

NANCY GERTNER

Losers' Rules

INTRODUCTION

Each year, the United States District Court for the District of Massachusetts holds an extraordinary panel. All active judges are present to answer questions from the bar. A lawyer's question one year was particularly provocative: "Why are the federal courts so hostile to discrimination claims?" One judge after another insisted that there was no hostility. All they were doing when they dismissed employment discrimination cases was following the law – nothing more, nothing less.

I disagreed. Federal courts, I believed, *were* hostile to discrimination cases. Although the judges may have thought *they* were entirely unbiased, the outcomes of those cases told a different story. The law judges felt "compelled" to apply had become increasingly problematic. Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964¹ were tantamount to a virtual repeal. This was so not because of *Congress*; it was because of *judges*.

Decades ago, law-and-society scholars offered an explanation for that phenomenon, evaluating the structural forces at work in law-reform litigation that lead to one-sided judicial outcomes. Focusing on employment discrimination claims, Marc Galanter argued that, because employers are "repeat players" whereas individual plaintiffs are not, the repeat players have every incentive to settle the strong cases and litigate the weak ones.² Over time, strategic settlement practices produce judicial interpretations of rights that favor the repeat players' interests.³ More recently, Catherine Albiston went

-
1. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).
 2. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 101 (1974).
 3. *Id.* at 102.

further, identifying the specific opportunities for substantive rulemaking in this litigation – as in summary judgment and motions to dismiss – and how the “repeat players,” to use Galanter’s term, take advantage of them.⁴

In this Essay, drawing on my seventeen years on the federal bench, I attempt to provide a firsthand and more detailed account of employment discrimination law’s skewed evolution—the phenomenon I call “Losers’ Rules.” I begin with a discussion of the wholly one-sided legal doctrines that characterize discrimination law. In effect, today’s plaintiff stands to lose unless he or she can prove that the defendant had explicitly discriminatory policies in place or that the relevant actors were overtly biased. It is hard to imagine a higher bar or one less consistent with the legal standards developed after the passage of the Civil Rights Act, let alone with the way discrimination manifests itself in the twenty-first century. Although ideology may have something to do with these changes, and indeed the bench may be far less supportive of antidiscrimination laws than it was during the years following the laws’ passage, I explore another explanation. Asymmetric decisionmaking—where judges are encouraged to write detailed decisions when *granting* summary judgment and not to write when *denying* it—fundamentally changes the lens through which employment cases are viewed, in two respects. First, it encourages judges to see employment discrimination cases as trivial or frivolous, as decision after decision details why the plaintiff loses. And second, it leads to the development of decision heuristics—the Losers’ Rules—that serve to justify prodefendant outcomes and thereby exacerbate the one-sided development of the law.

I. THE SKEWED EVOLUTION OF DISCRIMINATION LAW

Just as the social-psychological literature is exploding with studies about implicit race and gender bias—in organizational settings, in apparently neutral evaluative processes, and among decisionmakers of different races or genders—federal discrimination law lurches in the opposite direction, often ignoring or trivializing evidence of explicit bias.⁵ And just as empirical studies highlight the

4. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 *LAW & SOC’Y REV.* 869, 877-86 (1999).

5. See, e.g., John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 *RES. ORGANIZATIONAL BEHAV.* 39 (2009) (discussing ten recent studies demonstrating implicit bias with respect to race, ethnicity, gender, and social class); see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *CALIF. L. REV.* 945, 946 (2006) (“[A]ctors do not always have conscious,

stubborn persistence of discrimination at all levels of jobs and in salaries,⁶ federal discrimination law assumes the opposite. In summary judgment decisions, judges search for explicitly discriminatory policies and rogue actors; failing to find them, they dismiss the cases.⁷ It is as if the bench is saying: “Discrimination is over. The market is bias-free. The law’s task is to find the

intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553 (2005) (finding that implicit racial attitudes in certain environments predicted discrimination).

For discussions of the failure of the courts to address these issues, see Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); and Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

6. See, e.g., MAJORITY STAFF OF JOINT ECON. COMM., 111TH CONG., WOMEN AND THE ECONOMY 2010: 25 YEARS OF PROGRESS BUT CHALLENGES REMAIN 1 (2010) (noting that in 2009 the weekly wage for a woman was, on average, eighty percent of a comparable man’s wages); Nathan Berg & Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL’Y 394, 394 (2002) (examining wages from 1991 to 1996 and finding that nonheterosexual men earn twenty-two percent less than heterosexual men, while nonheterosexual women earn thirty percent more than heterosexual women); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1006-07 (2004); Catherine Rampell, *Older Workers Without Jobs Face Longest Time out of Work*, N.Y. TIMES: ECONOMIX (May 6, 2011, 6:27 PM), <http://economix.blogs.nytimes.com/2011/05/06/older-workers-without-jobs-face-longest-time-out-of-work> (observing that the typical duration of unemployment increases with age and is at an all-time high for those over fifty-five).

7. As one scholar puts it,

[C]ourts view discrimination largely as a “problem of errant or rogue individual discriminators acting contrary to organizational policy and interest.”

....

In some cases, the search for the rogue actor is appropriate; however, in others, the search for the rogue actor asks the wrong question about culpability. It ignores the fact that multi-tiered or group decisionmaking processes may make it difficult or impossible to locate intent within a particular person. [It] disregards the ways that both formal and informal processes and policies within an organization shape the intentions and actions of its individual members, and the ways that the actions and intentions of the individual members shape the organization.

Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 787-88 (2010) (quoting Tristia K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 356 (2008)).

aberrant individual who just did not get the memo.” The complex phenomenon that is discrimination can be reduced to a simple paradigm of the errant discriminator or the explicitly biased policy, a paradigm that rarely matches the reality of twenty-first-century life.⁸

Even without the contrary insights of social psychologists, this development is curious. Discrimination cases are about intent—in the language of the statute, whether an action was taken “because of” race or gender bias.⁹ Proof of intent is rarely direct. It is usually circumstantial, even multidetermined. In tort or contract cases, contests about intent require jury trials. Judges recognize that divining a person’s intent is messy and complex and that this issue usually involves a material dispute of fact for a jury to decide.¹⁰ Employment discrimination cases, in contrast, are typically resolved on summary judgment, although discriminatory intent may be more difficult to identify on a cold record than is the intent of a contract’s drafters or a putative tortfeasor’s state of mind.¹¹ Why?

Is the explanation solely an ideological one? Is the cause a more conservative bench, and in particular a more conservative Supreme Court, that is far, far less supportive of antidiscrimination laws than it was in the past? That is surely part of it. But the outcomes I identify cut across the ideological

-
8. See also Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007) (arguing that summary judgment allows subtle bias to enter into decisionmaking); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (discussing the different ways that a court will “slice and dice” the evidence to fit it into the existing summary judgment standards).
 9. Title VII makes it unlawful for employers to discriminate against any individual “because of such individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006).
 10. See, e.g., *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) (“However, where the contract language creates ambiguity, extrinsic evidence as to the parties’ intent may properly be considered. Where there is such extrinsic evidence, the meaning of the ambiguous contract is a question of fact for the factfinder.” (citations omitted)); *Creech v. Melnik*, 495 S.E.2d 907, 913 (N.C. 1998) (“[S]ummary judgment is particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations.”).
 11. See, e.g., Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, U.S. Dist. Court for the E. Dist. of Pa. 7 tbl.4 (Nov. 2, 2007), [http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/\\$file/insumjre.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf) (finding that in some jurisdictions with certain types of local rules governing summary judgment, seventy-four to seventy-seven percent of all summary judgment motions ruled on in employment discrimination cases were granted in whole or in part in fiscal year 2006—more than for any other type of case studied). See *infra* note 22 and accompanying text for more statistics from seventy-eight district courts, with a variety of local rules.

spectrum, applying equally well to judges who would describe themselves as sympathetic to a discrimination plaintiff's claims. Judges, as that District of Massachusetts panel reflected, feel that the law "compels" them to decide the cases as they do. But the "law" hardly compels anything in this context. Employment discrimination cases, after all, are factually complex, deal with state-of-mind issues, are typically proved circumstantially, and are rarely uncontested. The Supreme Court's legal standards for summary judgment are so general that, for the most part, they provide a way to organize the record and frame the issues. They rarely mandate a result as would, for example, a statute of limitations or a failure to exhaust administrative remedies. Rather, the source of the law's "compulsion" as the judges apparently experienced it was, at least in part, the phenomenon I call Losers' Rules.

II. THE ROLE OF ASYMMETRIC DECISIONMAKING

When the defendant successfully moves for summary judgment in a discrimination case, the case is over. Under Rule 56 of the Federal Rules of Civil Procedure, the judge must "state on the record the reasons for granting or denying the motion,"¹² which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement – "denied" – and the case moves on to trial. Of course, nothing prevents the judge from writing a formal decision, but given caseload pressures, few federal judges do.¹³ (During one case-management program in my district, the trainer, a senior judge, told the assembled judges, "If you write a decision, you have failed." The message was clear: you would only write a decision when you absolutely had to.) Plaintiffs rarely move for summary judgment.¹⁴ They bear the burden of proving all elements of the claim, particularly intent, and must do so based

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

13. See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 44; Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 11 (2002) (noting caseload burdens and the various methods Congress used to address them).

14. Memorandum from Joe Cecil & George Cort to Michael Baylson, *supra* note 11, at 4 tbl.1 (finding that plaintiffs are only responsible for eight to nine percent of summary judgment motions filed in employment discrimination cases).

on undisputed facts.¹⁵ Defendants need only show contested facts in their favor on one element of a plaintiff's claim.¹⁶

The result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant or, more recently, on the heels of the Supreme Court's decisions in *Twombly*¹⁷ and *Iqbal*,¹⁸ dismisses the complaint. After the district court has described— cogently and persuasively, perhaps even for publication— why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court's pessimistic assessment of the plaintiff's case.¹⁹

While the standard of review of summary judgment orders is de novo, appellate courts rarely reverse district courts' decisions.²⁰ It takes substantial work, not to mention a motivated decisionmaker, to dig into the voluminous summary judgment record and find a contested issue of fact. In my experience, few appellate court judges are so motivated in this area. On the contrary, they are even more affected than are district court judges by the skewed pool of

15. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

16. See, e.g., *Wells v. SCI Mgmt., L.P.*, 469 F.3d 697, 701 (8th Cir. 2006) (affirming summary judgment where the defendant demonstrated that the plaintiff failed to show that “she was treated differently from similarly situated males”).

17. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that a motion to dismiss will be granted unless the plaintiffs have “nudged their claim[] across the line from conceivable to plausible”).

18. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-83 (2009) (extending the “plausible” standard established in *Twombly*).

19. See Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 553 (2003) (noting that, between 1987 and 2000, plaintiffs were only able to secure reversals of pretrial decisions for a defendant eleven percent of the time, while defendants secured reversals of rulings in favor of the plaintiff forty-two percent of the time).

20. Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 470 (2009) (“Grants of summary judgments by district courts and affirmances by the Courts of Appeals are now a daily ritual in civil rights cases.” (citing *Kampouris v. St. Louis Symphony Soc’y*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, J., dissenting))); see also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 207 n.15 (1993) (“Noted legal scholar and Seventh Circuit Judge Richard Posner in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), an employment discrimination case, acknowledged that growing docket pressures on trial courts make the courts of appeals extremely reluctant to overrule grants of summary judgments by lower courts ‘merely because a rational fact finder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter.’”).

cases they see—the selection effects of reviewing appeal after appeal of plaintiffs' losses. They do not see the strong cases that settle. They may see appeals from successful plaintiffs' verdicts, but those appeals are few and far between. What they mainly see is a litany of losing cases, each resolved on summary judgment for the defendant.

Although judges do not publish all the opinions they write, the ones they do publish exacerbate the asymmetry. The body of precedent detailing plaintiffs' losses grows. Advocates seeking authority for their positions will necessarily find many more published opinions in which courts granted summary judgment for the employer than for the employee. And although one would expect that litigants would realize over time that their chances are slim and would then stop filing, the record proves otherwise. They continue to believe in the fairness of the system, notwithstanding the odds, flooding the courts with claims of all kinds—some frivolous, to be sure.²¹

But the problem is more than just the creation of one-sided precedent that other judges follow. The way judges view these cases fundamentally changes. If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.

Statistics tell the story. A recent Federal Judicial Center report noted that roughly sixty percent of the summary judgment motions studied were granted in whole or in part, while more than seventy percent of such motions were granted in employment discrimination cases.²² From 1994 to 1995, “employers prevailed in approximately 86% of published appellate opinions.”²³

21. See Ellen Berrey, Steve G. Hoffman & Laura Beth Nielson, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1, 18 (2012) (noting that most plaintiffs are new to the legal system and that, at the beginning of the litigation, their “expectations follow from the ideological promise that law provides a fair means of resolution by leveling the playing field”).

22. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, U.S. Dist. Court for the E. Dist. of Pa. (rev. June 15, 2007), <http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf> (reporting statistics for summary judgment in seventy-eight jurisdictions).

23. Albiston, *supra* note 4, at 885.

III. ONE-SIDED HEURISTICS: LOSERS' RULES

In addition to contributing to one-sided outcomes, the asymmetry of the decisionmaking process distorts the evolution of substantive legal standards.²⁴ Losers' Rules evolve to justify the judicial analysis. These rules are heuristics, "simplistic, rule-like tests developed by the courts" to deal with otherwise complex cases in a more efficient manner.²⁵ And they are particularly useful for organizing incomplete data,²⁶ like those found in most summary judgment records. Although heuristics develop across many areas of the law, at many stages, the growing use of summary judgment in civil litigation in general,²⁷ and its increased use in employment discrimination cases in particular, makes such "rule-like tests" all the more important. Thus, a pattern emerges. Courts create decision heuristics to enable them to quickly dispose of complex cases. They then write decisions employing the heuristics and publish their opinions. In short order, other courts rely on the heuristics, which become precedent, and the process is repeated over and over again.²⁸

The problem with heuristics, however, is that they are subject to systematic errors in all directions.²⁹ In the context of employment discrimination cases, false positives occur when a court finds that there may have been

-
24. Scholars have examined asymmetric decisionmaking in a number of other settings. See, e.g., Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 473-76 (2011) (arguing that the boundaries of patentability have been expanded because of the asymmetrical relationship between the Patent and Trademark Office and the Federal Circuit); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990) (arguing that asymmetry in criminal appeals skews judges' view of the characteristics of the typical case). Masur also identifies other asymmetric systems of review in areas such as immigration law, benefits law, and tax law. Masur, *supra*, at 476.
 25. Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 906 (2002).
 26. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 3 (Daniel Kahneman et al. eds, 1994).
 27. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1048-50 (2003).
 28. See Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 112-18 (2002) (describing the way in which heuristics are developed and sustained over time in the context of complex securities litigation).
 29. See Tversky & Kahneman, *supra* note 26, at 3; see also Sale, *supra* note 25, at 908 (applying Tversky and Kahneman's theories to errors in the analysis of dismissal claims under the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.)).

discrimination when there was not, and false negatives occur when a court finds no discrimination when there was.

When courts believe that most employment claims are without merit, as the decisional law suggests, they will be far more concerned with false positives than false negatives. One-sided heuristics—rules of thumb that oversimplify, dismiss, and often demean proof of discrimination—evolve. Sometimes their inculcation is explicit. At the start of my judicial career in 1994, the trainer teaching discrimination law to new judges announced, “Here’s how to get rid of civil rights cases,” and went on to recite a litany of Losers’ Rules. Indeed, he was right.

In *Iqbal* and *Twombly*, the Supreme Court—in effect—invited judges to use discrimination heuristics earlier in the litigation process than before, with far, far less information.³⁰ Both cases involved a motion to dismiss the complaint under Rule 12(b)(6). The *Iqbal* Court encouraged judges to use their “common sense” and “judicial experience” to determine when claims are “plausible,”³¹ rather than to apply the far more objective notice pleading standards that predated these decisions.³² Under notice pleading, courts asked whether any set of facts could be proven consistent with the allegations in the complaint.³³ Under *Iqbal* and *Twombly*, they are to determine whether alternative explanations for the events complained of are “more likely” than the allegations made by the plaintiff,³⁴ a probabilistic determination in fact, despite the Court’s disclaimer.

The Court’s motivation could not have been clearer. It was concerned only about false positives—wrongful accusations of discrimination—not false negatives that leave meritorious claims of discrimination unredressed. It focused expressly on the transaction costs to defendants that such claims engender, not the impact on the plaintiffs whose claims are given short shrift.³⁵

30. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

31. *Iqbal*, 556 U.S. at 679.

32. *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

33. *Id.*

34. *Iqbal*, 556 U.S. at 681. To be sure, the Court denied that the new standard was a “probability” standard, but it was surely moving in that direction. *See id.* at 678 (“The plausibility standard is not akin to a ‘probability requirement,’ but asks for more than a sheer possibility that a defendant has acted unlawfully.”).

35. In *Iqbal*, the Court reasoned that a higher pleading standard than in *Conley* was necessary to prevent groundless claims from imposing costs on defendants. *See Iqbal*, 556 U.S. at 685 (citing *Twombly*, 550 U.S. at 559). A deficient complaint should “be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Twombly*, 550 U.S. at 558 (citation omitted) (internal quotation marks omitted). The Court in *Iqbal* reiterated

Its approach was compelled by the perception that case management, as the Court noted, had not been particularly effective in addressing the problem of insubstantial claims and had thus failed to control litigation expenses.³⁶

But while it is one thing to be concerned about the limits of case management with respect to complex antitrust cases like *Twombly*, it is another to be concerned in connection with civil rights cases like *Iqbal*, where summary judgment has been wildly successful for employers and other defendants. *Iqbal* and *Twombly* have not yet produced wholesale dismissal of employment discrimination complaints,³⁷ but, given employment discrimination heuristics and precedent in other fields,³⁸ that is a fair prediction.

High on the list of heuristics that fundamentally distort the outcome of discrimination cases is what may be described as the “stray remarks” doctrine.³⁹ This heuristic discounts *explicitly* discriminatory statements—ironically, just at a time when social psychologists are concerned about *implicit* bias. Consider the usual situation (which I noted in *Diaz v. Jiten Hotel Management, Inc.*):

If a manager makes an ageist remark, it could well be a window on his soul, a reflection of his animus, or arguably, just a slip of the tongue somehow unrelated to his “true” feelings. If other managers were nearby, they could well have dismissed the overheard comment as an aberration, or it could have created a new norm of conduct for the

the *Twombly* theme that “[l]itigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources.” *Iqbal*, 556 U.S. at 685.

36. *Twombly*, 550 U.S. at 559 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (citation omitted)).
37. The courts are divided about the continued application of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which upheld notice pleading in employment cases. Compare *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (applying *Twombly* and *Iqbal*’s new standards to an employment case and rejecting *Swierkiewicz*), with *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (reaffirming the validity of *Swierkiewicz* and suggesting that *Iqbal* simply requires that a plaintiff plead enough facts to present “a story that holds together”).
38. Hillary Sale describes this phenomenon under the PSLRA, where “district courts have eagerly and overwhelmingly accepted the ‘opportunity’ Congress offered them by creating and using heuristics to eliminate cases on motions to dismiss.” Sale, *supra* note 25, at 904. Catherine Albiston describes the evolution of pleading standards under the Family and Medical Leave Act, where asymmetric rulemaking opportunities likewise skewed the development of the law. Albiston, *supra* note 4, at 887–901.
39. See Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 159–60 (2012).

company, an atmosphere of impunity. The point is that the inference to be given the remark should not be made by judges, particularly judges who have not heard the entire story.⁴⁰

The stray-remarks doctrine arose out of Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*.⁴¹ The majority described a mixed-motive burden-shifting approach in Title VII cases.⁴² When a plaintiff alleges that an adverse employment action was taken for both a discriminatory reason and a legitimate reason, the plaintiff bears the burden of showing that the discriminatory reason was a motivating factor. But once the plaintiff does so, the burden of persuasion shifts to the employer to demonstrate that he or she would have made the same decision if the discriminatory reason was not considered. The concurring opinion argued for limiting the approach to cases where there was direct evidence of discrimination⁴³ (a limitation that no longer applies⁴⁴). Although Justice O'Connor noted that certain statements "by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" are not "direct evidence" of discrimination,⁴⁵ she did

40. 762 F. Supp. 2d 319, 323 (D. Mass. 2011).

41. 490 U.S. 228, 261-79 (1989). For an extended discussion of the genesis of stray remarks after *Price Waterhouse*, see *Diaz*, 762 F. Supp. 2d at 333-38. As I noted, "It is not a surprise that the 'Stray Remarks Doctrine' originally came out of the weakest discrimination cases, those in which some employee made a single remark that a judge deemed insufficient to show bias or pretext on the part of the employer." *Id.* at 336; see also, e.g., *Gagné v. Nw. Nat'l Ins. Co.*, 881 F.2d 309, 314-16 (6th Cir. 1989) (finding that a single comment by a supervisor that he "needed younger blood" is insufficient to withstand summary judgment on an age discrimination claim); *Dungee v. Ne. Foods, Inc.*, 940 F. Supp. 682, 688 (D.N.J. 1996) (finding that a single comment that the employer hired a "young man" is too weak to raise an inference of discrimination in hiring practices); *Johnson v. J.C. Penney, Co.*, 876 F. Supp. 135, 139 (N.D. Tex. 1995) (holding that an employer's single remark that the plaintiff "should have been a preacher" after he led a prayer at a Christmas party is not sufficient evidence of racial pretext). As I have observed, "Bad cases, as they say, often make bad law. Surely, there must come a point, however, when there are enough remarks . . . that they can no longer be considered 'stray' . . . when they plainly offer a window into the way the decisionmaker or decisionmakers think." *Diaz*, 762 F. Supp. 2d at 336-37. But the problem—the abuse of this doctrine, as reflected in the cases described below—arises where the remark is unambiguously biased, is repeated, or corroborates other circumstantial evidence of discrimination.

42. *Price Waterhouse*, 490 U.S. at 246-52.

43. *Id.* at 271 (O'Connor, J., concurring).

44. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (holding that the plaintiff need not provide direct evidence of discrimination to shift the burden to the employer in mixed-motive cases).

45. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

not say that such remarks were *never* evidence of discrimination or *never* probative of discriminatory animus. Still, her statement birthed countless cases about stray remarks—a classic example of Losers’ Rules—that distort the original concept. Some courts have even suggested that stray remarks are not only insufficient in and of themselves to prove discrimination, but also may be inadmissible under Federal Rule of Evidence 403 because their unfair prejudicial impact substantially outweighs their probative value.⁴⁶

There are striking examples of courts dismissing extraordinary statements of bias as stray remarks. In *Shorter v. ICG Holdings, Inc.*,⁴⁷ a supervisor’s derogatory racial slur about the plaintiff was treated as a stray remark.⁴⁸ The court wholly discounted that comment even though it was directed at the plaintiff and was made by the decisionmaker in her case, finding, incredibly to be sure, that nothing linked them to the decision to terminate her.⁴⁹ They

46. Even remarks that are “arguably probative of bias” may not be probative at all unless they were (a) related to the employment, (b) made close in time to the employment decision, (c) uttered by decisionmakers or those in a position to influence the decisionmaker, and (d) unambiguous. See *Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App’x 45, 47-48 (1st Cir. 2010) (finding “ambiguous” comments insufficient to prove discriminatory intent); *Rivera-Aponte v. Rest. Metropol #3, Inc.*, 338 F.3d 9, 12 (1st Cir. 2003) (“The lack of a direct connection between the words and the employment action significantly weakens their probative value.”); *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001) (“Although statements directly related to the challenged employment action may be highly probative in the pretext inquiry, mere generalized ‘stray remarks,’ arguably probative of bias against a protected class, normally are not *probative of* pretext absent some discernible evidentiary basis for assessing their temporal and contextual relevance.” (emphasis omitted) (citations omitted)). *But see Tomassi v. Insignia Fin. Grp.*, 478 F.3d 111, 115-16 (2d Cir. 2007) (indicating that a stray-remarks characterization simply reflected that not all comments were equally probative of discrimination and adding that “[w]e did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category”).

47. 188 F.3d 1204, 1207 (10th Cir. 1999), *overruled in part by Fye v. Okla. Corp. Comm’n*, 516 F.3d 1217, 1226 n.6 (10th Cir. 2008). Indeed, the court in *Shorter* approvingly cited *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993). In *Heim*, the defendant had remarked, “Fucking women. I hate having fucking women in the office.” *Id.* at 1546. The *Heim* court concluded that the comment was not direct evidence of discriminatory intent. *Id.* at 1547. To be sure, since both cases predated *Desert Palace*, the court’s analysis involved the question whether the remarks comprised direct or circumstantial evidence. But the conclusions—that these statements did not directly reflect discriminatory animus—are still extraordinary.

48. *Shorter*, 188 F.3d at 1206 (noting that the supervisor called the plaintiff an “incompetent nigger”).

49. *Id.* at 1210. Indeed, in the past judges understood the salience of biased comments. In *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130 (4th Cir. 1988), the Fourth Circuit would not exclude statements using the word “nigger” from the trial. The court noted:

constituted “only” the speaker’s “personal opinion.”⁵⁰ Even if the court in *Shorter* had found that those statements were ambiguous—itself a shocking conclusion—questions of ambiguity are not remotely suitable for a judge to resolve on summary judgment.⁵¹

More employment heuristics—more Losers’ Rules—have evolved, the net effect of which has been to substantially lighten the employer’s burden of proof and make summary judgment in his or her favor increasingly likely. There is the “honest belief” doctrine—which starts from the notion that the employer’s belief was wrong, not based on the record, or foolish, but was “honest,”⁵² or at least “honestly described.”⁵³ This approach takes even a pretextual reason offered by an employer out of the discrimination calculus. Typically, when an employer’s reason for an adverse employment decision is not supported by the record, the plaintiff can argue that it suggests he is covering up his unlawful bias. Under this doctrine, however baseless the employer’s explanation may be,

The user of such terms intends only one thing: to degrade those whom he describes in the most offensive manner. General use of these words, though obviously not conclusive evidence that a particular decision was made with racial animus, is clearly relevant to determining whether it was. It would be ironic indeed to conclude that use of language of prejudice is irrelevant in a civil rights suit. Racial slurs represent the conscious evocation of those stereotypical assumptions that once laid claim to the sanction of our laws. Such language is symbolic of the very attitudes that the civil rights statutes are intended to eradicate.

Id. at 1133 (emphasis added).

50. *Shorter*, 188 F.3d at 1208.

51. *See Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003) (“When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.”); *Vesprini v. Shaw Indus., Inc.*, 221 F. Supp. 2d 44, 58 (D. Mass. 2002) (“Any statement from which a factfinder can take multiple inferences is arguably ‘ambiguous.’ ‘Ambiguity’ of that sort means the *defeat* of the defendants’ motion for summary judgment.”).

52. *Gustovich v. AT&T Commc’ns, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *see also Kariotis v. Navistar Int’l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) (stating that the issue is not whether “the employer’s reasons for a decision [were] ‘right’ but whether the employer’s description of its reasons [was] ‘honest’” (quoting *Gustovich*, 972 F.2d at 848)); *Fischbach v. D.C. Dep’t of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (stating that courts review not “the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers.” (alterations in original) (quoting *McCoy v. WGN Cont’l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992))).

53. *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (“A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination.”).

that element is trumped by the employer's "honest belief," and a judge, not a jury, may make such a determination on summary judgment.

There are also doctrines that require the comparator in the discrimination case to be "nearly identical" to the plaintiff.⁵⁴ In a discriminatory discharge case, for example, the plaintiff has to show that the misconduct for which he or she was fired was virtually identical to the misconduct of another employee outside the protected class.⁵⁵ It is not enough to show that the nonminority employee's conduct for which he escaped discipline was similar, comparable, or, indeed, more serious.⁵⁶

There are "rules" that turn the employment laws on their head, in which the court refuses to second-guess an employer's decision and defers to its business judgment.⁵⁷ The employment laws necessarily require second-guessing an employer when the plaintiff makes out a prima facie case, or, at the very minimum, the laws permit a jury to do so.

There are also Losers' Rules that are based on flawed sociological judgments about how discrimination occurs, and in what setting. Some courts have concluded that it is unreasonable to believe that the same decisionmaker who hired the plaintiff would later discriminate against him or her.⁵⁸ That conclusion assumes that bias will be reflected in every decision of an employer—that it cannot be repressed at, for example, the hiring stage and surface as the individual starts work.⁵⁹ Once the decisionmaker hires someone

54. *Holston v. Sports Auth., Inc.*, 136 F. Supp. 2d 1319, 1327 (N.D. Ga. 2000).

55. *Id.* at 1326.

56. *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570-71 (5th Cir. Unit B 1982) (finding that a plaintiff discharged for, inter alia, threatening to have a co-employee fired for reporting misconduct by the plaintiff did not present evidence of "nearly identical" conduct by the purported comparator who told other employees conducting an investigation into his alleged wrongdoing that he would "settle up with them").

57. *Blackman v. City of Dallas*, No. 3:04-CV-2456-H, 2006 WL 1816390, at *3 (N.D. Tex. July 3, 2006) ("[T]he Court declines to challenge the business judgment of the City in its staffing decisions."); see also *Windfelder v. May Dep't Stores Co.*, 93 F. App'x 351, 354 (3d Cir. 2004) ("We hesitate to second-guess the process by which an employer evaluates an employee's performance, even when the appraisal involves subjective elements.").

58. See *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) ("[I]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." (quoting John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 1017 (1991))).

59. See *Velez v. SES Operating Corp.*, No. 07 Civ. 10946 (DLC), 2009 WL 3817461, at *9 (S.D.N.Y. Nov. 12, 2009) ("[P]laintiff's allegations that Thadal called plaintiff a 'dumb Puerto Rican,' that Thadal said the word 'spics' during a telephone call with an unknown party, and that Thadal referred to 'you people' while speaking to plaintiff, are effectively

in the protected class, his or her later dealings with that employee are somehow immunized.⁶⁰

CONCLUSION

The list of “rules” provides a blueprint for the judge to grant the defendant summary judgment or to dismiss the complaint. Courts recite these “rules” in case after case, without regard to context, without examination, like the child’s game of telephone. A complex social phenomenon—discrimination—is disaggregated, or “sliced and diced,”⁶¹ into unrecognizable and sometimes unintelligible boxes, determined by the judge, not the jury, with predictable results. And, as did the judges responding to the questioner in Massachusetts, the judge here truly believes that he or she is “just following the rules” in dismissing the claim.

What to do about it? First, the problem has to be named: judges have made rules that have effectively gutted Title VII. These rules are not required by the statute, its legislative history, or the purposes of the Act. Second, the problem has to be addressed directly. Congress could, for example, amend Title VII to make its prohibitions more explicit. Alternatively, judicial-education programs can train judges not on how to “get rid” of these cases, but rather on how to analyze the merits in a way that privileges jury decisionmaking and reminds the decisionmakers what the law was designed to reform in the first place. And finally, to address the asymmetry, courts must write decisions if only to show what counts as discrimination, and not simply what does not.⁶²

negated by the fact that Thadal herself was responsible . . . for the decision to hire plaintiff fewer than three months earlier.”).

60. See Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 130 (2011) (“[T]he bias one harbors may not necessarily impede one’s hiring of an individual, for one reason or another (the bias is subconscious or unconscious); the bias may be concealed until the hired individual commences work, etc., but may emerge thereafter.”).
61. Schneider, *supra* note 8, at 729. For further discussion of this point, see Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519-20 (2010).
62. In the final analysis, as Owen Fiss notes, courts are more than dispute-resolution institutions. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). Their opinions “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes.” *Id.* Their decisions define what amounts to discrimination and what does not, legitimizing certain actions while condemning others. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978). As such, courts

Nancy Gertner is a professor at Harvard Law School and a former United States District Judge for the District of Massachusetts.

Preferred citation: Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2012), <http://yalelawjournal.org/2012/10/16/gertner.html>.

should be attentive to the range of cases before them, not just articulating why plaintiffs lose, but also explaining why they win.