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PSYCHOLOGICAL REALISM IN LABOR AND EMPLOYMENT LAW

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(March 2011)

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PSYCHOLOGICAL REALISM IN LABOR AND EMPLOYMENT LAW

PAUL M. SECUNDA*

ABSTRACT

Facts matter, especially in labor and employment law cases. But not in the way that labor scholars of a generation ago understood. Those scholars correctly posited that judicial perception of facts reflected previously-held values and assumptions rather than record evidence. Yet crucially, those scholars did not describe the psychological mechanism by which judges' values came to shape facts in labor and employment law cases. Understanding the psychological mechanism by which judicial values shape legal decisions is a necessary first step to set up a framework to counteract the impact of cognitive illiberalism, a form of cognitive bias that impacts society writ large, in such decisions.

Psychological realism in labor and employment law explains that judges in these cases are generally not self-conscious partisans but rather decisionmakers who seek most of the time to get the law right without being ideologically committed to any prior legal or political view. Yet, values matter because judges, as human beings, cannot help but to act based on their culturally-informed perceptions of legally consequential facts.

By understanding the mechanism by which values influence decisionmakers in labor and employment law cases, it is possible to consider ways to reduce needless cultural conflict over, and discontent with, the law. To this end, this article considers a spectrum of judicial reform proposals which seek to help judges address the increasing complexity of labor and employment law

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cases in a manner which would also reduce the incidents of impact of cognitive illiberalism in American society.

TABLE OF CONTENTS

I. INTRODUCTION.....4
II. THE THEORETICAL FOUNDATIONS.....7
A. The First Generation of Psychological Insight: Values and Assumptions.....7
B. The Next Generation: Cultural Cognition and the Mechanism Behind the Legal Realist Insight.....9
1. Cultural Cognition Theory – Mechanics of Interpretation..... 11
2. Cognitive Illiberalism: The Danger of Delegitimizing Judicial Decisionmaking.....14
III. AN EMPLOYEE BENEFITS CASE STUDY: "DUDE, WHERE'S MY PENSION?".....17
A. "Man Does Not Live by Words Alone" 17
B. "They Know Not What They Do"..... 21
C. "If the Facts Don't Fit the Theory, Change the Facts"..... 23
IV. A SPECTRUM OF APPROACHES TO COUNTERACT COGNITIVE ILLIBERALISM IN LABOR AND EMPLOYMENT LAW CASES.....25
A. Debiasing Techniques for Legal Decisionmakers..... .26
1. Judicial Humility.....27
2. Expressive Overdetermination and Self-Affirmation.....28
3. Trimming.....29
B. Federal Bankruptcy Court and Magistrate Judge Models.....31
1. Specialized Employment Judges and Courts: Advantages and Disadvantages 32
2. Two Proposed Models: Bankruptcy-Type Courts and Specialized Magistrate Judges..... ...36
a. Framework for Selection of Magistrate and Bankruptcy Judges 37
b. The Advantages of the Bankruptcy Court Model in Selecting Judges 39
c. The Advantage of Opacity in Judicial Selection Procedures.....41
C. Article III Labor and Employment Appellate Courts.....46
D. The British Employment Tribunal Model.....48
CONCLUSION.....53

PEOPLE MAKE MISTAKES. EVEN ADMINISTRATORS OF ERISA PLANS.[1]

IN THE WORLD OF LABOR RELATIONS, POWER AND ECONOMIC REALITIES ARE OFTEN AS, OR EVEN MORE, RELEVANT AND INFORMATIVE THAN LEGAL RULES.[2]

[1] Conkright v. Frommert, 130 S. Ct. 1640, 1644 (2010) (per Roberts, Chief Justice).

I. INTRODUCTION

In a seminal empirical study conducted in September and October 2007, law professors Dan Kahan, David Hoffman, and Donald Braman, set out to determine what influence, if any, motivated cognition had on individual's interpretations of legally-consequential facts.[3] Motivated cognition has been defined as "the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires."[4]

Kahan, Hoffman, and Braman decided to test their thesis based on a challenge Justice Scalia made as part of his majority opinion in *Scott v. Harris*.[5] In *Scott,* police officers conducted a harrowing chase of a suspect's car through busy roads with other cars and pedestrians present.[6] The chase ended with one of the police cars intentionally bumping the suspect's car, causing it to roll over at high speed and rendering the suspect a quadriplegic.[7] The suspect then sued the police department under federal civil rights law alleging that the use of deadly force to terminate the chase constituted an unreasonable seizure under the Fourth Amendment to the United States Constitution.[8]

What makes *Scott* unique is that the whole car chase was captured on police car video cameras, and the video was submitted as evidence on behalf of the police to establish that their conduct was reasonable under the circumstances.[9] Agreeing with the police, Justice Scalia for the majority found that, with the video

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[2] JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 31 (1983).

[3] Dan M. Kahan, Donald Braman, and David A. Hoffman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

[4] *See* Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction* 3 (February 5, 2011), *available at* SSRN: http://ssrn.com/abstract=1755706.

[5] 550 U.S. 372 (2007).

[6] *Id*. at 375.

[7] *Id*.

[8] *Id.* at 375–76.

[9] Readers of this article can watch the *Scott* video on the Court's website. *See* RealPlayer Video: Supreme Court of the United States, *Scott v. Harris* - Video (April 30, 2007), http://www.supremecourt.gov/media/06/scott_v_harris.rm.

as the primary evidence, the only possible conclusion was that the police acted in a reasonable manner.[10] In a footnote, Justice Scalia further stated: "We are happy to allow the videotape to speak for itself."[11] However, after watching the same videotape, Justice Stevens, the lone dissenter, concluded that he did not necessarily believe that the police acted in a reasonable manner.[12]

In their study, Kahan, Hoffman, and Braman showed the *Scott* video to a diverse demographic sample of 1,350 American citizens.[13] Although most of the respondents agreed with Justice Scalia's interpretation of the video tape,[14] a surprising number of individuals, particularly from defined cultural subcommunities, agreed with Justice Steven's dissent that the video did not necessarily speak for itself.[15]

Based on their study's findings, Kahan, Hoffman, and Braman argued that Justice Scalia's opinion for the majority in *Scott* constituted a "type of decisionmaking hubris that has cognitive origins and that has deleterious consequences that extend far beyond the Court's decision in *Scott.*"[16] They concluded that "judges' own perceptions of fact can sometimes furnish them with unreliable guidance on what 'reasonable' but culturally diverse people are likely to perceive."[17]

Moreover, they contended that Justice Scalia's interpretative method "incurred [a] cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity 'unreasonable' and hence unworthy of consideration in the adjudicatory process."[18] This is what is referred to as "cognitive illiberalism." To counteract cognitive illiberalism,

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[10] *Scott*, 550 U.S. at 378.

[11] *Id.* at 378 n.5.

[12] *Id*. at 390 (Stevens, J., dissenting) ("Rather than supporting the conclusion that what we see on the video 'resembles a Hollywood-style car chase of the most frightening sort,' . . . the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue.").

[13] Kahan, *supra* note 3, at 841.

[14] *Id*. at 879.

[15] *Id*. at 841.

[16] *Id*. at 842.

[17] Kahan, *supra* note 4, at 33.

[18] Kahan, *supra* note 3, at 842.

Kahan, Hoffman, and Braman suggested that courts could divest the law of culturally partisan overtones that detract from the law's legitimacy through various forms of debiasing education and techniques.[19]

Taking Kahan, Hoffman, and Braman's invitation to see if this "decisionmaking hubris that has cognitive origins" also was present in other specific areas of law, I sought in *Cultural Cognition at Work*[20] to see if such psychological explanations could help explain some of the more controversial labor and employment cases decided by the United State Supreme Court.[21] To my surprise, and counter to my initial intuition, motivated cognition of the cultural variety, or "cultural cognition,"[22] did appear to explain how Justices' values in these cases led to different perceptions of legally-consequential facts.[23] *Cultural Cognition at Work* therefore concluded by considering potential social science and legal techniques for ridding legal decisions of delegitimizing bias and simultaneously making them more acceptable to a larger segment of society.[24]

This article seeks to take the next necessary step in investigating in more detail structural reforms and approaches that may work to minimize conflict in society over labor and employment law decisions. In this vein, this article seeks to: (1) distill the essentials of psychological realism and how it relates to, and differs from, other earlier studies on the role that values and assumptions play in labor and employment law cases; (2) consider one possible example of the operation of psychological realism in a recent United States Supreme Court employee benefits case, *Conkright v. Frommert*;[25] and, finally, (3) expand greatly on the preliminary analysis started in *Cultural Cognition at Work* on ways to counteract culturally-motivated cognition, and the resulting delegitimization of the judicial function among community members, by exploring a spectrum of

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

[20] Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. STATE UNIV. L. REV. 107 (2010).

[21] *Id.* at 111.

[22] *Id.* at 148. *See also* Kahan, *supra* note 4, at 1 ("Cultural cognition refers to the unconscious influence on individuals' group commitments on their perceptions of legally consequential facts.").

[23] Secunda, *supra* note 20, at 139-140

[24] *Id.* at 140–48.

[25] 130 S.Ct. 1640 (2010).

possible responses to the phenomenon of psychological realism in labor and employment law decisions. These suggested approaches range from fairly simple debiasing strategies to the more radical idea of constituting new labor and employment courts within the federal judiciary.

II. THE THEORETICAL FOUNDATIONS

The context for this paper is the phenomenon of "culturally motivated cognition," or "cultural cognition," and its influence on, and danger to, neutral decisionmaking by legal decisionmakers in labor and employment cases. This Part sets out the theoretical background by first discussing the first generation of scholarly insight into the psychology of labor and employment law decisions. Thereafter, the second section discusses the next generation of insight–psychological realism in labor and employment law–which takes the project of understanding the way in which values shape legal decisionmaker's decisions to a new level of understanding by exploring the *mechanism* behind this psychological phenomenon.

A. The First Generation of Psychological Insight: Values and Assumptions

As labor law scholars from generations past aptly observed, facts matter very much in labor law cases. For instance, in *Values and Assumptions in American Labor Law*, Professor James Atleson observed that, "[l]egal criticism constantly expose[d] the failure of adjudicators either to justify coherently the decisions reached or to rationally place the decisions within the received wisdom."[26] Atleson maintained that such decisions were due to more than just faulty analysis or judicial whimsy.[27]

Instead, Atleson provocatively argued that, "many judicial and administrative decisions are based on other, often unarticulated, values and assumptions that are not to be found or inferred from the language of the statute or its legislative history."[28] Instead, he continued, "[t]he presence of such values and assumptions, often only implicit or hinted at, explains many decisions which otherwise seem odd, irrational, or at least inconsistent with the received wisdom."[29] In other words, there is a cultural war of values being fought between

[26] ATLESON, *supra* note 2, at 2.

[27] *Id.*

[28] *Id. See also id.* at 10 ("The basic theme of the book . . . is that assumptions and values about the economic system and the prerogatives of capital, and corollary assumptions about the rights and obligations of employees, underlie many labor law decisions.").

[29] *Id.* at 10.

management and labor, and legal decisionmakers often seem oblivious when choosing one cultural value over another.[30]

Other scholars later on made similar arguments. For instance, Professor Gary Minda in his book, *Boycott in America*,[31] discussed how the "cognitive effects of legal imagination remained concealed within law's official forms of reason."[32] He maintained that, "[l]ike a chameleon, the law is capable of changing the meaning it attributes to phenomena depending on the context and the ideological motivations of law's official interpreters."[33] Ideology, in Minda's sense, is not the vulgar ideology of the political,[34] but rather "refer[s] to the way cognitive thought conceals information about phenomena, especially the interests and values that may be implicated."[35]

Of course, Minda and Atleson were inspired by the realist critique of legal formalism from the early part of the Twentieth Century.[36] Consider the views of Jerome Frank, a well-known legal realist, on the legal perception of facts in this regard:

> The fact is, and every lawyer knows it, that *those judges who are most lawless, or most swayed by the "perverting influence of their emotional natures," or the most dishonest, are often the very judges who use meticulously the language of compelling mechanistic logic, who elaborately wrap about themselves the*

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[30] *Id.*

[31] GARY MINDA, BOYCOTT IN AMERICA (1999). *See also* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978) (quoting Jose Antonio Viera-Gallo, *July 1971 Speech*, *reprinted in The Legal System and Socialism,* 1972 WISC. L. REV. 754, 755) ("Law always expresses a vision of society. It also expresses the groups behind this vision and the interests served by conceiving the society in that particular form.").

[32] Minda, *supra* note 31, at xi.

[33] *Id.* at xii.

[34] *See* Secunda, *supra* note 20, at 110 n.12 (discussing as one way judges' values impact their decisions as when they choose "the outcome that best promotes their political preferences without regard for the law.").

[35] MINDA, *supra* note 31, at xiii.

[36] *See, e.g.,* Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938) (one example of a legal realist critique of formalism).

> *pretense of merely discovering and carrying out existing rules, who sedulously avoid any indications that they individualize cases.*[37]

Or Felix Frankfurter, later a United States Supreme Court Justice, who maintained:

> It is plain . . . that judges are not merely expert reporters of pre-existing law. Because of the free play of judgment allowed by the Constitution, judges inevitably fashion law.[38]

In all then, Atleson and Minda continued Frank and Frankfurter's realist critique of how legal decisionmaker's values and assumptions can have a dispositive impact on how important legal issues are decided, and continued this critique particularly in the labor and employment law context.

B. The Next Generation: Cultural Cognition and the Mechanism Behind the Legal Realist Insight

So how are cultural cognition insights different? Or to put it more provocatively, isn't this just another theory that recycles the basic thesis that values held by judges drive judicial decisions? The answer is emphatically "no."

Past generations of legal scholars did eloquently and thoroughly discuss how legal decisionmaker's values impacted labor and employment law cases. Yet, those scholars did not describe the *mechanism* or *process* by which judges' assumptions and values came to shape facts in labor and employment cases. This distinction is crucial because to counteract the influence of such values and assumptions, a psychological explanatory device for this phenomenon is required.

Psychological realism[39] is a theory that maintains that legal decisionmakers in many cases are not self-conscious partisans.[40] Rather, most of the time, they seek to arrive at the right decision without being ideologically

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[37] JEROME FRANK, LAW AND THE MODERN MIND 148 (1930) (emphasis in original).

[38] FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 8 (1938).

[39] Professor Kahan and his co-authors have recently also used this terminology in their recent work. *See* Kahan, *They Saw a Protest*, *supra* note 4, at 4.

[40] Secunda, *supra* note 20, at 139.

committed to any prior legal or political view.[41] Nevertheless, disagreements over legally-consequential facts are especially prevalent in labor and employment law cases.[42] In this highly-polarized field, legal decisionmakers naturally align themselves, based on their worldviews, with employer or employee interests.

For instance, current administrative law practice prescribes how many Democrats and Republicans sit on the National Labor Relations Board (NLRB or Board) during any given period.[43] This state of affairs is not because most Board members are incapable of putting aside their ideological differences for the betterment of industrial relations in this country; I have argued in a previous empirical study that most of the time they do.[44] Rather, NLRB Board Members, federal judges, and for that matter any judicial and administrative decisionmaker in the workplace milieu, cannot help but to bring their cultural background to bear in deciding cases involving complex labor issues. Consequently, there is a need to "fortify [labor and employment law] with psychological realism,"[45] because there is an on-going threat to the ideal of deciding labor and employment law cases in an evenhanded manner.[46]

A brief review of cultural cognition theory, and its related concept of cognitive illiberalism, will help to further elucidate why legal decisionmakers are so hamstrung by this psychological pathology.

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[41] *Id.* at 110.

[42] *Id.* ("[D]isagreements are especially prevalent in labor and employment cases where the factual issues that divide judges involve a large amount of speculation and inconclusive evidence.").

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

[44] *Id.* at 105–06.

[45] *See* Kahan, *supra* note 4, at 4.

[46] The core tenant of liberal neutrality should be a "prohibition on state endorsement of a partisan conception of the good life." *Id.* at 7.

1. Cultural Cognition Theory – Mechanics of Interpretation

The judicial role in society is popularly understood by its principle purpose of providing a fair adjudication of disputes by a neutral decisionmaker – the judge or the jury.[47] Yet, a "practical barrier" exists.[48] That practical barrier is cultural cognition.

"Cultural cognition," or "culturally-motivated cognition," describes a series of psychological processes that help to explain existing conflict among individuals over legally and/or politically consequential facts.[49] This is better understood in circumstances when individuals must make some sense and determination of uncertain and inherently ambiguous facts—a prospect not uncommon in the labor and employment law context.[50]

Where uncertainty and ambiguity exists, individuals must fill that information deficit in some manner. In an effort to make sense of indeterminate facts among competing claims and arguments about how those facts matter, an individual will "tend selectively to credit empirical information in patterns congenial to their cultural values."[51] At the same time, the idea of "naïve realism" explains that people simultaneously ignore or discount the views of people with different cultural outlooks.[52]

These psychologically-based conflicts cause a continuing threat to democratic pluralism by pitting subgroups with different cultural biases against one another. Using an anthropologically-based classification system,[53] studies have shown that persons with individualist, hierarchical values tend to be skeptical about facts and arguments that support a more communitarian or

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[47] *Id.* at 3.

[48] *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116 (2007).

[49] *See* Dan M. Kahan, "*Ideology in" or "Cultural Cognition of" Judging: What Difference Does it Make?*, 92 MARQ. L. REV. 413, 419 (2009).

[50] *See supra* note 42.

[51] Kahan, *supra* note 4, at 8.

[52] *See generally* Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY AND SOC. PSYCH. 404 (1995).

[53] *See* Secunda, *supra* note 20, at 112–115 (discussing anthropological studies discussing the relationship been risk perceptions and cultural worldviews).

egalitarian social model because endorsing those arguments would work counter to their culturally-identified group.[54]

Importantly, for purposes of this paper, legal decisionmakers experience some of the same type of identity-protective pressure that non-legal decisionmakers face. In the judicial context, what the legally consequential facts say largely depends upon *to whom* the facts are speaking. A different way of stating this is that the way that facts will matter in a given case will be based on how those facts are filtered and interpreted by the decisionmaker. Thus, the ultimate interpretation of those legally consequential facts will be distilled by the decisionmaker's cultural worldview, likely favoring a particular outcome in agreement with the decisionmaker's prior cultural worldview.[55]

A recent empirical study by Kahan, Hoffman, Braman, Evans, and Rachlinski illustrates in stark detail the extent to which cultural cognition can influence individuals' perception of factual events.[56] Study participants, a group of 202 randomly selected adults, were randomly assigned to view the same protest video.[57] One group was told the subject of the protest was against an abortion clinic while the other group was told the subject of the protest was against a military recruiting center at a university aimed at protesting the previous ban on gays openly serving in the military.[58] The participants were instructed to act as jurors in a case that "turned on whether a group of protesters had crossed the [constitutionally important] speech-conduct line."[59] In the video, participants were told that the police had halted the protest.[60] Because the First Amendment protects speech, if the participants found that the protest was speech, then the police action would be unlawful. However, if the participants found that the

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[54] Kahan, *supra* note 4, at 9–11.

[55] *See* Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 Cardozo L. Rev. 391, 394 (2006) ("[W]hen decision makers use simplifying heuristics, they are likely to make mistakes in the direction of their preexisting biases).

[56] Kahan, *supra* note 4.

[57] *Id.* at 16. The protest video can be viewed online at http://www.youtube.com/watch?v=k8ru-FE2v_8 and http://www.youtube.com/watch?v=X3PJACpL53k. *Id.* at 17 n.72.

[58] Kahan, *supra* note 4, at 17.

[59] *Id.* at 12.

[60] *Id.*

protest crossed the line from speech to conduct, the police would have a legitimate interest in halting the protest.[61]

Prior to viewing the video, the study participants answered a questionnaire and were rated based on their answers to four categories of cultural worldviews: hierarchy-individualism, hierarchy communitarianism, egalitarian individualism, and egalitarian communitarianism.[62] The significance of the study's findings is that even though all the subjects viewed the same video, "what they *saw*—earnest voicing of dissent intended only to persuade [i.e., lawful speech], or physical intimidation calculated to interfere with the freedom of others [i.e., unlawful conduct]—depended on how congenial . . . the protesters' position [was] to the subjects' own cultural values."[63]

The study thus illustrates the phenomenon of culturally motivated cognition and how it drives individuals' perceptions of factual events. Ultimately, the participants' perception of the same protest was heavily influenced by their culturally motivated cognition to either support the police action to halt the protest or disapprove the police action. It is this filtering process, or psychological realism, which explains the *mechanism* by which individuals fill perceived gaps with an interpretation that accords with their prior cultural worldview.

Understanding cultural cognition as a practical barrier to the neutrality commitment of judges in their exercise of their judicial role is important because the mechanics are both *unconscious* and *natural*. Although some judges can rightly be accused of engaging in an outright ideologically motivated form of judicial bias, the majority are sincerely not engaged in this kind of ideologically-based decisionmaking.[64] Rather, a better and perhaps more helpful understanding is that "[s]tates of persistent group polarization are . . . inevitable—almost mathematically so—as beliefs feed on themselves within cultural groups, whose members stubbornly dismiss as unworthy insights originating outside the group."[65] In short, it is the very mechanics of cultural cognition that push

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[61] *Id.* at 11–12.

[62] *See id.* at 13–15. These worldview categories are based on the work of the noted anthropologist, Mary Douglas. *See* MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY 54–68 (1970).

[63] Kahan, *supra* note 4, at 28.

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

[65] Kahan, *Illiberal State*, *supra* note 48, at 125.

individuals to adopt viewpoints that favor their identified cultural worldview and lead to the phenomenon of cognitive illiberalism.

2. Cognitive Illiberalism: The Danger of Delegitimizing Judicial Decisionmaking

Psychological realism is problematic for legal decisionmakers because it leads to this phenomenon of cognitive illiberalism. Cognitive illiberalism is "the vulnerability of . . . legal decisionmakers to betray their commitment to liberal neutrality by unconsciously fitting their perceptions of risk and related facts to their sectarian understanding of the good life."[66] As a result of this bias, the critical checking function performed by the judiciary is "subject to unwitting corruption."[67]

Another danger of cognitive illiberalism is that individuals are very poor at identifying when they themselves are engaged in cognitive illiberal bias, but are quite adept at identifying when others engage in cognitive illiberal bias.[68] This dynamic transforms everyday legal debates over how to provide justice and fairness in the workplace into instances of political and legal competition between management and labor interests.[69]

It is when legal decisionmaking engages in this hubristic overconfidence in favor of the prevailing judge's cultural worldview that cognitive illiberalism endangers judicial legitimacy and its commitment to neutrality.[70] A court majority, unconsciously motivated by culturally-motivated cognition, runs the risk of denigrating any differing viewpoint of a minority cultural identity group as an unreasonable interpretation of a set of legally consequential facts. In other words, this type of psychologically-tarnished decisionmaking will invariably delegitimize the legal justification for the court's decision in the eyes of the thwarted cultural

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[66] Kahan, *supra* note 4, at 29. Cognitive illiberalism also has been defined as the way that "decisionmakers (particularly adjudicators) unconsciously apply [the law] to favor outcomes congenial to favored ways of life . . . . This distinctive psychological threat to constitutional ideals . . . [can be] refer[red] to as 'cognitive illiberalism.'"). *Id.* at 3–4.

[67] *Id.* at 10.

[68] *See supra* note 52 and accompanying text.

[69] *See supra* note 42 and accompanying text.

[70] *See* Clyde Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 86 (1965) ("Judgment which bends with the political winds cannot command much confidence in the Court, nor are claims of industrial experience and expertise under such circumstances given full faith and credit.").

group.[71] This is especially so because the non-preferred group will readily recognize the occurrence of cognitive illiberalism as the underlying basis for the decision, rather than recognize the legal merits of that decision, no matter how justified those merits may be.[72]

It was this same cultural cognitive bias that lead Kahan, Hoffman, and Braman to criticize the decision announced by Justice Scalia in *Scott v. Harris* that "no reasonable jury" could reach a verdict that the police were not justified in using deadly force to end the car chase given the police videotape.[73] In many of the same ways, justices and judges are privileging one cultural worldview over that of another in a number of important labor and employment law cases and in a way that needlessly alienates specific groups of citizens, like those employed, let's say, at a Fortune 500 company that provided health benefits. This phenomenon of psychological realism endangers judicial legitimacy because the underpinning of law should not be based on privileged worldviews, but based on inclusive or neutral criteria.

In any event, whether it is in labor and employment cases, constitutional law cases, or other cases, little doubt exists that the legitimacy of the courts is a pressing social concern. In discussing his recent book, *Making Democracy Work: A Judge's View,*[74] Justice Stephen Breyer maintained that, "the court jeopardizes its legitimacy when it makes . . . radical rulings and that, in doing so, it threatens our democracy."[75] This is especially so in the broader judicial context outside of the Supreme Court among the lower federal and state courts where most decisions are decided. These decisions have local implications for the parties involved in the litigation as well as society as a whole. While "[t]here's no accepted index of legitimacy for the court . . . . [a]round the world, its influence has declined,

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[71] *See, e.g.*, Rebecca M. Bratspies, *Regulatory Trust,* 51 ARIZ. L. REV. 575, 620 (2009) (explaining how "different groups respond to the suggestion that a reinvigorated nuclear energy program is needed to respond to global warming. For those opposed to nuclear energy, the juxtaposition of the two issues seems absurd; but to those in favor of the technology the linkage is obvious.").

[72] In the context of assessing legal facts regarding risk, "individuals perceive the law as denigrating their visions of the good not merely when political actors [e.g., judges] justify it on culturally partisan grounds but also when they justify it on the basis of perceptions of harm distinctive of their worldviews." Kahan, *Illiberal State*, *supra* note 48, at 151–52.

[73] Kahan, *supra* note 3, at 881.

[74] STEPHEN BREYER, MAKING DEMOCRACY WORK: A JUDGE'S VIEW (2010).

[75] *See* Lincoln Caplan, *A Judge's Warning About the Legitimacy of the Supreme Court*, N. Y. TIMES, Sept. 26, 2010, at A22.

measured by the number of times top courts in other countries cite it."[76] As Breyer and other court commentators recognize, the legitimacy of the courts depends to a large degree upon society's perception of the judiciary as a neutral decisionmaking body.

So, psychological realism not only provides a working theory about how most legal decisionmakers interpret legally consequential facts, but it also helps to explain the formation of cognitive illiberalism and the delegitimization of the very neutrality that most judges wish to foster. Of course, all of this is not to say that efforts to counteract these inherent biases cannot be formulated. As Kahan and his co-authors aptly point out: "[J]ust like the rest of us, [judges] are perfectly capable of understanding that these dynamics exist and can adversely affect the quality of their decisionmaking."[77] To the extent that one sees cognitive illiberalism as being a consequence of unjust labor and employment law decisions, it is necessary to consider a number of structural reforms which might help to eliminate both culturally-motivated cognition from labor and employment law decisions and the prevalence of cognitive illiberalism surrounding disputes over labor policy in the United States.[78]

The next section analyzes a recent United States Supreme Court decision in the labor and employment law context where the majority appears to puts its institutional legitimacy at risk by neither understanding culturally-motivated

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[76] *Id.*

[77] Kahan, *supra* note 3, at 898. *See also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (suggesting judges employ an "intuition-override" model of decision making).

[78] As for the latter, it is has been fascinating observing the polarization caused by Wisconsin Governor Scott Walker's attempt to legislate out of existence most public-sector collective bargaining rights. As predicted by psychological realism, those who favor minimalist government and management rights favor the proposal, while those who believe government should promote collective bargaining as a fundamental human right are dead set against the legislation. *Compare* Jill Cook, *Wisconsin Labor Protests: Labor Union Negotiations Hold Back Economic Progress*, ALESTLELIVE.COM (Mar. 3, 2011) ("Collective bargaining has become an overly abused tool for greed and excused failure."), http://media.www.alestlelive.com/media/storage/paper351/news/2011/03/03/Opinion/Wisconsin.Labor.Protests.Labor.Union.Negotiations.Hold.Back.Economic.Progress-3982662.shtml *with* Samuel A. Culbert, *Why Your Boss is Wrong About You*, NEW YORK TIMES (Mar. 1, 2011), http://www.nytimes.com/2011/03/02/opinion/02culbert.html?_r=1&src=twrhp ("Unions in Wisconsin are justified in worrying that limiting collective bargaining would lead to capricious firing or demotions, whether for age, personality, salary or any other criterion you can think of.").

cognition, nor the cognitive illiberalism that it engenders in the larger society. Part IV then goes on to consider ways that this form of unconscious judicial subversion can be counteracted. In short, there are a spectrum of available tools to counteract judicial cultural cognition, ranging from education on various debiasing techniques to the formation of labor and employment courts and other types of tribunals. The goal of all of these approaches is to encourage the development of a professionalized group of labor and employment judges with expertise and familiarity with the complex body of American labor and employment law.

III. AN EMPLOYEE BENEFITS CASE STUDY: "DUDE, WHERE'S MY PENSION?"

A. "Man Does Not Live by Words Alone"

It is the rare Supreme Court case where a three-word first sentence of an opinion tells you everything you need to know about how the case will be decided. It is even rarer in an ERISA case.[79]

But that is exactly what occurred in *Conkright v. Frommert*,[80] where the majority opinion's first sentence by Chief Justice Roberts was: "People make mistakes."[81] The second sentence – "Even administrators of ERISA plans." –

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[79] Observing "that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute.'" Conkright v. Frommert, 130 S. Ct. 1640, 1644 (2010) (citing Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993)). Although some may question the use of an employee benefits law case under ERISA as an example of an everyday labor and employment law dispute, the fact is that ERISA cases have become a common part of many federal court dockets in the United States. *See* Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2008 and 2009, *Federal Judicial Caseload Statistics: March 31, 2009*, Administrative Office of the United States Courts, Mar. 31, 2009, *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx [hereinafter "Table C-2, 2009"] (reporting nearly 9,000 ERISA in 2009).

[80] 130 S. Ct. 1640 (2010). A disclosure: I was the co-author of an amicus brief by law professors in support of the retirees in *Conkright*. *See* Brief of Law Professors as Amici Curiae in Support of Respondents, Conkright v. Frommert, No. 08-810, at 5 (Nov. 20, 2009), *available at* 2009 WL 4074863. I have tried to do my best to avoid allowing my own cultural cognition from clouding my analysis below, but I am sure that it has had at least some impact.

[81] *Conkright*, 130 S. Ct. at 1644.

furthered the reasonable reader's view that these administrators would, under no circumstance, be held liable under ERISA for their "honest mistake."[82]

Conkright dealt with a dispute over the calculation of pension benefits between Xerox and a group of retired employees.[83] The "single honest mistake" in question involved an important pension calculation – the so-called phantom account offset method – with literally millions of pension money hanging in the balance for retirees.[84] Although ERISA contains a well-defined process for disputing denial of benefits under a plan,[85] the law is silent when the plan administrator initially interprets its pension plan in a way that a court deems "arbitrary and capricious."[86]

One might think, therefore, that some significant legal issue would decide how this employee benefits case might come out. For example, perhaps the United States Supreme Court would decide that the common law of trusts, which often informs decisions in ERISA cases,[87] needed to be interpreted one way or

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[82] Indeed, the United States Supreme Court reversed (5-3), Justice Sotomayor not participating, holding that the district court should have applied a deferential standard of review to the Plan administrator's new interpretation of the Plan on remand. *Id.* at 1651–52.

[83] *Id.* at 1644–45.

[84] *Id.* at 1645. ("Respondents are Xerox employees who left the company in the 1980's, received lump-sum distributions of retirement benefits they had earned up to that point, and were later rehired . . . . The dispute giving rise to this case concerns how to account for respondents' past distributions when calculating their current benefits.").

[85] Before bringing a Section 502(a)(1)(B) under ERISA in state or federal court, a plan participant must exhaust his or her internal claims procedures. ERISA § 503; DOL Reg. § 2560.503-1. Once the internal claims procedures have been exhausted, and the claim has been filed by the participant in state or federal court, the issue becomes under what standard of review should courts review benefit determinations.

[86] *See Conkright*, 130 S. Ct. at 1657 (Breyer, J., dissenting) ("Which of these cases says that, after the trustee has abused its discretion, a district court *must* still defer to the trustee? *None of them do*. I repeat: Not a single case cited by the Scott treatise writers supports the majority's reading of the treatise.") (emphasis in original).

[87] *See* Varity Corp. v. Howe, 516 U.S. 489, 496 (1995) ("[W]e recognize that these [ERISA] fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment.");

another. But the majority opinion in *Conkright* expressly concluded that trust law need not be considered.[88]

Perhaps, then, it would be a reconsideration of the *Firestone* standard of review,[89] which since 1989 has permitted employer-provided benefit plans to place discretion in their plan administrators and have their claim decisions reviewed under a highly deferential "arbitrary and capricious" standard.[90] But, no, the majority in *Conkright* concluded that *Firestone* continued to provide the appropriate standard of review for federal district courts reviewing all denial of benefit claims.[91]

There was even a thought, based on past labor and employment law cases, that this case would come down under a new application of existing administrative law principles.[92] The new legal theory would say something to the effect that whereas district courts must generally defer to the interpretation of the

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Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

[88] *Conkright*, 130 S. Ct. at 1648 ("Here trust law does not resolve the specific issue before us").

[89] 489 U.S. 101 (1989).

[90] At first, the Supreme Court in *Firestone* stated that the benefit decision be reviewed *de novo* by the court. *Id.* at 115. However, the Court then indicated that if the benefit plan contains language vesting the plan administrator with discretionary authority, the benefit determination decision is reviewed under a deferential arbitrary and capricious standard. *Id.* Unsurprisingly, the *Firestone* decision has led most employers to design plans with language investing its plan administrators with the necessary discretionary authority in order to take advantage of the more favorable review standard. *See* COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 532 (3ED 2011).

[91] *Conkright*, 130 S. Ct. at 1646-47.

[92] *See* Amicus Brief of Law Professors, *supra* note 80, at 5 (arguing that, "[b]ecause the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under the *Firestone* trust law-based deferential review standard as being unreasonable, the only new deference theory Petitioners' can be advancing here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position.") (citing Mead v. Tilley, 490 U.S. 714, 722 (1989) (ERISA case where Court deferred to the advocacy position of the Pension Benefit Guaranty Corporation presented in an *amicus* brief)).

plan by administrators, such deference is no longer required once the plan has already been found to have interpreted their own plan language in an "arbitrary and capricious" way.[93] But the majority opinion in *Conkright* does not even discuss how administrative law principles might apply in this context.

No, once Chief Justice Roberts and the majority decided, *as a factual matter*, that Xerox, in interpreting its own pension plan, had made a "single honest mistake,"[94] the plaintiff retirees had to know they had lost the case. How can you blame someone for just messing up inadvertently after all?

Because once the conclusion had been reached that Xerox's behavior had been merely mistaken and not a sanctionable violation of ERISA, it was clear that Xerox would be given a second chance to reinterpret their plan in a non-arbitrary and capricious manner. Indeed, the case was sent back to the district court with instructions to properly defer under the *Firestone* standard to Xerox's second interpretation of the plan.[95] Unremarkably, this second interpretation will likely deprive the plaintiff retirees of a substantial sum of retirement income. What this means is that all ERISA plaintiffs will continue to fight a difficult uphill battle to get their benefit denial claims overturned by a reviewing court.[96]

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[93] *Id.* at 11 (arguing that "[l]ower federal courts applying *Firestone* have confused deference in ERISA claims with the kind of deference courts extend to administrative agencies.").

[94] Indeed, Roberts used the phrase – "single honest mistake" – three times in his majority opinion. *See* Conkright v. Frommert, 130 S. Ct. 1640, 1644 ("The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan."); *id.* at 1647 ("If, as we held in *Glenn*, a systemic conflict of interest does not strip a plan administrator of deference, . . . it is difficult to see why a single honest mistake would require a different result."); *id.* at 1649 ("But the interests in efficiency, predictability, and uniformity-and the manner in which they are promoted by deference to reasonable plan construction by administrators-do not suddenly disappear simply because a plan administrator has made a single honest mistake.").

[95] *Id.* at 1652.

[96] *See* Meredith Z. Maresca, *Lawyers at ABA Meeting Discuss* Conkright, *Say Case Doesn't Change Review Standard*, BNA PENSION AND BENEFITS DAILY, February 18, 2011 ("The U.S. Supreme Court's decision last year in *Conkright* has had little impact on the standard of review used in evaluating denied benefit claims under the Employee Retirement Income Security Act, panelists said Feb. 17 at the American Bar Association's Section of Labor and Employment Law Midwinter Meeting of the Employee Benefits Committee.").

So because the majority in *Conkright* made the *legally-consequential, factual determination* that Xerox really had not meant to do what it did, the Court said thrice that "a single honest mistake" should not change the basic rules of ERISA plan interpretation by administrators.[97] And because it was just a "single honest mistake," Roberts agreed with Xerox that stripping plan administrators of deferential court review once they made such a mistake would upset the uniform administration of ERISA plans.[98]

B. "They Know Not What They Do"

So on what basis did Chief Justice Roberts conclude, as a factual matter, that Xerox had made a "single honest mistake"? The retirees had put this evidence in the record, as detailed in their brief to the Court:

> This lawsuit, however, is not about the legality of the phantom offset. That is so because, in 1989, as part of a major benefits redesign, *Xerox admittedly removed the phantom offset from its plan*. For the next five years, Xerox sent documents to respondents indicating that the company would deduct from their pensions only the *actual* monies they had previously received. In 1995, however, Xerox did an about-face. It informed respondents that the company would use the phantom offset to eliminate (or dramatically reduce) their pensions. Respondents objected, and after administrative resolution of the dispute proved unsuccessful, this lawsuit was filed . . . .
>
> Xerox had provided respondents*, for five years,* with personalized documents indicating that the offset would be limited to the monies that respondents had *actually received*.[99]

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[97] The dissent argued, however, that "trust law ... leaves to the supervising court the decision as to how much weight to give to a plan administrator's remedial opinion." *Conkright*, 130 S. Ct. at 1659–1660 (Breyer, J., dissenting). Justice Breyer also disagreed on the single-honest-mistake approach of the majority: "[T]he majority's absolute 'one free honest mistake' rule is impractical, for it requires courts to determine what is 'honest,' encourages appeals on the point, and threatens to delay further proceedings that already take too long." *Id.* at 1659.

[98] *Id.* at 1649 ("Respondents claim that deference is less important once a plan administrator's interpretation has been found unreasonable, but the interests in efficiency, predictability, and uniformity do not suddenly disappear simply because of a single honest mistake, as illustrated by this case.").

[99] Brief for Respondents, *Conkright v. Frommert* at 2–3 (Nov. 13, 2009) (emphasis in original), *available at* 2009 WL 5240210.

Roberts and the majority Justices do not mention this evidence at all in his majority opinion. Instead, they appear[100] to have taken his cue from Xerox's brief:

> [D]eference to plan administrators is not restricted to initial claims determinations. A hair-trigger rule that strips plan administrators of deference based on a good-faith mistake in the administration of a plan is not supported by ERISA or this Court's decisions, and would thrust federal courts into the role of making difficult and discretionary decisions under ERISA plans.[101]

When there are two conflicting stories of what happened in a case, it is not unusual for a court to consider the evidence and side with one party or another. What is remarkable about the *Conkright* decision, however, is that the opinion written by Chief Justice Roberts puts the proverbial rabbit in the hat. In other words, without discussing why one story of the events makes more sense than another, he starts his opinion by framing the relevant question as: "[W]hether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan."[102] Of course it doesn't, if the mistake was an honest one, and the Court so held.[103] But why did the majority opinion not even bother to explain how it came to believe Xerox's version of the dispute?

There is, in fact, little to no discussion of the underlying facts in the majority opinion. All we are told by way of explanation is that such a mistake "should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute;'" "the plans that administrators must construe can be lengthy and complicated. (The one at

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[100] I advisedly use the word "appears" here. It is simply impossible to know with any certainty what any of the Justices were thinking based on how they explain themselves in a case. Indeed, as in *Cultural Cognition at Work*, "I do not seek to psychoanalyze the Justices or analyze the motives of any judge. It makes no sense to look at a particular individual and say that a particular perception on his or her part involves 'cultural cognition,' as the theory is best understood as a phenomenon of collective decisionmaking." Secunda, *supra* note 20, at 121 n.76. Rather, "this Article offers an account of how we, as observers of judges' decisions, make sense of what's going on in those decisions." *Id.*

[101] Brief for the Petitioner, *Conkright v. Frommert* at 2 (Sept. 14, 2009), *available at* 2009 WL 2954165.

[102] *Conkright*, 130 S.Ct. at 1644.

[103] *Id.*

issue here runs to 81 pages, with 139 sections); and "[f]ortunately, most of the factual details are unnecessary to the legal issues before us, so we cover them only in broad strokes."[104] Not only did the retirees argue vehemently to the contrary, but Xerox itself never used the language of "single honest mistake" in its own briefing. It is completely the majority's factual characterization of how Xerox acted towards these retirees.

C. "If the Facts Don't Fit the Theory, Change the Facts"

It is clear that one could make the argument that the majority Justices decided they wanted to decide for Xerox and then found the reasoning to get there. Yet, I do not believe, and this is the most provocative part of psychological realism, that the majority Justices engaged in self-conscious, ideological, activist, or outcome-determinative decisionmaking in *Conkright*. I do not accuse any Justice of intellectual dishonesty in this paper. Indeed, if asked, I would suspect that they would all say that the law and the facts could only compel one proper result given employee benefits law and the facts of this case.

I want to contend here that the five conservative Justices who sided with Xerox simply were not psychologically able to characterize Xerox as dishonest or unreasonable in its interpretation of its own pension plan. Using the same matrix to define different worldviews held by individuals that Kahan and his co-authors have used in past cultural cognition studies,[105] it is at least conceivable to maintain that most of the five majority Justices in *Conkright* hold worldviews best described as "hierarchy individualism."

As described in *Cultural Cognition at Work*, these types of individuals "can be viewed as individuals who . . . . tend to embrace values such a liberty, market freedom, autonomy, and self-reliance. In the workplace context, these individuals dislike legal regulations because they undermine their vision of how to run their businesses."[106] Notice that the opinion for the majority consistently

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[104] *Id.*

[105] *See, e.g.,* Kahan, *supra* note 4, at 13.

> The first, Hierarchy-Egalitarianism, measures the subjects' orientations towards social orderings that either feature or eschew stratified roles and forms of authority. The second, Individualism-Communitarianism, measures their orientations toward orderings that emphasize individual autonomy and self-sufficiency, on the one hand, and those that emphasize collective responsibilities and prerogatives, on the other.

Id.

[106] Secunda, *supra* note 20, at 114.

focuses on the complexity of ERISA, the need for efficiency and predictability in the workplace when it comes to employee benefits, and the problems associated with interpreting ERISA in any way that would increase employer costs or lead to more litigation.[107] Complexity, inefficiency, and unpredictability, all cause much concern for individuals "who tend to place a high value on social order generally."[108] So, perhaps, what the majority saw depended on the congruence of the parties' positions in *Conkright* with its own cultural values.[109] In other words, a possible example of culturally-motivated cognition. Indeed, a similar conclusion might also exists with regard to the dissenting Justices' opinion in *Conkright*, but this time with the "egalitarian communitarian" label being affixed. In short, such motivated cognition exists equally among all groups of individuals and Justices.

Atleson provides some theory for why the Justices might break down along these lines labor and employment law decisions in *Values and Assumptions in American Labor Law*: "Whereas management efficiency is seen in terms of the lowest per-unit cost of production, worker perceptions of fairness and justice is quite different."[110] Inevitably, then, the legal decision comes down to a choice among conflicting cultural norms.[111] With this background in mind, the majority of the Court in *Conkright* seemed to have engaged in assumptions about inherent employer authority to interpret and to narrow the purpose of ERISA.[112] This is culturally-motivated cognition in practice in the labor and employment law setting. That is, one possible conclusion is that the majority in *Conkright*

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[107] *See, e.g., Conkright*, 130 S. Ct. at 1644 (describing ERISA as "an enormously complex and detailed statute"); *id.* ("As in many ERISA matters, the facts of this case are exceedingly complicated."); *id.* at 1647 ("[W]e refused to create such an exception to *Firestone* deference in *Glenn,* recognizing that ERISA law was already complicated enough without adding 'special procedural or evidentiary rules' to the mix."); *id.* at 1649 ("Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review."); *id.* ("The prospect of increased litigation costs inherent in respondents' approach does not end there.").

[108] Kahan, *supra* note 4, at 14.

[109] *Id.* at 28.

[110] ATLESON, *supra* note 2, at 65.

[111] *Id.*

[112] *Id.* at 177.

unconsciously applied the appropriate facts to favor an outcome congenial to their favored ways of life. And citizens, like the retirees, who adhere to a disfavored view in this context suffer as a consequence.[113]

Perhaps most significantly, the consequence of this type of legal decision making is the generation of needless cultural conflict between groups with different ideas of workplace fairness with regard to the reception of retirement benefits in the workplace. Those who sympathize with the losing retirees in *Conkright* now feel discontent with the labor and employment law, while those who identify with the majority in the case feel vindicated that their preexisting biases were accurate. Could all of this been avoided by nipping psychological realism in the bud?

The next Part maintains that because better informed legal decision makers are more self-aware of their own culturally-motivated cognition, and the cognitive illiberalism it can cause throughout society, a spectrum of judicial reform approaches should be explored to see whether all or parts of these ideas could help overcome legal decision makers psychological limitations in deciding labor and employment law cases. These approaches range from fairly simply debiasing techniques to the more radical idea of employment tribunals based on the British model.

IV. A SPECTRUM OF APPROACHES TO COUNTERACT COGNITIVE ILLIBERALISM IN LABOR AND EMPLOYMENT LAW CASES

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

It is also important to understand that these suggested reforms are not meant to be mutually exclusive. For instance, creating a specialized employment court to help counteract cultural cognition will not necessarily eliminate the need for judges to become cognizant of their own illiberal biases and utilize various debiasing techniques. Quite to the contrary, debiasing techniques are relevant to our current judicial system and would remain relevant in any potential future system in which employment courts are utilized. However, the systemic

[113] Kahan, *supra* note 4, at 3.

advantages of a specialized employment judiciary—namely the expertise and familiarity specialized employment judges would have—coupled together with the proactive utilization of de-biasing techniques, might offer the best solution for enhancing the way in which labor and employment law decisions are communicated to the larger public.

This Part is divided into four subparts, starting with the least drastic measures to consideration of the most drastic ones. After reviewing debiasing techniques for legal decisionmakers and how these strategies might have worked in the *Conkright* decision, this Part then discusses: (1) magistrate and bankruptcy court models; (2) specialized appellate courts; and (3) the British employment tribunal model from a comparative perspective.

A. Debiasing Techniques for Legal Decisionmakers

Cultural Cognition at Work discussed two different techniques for counteracting judicial cognitive bias: 1) humility as a judicial habit of mind, and 2) expressive overdetermination and self-affirmation.[114] These two concepts dovetail nicely with a third method for debiasing outlined by Cass Sunstein in his article, *Trimming*.[115] These approaches work particularly well with judges because "there is . . . convincing evidence that judges, when engaged in certain tasks distinctive of their professional role, are better able to resist various forms of at least some cognitive biases than are lay people under similar circumstances."[116]

1. Judicial Humility

The technique of judicial humility calls for a judicial state of mind which recognizes that it can misjudge a decision.[117] Judicial fallibility is especially possible in cases that elicit community outrage.[118] By recognizing the potential for community outrage and engaging in judicial humility, judges can more readily self-correct for their own cognitive biases that may bear upon how they view legally-consequential facts.[119] Indeed, recent research on educating judges about

[114] Secunda, *supra* note 20, at 140–48.

[115] *See* Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009).

[116] Kahan, *supra* note 4, at 34.

[117] *See* Secunda, *supra* note 20, at 140–41.

[118] *Id.* at 143.

[119] *Id.* at 140 (citing Dan M. Kahan et al., *supra* note 3, at 881).

their own biases has shown that "more precise techniques in encouraging self-analysis" may be more successful than past debiasing strategies.[120]

Judges with the sensitivity to acknowledge potential community outrage over decisions are also better prepared to draft decisions without the appearance of partisan motivations or denigrating the concerns held by the community group on the losing side of these cases.[121] Moreover, the concept of judicial humility addresses one of the core pitfalls of cognitive illiberalism: that a community group can easily recognize when a community group with opposing views is engaging in cognitive illiberal bias, but cannot recognize their own.[122] Judges are prisoners to their world views, and are blind to the influence of these underlying perspectives. In short, the practice of humility encourages judges to self-reflect on how psychological realism may color their view of legally-consequential facts and thereafter, avoid basing decisions on those biases.

So, for instance, in *Conkright*, the Xerox retirees, and their supporters, were outraged by Chief Justice Roberts' conclusion that Xerox had made a "single honest mistake" in calculating their pension benefits. Perhaps if Roberts were more sensitized to potential community outrage, he would have gone to greater lengths to discuss the conflicting factual evidence that supported different sides of the case. This approach probably would not lead to him changing his mind and voting differently in *Conkright*, but it might have made the decision less susceptible to community outrage. From a cognitive illiberalism perspective, the way in which this modified decision reads, will then have a salutary effect on the broader discourse in society about employee benefits issue.

2. Expressive Overdetermination and Self-Affirmation

Expressive overdetermination is a debiasing technique that encourages judges to interpret laws in a manner that seeks to accommodate competing worldviews.[123] Through accommodation, each community can find meanings in the decision that affirms some of their worldviews. Individuals may be able to find validation for their views in some aspect of the law because legal decisions incorporate "a plurality of meanings."[124]

In *Conkright*, Chief Justice Roberts could have sought to draft a more inclusive majority opinion by not denigrating the views of the dissent and the

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[120] *Id.* at 140–41.

[121] *See* Kahan, *supra* note 3, at 898–99.

[122] *See supra* note 54 and accompanying text.

[123] *See* Secunda, *supra* note 20, at 144–45.

[124] Kahan, *Illiberal State*, *supra* note 48, at 146–47.

Xerox retirees.[125] By drafting a legal opinion which affirmed the values of the dissenting Justices and the retirees, he might have been able to make the disagreement between the parties less dramatic. By utilizing expressive overdetermination, Roberts could have discussed in more detail why Xerox's conduct amounted to only a "single honest mistake," while equally affirming the concerns that Justice Breyer raised in dissent and that the retirees and their *amici* raised in their briefing of the case. Although such an expressive overdetermination approach might not work well with judges who are ideologically committed to their way of looking at the world,[126] I do not place Chief Justice Roberts or most of the other Justices in that category. Indeed, Roberts has previously positioned himself as a consensus builder, but so far as failed to live up to those expectations.[127]

3. Trimming

Trimming incorporates both techniques discussed above for combating cognitive illiberalism. Trimming, according to Sunstein, is a decision procedure that "requires close attention to all points of view, including the poles."[128] Because a judicial trimmer follows a framework that considers all points of view across a spectrum, "contemporary trimmers . . . tend to end up between the extremes, in a way that both believe that they have gained, or not lost, something of importance."[129]

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[125] For instance, Roberts called the retirees' theory of the case "overblown" and described their understanding of what pension benefits they were due actuarial "heresy." *See* Conkright v. Frommert, 130 S. Ct. 1640, 1650–51 (2010).

[126] *Accord* Edwards & Livermore, *supra* note 64, at 1964 ("There may be some judges who care little about their colleagues' views and who are determined not to engage in collegial interactions. However, they are not in the majority."). Indeed, a question that still needs to be addressed is whether different legal decision-makers have distinctive pathologies on this communicative front.

[127] See The Monitor's View, *Elena Kagan as Supreme Court Consensus Builder*, May 10, 2010, at http://www.csmonitor.com/Commentary/the-monitors-view/2010/0510/Elena-Kagan-as-Supreme-Court-consensus-builder (last visited Mar. 2, 2011) ("Elena Kagan is Obama's chance to have a Supreme Court justice who can build bridges between factions on the court. Chief Justice John Roberts said he wanted to do that but so far he is failing.").

[128] Sunstein, *supra* note 115, at 1054.

[129] *Id.*

Thus, expressive overdetermination is a technique that is essential to trimming due to fact that individuals with opposite worldviews can find affirmation in the underlying basis for a judicial decision. Furthermore, the trimmer operates from a decision procedure that explores the merits of the other side's argument and seeks to preserve what can be valuably drawn from those arguments.[130] In order to explore the merits of the other side's argument, a judge would necessarily need to exercise a judicial habit of mind fostering humility so that a judge can acknowledge that their worldview alone does not illuminate fully the significance of legally-consequential facts and their effect on how a case should be decided.

What makes Sunstein's concept of trimming relevant as a debiasing technique is that this approach does not just encourage judges to listen to the other side, but rather encourages judges to identify "what is deepest and most appealing in competing positions" so as to ensure that "to the extent possible, no one is, or feels, rejected or repudiated."[131] This is not to say, however, that trimming involves finding the middle ground between two competing worldviews. In fact, trimming is not analogous to a moderate political affiliation because moderates "do not much care about the competing positions, and are not trying to steer between them."[132]

By engaging in a trimming experiment, judges may be able to best "capture the most plausible convictions of the adversaries."[133] Because judges engaging in a process that facilitates capturing the deepest convictions held by competing worldviews, judges can show respect for both views while avoiding decisions based on their own culturally-biased motivations.[134]

Although Sunstein believes that trimmers cannot engage in trimming without mediating between two poles of thought because the trimmer would otherwise not be able to find his bearings,[135] trimming can still play an important in counteracting the impact of psychological realism. This is because the concept holds most of its value as a debiasing technique. It is predicated on recognizing the deepest held values of another side's worldview and then incorporating that worldview into a decision.

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[130] *See id.*

[131] *Id.* at 1059.

[132] *Id.* at 1058.

[133] *Id.* at 1061.

[134] *See id.* at 1070.

[135] *See id.* at 1073–74.

So, in *Conkright*, Roberts could have trimmed his decision by more fully considering the dissenting views points and incorporating some of the important factual parts of the record as raised by the Xerox retirees in their briefing. Even more specifically, Roberts could have discussed the three mistakes that Justice Breyer identified in dissent that Xerox, the district court, and the majority, respectively, made,[136] and then explained his views about how these specific mistakes should be handled.[137] Again, the majority decision might have still come out the same way, but the hope would be a resulting legal opinion drafted with humility and which allowed the losing side to find self-affirmation in parts of that decision. As *Conkright* is written now, that is not possible.

B. Federal Bankruptcy Court & Magistrate Judge Models

Although the number of actions commenced in the federal courts that deal with labor and employment matters is not as significant as that of criminal or bankruptcy cases, this is not to say that labor and employment cases are an insignificant part of federal courts' dockets. When looking at the number of cases commenced in the United States District Courts in 2009 (the last year that caseload statistics are available for the federal court in February 2011), a picture emerges of a large number of actions involving labor law cases and civil rights employment-related claims.

For instance, during 2009, there were over 17,000 labor cases (including Fair Labor Standard Act (i.e., hours and wages cases), traditional labor cases under the National Labor Relations Act and Railway Labor Act, and ERISA cases) and nearly 15,000 civil right-related employment cases (i.e., employment discrimination claims under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act).[138] In the area of labor law, alone,

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[136] Conkright v. Frommert, 130 S. Ct. 1640, 1651–56 (Breyer, J., dissenting).

[137] *Id.* at 1655–56 ("[T]he majority further concludes that trust law "does not resolve the specific issue before" the Court in this case-*i.e.,* whether a court is *required* to defer to an administrator's *second attempt* at interpreting plan documents, even after the court has already determined that the administrator's first attempt amounted to an abuse of discretion. In my view, this final conclusion is erroneous, as trust law imposes no such rigid and inflexible requirement.") (emphasis in original).

[138] *See* Table C-2, 2009, *supra* note 82; *and* Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2001, *Federal Judicial Caseload Statistics: March 31, 2001*, Administrative Office of the United States Courts, Mar. 31, 2001, *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2001.aspx [hereinafter "Table C-2, 2000"].

litigation increased by 19.08 percent from 2000 to 2009.[139] Furthermore, reflecting the growing complexity of labor law cases, the number of actions pending for three years or more increased by 69.25 percent between the same period.[140]

While the numbers by themselves may not obviously support the creation of a separate court system as comprehensive as that of the bankruptcy courts, or support the creation of a specialized group of magistrate judges, there are several arguments in favor of creating a specialized court system for employment-related matters within the federal courts. First, the growing complexity of labor and employment law calls for a vigorous response within the federal judiciary by creating a mechanism for the speedy, efficient, and equitable adjudication of employment actions. By steering employment cases to those judges with the expertise and familiarity with labor and employment law, these goals can realistically be attained.

Secondly, by locating employment-related cases with judges steeped in knowledge and familiarity of labor and employment law, the residuary goal of ensuring that a specialized cadre of judges will adjudicate labor law cases free of culturally-motivated cognition will be promoted. Because these judges will not

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[139] *See id.*

[140] *See* Table S-11, U.S. District Courts—Civil Cases Pending Three Years or More, by Basis of Jurisdiction and Nature of Suit, on September 30, 2008 and 2009, *Federal Judicial Caseload Statistics: March 31, 2009*, Administrative Office of the United States Courts, Mar. 31, 2009, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx [hereinafter "Table S-11, 2009"]; Table S-11, U.S. District Courts—Civil Cases Pending Three Years or More, by Basis of Jurisdiction and Nature of Suit, on September 30, 1999 and 2000, *Federal Judicial Caseload Statistics: March 31, 2000*, Administrative Office of the United States Courts, Mar. 31, 2000, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2000.aspx [hereinafter "Table S-11, 2000"]. Although the number seems high, the comparison does not seem so great when compared to the percentage of cases pending for three years over the number of cases commenced the same year. To illustrate this point, the number of cases filed under labor law for 2009 was 17,127 while the number of cases pending for three years or more during that same year was 633, or 3.7 percent of the total. *See* Table C-2, 2009, *supra* note 82; Table S-11, 2009. Contrast this with the year 2000 where the total number of actions commenced under labor law was 14,383 while actions pending for three years or more for matters falling under labor law was 374, or 2.6 percent of the total. *See* Table C-2, 2000, *supra* note 144; Table S-11, 2000. Thus the increase in the number of cases pending for more than three years in relation to the total number of actions commenced that same year results in a comparative increase of only 1.1 percent.

be faced with the need to fill in gaps in knowledge in the same way or to the same degree that a generalist judge may need to, judges specialized in labor law may be better equipped to fairly adjudicate cases without the corrupting unconscious influence of this illiberal bias. In turn, cognitive illiberalism will be diminished when more evenhandedly decided cases are processed by "losers" in the politico-legal wars. The following sections consider in more detail the advantages and disadvantages in creating specialized employment judges or courts.

1. Specialized Employment Judges and Courts: Advantages and Disadvantages

Specialized judges and courts offer three recognized advantages: 1) a reduction in the caseload for generalist judges; 2) an enhancement in the quality of decisions by judges specialized in complex areas of the law; and 3) a promotion of greater uniformity of decisions in courts specialized in particularized areas of the law.[141] As the numbers mentioned earlier suggest, generalist Article III judges have been inundated with an increasing caseload while their judicial resources have not kept pace with the increased demand on the federal judiciary.[142]

The expanded jurisdiction of, and reliance on, magistrates is an indicator of the need for greater judicial resources for the federal courts.[143] Diverting employment cases to specialized employment judges has the potential to reduce the caseload for generalist judges by more than 30,000 cases: not an insignificant

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

[142] Matters have been made worse by recent political polarization which has substantially delayed the confirmation of federal judges in recent years. *See* Russell Wheeler & Sarah A. Binder, *Do Judicial Emergencies Matter? Nomination and Confirmation Delay during the 111th Congress*, Brookings Institute (Feb. 16, 2011), *available at* http://www.brookings.edu/papers/2011/0216_judicial_emergencies_wheeler_binder.aspx ("In sum—and recognizing individual exceptions—the priority the Judicial Conference attaches to filling judicial emergencies was not shared (at least with regards to the district courts) in 2009-2010 by the administration in making nominations or by the Senate in confirming them (and probably not by legislators in recommending nominees).").

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

number. In addressing the case for enhanced decisionmaking by specialized judges, the crux of the theory that judges in complex areas of law will enhance the quality of decisions is that some areas of law, such as tax law or patent law, are inherently difficult for non-specialists to understand. Thus, a specialist in the subject matter of the case will have a better opportunity to understand and formulate the law as applied to the relevant facts in a given case.[144]

Another perceived advantage of specialized courts is that specialization will lead to greater uniformity of decisions.[145] This does not necessarily have to be done only through specialized judges, but also can be done through the utilization of experts, special masters, and technical advisors who can assist the judiciary.[146] Increased caseloads compounded with increased complexity in particular areas of the law, on the other hand, can work to further multiply the problem of non-uniformity.[147]

Still, there are several points of concern for specialized courts. Among those concerns, the most salient are: 1) judicial "tunnel vision," 2) the risk of judicial capture by special interests, and 3) excessive judicial bias rooted in familiarity with the subject matter.[148] First, with regard to judicial tunnel vision, there is a risk that specialized judges will lack the "cross-pollination" of ideas in the common law and other areas of law.[149] Furthermore, specialized judges could make their specialized area of the law even more complex, rendering it even less intelligible to a generalist judge or attorney.[150]

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[144] Damale, *supra* note 141, at 1277.

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

[146] *See* LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Internet Law and Other High Technology Cases*, 2002 UCLA J. L. & TECH. 1, 24–28 (2002).

[147] Damale, *supra* note 141, at 1277–78.

[148] *Id.* at 1269.

[149] *Id*. at 1281. Though this seems like it would be less of a concern in an area like employment law, where much of the law is based on the common law of contracts and torts. *See, e.g.,* RESTATEMENT THIRD, EMPLOYMENT LAW, TENTATIVE DRAFT NO. 1, chs. 1, 2, & 4 (2008).

[150] Damale, *supra* note 141, at 1281.

The risk of judicial capture is also an important concern.[151] Because of the more narrowly defined area of law that a specialized judge would necessarily be focused, the risk of capture is more accentuated due to the more narrowly defined group of interests that those judges' decisions would potentially affect.[152] On the other hand, the perceived advantage of a generalist judge is that that judge will hear cases affecting a wider range of competing interest groups, thus reducing the risk of capture.

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

> [W]hile the expertise that courts of limited jurisdiction provide is undoubtedly valuable, the flip side is that specialist judges might have too much familiarity with a particular area of the law. Judges who are experts in welfare law, for example, are much more likely to have particular views about the proper operation of welfare law and hence are much more likely than generalist judges to impose their views of policy.[153]

Further compounding the problem from a cultural cognition standpoint is how a narrow group of specialized judges may be even more inclined to engage in cultural bias due to the community of interest that may form among a smaller community of employment judges.[154] And it's not simply about getting a decision or two "wrong;" it is also the problem of this smaller group of judges incorrectly predicting how others will see a decision, and then being aggressively overconfident in defending the choice. That is cognitive illiberalism.

Two other concerns about specialized courts also deserve mention. First, federal courts of general jurisdiction are much better suited to adapting to the changing volume of cases in different areas of the law.[155] From year to year, and

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[151] *Id.* at 1283.

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

[153] Damale, *supra* note 141, at 1283.

[154] *See id.* Kahan notes that "[i]ndividuals generally conform their beliefs to those held by their associates--both because those are the persons from whom they obtain most of their information and because those are the ones whose respect they most desire." Kahan, *Illiberal State*, *supra* note 48, at 120–21. In consequence, specialized judges may be encouraged to conform their beliefs to accord with those held by their narrowly specialized group.

[155] Damale, *supra* note 141, at 1284–85.

in different areas of the law, there is unpredictability in the volume of cases.[156] Therefore, developing a specialized court system would entail ascertaining a predicted volume of cases to justify an allocation of federal resources to procuring staff to meet those volume demands.

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

Second, there may be concern that a specialized federal court, with its focus on a narrow area of law, may not be able to attract highly qualified individuals to fill these specialist judicial roles. Specialized courts have been traditionally viewed "by the bar and the public as 'inferior,' regardless of their place on a judicial organization chart."[157] Because of this perception of specialized courts as inferior in stature among the bar and public, these courts may have more trouble attracting highly qualified individuals to serve as judges on these courts, potentially affecting the quality of decisions.[158]

While the point of this section is not to diminish the case for creating a system within the federal judiciary to develop a cadre of specialized employment judges by pointing out the potential criticisms and pitfalls that specialized courts

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[156] *See supra* note 138 and accompanying text (noting the 19% rise in labor law litigation from 2000 to 2009).

[157] *See* Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 748 (1981). Although since this article was written, many believe that the Federal Circuit Court of Appeals, for instance, has become the preeminent intellectual property court in the country. *See* Nicole-Marie Slayton, *Internet Business Model Patents: An Obvious Incentive to Reform the United States Patent and Trademark Office*, 21 LOY. L.A. ENT. L. REV. 123, 131 n. 82 (2000) (noting the preeminence of the Federal Circuit in the patent field).

[158] *See* Damale, *supra* note 141, at 1284–85. With the bankruptcy courts, for instance, it is notable that only a few judges who started on the bankruptcy courts ended up being elevated to Article III courts. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 793 (2010) ("Of the 115 bankruptcy judges who left the bench between 1995 and 2004, only 8 did so due to elevation to the Article III bench" (citing Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 107 (2005)).

may have, these concerns are highlighted here so that they can be addressed if such a model were adopted. By recognizing the potential drawbacks of specialized courts, many of these concerns can be addressed through systemic solutions while also addressing the overarching issue of cognitive illiberal bias in employment-related cases. Furthermore, the potential shortcomings of specialized judges in the employment law area must be balanced against the advantages specialization can offer: increased uniformity, enhanced decisional quality, greater systemic efficiency, and decisions free from cognitive illiberalism and the influences of psychological realism.

2. Two Proposed Models: Bankruptcy-Type Court and Specialized Magistrate Judges

The bankruptcy court system and the use of magistrate judges within the federal district courts offer two possible models for the development of specialized employment judges to handle employment cases. A particularly attractive aspect of the bankruptcy and magistrate judge systems is not only their statutory status, obviating the need to create a fully separate and newly formed Article III employment court, but also the selection of bankruptcy and magistrate judges from within the judiciary makes them attractive for emulation. The bankruptcy courts handle far more cases than a specialized group of employment judges would.[159] Despite this disparity, the bankruptcy and magistrate system offers a couple core strengths that are worth emulating: 1) autonomy and independence from political pressure; and 2) the overall quality of bankruptcy and magistrate judges.

a. Framework for Selection of Magistrate and Bankruptcy Judges

One of the more interesting trends in the federal system from the 20th to the 21st century is the increasing number of statutory judges, supplementing the role of their Article III counterparts. There are more than 750 magistrate and bankruptcy judgeships serving at the district court level, outnumbering the

[159] The number of bankruptcy filings for 2009 was 1,202,503 while the aggregate total of labor law case filings together with civil rights employment-related matters was 31,763. *See* Table F, U.S. Bankruptcy Courts, Bankruptcy Cases Commenced, Terminated and Pending During the Twelve Month Periods Ended Mar. 31, 2008 and 2009*, Bankruptcy Statistics: 2008–2009 Calendar Year Comparison*, Administrative Office of the United States Courts, Mar. 31, 2009*, available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx; Table C-2, 2009, *supra* note 142. The 31,763 figure includes the number of cases commenced under "ADA—Employment" and "ADA—Other," though I did not include these two categories in the percentage calculations in *supra* notes 142–144 because these two categories were not included in Table C-2 for the 2000 report. *See supra* notes 136–138 and accompanying text.

judgeships slotted for Article III district court judges.[160] Article III judges, however, retain important control over statutory judges through the selection, appointment, and reappointment process itself.[161] This is important in that, "those chosen to be constitutional judges therefore not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory judges."[162]

The authorizing statute for magistrate judges specifies several requirements when district courts make appointments.[163] One selection criteria is that magistrate judges are required to have several years of experience as a practicing attorney.[164] For the selection process itself, district courts are required to use "merit selection panels," to be "composed of residents of the individual districts, to assist the courts in identifying and recommending persons best qualified to fill such positions."[165]

The merit selection panels are also required to give "due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities."[166] Finally, the Judicial Conference of the United States has issued guidelines for "both the appointment and the reappointment of magistrate judges."[167] Ultimately, the final decision on the selection of candidates for magistrate judgeships resides with the Article III judges of each district court.[168]

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[160] Table 1.1, Total Judicial Officers—Courts of Appeals, District Courts, and Bankruptcy Courts, *Judicial Facts and Figures 2008*, Administrative Office of the United States Courts, *available at* http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2008.aspx.

[161] *See* 28 U.S.C. § 631 (2010) (magistrate judicial selection); 28 U.S.C. § 152 (2010) (bankruptcy judicial selection).

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

[163] *See* 28 U.S.C. § 631.

[164] *Id.* at § 631(b)(1).

[165] Resnik, *supra* note 162, at 607 (citing 28 U.S.C. 631(b) (2000)).

[166] *Id.*

[167] *Id.* (citing Administrative Office of the United States Courts—Magistrate Judges Division, The Selection and Appointment of United States Magistrate Judges (2002)).

[168] *See* 28 U.S.C. § 631.

Article III judges are also responsible for the decision of whether to reappoint magistrate judges at the end of their eight-year term.[169]

The selection, appointment, and reappointment of bankruptcy judges works in a similar fashion to the procedures for the selection of magistrates, except the federal Courts of Appeals have decision-making authority and are not bound by the same statutory requirements for the selection of magistrate judges.[170] The Judicial Conference has issued guidelines for the selection of bankruptcy judges,[171] but there are variations on the procedure across the federal circuits. The following is one example of the selection process for a bankruptcy judge in the Ninth Circuit Court of Appeals.[172]

First, a local merit-screening committee will review applications from candidates for open bankruptcy positions.[173] The local merit-screening committee will review the applications and recommend no more than five candidates for consideration to the Court-Council Committee on Bankruptcy Appointments.[174] The members of the local merit-screening committee is made up of 1) the chief judge of the federal judicial district in which the bankruptcy judge is to be appointed, 2) the president of the state bar association, 3) the president of one or more local bar associations within the district, 4) the dean of a law school located within the district, 5) the administrative circuit judge or the designee of the administrative circuit judge of the circuit geographical unit in which the bankruptcy judge is to be appointed, and 6) the chief bankruptcy judge of the district in which the bankruptcy judge is to be appointed, except when a resident incumbent judge is seeking appointment to an additional term.[175] The members of the Court-Council Committee, consisting of no more than five members with at

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[169] *Id.* at § 631(a), (e).

[170] Resnik, *supra* note 162, at 607–08 (citing 28 U.S.C. § 152 (2000)).

[171] Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges (promulgated in 1984 and amended recently in 2006), *available at* www.ca5.uscourts.gov/news/news/2011_CE_STX_QUALIF.PDF.

[172] Resnik, *supra* note 162, at 608.

[173] Judicial Council of the Ninth Circuit, Regulations Governing the Appointment of U.S. Bankruptcy Judges (2001), § 3.03(c)(1), *available at* http://207.41.19.15/web/ocelibra.nsf/504ca249c786e20f85256284006da7ab/392dbd6884261adb88256afd0060030f?OpenDocument [hereinafter "Regulations Governing Appointment"].

[174] *Id.*

[175] *Id.* at § 3.02(a).

least three being circuit court judges with voting authority, recommends to the Ninth Circuit Judicial Council, in a report, a candidate for appointment.[176] The Judicial Council then reviews the recommendations and either determines that the Court-Council Committee reconsiders the candidate or recommends the candidate to the Court of Appeals.[177] The candidate will then be appointed upon a majority vote by the members of the Court of Appeals.[178]

b. The Advantages of the Bankruptcy Court Model in Selecting Judges

Even though bankruptcy judges lack the protections of Article III judges with life tenure and secure compensation,[179] bankruptcy judges are arguably more insulated from the legislative and executive branches than federal district judges.[180] The selection process of bankruptcy judges by the Courts of Appeals encourages merit-based selection of bankruptcy judges based on their professional credentials rather than their political leanings.[181] Because bankruptcy judges, as non-Article III judges, do not require nomination by the President with the advice and consent of the Senate, these judges are shielded from the political branches.[182] Instead of relying on a political appointment process, the bankruptcy appointment process relies on the bankruptcy bar.[183]

The bankruptcy bar encourages creativity in the management of cases and efficient resolution of complex cases.[184] In short, a reciprocal relationship exists between the bankruptcy judiciary and the bankruptcy bar in that both groups seek the promotion of a skilled professional bankruptcy judiciary that places a high value on "pragmatic solutions to financial distress."[185] In addition, the relationship between the bankruptcy bar and bankruptcy judges promotes

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[176] *Id.* at § 3.04(c)(5).

[177] *Id.* at § 3.05(a)

[178] *Id.* at § 4.01; *see also* 28 U.S.C. § 152(a)(3).

[179] U.S. Const. art. III, § 1.

[180] *See* McKenzie, *supra* note 158, at 793.

[181] *Id.* at 793–94.

[182] *Id.* at 794–95.

[183] *See id.* at 795.

[184] McKenzie, *supra* note 158, at 798.

[185] *Id.*

consensus among the groups' members on the "general aims of bankruptcy law and the ideal workings of the process."[186]

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

By emulating the appointment process of the bankruptcy courts, this may encourage the development of a class of employment judges that can better communicate with the labor and employment bar and other employment scholars on the general aims of labor and employment law and the ideal workings of the process. Moreover, the appointment process of bankruptcy judges is also worth emulating from the standpoint of shielding a labor and employment judge from political pressures. By minimizing the need to garner favor among politically connected actors, employment judges may not feel the need to curry favor from those political actors in order to obtain promotion to the federal bench or reappointment to an additional term as an employment judge. Free from these political considerations, labor and employment judges would have more freedom to focus on "professional, creative, and nonideological adjudication" of labor and employment-related cases.[187]

From a psychological realism perspective, the creation of Article I employment courts would also be a constructive development. Because "judges . . . report seeing different things when they make and review findings of fact akin" to most individuals,[188] it is important that they not only become familiar with the law, but also with the concerns and ideas of the labor and employment law bar. The upshot, as is seen when judges engage in thorough and good faith deliberation like on an appellate panel,[189] are less dispositive disagreements over legally-consequential facts.

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[186] *Id*. at 804.

[187] *Id*. at 793.

[188] Kahan, *supra* note 4, at 35.

[189] *See* Edwards & Livermore, *supra* note 64, at 1963 ("[T]he process of deliberation in a collegial environment can reduce the impact of any individual judge's cultural cognition.").

c. The Advantage of Opacity[190] in Judicial Selection Procedures

The problem of capture is an issue potentially with any judicial selection process. This phenomenon arises in various contexts including in situations where a federal judge may be predisposed to deciding cases in ideological conformity with his or her party affiliation. The concern about capture becomes more heightened when a judge only works with cases in a particular field of law, and a potential exists that parties affected by these decisions will seek to influence these specialized judges to decide in their favor.[191]

Capture may become even easier when a specialized judge only deals with one type of case.[192] Thus, employer or pro-union groups may be encouraged to curry favor with judges specialized in labor and employment law. Indeed, there is a similar issue in non-union employment arbitration, as is seen with the "repeat player problem."[193] Because arbitrators are selected by the parties and employers are more often called to arbitrate employment disputes, there is a fear that arbitrators will seek to curry favor with those employers because that is where their future business will likely come from.[194]

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[190] *See generally* Rafael I. Pardo, *The Utility of Opacity in Judicial Selections*, 64 N.Y.U. ANN. SURV. AM. L. 633 (2009). The term "opacity" is used by Pardo to describe candidate selection processes that are closed in nature, or opaque, in contrast to transparent selection processes that are open to the public. Pardo utilizes the selection process of bankruptcy judges to illustrate how the opaque selection process for bankruptcy judges facilitates the selection of highly qualified candidates that are freer from political bias than those judges selected to the Article III bench. *See id.* at 633 ("The Article concludes that process opacity may prevent candidate transparency from being co-opted for political ends, thus improving judicial quality.").

[191] *See* McKenzie, *supra* note 158, at 798–800. *See also* Damale, *supra* note 141, at 1283.

[192] *See* Damale, *supra* note 141, at 1283.

[193] *See* Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 413 (2009).

[194] *Id.* ("Not only are the corporations more aware of, and familiar with, the arbitral process, but the process and its agents are more familiar with them. This circumstance could breed either an underlying contempt or a procedural or psychological advantage."). *See also* Alex Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUDIES 1 (2011) (comprehensive empirical study establishing "strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration

Another concern for Article I judges in the area of capture is that they are perceived not to have the same degree of judicial independence as their Article III counterparts because they do not have life tenure with salary protection.[195] However, the selection process of Article I judges provides its own protection for this judicial class, if the process for selecting bankruptcy judges in the Ninth Circuit Court of Appeals provides an indication of how a process might work.[196]

The selection of magistrate judges and bankruptcy judges by Article III judges from within the federal judiciary, hidden to a substantial degree from public comment, provides the protection of opacity to the Article I judiciary.[197] In others words, and as aptly put by Professor Pardo: "[P]rocess transparency may reduce the utility of a candidate transparency requirement and thus undermine judicial quality" while on the other hand "process opacity may prevent candidate transparency from being co-opted for political ends, thus improving judicial quality."[198]

The primary controls available for ensuring judicial accountability are screening through either the appointment process of the Article III judiciary or the merit-screening process from within the federal judiciary for Article I judges.[199] The second method devised is the process for censure, reprimand, suspension, and finally removal or reappointment if the Article I judges act in a way beyond the realm of reasonable behavior.[200] Pardo separates these two functions as the "ex

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cases."); David S. Sherwyen, Bruce Tracy & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bathwater and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 143-44 (1999) ("Despite the fact that the concept is illogical, Professor Bingham's research supports the hypothesis that the repeat player bias does have an effect on arbitration results," but maintaining that the "concept of repeat player bias is tenuous.") (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect,* 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997)).

[195] *See* McKenzie, *supra* note 158, at 750–51.

[196] *See supra* notes 173–178 and accompanying text.

[197] *See* Pardo, *supra* note 190, at 641.

[198] *Id.* at 633.

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

[200] Pardo, *supra* note 190, at 635–36 (citing 28 U.S.C. § 354(a)(2)(A) (2000); 28 U.S.C. § 152(a)(1) (Supp. V 2005); 28 U.S.C. § 631(e) (2000)). *See also* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial*

ante accountability mechanism" and the "ex post accountability mechanism."[201] The most familiar ex ante accountability mechanism for judges is the appointment of Supreme Court justices where candidates articulate their judicial philosophy on a variety of issues, judicial approach, the role of the courts, and the state of the law.[202] The ex ante method seeks:

> a precommitment from the candidate regarding the manner in which he or she would carry out the duties of office . . . . If the selecting group places a great deal of emphasis on the candidate's answers as a selection qualification, and if the group is particularly adept at identifying candidates who will adhere post-selection to what they have said during the selection process, then the process will function as an accountability mechanism prior to the judge taking office.[203]

However, the difficulty of the ex ante approach is that the longer a judge's term is, the opportunity for accountability becomes even less frequent.[204]

For Article I magistrate and bankruptcy judges, the importance of the ex ante accountability mechanism is not as substantial precisely because of their

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Service—and Disservice—1789-1992, 142 U. PA. L. REV. 333, 335 (1993) (describing removal process for Article III judges).

[201] *See* Pardo, *supra* note 190, at 635–36.

[202] Of course, given recent troubles in confirming all levels of federal court judges, *see supra* note 142, this process may not be the best one to emulate. There is also the concern that nominees try to avoid saying anything of substance in the confirmation process. *See* David Wiegel, *The Judges Who Didn't Make It*, Slate.com, Dec. 23, 2010, at http://www.slate.com/blogs/blogs/weigel/archive/2010/12/23/the-judges-who-didn-t-make-it.aspx (last visited Mar. 2, 2011) ("Most future judicial nominees have learned the lesson that the young Barack Obama learned in the 1990s -- don't say anything interesting about the law.").

[203] Pardo, *supra* note 190, at 635.

[204] *Id.* at 636–37 ("[T]he more structural independence a judge's term of office provides, the more important it becomes for an ex ante accountability mechanism to play a role in the judicial quality function."). In this regard, consider Justices who were appointed by Republican Presidents to the United States Supreme Court who later became quite progressive in their judicial philosophies (e.g., Justices Brennan, Blackmun, Stevens, and Souter). *See, e.g.*, Lisa Keen, *Justice Stevens: A Republican Who Grew Liberal With The Times*, GA Voice, April 15, 2010, at http://www.thegavoice.com/index.php/news/national-news-menu/177-justice-stevens-a-republican-who-grew-liberal-with-the-times (last visited Mar. 2, 2011).

limited-tenure status.[205] Furthermore, there is a recurring ex post accountability mechanism for these judges who must, if they wish to be re-appointed, adhere to the standards of review for selection to a new term.[206] Although it is true that candidates for bankruptcy and magistrate judges are submitted to a selection process that is less transparent than for Article III judges, the reduced transparency together with the increased frequency of ex post review provides the Article I judges with an important degree of judicial independence from political and cultural bias.[207] On the other hand, because those who appoint these Article I judges may increasingly feel the need to satisfy constituencies, "this loss of independence distorts the decision-making process and may end up compromising judicial quality by creating an ideological [or culturally-biased] judiciary."[208]

By allowing for a degree of opacity in the selection process of candidates for specialized employment courts therefore, this might mitigate the political pressure upon individuals serving on selection committees to please narrow constituent groups.[209] And because the decision to select a bankruptcy or magistrate judge is ultimately made by a life-tenured Article III judge, decision-makers are free to make decisions, ignoring the appeals of narrow constituent groups, on the basis of the candidate's professional merits rather than on whether the candidate's political affiliations matches with the decisionmaker's political wishes.

From a psychological realism perspective, the hope is that insulation of Article I-type judges from groups to whom they have a natural cultural affinity will make it more likely that these judges will produce "trimmed" legal decisions which permit self-affirmation for those who are disfavored in a given case. Moreover, such decisions will be more legitimate to most citizens because the larger community will be assured "that those decisionmakers' findings are genuinely untainted by cultural partisanship."[210] Unfortunately, cases like *Conkright,* do not provide such assurances and instead, lead to one group of

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[205] Magistrate judges serve for terms of eight years while Bankruptcy judges serve for 14 year terms. *See* 28 U.S.C. § 631(e) (2010); 28 U.S.C. § 152(a)(1) (2010).

[206] *See* 28 U.S.C. § 631(a)–(b); 28 U.S.C. § 152(a)(1).

[207] *But see* Pardo, *supra* note 190, at 640 ("Although transparency is generally viewed as a positive quality that improves the manner in which processes function, the politicization of the appointment process arguably has resulted because of transparency.").

[208] *Id.* at 641.

[209] *See* Pardo, *supra* note 190, 641.

[210] Kahan, *supra* note 4, at 36.

citizens accusing another group of citizens of illegitimate bias and add to the growth of cognitive illiberalism in our society. [211]

One last point regarding both magistrate judges and bankruptcy court models: although perhaps appealing alternatives for counteracting cognitive illiberalism in legal decisionmakers in labor and employment law cases, both of these models it face one particularly significant obstacle: the need for Congress to enact legislation to set up either model.

For instance, magistrate judges cannot be currently funneled certain types of cases (i.e., labor and employment actions) by the district courts.[212] Therefore, in order to allow the district courts to direct labor and employment cases to a specified magistrate judge—presumably with extensive background and knowledge about labor and employment law—Congress would need to pass legislation allowing the practice. Similarly, just as done with the Bankruptcy Reform Act of 1978, Congress would need to pass legislation to establish Article I employment courts.[213]

As far as magistrates, however, though the present system poses an obstacle in utilizing a particular magistrate judge within a federal district to hear labor and employment cases, it also offers an opportunity for experimentation to pilot the use of a designated labor and employment judge.[214] By allowing a

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[211] *Id.*

[212] Admin. Office of the U.S. Courts, Inventory of United States Magistrate Judge Duties 141 (3d ed. 1999).

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

Id. (emphasis added).

[213] *See generally* Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978: Part One, Outside Looking In*, 81 AM. BANKR. L. J. 1 (2007) (this article is part of an extensive five-part series by the same author analyzing the passage of the Bankruptcy Act of 1978).

[214] Consider, in this regard, other pilot projects that courts have undertaken to improve judicial administration and efficiency. For instance, the Judicial Conference of the United States recently approved a pilot project to allow cameras in federal district court courtrooms. *See* United State Courts, *Judiciary*

district court to utilize, on a trial basis, a specialized magistrate for hearing labor and employment cases, more information can be gathered about the model's usefulness and further build the case for expanding the use of specialized labor and employment judges in order to effectively address the danger of cognitive illiberalism surrounding labor and employment law decisions.

C. Article III Labor and Employment Appellate Courts

An even more far-reaching model on the spectrum for employment courts is to adopt a separate, Article III system of labor and employment courts, similar to the one established for intellectual property cases by creation of the Federal Circuit Court of Appeals.[215] However, the fact of the matter is that creating a system of Article III labor and employment courts would, needless to say, face significant political hurdles in Congress.[216] One only needs to review the contentious history and the considerable legislative effort required to create a separate Article I Bankruptcy Court system.[217]

Approves Pilot Project for Cameras in District Court (Sept. 14, 2010), *available at* http://www.uscourts.gov/news/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx (last visited Feb. 20, 2011).

[215] The Federal Circuit Court of Appeals was established in 1982. Since that time, "[a] number of commentators have concluded that . . . the Federal Circuit has come to embody a number of long-theorized problems with specialized courts, such as tendencies toward interest-group capture, bias in favor of an overly muscular view of the laws under its special care, and an esotericism or tunnel vision that disconnects the circuit from broader social or legal concerns." *See* John M. Golden, *The Supreme Court as Prime Percolator: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 659 (2009).

[216] Indeed, one of the more difficult questions that would need to be answered is if there is need for a specialized labor and employment law appellate court, why is there not a need for specialized courts dealing with everything from real estate law to products liability law? Furthermore, the District of Columbia Circuit Court already plays this role to some degree as many appeals it receives comes from federal administrative agencies like the National Labor Relations Board (NLRB). *See* Matthew Ginsburg, *"A Nigh Endless Game of Battledore and Shuttlecock": The D.C. Circuit's Misuse of Chenery Remands in NLRB Cases*, 86 Neb. L. Rev. 595, 597 (2008) ("The D.C. Circuit, which is an alternate venue for appeals under the National Labor Relations Act of 1935 . . ., routinely hears more petitions for review of NLRB orders than any other circuit.").

[217] *See generally* Mund, *supra* note 213. Of particular interest is the fact that Congress defeated attempts to change Article I bankruptcy courts into Article III courts. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit:*

Nevertheless, advantages would also exist for a specialized labor and employment appellate court. First, the advantage of judicial familiarity and expertise that an Article III labor and employment court system would necessarily have in adjudicating solely labor and employment matters. Second, judicial efficiency would be further enhanced because the district courts would remove these cases from their dockets as well as appeals for *de novo* review from an Article I tribunal like that of the bankruptcy courts.[218] Third, the federal courts of appeals would not likely experience any increase in the number of appeals for labor and employment cases compared to the present rate of appeals from the district courts on these types of cases.

Such appellate courts would also benefit from the influence of deliberation on cultural cognition.[219] No less than an authority on labor and employment law, Judge Harry T. Edwards, has commented in a recent piece that, "[i]n many such situations, a judge's cultural cognition can be moderated in anticipation of a colleague's views--a kind of tacit deliberation."[220] Indeed, deliberation as a cleansing and information-filtering mechanism provides numerous opportunities to eliminate cognitive illiberalism from appellate court decisionmaking:

> Judges deliberate when they raise questions during oral argument to alert their colleagues to their concerns. Judges deliberate in conference and continue to deliberate after conference when they raise issues uncovered in their research. Judges deliberate when they circulate draft opinions, receive their colleagues' responses, and negotiate resolutions to any differences.[221]

In short, a good argument exists that an appellate court that specializes in labor and employment law cases may provide the best opportunity for fortifying labor

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Limiting the Powers and the Term of the Chief Justice of the United States, 154 U. PA. L. REV. 1575, 1611 (2006) ("When considering what came to be known as the 1978 reforms, members of Congress contemplated creating life-tenured judgeships for bankruptcy judges. The Judicial Conference took a position against that proposition, and . . . Chief Justice [Burger] was a very present lobbyist opposed to conferring Article III status on bankruptcy judges.").

[218] *See* In Re Schwarzkopf, 626 F.3d 1032, 1035 (9th Cir. 2010) (citing Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir.1990) ("We apply the same standard of review to the bankruptcy court findings as does the district court: findings of fact are reviewed under the clearly erroneous standard, and conclusions of law, *de novo*.").

[219] Edwards & Livermore, *supra* note 64.

[220] *Id.* at 1964.

[221] *Id.*

and employment law theorizing from psychological realism by requiring these judges to moderator their culturally-motivated cognition through deliberation with other judges.

D. The British Employment Tribunal Model

The last model, and the most far-reaching one, discussed on the spectrum of approaches to the problem of cognitive illiberalism in labor and employment law decisions would be to adopt a system modeled on certain international court systems. The British system offers a good point of reference because of some similarities in the way that British and American law approach workplace legal disputes as a theoretical matter.[222]

Under the British employment tribunal system, tribunals consist of a chairperson, who is an experienced attorney, and two lay members appointed from employer and employee representative groups respectively.[223] The two lay members are not present at the hearing to represent either side in a dispute, and must maintain impartiality at all times.[224] In addition, the tribunal will try to match a lay member to the gender or to the race of the claimant if the claim involved gender or race discrimination.[225]

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[222] *See* Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 268 (2008) (in the workplace bullying context, arguing that "the U.K. is a useful comparator for the U.S. in this particular context because both countries lack a tradition of basing harassment law on a dignity paradigm.").

[223] *See id.* at 270 ("[E]mployees may pursue their employment disputes through a specialized Employment Tribunal."); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1431-32 (2004) (quoting in part ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968, REPORT, 1968, Cmnd. 3623, at 156) ("The idea of resolving discrimination claims through tribunals can be traced to the Royal Commission on Trade Unions and Employers Associations, better known as the Donovan Commission. This group suggested in 1968 that labor tribunals' jurisdiction 'should be defined so as to comprise all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have against each other in their capacity as employer and employee.'").

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

[225] Sternlight, *supra* note 223, at 1433.

As far as the normal procedure in the employment tribunals, a claimant will file an application for a hearing.[226] After the defendant has been notified of the complaint, the parties to the dispute proceed to mediation, which is administered by the Advisory Conciliation and Arbitration Service (ACAS).[227] During conciliation, an officer from the ACAS will explain the procedures of the employment tribunal and the points of law relevant to the claimant's claim.[228] Frequently, disputes are resolved during the conciliation stage so that it effectively acts as a filtering mechanism for reducing the number of claims that will ultimately be decided by the tribunal.[229]

If mediation is unsuccessful, the tribunal will conduct a hearing, which will typically last for a half day or less,[230] though discrimination cases may take two or three days.[231] In order to facilitate the speedy adjudication of disputes, the hearings are conducted informally and are not subject to the normal rules of evidence that usually apply in British law courts.[232] Lastly, the plaintiff is limited to one of three remedies: 1) reinstatement to their previous position; 2) rehire by the same employer or an associated employer; or 3) compensation (which does

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[226] Mankes, *supra* note 224, at 90.

[227] *See* Sternlight, *supra* note 229, at 1434–35; Martin Schneider, *Employment Litigation on the Rise? Comparing British Employment Tribunals and German Labor Courts*, 22 COMP. LAB. L. & POL'Y J. 261, 268–69 (2001).

[228] Sternlight, *supra* note 223, at 1434.

[229] *Id.* at 1435 ("According to the 2001-2002 ACAS Annual Report, 77.5% of completed discrimination claims were either settled or withdrawn, as compared to just 22.5% that were resolved at the tribunal stage.").

[230] Mankes, *supra* note 224, at 92.

[231] Sternlight, *supra* note 223, at 1433 & n.154 (citing Secretary of State for Employment, *Resolving Employment Rights Disputes: Options for Reform* 27 (1994)).

[232] Mankes, *supra* note 224, at 92. *See also* Sternlight, *supra* note 223, at 1433 ("The proceeding before the [tribunal] is adjudicative in nature, though it is intended to be less formal than a court proceeding."); Joseph M. Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 120 (1996) ("[Employment] tribunals are not courts of record and their decisions have no precedential value.").

not include the possibility of compensatory or punitive damages, but merely loss wages).[233]

Applications for review can be made to the employment tribunal within fourteen days from the decision of the tribunal and the tribunal may only grant a review in cases of error in the decision, errors in notice to a party or parties, or other reason warranting review.[234] Appeals against the decision of an employment tribunal can only be made on matters of law to an Employment Appeals Tribunal, with further appeal available to the Court of Appeals and the House of Lords.[235]

The British employment tribunal system was set up with the goal of creating a system that was "easily accessible, informal, speedy, and inexpensive" so as to give employers and employees "the best possible opportunity of arriving at an amicable settlement of their differences."[236] Because the tribunals are informal and are not bound by the rules of evidence, plaintiffs do not face the same obstacles in pursuing claims *pro se* as their American counterparts. Court fees are paid out of public funds and litigants do not bear the prevailing party's costs, unlike the typical British rule that the losing party to a suit will pay the prevailing party's costs.[237]

One of the notable advantages of the British employment tribunal model, aside from its accessibility, speed, and low cost for claimants and employers, is that the members of the tribunal have significant experience on employment matters.[238] On the one hand, the lay members of the tribunal provide impartial experience concerning the job involved or about the industry in which the job

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[233] Mankes, *supra* note 224, at 92. Although reinstatement is the preferred remedy in unfair dismissal cases, compensation is the most common remedy granted. *See* Schneider, *supra* note 227, at 278 (citing Linda Dickens et at., *Re-employment of Unfairly Dismissed Workers: The Lost Remedy*, 10 INDUS. L.J. 161 (1981)). Indeed, the proportion of reinstatement in successful unfair dismissal claims declined to the point that the remedy was granted in less than one percent of cases in 1998 and 1999. *Id.* (citing Labor Market Trends 494 (Sept. 1999)).

[234] Schneider, *supra* note 227, at 269 (explaining that "parties can apply to the tribunal for review of its decision, for example on the ground that new evidence has come to light since the hearing").

[235] *Id.*

[236] Sternlight, *supra* note 223, at 1432 (quoting ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968, 1968, Cmnd. 3623, at 156).

[237] Mankes, *supra* note 224, at 92.

[238] *See id.* at 94.

exists.[239] On the other hand, the chairperson is constantly exposed to labor and employment issues and has the opportunity to develop sophisticated expertise on labor and employment issues.[240] Finally, this tripartite structure of the employment tribunal panel also facilitates the legitimacy of the ultimate decision of the tribunal.[241]

From a psychological realism perspective, the hope is that the familiarity of the tribunal members with the labor and employment law will lead to less need to fall back on cultural values congenial to the legal decisionmakers' values.[242] Aside from the British employment tribunal model's goal of promoting accessibility, efficiency, and economy,[243] the British tribunal model also represents a systemic solution for the promotion of impartiality and the elimination of cognitive illiberalism. With the tribunal's three person panel and the focus on employees and employers having a representative present mirroring the claimaint's and employer's perspectives, the tribunal consequently has in place a mechanism to ensure that each side to a dispute is not delegitimized by the potential of the cognitively motivated biases of a sole decisionmaker.[244]

Put differently, the employment tribunal chairperson is well positioned to act as a judicial trimmer because he or she must mediate between the poles represented by the two lay members of the tribunal.[245] What this means in the British tribunal model is that decisions are more likely to end up between the extremes, in a way that both employer and employees believe that they have gained, or at least not lost, something of importance.[246] Such decisions will also

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[239] The justification for including the two lay members is that the members bring "'knowledge of human nature and industrial practice,' to communicate in plain words the complicated legal matter to participants, and to enhance the *perceived fairness* of the hearing, thus ensuring acceptance with the outcome of the case." Schneider, *supra* note 227, at 275 (quoting LINDA DICKENS ET AL., DISMISSED: A STUDY OF UNFAIR DISMISSAL AND THE INDUSTRIAL TRIBUNAL SYSTEM 59ff (1985)) (emphasis added).

[240] *Id.*

[241] *Id*. at 275–76.

[242] There will also be deliberation, as in appellate panels, which may also act to counteract psychological realism. *See supra* notes 218–220 and accompanying notes.

[243] Sternlight, *supra* note 223, at 1432.

[244] *Id.*

[245] *See infra* Part IV.A.3.

[246] *See* Sunstein, *supra* note 115, at 1054.

therefore be more consistent with the ideals of humility and express overdetermination.

Of course, the British model may also be subject to abuses that are all-too familiar in the United States. Indeed, many of the problems with both current employment arbitration practice in the United States[247] or with the workers' compensation model[248] might make a British-type employment tribunal model not ideal for those focused on workers receiving a legitimate chance to vindicate their workplace rights in an adjudicative setting. Nonetheless, its example should be taken seriously by those who believe that some form of specialized tribunal is necessary to fight against the psychological pathologies currently associated with the current system of resolving labor and employment legal disputes in the United States.

V. CONCLUSION

The motivation for this article is to focus attention of the danger that cognitive illiberalism can pose to labor and employment law. Through use of the recent United State Supreme Court ERISA case, *Conkright v. Frommert*, this article has attempted to illustrate how legal decisionmakers are vulnerable to betraying their commitments to neutrality by unconsciously fitting their view of the legally-consequential facts of a case in a way that is congenial to their values. Infected by cognitive illiberalism, labor and employment law suffers as perceived by the larger community.

To deal with this threat to the ideal of deciding labor and employment law cases evenhandedly, this article seeks to fortify labor and employment law theorizing with insights from psychological realism. The spectrum of approaches explored here is not meant to conclusively determine the best approach to these

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[247] Criticism of employment arbitration include the fact that, "[c]ompanies have greater experience with, knowledge of, and resources for litigation; they are more lucid about adjudication and better understand its rules and objectives." *See* Carbonneau, *supra* note 192, at 413. The repeat player problem that stems from these structural deficiencies might lead to employers being unfairly advantaged in these settings. *See supra* note 193 and accompanying text.

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

problems. Rather, the purpose is to provide an analytical toolbox for legislators and others to consider how to bolster the legitimacy of the law in this area of legal decisionmaking. By doing so, the hope is to minimize the amount of needless cultural conflict over, and discontent with, labor and employment law.