attitudes or preferences, however. Consciousness is "embedded in the practical constitution of everyday life, part and parcel of the process whereby the subject is constructed by external sociocultural forms."<sup>99</sup> In other words, consciousness is shaped by stories to which individuals are exposed as well as the relationships and networks in which individuals operate; it is formed through the interaction of individuals with cultural objects<sup>100</sup>, including the media. These collective, patterned ideas about society are culturally available

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<sup>95</sup> Abelson describes a cognitive script as a "coherent sequence of events expected by the individual, involving him either as a participant or as an observer." Robert P. Abelson, *Script Processing in Attitude Formation and Decision Making*, in COGNITION AND SOCIAL BEHAVIOR 33, 33 (John S. Carroll & John W. Payne eds., 1976) (emphasis omitted). See generally ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING* (1977); Robert P. Abelson, *The Psychological Status of the Script Concept*, 36 AM. PSYCHOL. 715 (1981); Robert J. MacCoun, *Blaming Others to a Fault?*, 6 CHANCE 31 (1993).

<sup>96</sup> Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000).

<sup>97</sup> There is much sociological research—as compared to the psychological research discussed in note 95—that also examines how the news media constructs the cultural frames in which laypeople think about the law, crime, and politics. See generally RICHARD V. ERICSON ET AL., *REPRESENTING ORDER: CRIME, LAW, AND JUSTICE IN THE NEWS MEDIA* (1991); KATHLEEN HALL JAMIESON, *DIRTY POLITICS* (1992); MALCOLM SPECTOR & JOHN I. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* (1977); Lawrence Friedman, *On Stage: Some Historical Notes About Criminal Justice*, in SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 68 (Patricia Ewick et al. eds., 1999).

<sup>98</sup> See PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 39 (1998); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000).

<sup>99</sup> JEAN COMAROFF, *BODY OF POWER, SPIRIT OF RESISTANCE: CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE* 4-5 (1985).

<sup>100</sup> Griswold defines cultural objects as "meaning embodied in symbols." WENDY GRISWOLD, *CULTURES AND SOCIETIES IN A CHANGING WORLD* 14 (1994). Physical objects do not become cultural, per se, until they become part of human discourse. For example, she writes that

[i]f a poet sings her odes in the wilderness with no one to hear or record, if a hermit invents a revolutionary new theology but keeps it to himself, if a radio program is broadcast but a technical malfunction prevents anyone from hearing it, then these are potential cultural objects but not actual ones. It is only when such objects become public, when they enter the circuit of human discourse, that they enter the culture and become cultural objects.

*Id.*; see also WENDY GRISWOLD, *RENAISSANCE REVIVALS: CITY COMEDY AND REVENGE TRAGEDY IN THE LONDON THEATRE, 1576-1980* (1986).

and systematically employed, but with certain variation. These ideas are what Sewell labels “schemas”—a “society’s fundamental tools for thought.”<sup>101</sup>

Because consciousness is created through the interaction of individuals and social structures,<sup>102</sup> the media’s influence on legal consciousness should not be underestimated. By examining the cultural schemata that inform individual and cultural assumptions about the dynamics of anti-discrimination law and employment discrimination complaints, we see—in dramatic form—the narratives that inform people’s thoughts about the law.

Media coverage of employment discrimination complaints is processed by individuals. Through repeated and patterned reading of that coverage, individuals come to possess cultural knowledge about the law. This cultural knowledge is not a replication of what the media indicates, but a restructuring of it that requires integration from other processes and artifacts that create cultural knowledge. The media story is incorporated by individuals and interpreted through preexisting worldviews and the organizational and institutional contexts in which they operate. Thus, the misrepresentations that the media disseminates make their way into the worldviews of people who interact with the media, perpetuating and exacerbating those misrepresentations. But of what consequence?

If the culturally available story is one of universal plaintiff victories with enormous awards in employment discrimination lawsuits, it builds a set of expectations for potential plaintiffs, business people, and human resources professionals, as well as for other workplace professionals, judges, and policy makers.

Ordinary workers who come to think of the anti-discrimination law system as a windfall for plaintiffs may come to have unrealistic expectations about what constitutes illegal workplace discrimination and their likelihood of winning (should they pursue a claim), as well as the remedy they are likely to obtain should they prevail. These unrealistic expectations may be one of the many factors fueling increased claiming behavior in the last decade.<sup>103</sup> It is

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<sup>101</sup> William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 8 (1992).

<sup>102</sup> Grand theories about the social construction of knowledge and the ontology of knowledge are disparate, but we espouse a common ground: we consider both individuals and social structures to play fundamental roles in creating knowledge. Some of the mechanisms that are often emphasized in this line of thinking are structuration (the recursive relationship between human agents and patterns of social relationships), *see generally* ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984), the utilization of schema and resources, *see generally* Sewell, *supra* note 101, and the accessing of cognitive knowledge structures, *see generally* ROY D’ANDRADE, *THE DEVELOPMENT OF COGNITIVE ANTHROPOLOGY* (1995); Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263 (1997).

<sup>103</sup> Other explanations for the apparent rise in employment discrimination complaints are the increased damages provided by the 1991 Civil Rights Act, *see Employment Discrimination Litigation*, *supra* note 73, an increasingly active plaintiffs’ bar, and



important to note that although there has been an increase in claiming behavior over the last fifteen years, it is still the case that the vast majority of employees who think they have been discriminated against in the workplace do not pursue a formal complaint either within the organization or with the appropriate state or federal agency.<sup>104</sup>

### B. *Workplace Ramifications*

It is difficult to measure exactly how much the media influences legal consciousness and how much increasing claiming behavior can be attributed to media accounts. We do know, however, that media accounts are used as part of management and insurance professionals' efforts to shape policies and practices in American workplaces. In this way, we see that "[t]he way journalists frame their coverage helps reshape the legal world that they claim only to represent."<sup>105</sup>

Media portrayals are used by management professionals and those in the insurance industry to create a market for the products and services they provide. It may be that business and insurance professionals unwittingly accept the media's portrayal of anti-discrimination law, responding in ways that seem rational given the magnitude of the threat presented by the media. Or, the use of media accounts may be part of a calculated effort to create demand for the very services they provide. Whatever the motivation of these professionals, the various ways they use media portrayals of employment discrimination affect the American workplace.

Previous empirical research has reliably demonstrated that employers and human resources departments tend to overestimate and therefore overcompensate for the risk of legal liability for various employment decisions, including decisions about employee termination.<sup>106</sup> There is some evidence that the threat of employment liability has had a backlash effect whereby employers choose not to hire members of protected groups for fear of incurring legal liability should they have to be terminated at a later time.<sup>107</sup>

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changing consciousness more generally.

<sup>104</sup> See HELDRICH CTR. FOR WORKPLACE DEV., *supra* note 24; LAURA BETH NIELSEN & ROBERT NELSON, *THE LEGAL CONSTRUCTION OF DISCRIMINATION: A SOCIOLOGICAL MODEL OF EMPLOYMENT DISCRIMINATION LAW* (Am. Bar Found. Working Paper Series, No. 2204, 2003).

<sup>105</sup> Deborah L. Rhode, *A Bad Press on Bad Lawyers: The Media Sees Research, Research Sees the Media*, in *SOCIAL SCIENCE, SOCIAL POLICY AND THE LAW*, *supra* note 97, at 139; see also FISKE, *supra* note 90.

<sup>106</sup> Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *LAW & SOC'Y REV.* 47 (1992); Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination in the United States and Canada*, 21 *LAW & POL'Y* 247 (1999).

<sup>107</sup> See Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire?*, 45 *J.L. & ECON.* 41 (2002); Devah Pager, *The Mark of a*

The insurance industry, anxious to capitalize on these fears, trumpets large awards to sell liability insurance to employers. "Employment Practices Liability Insurance" (EPLI) insures employers against employee claims of wrongful employment practices, including charges of discrimination.<sup>108</sup> EPLI is an effort to make the risk of being liable in an employment civil rights claim predictable. Like all insurance products, these are designed to generate profits, and the sale of these products is furthered by emphasizing risk. Using media accounts in their sales pitches lends the air of neutral authority to insurance companies' claims of a litigation explosion in employment civil rights cases.<sup>109</sup>

In the workplace, the threat of employment discrimination affects workplace morale. Although people are generally loathe to attribute their own bad outcomes to discrimination,<sup>110</sup> workers who do claim that race is affecting how they are perceived on the job are characterized as "making excuses" for their own shoddy work or as seeking the easily available cash award or settlement that accompanies the filing of an employment discrimination lawsuit.<sup>111</sup>

In the courtroom, jurors proceed warily in evaluating plaintiffs' claims when the plaintiffs themselves may be responsible for their troubles.<sup>112</sup>

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*Criminal Record*, 108 AM. J. SOC. 937 (2003). It is important to note that the Civil Rights Act prohibits making hiring decisions based on race. However, complaints about hiring decisions are only a small part of EEOC complaints and are clearly more difficult to prove than termination claims.

<sup>108</sup> For more on Employment Practice Liability Insurance, see THE EPL BOOK: A PRACTICAL GUIDE TO EMPLOYMENT PRACTICES LIABILITY AND INSURANCE (Andrew Kaplan et al. eds., 1997); Douglas R. Richmond, *Insurance Coverage for Wrongful Employment Practices*, 48 OKLA. L. REV. 1 (1995); Stephen L. Weber, *Sexual Harassment Lawsuits: Does the Commercial General Liability Insurance Policy Protect the Employer?*, 22 W. ST. U. L. REV. 381 (1995).

<sup>109</sup> W. Bielby & M. Bourgeois, *Insuring Discrimination: Making a Market for Employment Practice Liability Insurance* (2002) (unpublished paper presented at annual meeting of the American Sociological Association, on file with authors).

<sup>110</sup> Social psychologists repeatedly demonstrate that white women and people of color report that they themselves are the target of discrimination far less frequently than they perceive the typical member of their group as being a target. Moreover, white women and people of color are loathe to define a negative outcome as discrimination even when the event objectively amounts to discrimination. For a concise overview of the social psychological research in this area, see Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination* (2001) (unpublished manuscript, on file with authors); see also Crosby et al., *supra* note 26; *Derogating the Victim*, *supra* note 26; *Stop Complaining!*, *supra* note 26.

<sup>111</sup> See HELDRICH CTR. FOR WORKPLACE DEV., *supra* note 24.

<sup>112</sup> Although there has not been empirical research about jurors' attitudes in employment civil rights cases, the media horror stories regarding products liability have been shown to affect jury decision-making in tort cases. See VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000); Neil Feigenson et al., *Effect of Victim Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 L. & HUM. BEHAV. 597 (1997).

Ironically, the promise of plaintiff success and large awards presented in the media may at once be a source of claims and a contributing factor in those claims' ultimate failure.

The negative outcomes stemming from media bias no doubt can be traced to other sources as well. While the media is an important source of information for ordinary citizens as well as for business elites, there can be no doubt that personal experiences with law and legal actors affect legal consciousness as well.<sup>113</sup> Our research begins an empirical inquiry into the effects of the media on popular conceptions about anti-discrimination law. These links require further study to determine which aspects of ordinary citizens' understanding of anti-discrimination law are constructed by the media and which parts are shaped by other factors. Nonetheless, this study represents an important first step for our understanding of the relationship between legal consciousness, anti-discrimination law, and the media.

#### VII. CONCLUSION: HIRAM CLIFTON REVISITED

By way of conclusion, consider again Hiram Clifton's racial discrimination complaint against the MBTA. The front page newspaper article appearing in September 1999 in *The Boston Globe* announced that "the Massachusetts Bay Transportation Authority was ordered yesterday to pay \$5.5 million to a black employee who endured nearly a decade of racist jokes, taunts, and pranks by his supervisors."<sup>114</sup>

Although *The Boston Globe* highlighted the jury award in *Clifton v. MBTA*, it failed to similarly publicize the ultimate outcome. On February 3, 2000, in *Clifton v. MBTA*, the Suffolk County Superior Court ordered "a remittitur of the punitive damage award from \$5,000,000 to \$500,000, and of the total damage award from \$5,500,000, to \$1,000,000,"<sup>115</sup> reducing Clifton's ultimate award by more than 80%. *The Boston Globe* covered this award reduction, but it appeared embedded in the newspaper in a 180-word news brief on page C22.<sup>116</sup>

Although actual legal proceedings are accurately reported, the norms of "newsworthiness" mean that consumers of *The Boston Globe* are far less likely to be aware of the final outcome in this case than of its initial status. Whether or not the ultimate outcome of *Clifton v. MBTA* was an appropriate levying of justice, *The Boston Globe* did not highlight the outcome for its readers. *The Globe* should not be directly implicated, however; for as we have demonstrated, this is a common trend. The media wants an audience, and the

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<sup>113</sup> See Nielsen, *supra* note 98.

<sup>114</sup> Pfeiffer, *supra* note 1.

<sup>115</sup> *Clifton v. Mass. Bay Transp. Auth.*, 11 Mass. L. Rptr. at 316.

<sup>116</sup> Thomas C. Palmer, Jr., *Judgment Reduced in MBTA Bias Case*, BOSTON GLOBE, Feb. 10, 2000, at C22.

audience wants stories with a certain form and substance, which the true dynamics of employment discrimination law simply cannot satisfy. As a result, the media emphasizes those stories that satisfy its readership's thirst for drama, unwittingly contributing to the production and reinforcement of inaccurate but powerful expectations about the legal realities of employment discrimination.

APPENDIX 1	
Media Data not Reported in Table 2	
	Media Accounts of Cases
<b>Plaintiff Awards</b>	
Mean award of settled cases	63,321,000 (201)
Median award of settled cases	13,000,000 (201)
Mean award of settled and terminated cases	48,777,000 (270)
Median award of settled and terminated cases	3,640,000 (270)
<b>Appellate Outcome</b>	
Affirmed	24% (8)
Reversed	68% (23)
<b>Plaintiff</b>	
Individual	53% (342)

