

# Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities

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## INTRODUCTION

Verdicts matter. They matter not only to the parties and their counsel in those few cases where verdicts are rendered,<sup>1</sup> but also to public policy makers and lawyers evaluating that vast majority of cases that never go to trial. Because they represent only the tip of the iceberg,<sup>2</sup> because trial and/or appellate judges so often reduce them,<sup>3</sup> because the plaintiff may actually receive only a small part of the judgment,<sup>4</sup> and because they may be the product of atypical cases,<sup>5</sup> it may be a mistake to rely on verdicts to make such decisions. But rely on them we do.<sup>6</sup> Stories about jury verdicts can have a profound effect on public opinion and public policy.<sup>7</sup> This Article and the empirical study it describes are an attempt

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<sup>1</sup> Most cases are dismissed, abandoned, or settled, with few actually being tried. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-153177, SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS 1-2 (1995) (noting that 3% of state court cases are resolved by trial); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925-28 (2000) (stating that in 1994 and 1998, six to eight percent of federal civil cases went to trial).

<sup>2</sup> *See, e.g.*, Peter Siegelman & John J. Donohue III, *Studying The Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990); Neil Vidmar, *Making Inferences About Jury Behavior from Jury Verdict Statistics*, 18 LAW & HUM. BEHAV. 599, 601-05 (1994).

<sup>3</sup> *See, e.g.*, JAMES N. DERTOUZOS, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 33-37 (Rand Institute for Civil Justice 1988) (noting in study of California wrongful discharge judgments, post-verdict rulings, settlements, and appeals substantially reduced payout to plaintiffs, reducing average payout among cases for which data were available from \$272,064 to \$150,000).

<sup>4</sup> *See, e.g., id.* at 40 tbl.16 (reporting that where mean verdict in cases won by plaintiff was \$646,855, mean net payment actually received by plaintiff where plaintiff won was \$188,520). The medians were substantially smaller. The median plaintiff's verdict in this study was \$183,500 and the median net payment was \$74,500.

<sup>5</sup> *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUDIES 1, 2 (1984) (citing KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 58 (1960) for proposition that litigated cases are "pathological").

<sup>6</sup> *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) (noting practitioners rely on jury verdicts to evaluate cases for settlement purposes).

<sup>7</sup> Consider the public furor around the McDonald's coffee burn case, or the debate over whether we have a medical malpractice crisis or an insurance crisis. *See* Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has it Done its Job?*, 67 S. CAL. L. REV. 1609, 1610 (1994); Jonathan J. Frankel, *Medical Malpractice Law and Health Care Cost Containment: Lessons for Reformers from the Clash of Cultures*, 103 YALE L.J. 1297, 1316-18 (1994) (discussing question of whether medical malpractice crisis really exists); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731-33 (1998) (discussing controversy over McDonald's case and citing extensive commentary thereon). Attacks on the purported generosity of juries in employment law cases have been the subject of a number of recent influential books. *See, e.g.*, WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE

to provide some meaningful accessible data with which to analyze jury verdict reports in California employment law cases. The most significant finding is that women and minorities are substantially disadvantaged in bringing certain kinds of employment discrimination claims, as compared with the success rates of all plaintiffs in all employment law jury trials. After considering and rejecting several other possible explanations, I conclude that the most likely explanation is judicial and juror bias.

Why look at employment law verdicts? First, throughout the last decades of the twentieth century, at meetings, conferences, symposia, CLE programs,<sup>8</sup> and television talk shows, speakers and participants traded stories of employment law jury verdicts as indicators of case values, litigation trends, the skill of particular advocates, and, more broadly, the changing nature of American society. The discussants often expressed strongly held views, but were rarely informed by reliable data. Second, public policy on employment law and civil rights law is derived, in significant part, from the views of legislators, lobbyists, pundits, interest groups, and lawyers regarding likely litigation outcomes in employment rights lawsuits. If the data they rely on are misleading, policies may be adopted that fail to provide the intended results.

My initial objective here was to provide such data, by conducting, describing, and analyzing a comprehensive study examining California jury verdicts in employment discrimination and wrongful discharge cases reported in 1998 and 1999. I thus hoped to better inform the myriad debates in which employment law verdicts are influential. Once I found the substantial disadvantage suffered by women and minorities, my objective expanded to offer an explanation of these findings. I will conclude herein that the most likely source of the disadvantage faced by women and minorities is bias, and that juror bias and judicial bias are

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AMERICAN WORKPLACE 49, 63 (1997) (asserting that employment law tilts wildly toward plaintiffs); *id.* at 73 (juries in employment law encouraged to pick any amount for damages that appeals to them); *id.* at 190 (no method of hiring can avoid liability in these suits); *id.* at 204 (ADA requires watering down of standards of competence); *id.* at 303-04 (employment law is eliminating jobs); *see also* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 180 (1994) (stating plaintiffs' employment lawyers view jury trials as "manna from heaven"); PHILIP K. HOWARD, THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR 117-18 (2001) (claiming that civil rights are expensive hidden subsidy); *id.* at 135 (civil rights have become obsession); *id.* at 136 (impossible to deny tenure to black professors); *id.* at 139 (discrimination claims unreliable); *id.* at 140 (discrimination charges are form of extortion).

<sup>8</sup> On the importance of CLE programs to the development of lawyer attitudes about employment law, see Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 978-79 (1999).

both likely suspects. I will argue that false claims and heated rhetoric, used in the political discourse about civil rights law by its opponents, may be contributing to this problem.

Following this introduction, the article begins (in Part I) by reviewing prior studies of California employment law verdicts. Most were studies of common law wrongful discharge verdicts (primarily termination in breach of contract and tortious discharge in violation of public policy), although some included statutory employment discrimination verdicts (primarily race, sex, disability, and age discrimination and sexual harassment). None provided sufficient access to the underlying data to permit other researchers to experiment with different manipulations of the data.

Part II discusses how some of these prior verdict studies were used in an important public policy debate that led to a controversial congressional compromise. Faced with evidence that discrimination victims, particularly sexual harassment plaintiffs, were not receiving fair compensation under Title VII of the 1964 Civil Rights Act,<sup>9</sup> Congress decided in 1991 to amend the Act to permit legal damages in Title VII cases.<sup>10</sup> This moved federal law closer to California's state anti-discrimination law, under which legal damages (principally compensatory damages for emotional distress and punitive damages) have been available following a court ruling in 1982.<sup>11</sup> But in response to concerns raised by employers and commercial interest groups that runaway jury verdicts would be unfairly punitive, supported with jury verdict data describing common law wrongful discharge verdicts, Congress limited — or “capped” — the amount juries could award.<sup>12</sup> Proposals to remove these caps have been considered and rejected by Congress,<sup>13</sup> and may be considered again; these data may be helpful in deciding whether such caps are necessary.

Part III presents the methodology and results of the study. The study examined every California employment law jury verdict reported in one

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<sup>9</sup> 42 U.S.C. § 2000e et seq. (2000).

<sup>10</sup> *See id.* §§ 1997a, 1981a.

<sup>11</sup> *Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 221 (1982) (making compensatory and punitive damages available in employment discrimination action brought pursuant to Fair Employment and Housing Act). The author represented the State of California Department of Fair Employment & Housing as *amicus curiae*, and argued the case before the California Supreme Court.

<sup>12</sup> *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a; Pub. L. No. 102-66, § 102, 105 Stat. 1071 (1991).

<sup>13</sup> *See* Equal Remedies Act of 1995, H.R. 96, 104th Cong. (1995); S. 296, 104th Cong. (1995); Equal Remedies Act of 1997, S. 516, 105th Cong. (1997).

or more of the state's three major jury verdict reporters<sup>14</sup> for the years 1998 and 1999. Because my primary interest was in how juries evaluate these cases, I counted only those cases that were actually decided by a jury, eliminating cases resolved by settlement, motions to dismiss, summary judgment, bench trial, directed verdict, or non-suit. For the same reason, and because it will be several years before the ultimate outcomes of many of these verdicts will be known, I made no attempt to track post-verdict resolutions by settlement, or motions for new trial.<sup>15</sup> The data thus tell us about jury outcomes, not case outcomes.

In brief, the survey revealed that in the late 1990s juries in reported California employment law cases found for plaintiffs just over half the time (53%), with a median verdict of \$249,000.<sup>16</sup> But success rates varied considerably by case category, with the lowest success rates in employment discrimination cases (excepting sexual harassment cases) filed by women and minorities. Success rates were lowest at the intersection of race and gender and the intersection of gender and age (over forty).

At first blush, the common practice of lumping employment discrimination cases with common law wrongful discharge cases appears justified by the data reported herein. Plaintiffs' success rates were marginally higher, but not significantly higher,<sup>17</sup> in common law discharge cases (59%) compared with statutory employment discrimination cases (50%).<sup>18</sup> But when certain core areas of employment discrimination were isolated, it became clear, as Michael Selmi, Theodore Eisenberg, David Jung, and others have argued, that employment discrimination cases are very hard to win.<sup>19</sup> Even more significantly, the data demonstrate that discrimination cases are hardest to win when brought by non-whites (and particularly black women) alleging race

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<sup>14</sup> They are *Jury Verdicts Weekly*, *Los Angeles/San Francisco Daily Journal Verdicts and Settlements Reports*, and *Trials Digest*.

<sup>15</sup> When the verdict report included disclosure that the verdict was reversed on JNOV (judgment notwithstanding the verdict), the verdict was eliminated from the database. It does not, however, track post-verdict reports, and thus may have missed some cases in which JNOV was granted after the verdict was reported.

<sup>16</sup> See Table 3 *infra* p. 404.

<sup>17</sup>  $P = .121$ . Our method for calculating statistical significance is described at *infra* p. 404.

<sup>18</sup> See Table 3 *infra* p. 404.

<sup>19</sup> DAVID J. JUNG, *JURY VERDICTS IN WRONGFUL TERMINATION CASES* 10, 22 (Public Law Research Institute at Hastings College of the Law 1997); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 *GEO. L.J.* 1567, 1582 (1989); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 *LA. L. REV.* 555, 556 (2001).

discrimination, women alleging sex discrimination (except for sexual harassment), and women over forty alleging age discrimination.

Plaintiffs success rates were significantly lower in race discrimination cases brought by non-whites (36%), and particularly race discrimination discharge cases brought by non-whites (as opposed to race discrimination harassment cases) (16%) compared with all employment law cases (53%). The lowest success rates within a single broad category were for age discrimination plaintiffs (27%), race discrimination plaintiffs where the plaintiff was non-white (36%), sex discrimination termination cases (as opposed to sexual harassment cases) where the plaintiff was female (35%), and disability discrimination cases (41%). At the intersection of age and gender, men won 36% of their twenty-eight age discrimination cases, while women won none of the eight age discrimination cases they brought. At the intersection of race and gender, of the thirty-nine cases brought by African American plaintiffs in which the plaintiffs' gender was reported, men won fourteen of twenty-seven (52%), while women won only two of twelve (17%). In contrast, among the cases analyzed by the study, whites suing for race discrimination (or "reverse discrimination"), and men suing for sexual harassment by other men, won every case tried to a jury.

Finally, Part IV discusses some of the policy implications of the data. The study demonstrates why studies of jury verdicts in employment law cases should not be used when making policy decisions about employment discrimination rights. Although employment discrimination is a subset of employment law, juries treat discrimination claims differently than other employment claims. This distinction is particularly relevant to some groups who already face heightened disadvantages in the American workplace: minorities (especially African Americans) and women generally, and minority women and women over forty in particular.

I conclude that the most likely explanation for the disadvantage suffered by women and minorities in employment discrimination jury trials is juror bias. (Michael Selmi has made a persuasive argument that in bench trials, judicial bias plays a similar role.<sup>20</sup>) Such bias in American society, often at the unconscious level, is well documented.<sup>21</sup> I further

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<sup>20</sup> Selmi, *supra* note 19, at 561.

<sup>21</sup> See, e.g., Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995) (explaining psychological mechanics of unconscious bias); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing unconscious racism endemic in American society); David B. Oppenheimer,

conclude that the attempt by civil rights opponents to persuade the American public that discrimination law is an extortion system that brings enormous unwarranted benefits to women and minorities<sup>22</sup> has exacerbated the pre-existing juror bias in discrimination lawsuits.

#### I. A REVIEW OF PRIOR EMPLOYMENT DISCRIMINATION AND WRONGFUL DISCHARGE JURY VERDICT RESEARCH

Several studies from the 1980s examined California jury verdicts in wrongful discharge cases.<sup>23</sup> These studies played an important role in public policy discussions and decisions about employment law, including employment discrimination law. Advocates for limiting civil rights remedies for discrimination victims relied on these studies, although the plaintiffs were usually not bringing discrimination claims, in arguing that runaway juries in discrimination cases were a threat to American business.<sup>24</sup>

These early studies reported plaintiff success rates as low as 46% and as high as 78%, with median verdicts ranging from \$76,500 to \$400,938 and average (mean) verdicts between \$238,221 and \$2,506,132. The studies are described herein chronologically; the findings are summarized in Table 1.

A study by Jung and Harkness<sup>25</sup> was published in the *Daily Journal*, a legal newspaper published in Los Angeles and San Francisco. It examined 223 common law wrongful discharge judgments entered between January 1979 and May 1987. They reported that plaintiffs won 70% of the cases in their sample, and that the average award in cases in which plaintiffs prevailed was over \$450,000, although the median

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*Negligent Discrimination*, 141 U. PA. L. REV. 899, 902-15 (1993) (same, collecting studies).

<sup>22</sup> See discussion *infra* at Part IV.B.5.

<sup>23</sup> Throughout this Article common law wrongful discharge claims (such as breach of contract, tortious discharge in breach of public policy, and whistle-blower retaliation) will be described as "wrongful discharge" or "common law wrongful discharge" or "common law discharge" cases. Statutory employment discrimination claims (such as race, sex, national origin, religion, age, disability, and sexual orientation claims, including harassment claims based on these categories, brought under Title VII, the ADEA, the ADA, Section 1981, or the State FEHA) will be described as "employment discrimination" or "statutory employment discrimination" or merely "discrimination" cases. When combining wrongful discharge and employment discrimination cases, the term "employment cases" or "employment law cases" will be used.

<sup>24</sup> See sec. III *infra*.

<sup>25</sup> David J. Jung & Richard Harkness, *The Facts of Wrongful Discharge*, 87-22 L.A. DAILY J. REP., Nov. 20, 1987, at 1, *republished at* 4 LAB. LAW. 257 (Spring 1988).



award was under \$125,000.<sup>26</sup>

In 1981, the San Francisco law firm of Orrick, Herrington & Sutcliffe began a still ongoing study examining California jury verdicts in wrongful discharge cases [hereinafter Orrick study].<sup>27</sup> Summaries of the survey data have been published frequently but irregularly. For the years 1981-1988 (Orrick I)<sup>28</sup> their data show that of 385 California employment cases (including common law discharge and statutory discrimination) tried to a jury verdict, 239 (62%) were won by plaintiffs, with the average verdict ranging annually from \$238,221 to \$866,074 and the median verdict ranging annually from \$76,500 to \$300,000.

In 1987, the San Francisco law firm of Schachter, Kristoff, Ross, Sprague & Curiale reported that plaintiffs won forty of the fifty-one California wrongful discharge jury cases tried in 1986, a success rate of 78%, with an average award of \$424,500.<sup>29</sup> That same year, another installment of the Orrick study was published (Orrick II), showing that between 1982 and 1986 employees won more than 70% of the California wrongful discharge cases tried to juries, with an average award of \$652,100.<sup>30</sup> Both surveys were cited by Professor (and subsequently National Labor Relations Board Chair) William B. Gould IV in an influential article calling for arbitration of wrongful discharge cases.<sup>31</sup> Professor Gould's article was cited by the California Supreme Court the following year as justification for limiting damage awards in wrongful discharge breach of contracts cases.<sup>32</sup> Also in 1987, *Newsweek* magazine reported that in a seven-year period employees won 72% of the job termination trials in California, with an average jury award of \$582,000.<sup>33</sup>

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<sup>26</sup> *Id.* at tbl.1.

<sup>27</sup> Orrick, Herrington & Sutcliffe LLP, Summary of California Jury Verdicts in Employment Cases (1999) [hereinafter Orrick study] (on file with author).

<sup>28</sup> The firm has kindly supplied a recent summary, cited *id.*, which analyzes the data for two periods, 1981-1988 and 1989-1999. In addition, I will discuss an analysis of their 1982-1986 data cited by William B. Gould IV. See William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404, 405 (1987). In the table following this section is a summary of these three analyses as Orrick I for the 1981-1988 analysis, Orrick II for the 1982-1986 analysis, and Orrick III for the 1989-1999 analysis.

<sup>29</sup> The survey was reported by Rick DelVecchio, *Big Awards in Lawsuits Over Firings*, S.F. CHRON., Feb. 18, 1987, at 7. The survey data can no longer be found. Telephone Conversation with Victor Schachter, Partner, Schachter, Kristoff, Ross, Sprague & Curiale (Apr. 7, 2000).

<sup>30</sup> Frederick Brown, Summary of Wrongful Discharge Cases Which Concluded With a Jury Verdict (unpublished survey by Orrick, Herrington & Sutcliffe LLP) (cited in Gould, *supra* note 28).

<sup>31</sup> Gould, *supra* note 28.

<sup>32</sup> *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 695-96 (1988).

<sup>33</sup> Jeff B. Copeland et al., *The Revenge of the Fired*, NEWSWEEK, Feb. 16, 1987, at 47-48.

In 1988 the Rand Corporation's Institute for Civil Justice published a study of California jury verdicts in common law wrongful discharge cases by Dertouzos, Holland and Ebener [hereinafter the Rand study].<sup>34</sup> The Rand study examined the 120 California common law wrongful discharge jury verdicts reported by *Jury Verdicts Weekly* between 1980 and 1986.<sup>35</sup> Of the 120 cases, eighty-one (67.5%) resulted in plaintiff verdicts, with an average verdict of \$436,626 (including defense verdicts) or \$646,855 (excluding defense verdicts), and a median award (excluding defense verdicts) of \$177,000.<sup>36</sup> The Rand study would prove to be the most influential of the employment law jury verdict studies and is still widely cited.

A study conducted by Gross and Syverud and reported in the *UCLA Law Review* [hereinafter Gross & Syverud study]<sup>37</sup> examined a set of California jury verdicts in a broad range of civil trials, including employment law cases,<sup>38</sup> during the years 1985-1986 and 1990-1991. Their database, like the Rand study, relied on verdicts reported in *Jury Verdicts Weekly*. It included twenty-five employment law verdicts from 1985-1986 and seventeen employment law verdicts from 1990-1991.<sup>39</sup> But in analyzing the verdicts, the authors grouped the employment cases with other "commercial" cases, making it impossible to segregate and separately analyze the results in the employment cases.<sup>40</sup>

California wrongful discharge law underwent a significant change in 1988, when the California Supreme Court decided *Foley v. Interactive Data Corporation*,<sup>41</sup> holding that employees could not receive tort damages in bad faith breach of employment contract actions.<sup>42</sup> Most commentators expected that filings and verdicts would be significantly reduced.<sup>43</sup> But

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<sup>34</sup> DERTOUZOS, *supra* note 3.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.* at 25-27 and tbls.9-10.

<sup>37</sup> Gross & Syverud, *supra* note 6, at 5.

<sup>38</sup> The cases included both common law wrongful discharge claims and statutory employment discrimination claims. *Id.* at 11-12.

<sup>39</sup> *Id.* at 13 tbl.1 ("Basis for Claims").

<sup>40</sup> *Id.* at 11-12.

<sup>41</sup> 765 P.2d 373; 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988).

<sup>42</sup> *Foley* is itself an illustration of the public policy impact of jury verdict studies. The Court cited as support for its decision to reform wrongful discharge law the conclusion of Professor Gould, itself reliant on verdict data, that "employers are subject to volatile and unpredictable juries. . . [while] the employees who benefit are few and far between." *Foley v. Interactive Data Corp.* 47 Cal. 3d 654, 695-96 (1988).

<sup>43</sup> See, e.g., David J. Jung & Richard Harkness, *Life After Foley: The Bottom Line*, 5 LAB. LAW. 667, 671, 673-74 (1989) (arguing that *Foley* is likely to produce smaller compensatory and punitive damage awards and fewer filings of wrongful discharge cases).

studies from the 1990s suggest that while there has been a reduction in plaintiff success rates, there has been a slow but steady rise in the number of cases tried.

The continuing Orrick study (Orrick III) reported that between 1989 and 1999 there were 452 common law employment verdicts in California (compared with a combined 385 common law and statutory cases between 1981 and 1988), and that plaintiffs won 54% of the time (compared with 62% reported in Orrick I).<sup>44</sup> The Orrick III study distinguishes between awards in common law wrongful discharge cases and awards in statutory discrimination cases, primarily race, sex, age, and disability discrimination. The distinction turns out to be important. The Orrick III study reveals that plaintiffs won 62% of the common law wrongful discharge cases but only 46% of the discrimination cases. Overall, the median jury award was \$289,701; the average award was \$610,922. In discrimination discharge cases, the median awards ranged from \$140,242 to \$497,676, depending on the category of discrimination; and the average awards ranged from \$389,660 to \$1,559,318. In common law wrongful discharge cases, the median awards ranged from \$123,000 to \$400,938, depending on case theory; and the average awards ranged from \$621,001 to \$1,360,837. The findings from employment discrimination verdict studies are reported in Table 2.

A 1997 study conducted by Jung (Jung II), at the request of the California Senate Office of Research, reported that between 1992 and 1996 there were 639 California wrongful discharge jury verdicts reported in the Lexis-Nexis databases.<sup>45</sup> Jung reports that plaintiffs won 46% of the common law cases and 29% of the discrimination cases.<sup>46</sup> The median compensatory damages verdicts ranged from \$152,750 in 1995 to \$270,951 in 1992.<sup>47</sup>

A 1999 survey issued by the San Francisco law firm of Sonnenschein, Nath & Rosenthal<sup>48</sup> reported that there were 249 employment law

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<sup>44</sup> Orrick study, *supra* note 27, at 2.

<sup>45</sup> JUNG, *supra* note 19, at 3.

<sup>46</sup> *Id.* at 17 tbl.4. The methodology for analyzing success rate by category was, apparently, different than that used to determine overall success rates. Compare Tables 1 and 4.

<sup>47</sup> *Id.* at 12 tbl.2.

<sup>48</sup> The study and some of its conclusions are described in *Litigation: Law Firm Provides Survey Data on Jury Verdicts in Employment Cases*, DAILY LAB. REP., Dec. 12, 1999, at 1 [hereinafter Report on Sonnenschein Survey], but the firm spokesperson revealed in a telephone conversation that the data are no longer available. Telephone conversation between William Kidder and Sandra McCandless (May 1, 2000). Thus, I can only report what the press report states in describing the survey.

verdicts in California in 1998,<sup>49</sup> with plaintiffs winning 46% of the time. The median award was \$250,000; the average was \$2,506,132.<sup>50</sup> The report disclosed varying success rates by case theory, ranging from public policy tort (66%), disability discrimination (56%), and sexual harassment (56%) to sex discrimination (50%), breach of contract (50%), age discrimination (37%), breach of the covenant of good faith and fair dealing (35%), race discrimination (13%), and national origin discrimination (1%). The survey also reported that in 1997 the median award had been \$386,000 and the average had been \$1,014,046.<sup>51</sup>

Thus, the Orrick III study, the Jung II study, and the Sonnenschein study all reveal that by the late 1990s there was a substantial gap between the success rates in California common law discharge verdicts and California statutory employment discrimination verdicts. This finding was consistent with a number of studies dating back to the 1980s reporting national data on employment discrimination verdicts, as opposed to wrongful discharge verdicts. For example, a study conducted by Eisenberg on the outcome of all the 7,502 employment discrimination cases tried in federal courts between 1978 and 1985 reported that plaintiffs won only 22.2%.<sup>52</sup> When the 974 jury trials were isolated from the 6,526 bench trials, the win rate increased to 42.6%.<sup>53</sup> While this study did not quantify the size of verdicts, a follow-up study by Eisenberg and Schwab reported that as of 1990 there had been fifty-nine reported federal court employment discrimination plaintiffs' verdicts in cases brought under the 1866 Civil Rights Act.<sup>54</sup> This Act had been interpreted by the Supreme Court to permit legal damages, and was thus comparable to the California employment discrimination

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<sup>49</sup> By contrast, I only report 208 cases in 1998. I don't know why Sonnenschein reports a higher number, but suspect that they, like Orrick, count each cause of action as a separate case. I cannot confirm this, because the data are no longer available. See discussion *id.*

<sup>50</sup> This extremely high average for 1998 illustrates the problem of using average (mean) verdict amounts instead of median amounts. It is likely that among the 115 plaintiff verdicts calculated by the Sonnenschein survey for 1998 is the verdict in *Dawson-Austin v. Starkey Labs.*, C.D. Cal., EDCV940197RT, *Daily Journal Verdicts and Settlements Reports*, Aug. 7, 1998. In *Starkey*, the defendant fired his wife after she refused to sign a post-nuptial agreement. She sued for breach of their employment contract and was awarded \$62,000,000. This award alone added \$539,130 to the average plaintiff employment law verdict in 1998.

<sup>51</sup> See Report on Sonnenschein Survey, *supra* note 48.

<sup>52</sup> Eisenberg, *supra* note 19, at 1588 tbl.1.

<sup>53</sup> *Id.* at 1591 tbl.2.

<sup>54</sup> 42 U.S.C. § 1981 (2000). See *Johnson v. R.R. Express Agency*, 421 U.S. 454, 459-60 (1975) (stating legal damages available in employment discrimination action brought under 1866 Civil Rights Act, codified in section 1981).

statute, and to Title VII after it was amended to include legal damages. Of the fifty-nine verdicts, the awards ranged from \$500 to \$800,000, with a median award of \$39,167 and an average award of \$105,179.<sup>55</sup>

A report by the U.S. Department of Justice<sup>56</sup> sampled 1996 jury verdicts from state courts in the seventy-five largest counties of the United States, including nine large California counties.<sup>57</sup> The study found that among the 208 employment discrimination cases in their jury trial sample, plaintiffs won ninety-eight (47%) of the cases, with a median award of \$250,000. Of the eighty-seven bench trials in their sample, plaintiffs won seventeen (20%), with a median award of \$75,000.<sup>58</sup>

A 2000 report by the U.S. Department of Justice<sup>59</sup> found that between 1990 and 1998 a total of 8,466 civil rights employment cases were tried in the federal courts, ranging from 715 in 1990 to 1,083 in 1998. The plaintiff success rates varied from a low of 23.8% in 1990 to a high of 35.5% in 1998.<sup>60</sup> The median verdict in 1990 was \$450,000. It dropped to \$188,000 the following year, and thereafter ranged from a low of \$62,000 in 1993 to a high of \$137,000 in 1998. Although the Justice Department compared jury verdicts with bench verdicts, it did not separate employment cases from other civil rights cases in this analysis. The comparison nonetheless suggests some differences between judge and jury verdicts in employment cases, because over half the total of civil rights cases tried in each year reported were employment discrimination cases.<sup>61</sup> Plaintiffs won 35% of the jury trials, but only 23% of the bench trials, with median awards in jury trials over twice the median awards in bench trials.<sup>62</sup>

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<sup>55</sup> The study is reported in the prepared statement of Theodore Eisenberg and Stewart Schwab before the House of Representatives. See *The Civil Rights Act of 1990: Hearing on H.R. 4000 Before the House Comm. on Educ. and Labor*, 101st Cong. 142, 160 (1990) [hereinafter *1990 Hearing*].

<sup>56</sup> CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ 173426 (1999), available at <http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm> (last visited October 16, 2003).

<sup>57</sup> Alameda, Contra Costa, Fresno, Los Angeles, Orange, San Bernardino, San Francisco, Santa Clara, and Ventura. *Id.* at App.B.

<sup>58</sup> *Id.* at tbls.5, 7.

<sup>59</sup> CIVIL RIGHTS COMPLAINTS IN U. S. DISTRICT COURTS, 1990-98, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ 173427 (2000), available at <http://www.ojp.usdoj.gov/bjs/abstract/crcusdc.htm> (last visited October 16, 2003).

<sup>60</sup> *Id.* at 9 tbl.9.

<sup>61</sup> *Id.* Compare Tables 8 and 9 at 8-9.

<sup>62</sup> *Id.* at 8.

A 1999 study conducted by Colker and published in the *Harvard Civil Rights-Civil Liberties Law Review*<sup>63</sup> [hereinafter Colker study] examined a database collected by the American Bar Association containing every reported federal court Americans with Disabilities Act (ADA) employment discrimination case against a private employer<sup>64</sup> between 1992 and 1998.<sup>65</sup> Three hundred seventy-one of those cases were decided "on the merits," either by bench trial or jury trial.<sup>66</sup> (Colker could not determine how many were jury verdicts.<sup>67</sup>) Of these 371 judgments, 332 (89%) were for the defendant/employer, while only thirty-nine (11%) were for the plaintiff/employee.

In sum, prior studies reveal that for the past twenty years, plaintiffs in California common law wrongful discharge cases have had a high rate of success in jury trials, winning over 60% of the time, with annual median verdicts usually over \$100,000, and often as high as \$250,000 to \$400,000. And, the number of verdicts apparently rose substantially over the twenty years from 1979 to 1999. Using the same sampling technique, Jung and Harkness found twenty-eight verdicts a year in the 1979-1987 period, while Orrick found forty-five verdicts a year between 1989 and 1999.<sup>68</sup>

The reports further demonstrate that statutory employment discrimination cases and common law wrongful discharge cases are less comparable than one might expect. Both kinds of cases concern wrongful acts by employers against employees, often improper termination. But in the statutory discrimination cases, the plaintiffs had a much lower rate of success, winning less than half the time, and with median verdicts over a much broader range (\$39,167 to \$497,676) than those in the common law cases. Here again, the Orrick data is the most comprehensive. It reports that, in the 1989-99 period, California plaintiffs won 62% of the common law cases, but only 46% of the discrimination cases, although with somewhat higher median verdicts.<sup>69</sup> My findings, reported in the next section, are similar. But when sexual harassment cases and reverse discrimination cases brought by white men

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<sup>63</sup> Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).

<sup>64</sup> *Id.* at 109 n.45.

<sup>65</sup> *Id.* at 100 n.9.

<sup>66</sup> *Id.* at 126.

<sup>67</sup> *Id.*

<sup>68</sup> Orrick study, *supra* note 27, at 5; Jung & Harkness, *supra* note 43, at 668.

<sup>69</sup> Verdicts ranged from \$123,000 - \$400,938 in common law cases, and from \$140,242 - \$497,676 in discrimination cases.

are removed, I find a far larger disparity between discrimination verdicts and common law discharge verdicts.

Table 1 – Summary Comparison of Prior Studies of Common Law Wrongful Discharge Verdicts

Name of Study	Years Covered	Number of Cases Analyzed	Type of Cases Analyzed	Plaintiff Win Rate	Median Award	Average Award
Jung & Harkness	1979 - 1987	223	California Wrongful Discharge	70%	< \$125,000	> \$450,000
Rand	1980 - 1986	120	California Wrongful Discharge	67.5%	\$177,000	\$646,855
Orrick I	1981 - 1988	385	California Wrongful Discharge & Employment Discrimination	62%	\$ 76,500 - \$300,000	\$238,221 - \$866,074
Orrick II	1982 - 1986	Not Reported	California Wrongful Discharge & Employment Discrimination	> 70%	Not reported	\$652,100
Newsweek	7 years prior to 1987	Not Reported	California Wrongful Discharge	72%	Not reported	\$582,000
Schachter, Kristoff	1987	51	California Wrongful Discharge	78%	Not reported	\$424,500
Orrick III California Wrongful Discharge Subset	1989 - 1999	452	California Wrongful Discharge	62%	\$123,000 - \$400,938	\$621,001 - \$1,559,837

Name of Study	Years Covered	Number of Cases Analyzed	Type of Cases Analyzed	Plaintiff Win Rate	Median Award	Average Award
Jung II	1992 - 1996	639 <sup>70</sup>	California Wrongful Discharge & Employment Discrimination	Wrongful Discharge 46%	Not reported	Not reported
Sonnenschein, Nath & Rosenthal	1998	249	California Wrongful Discharge & Employment Discrimination	46% <sup>71</sup>	\$250,000	\$2,506,132

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<sup>70</sup> Although the win rates for wrongful discharge and employment discrimination are reported separately, the numbers of cases are not.

<sup>71</sup> From the limited information available regarding this study, it was impossible to separate the common law wrongful discharge cases from the statutory employment discrimination cases. Since the article describing the survey reports that plaintiffs won 66% of the common law tortious discharge in violation of public policy cases, but only 56% of the sexual harassment and disability cases, half the sexual orientation, sex discrimination (excluding sexual harassment) and contract cases, and fewer than half the age discrimination, race discrimination, and national origin discrimination cases, it appears that the plaintiff win rate would be higher if the statutory discrimination cases were excluded.



Table 2 – Summary Comparison of Prior Studies of Statutory Employment Discrimination Verdicts

Name of Study	Years Covered	Number of Cases Analyzed	Type of Cases Analyzed	Plaintiff Win Rate	Median Award	Average Award
Eisenberg	1978 – 1985	974	Federal Employment Discrimination	42.6%	Not Reported	Not Reported
Eisenberg & Schwab	Not Reported	59 Plaintiff Verdicts	Federal Employment Discrimination Plaintiff Verdicts		\$39,167	\$105,179
Orrick III California Employment Discrimination Discharge Subset	1989 – 1999	421	California Employment Discrimination Discharge	46%	\$140,242 - \$497,676	\$389,660 - \$1,559,938
US DOJ (State Courts)	1996	208	Employment Discrimination	48%	\$250,000	\$536,480
Jung II	1992 – 1996	639 <sup>72</sup>	California Wrongful Discharge & Employment Discrimination	Employment Discrimination 29%	Not reported	Not reported
US DOJ (US District Courts)	1990 – 1998	8,466 (jury and bench trials)	Federal Employment Discrimination	23.8% - 35.5% (35% of jury trials in all civil rights cases, but no separate report of jury verdicts in employment cases)	\$62,000 - \$450,000	Not Reported

<sup>72</sup> Although the plaintiff success rates for wrongful discharge and employment discrimination are reported separately, the numbers of cases are not.

Name of Study	Years Covered	Number of Cases Analyzed	Type of Cases Analyzed	Plaintiff Win Rate	Median Award	Average Award
Sonnenschein, Nath & Rosenthal	1998	249	California Wrongful Discharge & Employment Discrimination	46% <sup>73</sup>	\$250,000	\$2,506,132

## II. VERDICTS MATTER: HOW JURY VERDICT DATA WERE USED TO JUSTIFY THE IMPOSITION OF DAMAGE CAPS IN THE 1991 CIVIL RIGHTS ACT

In the early 1990s there were few issues more controversial in the field of employment law than the question of whether Title VII should be amended to permit jury trials and awards of legal damages.<sup>74</sup> One of the major tools of those who opposed the change were the California wrongful discharge studies, which were used to support the position that jury trials and legal damages would open employers to runaway verdicts.

For example, Marshall B. Babson, a partner at Morrison & Foerster and former member of the NLRB, appearing before the House of Representatives Committee on Education and Labor on behalf of the United States Chamber of Commerce, testified that:<sup>75</sup>

Recent experience in California has shown that the availability of compensatory and punitive damages turns employment litigation into a high-stakes lottery in which everyone — employees, employers, and the courts — loses. Once compensatory and punitive damages became available in California, wrongful discharge litigation went out of control. The courts were overwhelmed with cases, and juries seemed to lose touch with reality. Between 1980-1986, employees won more than 70% of the cases tried before juries, and the average award was more than \$645,000. Million dollar verdicts to plaintiffs were not uncommon, and one verdict in Santa Clara County exceeded \$50 million.

<sup>73</sup> See Report on Sonnenschein Survey, *supra* note 48.

<sup>74</sup> 1990 Hearing, *supra* note 55, at 635-67 (containing copies of over 25 editorials and news articles from nation's leading newspapers discussing whether Congress should amend Act).

<sup>75</sup> *Id.* at 109, 127-28.

Ralph Baxter, the chairman of Orrick, Herrington & Sutcliffe, testified that:<sup>76</sup>

The imposition of compensatory and punitive damages would raise dramatically the stakes of employment discrimination litigation. While, as noted above, this will not necessarily make enforcement of Title VII more effective, it will make far more certain and far more costly the prospect of employment litigation.

Our recent experience in California in handling “wrongful termination” litigation illustrates vividly the cost associated with the availability of compensatory and punitive damages in employment litigation. Until December 1988, when the California Supreme Court finally put a stop to it, any terminated California employee could participate in what came to be known as the other “California lottery” by filing a wrongful termination claim. Regardless of the underlying merit of the claim, an employee could put an employer through expensive and time-consuming litigation in pursuit of compensatory and punitive damages. As time went on, increasing numbers of these cases were tried to a final jury verdict in favor of the employers (i.e., the employees recovered nothing).<sup>77</sup> The flood of litigation continued unabated, however, because both the employees and their lawyers were motivated by the prospect of “hitting a home run” before a given jury.

The prospect of hitting a home run was quite real. The average California jury verdict grew to exceed \$500,000. While many employees recovered little or nothing ultimately from the litigation, some employees recovered hundreds of thousands of dollars.

In December 1988 in *Foley v. Interactive Data Systems, Inc.*, the California Supreme Court declared that compensatory and punitive damages were no longer available in ordinary wrongful termination litigation. If the plaintiffs cannot make out a traditional tort theory (such as intentional infliction of emotional distress)<sup>78</sup> they may no

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<sup>76</sup> *Id.* at 34, 38-39.

<sup>77</sup> Actually, according to the Orrick data, the plaintiff win rate in 1988 (67%) was higher than the rate in all but one of the eight years between 1981 and 1988. The win rates, in order, were 1985 (78%), 1988 (67%), 1981 (65%), 1982 (63%), 1984 (59%), 1986 (58%), 1983 (54%) and 1987 (53%).

<sup>78</sup> Baxter failed to note that *Foley* did not affect the tort theory of wrongful (or tortious) discharge in violation of public policy, which soon filled the gap. The theory of liability changed, but the pattern continued.

longer recover tort damages for wrongful termination.

The impact of this decision was as swift as it was predictable. Without the prospect of the California lottery, employees and plaintiff lawyers quit filing frivolous termination claims. The volume of litigation dropped dramatically.<sup>79</sup>

Similarly, Victor Schachter, name partner of Schachter, Kristoff, Ross, Sprague & Curiale testified against the damages provision, citing the Rand study and his own firm's survey of 1986 and 1987 verdicts, in which they calculated that the average punitive damages award in wrongful discharge cases in 1986 was \$494,786.<sup>80</sup>

Those who favored the change pointed to the results in individual employment discrimination cases, and jury verdict studies of civil rights cases, to support their position that bench trials and back pay awards were inadequate to carry out the purpose of the civil rights laws. The National Women's Law Center published a pamphlet, *Title VII's Failed Promise: The Impact of the Lack of A Damages Remedy*<sup>81</sup> that told the story of several women who won sexual harassment cases but were awarded no damages. A number of these women testified before the committee.<sup>82</sup>

Responding to the testimony relying on wrongful discharge jury verdicts, Professor Theodore Eisenberg of Cornell Law School testified and submitted two extensive written statements.<sup>83</sup> Eisenberg argued that the experience of the federal courts hearing employment discrimination cases under the 1866 Civil Rights Act (known as Section 1981 cases) suggested that an amended Title VII would not create a flood of new litigation. He referred to his own studies demonstrating that the numbers of Section 1981 cases were not overwhelming the courts, and

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<sup>79</sup> In early 1990, when Baxter made these remarks, it did look like the volume of litigation had dropped. According to the Orrick data there were 63 wrongful discharge verdicts in 1988 but only 42 in 1989, the lowest number since 1984. And the average verdict dropped in 1989, from \$610,613 to \$341,431. The median verdict rose, however, from \$120,742 to \$154,007. By the end of 1990 it appeared that the predicted drop in litigation volume was not to be. That year, there were 67 verdicts, compared to 63 in 1988. The plaintiff win rate was slightly higher than in 1988 at 68% compared to 67%. And the 1990 median verdict of \$317,135 was the highest ever recorded by the Orrick survey, as was the 1990 average verdict of \$1,806,034.

<sup>80</sup> 1990 *Hearing*, *supra* note 55 at 87, 91, 95-96 n.4.

<sup>81</sup> CAROLINE D. NEWKIRK, ET AL., NATIONAL WOMEN'S LAW CENTER, *TITLE VII'S FAILED PROMISE: THE IMPACT OF THE LACK OF A DAMAGES REMEDY* (1991).

<sup>82</sup> 1990 *Hearing*, *supra* note 55.

<sup>83</sup> *Id.* at 137, 142, 229.

that damages awarded in Section 1981 and Section 1983 cases were quite modest.<sup>84</sup> He argued that the Civil Rights Attorney's Fee Award Act of 1976 had also been predicted to lead to a flood of civil rights litigation, but that in his research he found that the number of civil rights filings dropped by 31% between 1975 and 1984.<sup>85</sup> Turning from verdicts to outcomes, he pointed out that many verdicts are reduced, and that the Rand study found that the actual median amount recovered by plaintiffs in wrongful discharge cases after post-verdict reductions and contingent fees was \$30,000. Returning to his own research on federal trial outcomes, he argued that although the 67.5% plaintiff win rate reported by Rand for California wrongful discharge cases was comparable to the plaintiff win rate in federal court contract litigation, the federal civil rights win rates he had measured were far lower, 36% to 39%.<sup>86</sup>

Eisenberg concluded that:

One hears about the lottery effect in putting things before juries. I guess I want to accept that. There is a lottery aspect to jury trials and it is as follows: Most cases that have clear outcomes settle. It is only the difficult cases that get to trial and it is because if the parties can't agree as to the outcome they have to try the case.

If I agree with you that the case was worth a certain amount, we settle. There is no point in us spending the money to litigate. When we can't agree, we go to the juries. One might expect a lot of variation in jury outcomes precisely because juries see the hard cases. At the extreme, you should win 50 percent before juries, otherwise the lawyers weren't doing their jobs in negotiating a settlement.

So, I would say you ought to base your consideration of H.R. 4000 on 25 years of Federal civil rights experience, which suggests, one, juries are not wildly pro-plaintiff; two, awards are modest. Indeed, if anything, they are too small. Rather than on one year or one decade of California wrongful termination experience, which when analyzed closely suggests a very different picture than some of the

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<sup>84</sup> *Id.* (citing Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 779 (1988); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 529 (1989)).

<sup>85</sup> 1990 Hearing, *supra* note 55, at 137, 142, 229.

<sup>86</sup> See James A. Henderson Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 546 (1990).

testimony might suggest. Thank you.<sup>87</sup>

Congress compromised; the Act was amended, providing employment discrimination plaintiffs with a statutory right to a jury trial, but damages were capped (except in race discrimination cases) to avoid runaway jury verdicts.<sup>88</sup> Employers of over fourteen but under 101 employees are subject to a damages cap of \$50,000 in compensatory and punitive damages. Larger employers are subject to larger awards, but the maximum damage award, for employers of over 500 employees, is \$300,000. By contrast, in California employment discrimination cases brought under state law, uncapped legal damages are available.

In sum, one of the ways that verdicts demonstrably matter is their influence on public policy. Without the use of jury verdict studies by the proponents and opponents, the 1991 Civil Rights Act might not have provided for compensatory and punitive damages, or might have provided for uncapped damages. Thus, with Ted Eisenberg's warnings about how little one can conclude from studying a few years' worth of California jury verdicts still ringing in my ears, I turn to my own survey.

### III. THE RESULTS OF A COMPREHENSIVE SURVEY OF CALIFORNIA EMPLOYMENT DISCRIMINATION AND WRONGFUL DISCHARGE VERDICTS FROM 1998 & 1999

We<sup>89</sup> coded every California verdict in a common law wrongful discharge or statutory employment discrimination case reported in 1998 or 1999 in one or more of the three major California jury verdict reporters *Jury Verdicts Weekly*, *The Los Angeles/San Francisco Daily Journal Verdicts and Settlements Report*, and *Jury Verdicts Digest*. For the two-year period analyzed, there were a total of 389 reported cases, of which 272 were employment discrimination cases and 117 were wrongful discharge cases. I further describe the survey methodology in section A. In section B, I present my analysis of the data, setting forth how the data demonstrate the disadvantages experienced by women and minorities in employment law litigation. In section C, I analyze the reliability of the data, concluding that there are good reasons to conclude that they are reliable.

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<sup>87</sup> 1990 *Hearing*, *supra* note 55 at 141 (Vol. 2).

<sup>88</sup> See Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000); Pub. L. No. 102-66, § 102, 105 Stat 1071.

<sup>89</sup> Student research assistants coded the verdicts under my supervision.

*A. Survey Methodology*

Through a process of several coding review sessions, we developed a coding manual to code twenty items of data for each case. The law student research assistants then coded the data, with coding problems reviewed and the coding supervised by the author. We coded the data on an Excel spreadsheet, allowing us, or any other interested researcher, to sort and re-sort the data easily.<sup>90</sup>

With the exception of the single class-action verdict, we treated trials with multiple plaintiffs as multiple cases. Thus, if three plaintiffs joined their claims in a single trial before a single jury, we counted each plaintiff's claim as a separate case. If three plaintiffs joined their claims and the defendant won a verdict against each of them, it counted as three defense verdicts. If each plaintiff won a verdict, it counted as three plaintiff verdicts. We apportioned the verdict amount as the jury did. Where the apportionment was not reported, we contacted counsel to determine the distribution. Most of the trials involved only one plaintiff, but where there were multiple plaintiffs that fact was noted on the spreadsheet. Thus, 334 trials produced 389 total cases; 307 trials involved only a single plaintiff, while twenty-seven trials involved multiple plaintiffs, with fourteen trials involving two plaintiffs, three trials involving three plaintiffs, four trials involving four plaintiffs, two trials involving five plaintiffs, three trials involving six plaintiffs, and one trial, a class action, counted here as a single case involving 132 plaintiffs.

Unlike the Orrick studies, however (and perhaps others),<sup>91</sup> each plaintiff's joined claims were counted as a single case. We chose a single principle case type, either wrongful discharge or employment discrimination, and a principal theory (e.g., breach of contract, public policy tort, sex discrimination). We also coded any secondary theories reported. In many cases this required a difficult judgment call, since multiple theories were often reported. The Orrick survey resolved this problem by coding a separate entry for each case theory and each cause of action. This option was considered, but rejected for two reasons. First, separate entry would have meant listing some cases several times, which would skew the quantitative evaluations. Second, based on my twenty-plus years of personal experience observing and litigating employment law cases, I have concluded that most (though not all) cases tried to juries rely on several theories initially, but are ultimately

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<sup>90</sup> See spreadsheet, available at [http://internet.ggu.edu/law\\_library/opnphm.html](http://internet.ggu.edu/law_library/opnphm.html).

<sup>91</sup> It appears this is also true of the Sonnenschein firm's survey.

submitted for verdict on a single principal theory of the case. This theory, if discernable from the reports, best characterizes the case. We tried to determine from the information reported the best choice of theory, but we also reported the alternate theories and further described each case in narrative form. Other researchers are invited to use the alternate theories data and the narratives to re-code the data.

Each case was given a number, from 1 to 389. Each case was given a name, listing the first named plaintiff and, where applicable, the first named corporate or institutional defendant. We listed the first date the verdict was reported in 1998 or 1999, and the first source, as well as other sources. Of our 389 cases, only fifty-nine were reported by all three sources during the applicable period, and only 111 of the remaining 330 were reported by two of our three sources. The court system (state or federal), the particular court (e.g., San Francisco Superior Court, United States District Court, Northern District (San Francisco)), and the docket number were entered as separate items. We coded the plaintiff's gender and race/ethnicity. We were nearly always (97%) able to determine the plaintiff's gender (377 of the 389 cases), but could rarely determine race/ethnicity unless it was an issue in the case.<sup>92</sup>

For employment discrimination cases we coded the plaintiff's relevant protected class characteristic (i.e., her race, gender, etc.). For all cases we coded the adverse action (i.e., termination, harassment, failure to hire), the verdict outcome (P or D), and, for plaintiff's verdicts, the dollar amount awarded. When reported, we coded whether punitive damages were included in the award and the amount.

The study combines all cases from 1998 and 1999, rather than treating each calendar year as a separate category. We determined the total number of verdicts, the number of plaintiff verdicts, the resulting plaintiff success rate, and the median plaintiff verdict (excluding defense verdicts). The median is reported herein, but not the average (mean), because a few large verdicts skew the meaning of the average. For example, in 1998 a Los Angeles federal jury awarded \$62,000,000 in a breach of employment contract case.<sup>93</sup> This anomalous award alone added \$300,452 to the average plaintiff employment law verdict and \$885,127 to the average wrongful discharge verdict, thereby suggesting a widespread trend of growing verdicts where none occurred. This report

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<sup>92</sup> See discussion *infra* at Part III.

<sup>93</sup> The defendant fired his wife after she refused to sign a post-nuptial agreement. She sued for breach of their employment contract and was awarded \$62,000,000. Dawson-Austin v. Starkey Labs., C.D. Cal., EDCV940197RT, Daily Journal Verdicts and Settlements Reports, Aug. 7, 1998.



tries to guard against such false impressions by reporting median verdict amounts.

*B. Who Wins? How Much? An Analysis of the Data*

Table 3 illustrates the overall results of the study, listing the verdict data for all cases surveyed, and separately for the wrongful discharge verdicts and the employment discrimination verdicts. It reveals that of the 389 total verdicts, plaintiffs won 205 (53%), with a median award of \$249,000. Of the 389 awards, 272 (70%) were in statutory discrimination cases. Plaintiffs won 136 verdicts (50%), with a median verdict of \$200,000. The remaining 117 verdicts (30%) were in common law discharge cases. Plaintiffs in these cases won sixty-nine verdicts (59%), with a median verdict of \$296,991.

For each comparison reported, we performed Fisher's "exact test" to determine statistical significance.<sup>94</sup> The test measures the probability that a difference between two findings is the result of chance or randomness. When the probability that a differential is random is less than 0.05, statistical significance is demonstrated; that is, social scientists agree that the probability that the difference is random is too low to accept as a valid explanation.<sup>95</sup> The measure of probability is described as the "AP - value." Using Fisher's exact test, the difference between the 59% win rate in common law cases and the 50% win rate in statutory discrimination cases is not statistically significant.<sup>96</sup>

When sexual harassment cases are separated from other discrimination cases, a larger difference between common law cases and discrimination cases emerges. Of the 272 employment discrimination cases, ninety were sexual harassment cases. Of these cases, plaintiffs won sixty-two, a success rate of 68%. In the remaining 182 discrimination cases, plaintiffs won seventy-four, a success rate of 41%. The difference between the plaintiff success rate in non-sexual harassment discrimination cases and common law wrongful discharge cases is statistically significant, as is the difference in discrimination case success rates between sexual harassment and non-sexual harassment

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<sup>94</sup> To perform the test, see Fisher's Exact Test, at <http://www.matforsk.no/ola/fisher.htm> (last modified Aug. 3, 1999).

<sup>95</sup> For more on the use of the Fisher exact test to measure statistical significance in jury verdict differentials, see Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1127 n.17 (1996).

<sup>96</sup> P = 0.121.

cases.<sup>97</sup>

Table 3 – General Summary

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Employment Law Cases, 1998 & 1999	389	205	53%	\$249,000
All Statutory Employment Discrimination Cases, 1998 & 1999	272	136	50%	\$200,000
All Statutory Employment Discrimination Cases Except Sexual Harassment Cases, 1998 & 1999	182	74	41%	\$195,000
All Common Law Wrongful Discharge Cases, 1998 & 1999	117	69	59%	\$296,991

Why should the sexual harassment cases be examined differently than other employment discrimination or other sex discrimination cases? Undoubtedly, sexual harassment is a form of sex discrimination in employment. The Supreme Court resolved any doubts on this question in 1986.<sup>98</sup> It is prohibited by the same laws that prohibit other sex discrimination.<sup>99</sup> It may be committed to oppress, subordinate, or disempower women.<sup>100</sup> But there is nonetheless a difference for a juror

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<sup>97</sup> Comparing non-sexual harassment discrimination cases with common law discharge cases,  $P = 0.002$ ; comparing sexual harassment cases with all other employment discrimination cases,  $P = 0.000001$ .

<sup>98</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding sexual harassment as form of sex discrimination actionable under Title VII of Civil Rights Act of 1964.).

<sup>99</sup> *Id.*

<sup>100</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 40-55 (1979); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *CORNELL L. REV.* 1169, 1219 (1998) (analyzing how sexual harassment perpetuates male control of workplace,

finding liability in a "traditional" sex discrimination case claiming unequal treatment in hiring, promotion, or termination, and a sexual harassment case. The need to provide legal protection to insure women receive equal treatment in the workplace remains controversial. Many Americans are skeptical about whether sex discrimination is a serious problem. Some believe women should be subservient to men and should play a secondary role in public life; they support sex discrimination as proper.<sup>101</sup> By contrast, few believe that sexual harassment is proper; most believe that women should be protected from such behavior by men.<sup>102</sup> Even a gender-role "traditionalist" will support "protecting" women. Thus, once the legal questions that keep cases from juries are resolved, most jurors are likely to be sympathetic to women in meritorious harassment cases, while some are less likely to be sympathetic in other kinds of equally valid sex discrimination cases.

A second reason to distinguish sexual harassment cases from other sex discrimination cases is the kind of evidence required to prove liability. Sex discrimination cases may be proven by circumstantial evidence of differential treatment; that is, by comparing the treatment of men and women to infer a gender-based cause for the difference.<sup>103</sup> By contrast, sexual harassment is typically proven by direct evidence. Such evidence may be less likely to be disregarded by jurors.

There is a third reason to treat sexual harassment cases differently than other sex discrimination cases: plaintiffs' lawyers do. The 1996 membership directory of the California Employment Lawyers Association, the state-wide organization of lawyers who represent plaintiffs in employment law cases, lists sexual harassment and discrimination as distinct areas of employment rights practice (although most lawyers who handle one also handle the other).<sup>104</sup> No other area of employment discrimination law is broken out as a separate category.

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entrenches sex and gender hierarchies, and compromises women's opportunities for economic self-sufficiency and new conceptions of self).

<sup>101</sup> Michael Selmi reports that in 1998, 40% of respondents polled by the WASHINGTON POST favored returning to the gender roles of the 1950s. See Selmi, *supra* note 19 (citing Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat*, WASH. POST, Mar. 22, 1998, at A1).

<sup>102</sup> See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685, n.3 (1998) (collecting news articles depicting sexual harassment in negative terms). Schultz criticizes the direction of sexual harassment law as "sexualizing" all gender discrimination law, with judges increasingly requiring evidence of a sexual motive in cases alleging gender discrimination.

<sup>103</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>104</sup> See discussion *infra* at Part IV.B.3.

A fourth reason to treat sexual harassment cases differently than other discrimination cases is the physical nature of many sexual harassment claims. While most discrimination claims involve strictly verbal conduct and adverse employment decisions, sexual harassment cases often involve unwanted physical touching, and often highly offensive touching. In an article describing the difference between how judges and lay people view sexual harassment, Theresa M. Beiner reports that over 90% of a large group of federal employees surveyed agreed that deliberate touching or cornering definitely or probably does constitute sexual harassment.<sup>105</sup> And in a study of reported judicial decisions on sexual harassment, Ann Juliano and Stewart J. Schwab found that:

[p]laintiffs who alleged harassment as sexualized behavior have significantly higher win rates than other sexual harassment plaintiffs. Plaintiffs who alleged harassment based on comments on a sexual or physical nature were more successful than plaintiffs who alleged comments that devalued women as women (such as "honey" or "babe"). Further, harassment claims premised upon physical contact of a sexual nature met greater success than physical conduct of a nonsexual nature.<sup>106</sup>

For these reasons, I have examined sex discrimination cases in two ways: first by including sexual harassment cases with other sex discrimination cases; and second by examining them separately.

Table 4 separates the wrongful discharge verdicts into their major categories. In breach of contract cases, plaintiffs won thirty-nine of the sixty-six verdicts (59%), with a median verdict of \$296,991. In whistle-blower cases, plaintiffs won fifteen of twenty-four verdicts (63%), with a median verdict of \$540,000. In public policy tort cases, plaintiffs won fourteen of twenty-three verdicts (61%), with a median verdict of \$340,500. The differences in win rates are not statistically significant.<sup>107</sup>

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<sup>105</sup> Theresa M. Beiner, *Let the Juries Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 834 (2002).

<sup>106</sup> Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 580-81 (2001).

<sup>107</sup> Comparing breach of contract, whistle-blower and public policy tort verdicts with each other and all other wrongful discharge verdicts the P value in each comparison was > .05.

Table 4 – Comparison of Common Law Wrongful Discharge Verdicts

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Common Law Wrongful Discharge Cases, 1998 & 1999	117	69	59%	\$296,991
Breach of Contract Cases	66	39	59%	\$296,991
Whistle-blower Cases	24	15	63%	\$540,00
Public Policy Tort Cases	23	14	61%	\$340,500
Other	1	0	0%	NA

Table 5 compares employment discrimination cases generally with different kinds of sex discrimination cases. It reveals that of the 272 statutory employment discrimination verdicts, 118 (43%) were sex discrimination cases, including 108 (92%) in which the plaintiff was female, and ten (8%) in which the plaintiff was male. The women plaintiffs won sixty-four of their 108 cases (59%), with a median verdict of \$224,933. The male plaintiffs won all but one of their cases (nine of ten), but with a median verdict of only \$87,500. The difference in the success rates is not statistically significant.<sup>108</sup>

As discussed *supra*, a very large proportion of the sex discrimination cases were sexual harassment cases. Of the 108 cases filed by women, eighty (74%) were sexual harassment cases, with all but two alleging harassment by men. Of these seventy-eight cases, plaintiffs won fifty-two (67%), with a median verdict of \$210,000. The difference between this success rate and the overall success rate in all employment cases is statistically significant.<sup>109</sup> In the two same-sex sexual harassment cases filed by women, the plaintiff won one, with a verdict of \$500,000. Of the ten sex discrimination cases filed by men, all ten were sexual harassment cases. In eight of the ten, the plaintiff alleged same-sex harassment; that is, the male plaintiff alleged harassment by another man. In what may be an illustration of the depth of homophobia in American life, the plaintiffs won every one of these cases, with a median verdict of \$166,000. However, the differential in success rates between sexual harassment cases in which the defendant was a man and the plaintiff a woman, and cases in which both plaintiff and defendant were men was

<sup>108</sup> P = 0.08.

<sup>109</sup> P = 0.006.

not statistically significant.<sup>110</sup> In the two cases where a man alleged he was harassed by a woman, the plaintiff won once, with a verdict of only \$1,400.

Of the remaining twenty-eight sex discrimination cases, all were filed by women. Of the seven of these cases that were pregnancy discrimination cases, the plaintiff won three (43%), with a median verdict of \$556,722. Of the remaining twenty-one sex discrimination cases, plaintiffs won eight (38%), with a median verdict of \$331,500, including sixteen termination cases in which the plaintiffs won four (25%), with a median verdict of \$406,500. The difference between the success rates in termination cases and in all employment cases is statistically significant.<sup>111</sup>

Table 5 – Comparison of Sex Discrimination Cases

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Statutory Employment Discrimination Cases, 1998 & 1999	272	136	50%	\$200,000
All Sex Discrimination Cases Where Plaintiff is Female.	108	64	59%	\$224,933
All Sex Discrimination Cases Where Plaintiff is Male.	10	9	90%	\$87,500
Opposite-Sex Sexual Harassment Cases Where Plaintiff is Female	78	52	68%	\$210,000
Opposite-Sex Sexual Harassment Cases Where Plaintiff is Male	2	1	50%	\$1,400
Same-Sex Sexual Harassment Cases Where Plaintiff is Female	2	1	50%	\$500,000
Same-Sex Sexual Harassment Cases Where Plaintiff is Male	8	8	100%	\$166,000
Pregnancy Discrimination Sex Discrimination Cases	7	3	43%	\$556,722
Sex Discrimination Cases (Excluding All Sexual Harassment and Pregnancy Discrimination Cases) Where Plaintiff is Female.	21	8	38%	\$331,500
Sex Discrimination Cases (Excluding All Sexual Harassment Cases) Where Plaintiff is Male.	0	NA	NA	NA

<sup>110</sup> P = 0.10.

<sup>111</sup> P = 0.02.

The wrongful discharge plaintiffs were more likely to be men, and the employment discrimination plaintiffs were far more likely to be women.<sup>112</sup> And, although there were insufficient data to confirm it, the data in which race is reported suggest that the wrongful discharge plaintiffs were more likely to be white, and the employment discrimination plaintiffs were more likely to be non-white. The plaintiff's race was reported in seventy of the 272 employment discrimination cases. Of the seventy reports, the plaintiff was non-white in sixty-six of the cases. In the four employment discrimination cases in which the plaintiff's race was reported as white, all included allegations of reverse race discrimination. But in the 117 wrongful discharge cases, race was reported only thirteen times. In ten cases, the plaintiff was non-white; in the other three, the plaintiff was white. In two of those cases, the plaintiff was a white male, and reverse race discrimination was a secondary theory of liability. In every one of the seven cases where the plaintiff was identified as white, the plaintiff won.

These data suggest that racial minority status is noticed, while whiteness is not, unless race discrimination is specifically alleged. This is consistent with the observation that in a society dominated by whites,<sup>113</sup> minority racial status is highly visible, while whiteness is invisible to most whites (though not to people of color), who are socialized not to think about their own racial identity. On this point, Barbara Flagg observes:

The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behavior, experiences, or perspectives that are white specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial

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<sup>112</sup> Where gender was reported, of the wrongful discharge plaintiffs, thirty-eight (32%) were women, while seventy-nine (68%) were men. Of the employment discrimination plaintiffs, 154 (58%) were women, while 112 (42%) were men.

<sup>113</sup> Although non-Hispanic whites are no longer an absolute majority in the California population, they are the largest racial/ethnic group, with 46.7% of the population. U.S. CENSUS BUREAU, A PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (geographic area California), available at <http://factfinder.census.gov> (last visited Oct. 17, 2003).

justice.<sup>114</sup>

Similarly, Sylvia Law writes:

When people are asked to describe themselves in a few words, [black] people invariably note their race and white people almost never do. Surveys tell us that virtually all [black] people notice the importance of race several times a day. White people rarely contemplate the fact of our whiteness — it is the norm, the given. It is a privilege to not have to think about race.<sup>115</sup>

Ann Juliano and Stewart J. Schwab make a similar observation in their discussion of their study of 650 federal case decisions (including eleven jury verdicts) in sexual harassment cases. They found “that in all cases when we can identify race, nearly three times as many involve minority plaintiffs as white plaintiffs. We do not interpret this statistic as suggesting that victims of color are more common than white plaintiffs in the reported decisions. Rather, we suspect that judges simply do not mention the race of the victim when she is white.”<sup>116</sup>

Table 6 reveals that of the 272 statutory employment discrimination cases, fifty-one (19%) were race discrimination cases. In forty-seven of the fifty-one cases (92%) the plaintiff was non-white. Of those forty-seven plaintiffs, thirty-three were black, seven were Asian/Pacific Islander, six were Hispanic, and one was Middle-Eastern. Of the forty-seven cases, eight concerned harassment, while thirty-nine concerned other forms of discrimination. Of the forty-seven race discrimination cases brought by non-whites, the plaintiff won seventeen (36%), with a median verdict of \$105,000. Compared with the success rate for all employment cases (53%), the difference is statistically significant.<sup>117</sup> When the eight harassment cases are subtracted from the forty-seven race discrimination cases, there were thirteen plaintiff verdicts, a win rate of 33% with a median verdict of \$105,000. Again, compared with the overall win rate in employment law cases (53%), the difference is statistically significant.<sup>118</sup> There were nineteen race discrimination termination cases brought by non-white plaintiffs, resulting in just three

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<sup>114</sup> See Barbara J. Flagg, “Was Blind, But Now I See”: *White Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

<sup>115</sup> Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604-05 (1999).

<sup>116</sup> Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 558 (2002) (footnotes omitted).

<sup>117</sup> P = .04.

<sup>118</sup> P = .02.



plaintiff verdicts (16%), with a \$500,000 median verdict. Compared with the success rate for all employment cases (53%) and for all termination cases (47%), the difference is again statistically significant.<sup>119</sup> Of the nineteen race discrimination termination cases, twelve were filed by African Americans, resulting in the three plaintiff verdicts (25%). Again, compared with the success rate for all employment cases (53%), the difference is statistically significant,<sup>120</sup> but compared with all termination cases (47%), it is not.<sup>121</sup> There were four race discrimination cases brought by white plaintiffs, all of which were won by the plaintiffs, with a median verdict of \$49,349. Although the number is small, compared with the success rate for discrimination cases brought by non-whites (36%), the difference is again statistically significant.<sup>122</sup>

Table 6 – Comparison of Race Discrimination Cases

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Statutory Employment Discrimination Cases, 1998 & 1999	272	136	50%	\$200,000
All Race Discrimination Cases Where Plaintiff is Non-White (Including Racial Harassment Cases)	47	17	36%	\$105,000
All Race Discrimination Cases Where Plaintiff is White	4	4	100%	\$49,349
All Racial Harassment Cases Where Plaintiff is Non-White	8	4	50%	\$1,270,000
All Racial Harassment Cases Where Plaintiff is White	0	NA	NA	NA

<sup>119</sup> All employment P = .001; termination P = .007.

<sup>120</sup> P = .05.

<sup>121</sup> P = .149.

<sup>122</sup> P = .02.

All National Origin Discrimination Cases	9	5	56%	\$350,000
All Race Discrimination Cases Where Plaintiff is Non-White (Excluding Racial Harassment Cases)	39	13	33%	\$105,000
All Race Discrimination Termination Cases Where Plaintiff is Non-White	19	3	16%	\$500,000
All Race Discrimination Termination Cases Where Plaintiff is African American	12	3	25%	\$500,000

Table 7 displays the intersection of race and gender. In the categories that describe the kind of case that many view as the quintessential employment discrimination claim, the claim that a woman was fired because of her sex, or an African American was fired because of his or her race, plaintiffs won just seven of the twenty-eight cases (25%).<sup>123</sup> And at the intersection of race and sex, where race and gender were both reported, black women won only two of the twelve cases tried (17%),<sup>124</sup> including one of the four termination cases (25%).

Over the two years covered by the study, the thirty-nine reported race discrimination non-harassment verdicts in cases brought by non-whites resulted in an aggregate \$2,497,913 awarded to plaintiffs while the four race discrimination cases brought by whites (all of which were non-harassment) resulted in an aggregate award of \$2,881,314. The eight racial harassment cases (all filed by non-whites) resulted in an aggregate award of \$8,585,000. Among sex discrimination cases, the eighty sexual harassment cases brought by women resulted in an aggregate award of \$24,173,189, while the ten cases brought by men resulted in an aggregate award of \$2,772,900. By contrast, the twenty-eight sex discrimination cases which were not sexual harassment cases resulted in an aggregate award of \$4,290,451.

<sup>123</sup> P = .02.

<sup>124</sup> P = .02 when compared with all employment law cases.

Table 7 – Traditional and Intersectional Discrimination

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Statutory Employment Discrimination Cases, 1998 & 1999	272	136	50%	\$200,000
Combined Sex Discrimination Cases Filed by Women Plaintiffs and Race Discrimination Cases Filed by Black Plaintiffs	28	7	25%	\$500,000
Employment Discrimination Cases Filed by Non-White Women	16	4	25%	\$281,500
Employment Discrimination Cases Filed by Black Women	12	2	17%	\$265,000
All Age Discrimination Cases	37	10	27%	\$93,926
Age Discrimination Cases Filed by Men	28	10	36%	\$93,926
Age Discrimination Cases Filed by Women	8	0	0%	N/A

Table 8 displays the success rates in areas of statutory employment discrimination other than race and sex discrimination. It reveals that in age discrimination cases, the plaintiff won ten of thirty-seven verdicts (27%),<sup>125</sup> with a median verdict of \$93,926, and an aggregate award of \$12,638,596. Here again there were interesting findings at the intersection — here the intersection of age and sex. In thirty-six of the thirty-seven cases the plaintiff's gender was reported. Of the twenty-eight cases filed by men, there were ten plaintiff verdicts (36%). But in the eight age discrimination cases filed by women, the defendant won every case. This gender difference is on the borderline of statistical significance.<sup>126</sup> In disability discrimination cases, plaintiffs won fourteen of thirty-four verdicts (41%), with a median verdict of \$275,000.<sup>127</sup> The aggregate award in disability discrimination cases was \$5,975,158. Of the seventeen retaliation cases tried, plaintiffs won ten (59%), with a median verdict of \$126,700 and an aggregate award of \$10,203,704. Of the two religious discrimination cases, the plaintiff won one, with a

<sup>125</sup> P = .003 when compared with all employment law cases.

<sup>126</sup> P = .05.

<sup>127</sup> P = .212 (not statistically significant when compared with all employment law cases.)

\$2,210,092 verdict. In the only marital status discrimination verdict reported, the plaintiff won a \$698 verdict.

Table 8 – Comparison of Other Statutory Employment Discrimination Cases

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Statutory Employment Discrimination Cases, 1998 & 1999	272	136	50%	\$200,000
All Statutory Employment Discrimination Cases Except Sexual Harassment	182	74	40%	\$195,000
All Age Discrimination Cases	37	10	27%	\$93,926
All Disability Discrimination Cases	34	14	41%	\$275,000
All Statutory Employment Discrimination Retaliation Cases	17	10	59%	\$126,700
All Religious Discrimination Cases	2	1	50%	\$2,210,092
All Marital Status Discrimination Cases	1	1	100%	\$698

Table 9 – Impact of Gender On Employment Verdicts

Case Category	Total Verdicts	Plaintiff Verdicts	Plaintiff Win Rate	Median Plaintiff Verdict
All Employment Law Cases, 1998 & 1999	389	205	53%	\$249,000
All Cases Where Plaintiff is Male	188	95	51%	\$248,000
All Cases Where Plaintiff is Female	189	102	54%	\$220,000
All Termination Cases	236	112	47%	\$296,991
Sex Discrimination Termination Cases Where Plaintiff is Female	16	4	25%	\$406,500

Table 10 examines verdicts over one million dollars, a popular marker for “successful” verdicts (from a plaintiff’s perspective) or “runaway” verdicts (from defendant’s perspective). It reveals that of the 205 plaintiffs’ verdicts, thirty-six (18%) were over one million dollars. The largest numbers of these verdicts were in opposite-sex sexual harassment cases and contract cases. In opposite-sex sexual harassment cases, seven of the eighty verdicts (9%) were over one million dollars. There were also six “successful verdicts” out of thirty-nine, (15%) in breach of contract cases, four out of fourteen (29%) in public policy tort cases and four out of fifteen (27%) in whistle-blower cases. Three verdicts out of ten (30%) exceeded one million dollars in age cases, three out of fourteen (21%) in disability cases, two out of four (50%) in racial harassment cases and two out of ten (20%) in retaliation cases, and one each in reverse race cases (out of four, 25%), religion cases (out of one, 100%), sex discrimination (excluding harassment and pregnancy) cases (out of eight, 13%), pregnancy cases (out of three, 33%), national origin cases (out of five, 20%), and same-sex sexual harassment cases (out of ten, 10%). There were no million-dollar verdicts in race discrimination cases (non-harassment) brought by non-whites.

In fifty-three of the 205 cases won by plaintiffs (26%), punitive damages were reported, with a median punitive damages award of \$250,000.

Table 10 – Verdicts Over One Million Dollars

Case Category	Total Verdicts	Total Plaintiff Verdicts	Verdicts Over \$1 Million	Percentage of Plaintiff Verdicts Over \$1 Million
Age Discrimination	37	10	3	30%
Breach of Contract	66	39	6	15%
Disability Discrimination	34	14	3	21%
National Origin Discrimination	9	5	1	20%
Pregnancy Discrimination	7	3	1	33%
Public Policy Tort	23	14	4	21%
Race Discrimination (White Plaintiff)	4	4	1	25%
Race Discrimination (Non-White Plaintiff)	39	13	0	0%
Racial Harassment (Non-White Plaintiff)	8	4	2	50%
Religious Discrimination	2	1	1	100%
Retaliation Discrimination	17	10	2	20%
Sex Discrimination (Excluding Harassment & Pregnancy)	21	8	1	13%
Sexual Harassment (Opposite Sex)	80	53	7	13%
Sexual Harassment (Same Sex)	10	9	1	11%
Whistle-Blower	24	15	4	27%

Summarizing those data that seem most important, there are a number of notable areas where the results deviate significantly from popular expectations about employment law, or the social science expectation that plaintiffs should win approximately 50% of cases tried.<sup>128</sup> These are:

1. Most sex discrimination cases were sexual harassment cases. When women alleged harassment by men, they won 68% of the time. When men alleged harassment by men, they won 100% of the time. But when women alleged sex discrimination other than sexual harassment, they won only 39% of the time.

<sup>128</sup> Priest & Klein, *supra* note 5 at 4-5.

2. In race discrimination cases brought by non-whites (and in the subset of race discrimination cases brought by African Americans) the plaintiffs won only 36% of the time. In race discrimination cases brought by non-whites involving allegations other than harassment, plaintiffs won only 33% of the time. In the four race discrimination cases brought by whites, the plaintiffs won 100% of the time.
3. In termination cases generally, plaintiffs won 46% of the verdicts, but in race discrimination termination cases filed by non-whites, plaintiffs won only 16% of the time, including three of twelve (25%) for black plaintiffs. In sex discrimination termination cases filed by women, plaintiffs won only 25% of the time.
4. At the intersection of sex and race, in cases brought by black women alleging either sex discrimination and/or race discrimination, plaintiffs won only 17% of the time.
5. At the intersection of sex and age, women alleging age discrimination lost every case they tried, while men alleging age discrimination won 36% of the time.

### C. How Reliable are the Data?

By one measure, the data appear quite reliable. Of the 170 cases that were reported during the reporting period by two or three of the three services, only five had a differential in the dollar amount of the verdict reported (and only a small difference in three of the five), and none had a disagreement about who won. Similarly, few meaningful differences existed in the narrative descriptions. The most comprehensive, *Jury Verdicts Weekly*, reported 289 of the 389 verdicts, or 74% of the total.<sup>129</sup>

But there is good cause to have serious reservations regarding how inclusive the three reporting services are, and a substantial reason for concern about reporting bias. Regarding inclusiveness, there are several reasons to doubt that the three reporters are reporting most California jury verdicts in employment law cases. First, the available federal data demonstrate that among the federal district court employment discrimination verdicts rendered in California in 1998 and 1999, nearly half were not reported by any of the three services. The Federal Judicial

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<sup>129</sup> Of the 389 cases, twenty-five were reported in 1997, but were included in this study because another service reported the verdict in 1998 or 1999, and six were reported after 1999.

Center has collected data on every case filed and decided in the United States District Courts for the years 1970 to 2000. The data have been made available by the Inter-University Consortium for Political and Social Research. These data show that in 1998 and 1999 there were seventy-four verdicts in the four California districts of the United States District Court in Category 442 — Civil Rights Jobs Terminations. These cases should roughly correspond with the federal court statutory employment discrimination verdicts reported in this study. But, in fact, we found only thirty-eight federal employment discrimination verdicts, plus four cases that we coded as wrongful discharge verdicts but that the federal courts study coded as civil rights job termination cases, a total of forty-two corresponding cases. Thus, the three verdict reporting services reported only 56% of the actual federal verdicts rendered in the applicable period.

The federal data, however, also provide independent evidence of the reliability of the study findings. Of the seventy-four employment discrimination cases in the federal data base, plaintiffs were reported as winning thirty-four, a success rate of 46%; of the forty-two federal discrimination cases in our study, plaintiffs won twenty, a success rate of 47%. This small difference in the results of the two studies is not statistically significant.<sup>130</sup> This comparison suggests that although the jury verdict reporters capture only a portion of the total number of verdicts, it is a representative portion.

Why then, do I express a concern about reporting bias? Verdict reporters may undercount because of the way they collect their information. The jury verdict reporting services rely on lawyers to report their verdicts. There are good reasons why plaintiffs' lawyers have a greater interest in reporting verdicts than defense lawyers, and why winning plaintiffs' lawyers in particular have a greater interest in reporting verdicts than do winning (let alone losing) defense lawyers, and are thus more likely to report their verdicts.

First, winning lawyers are more likely to report their winning verdicts. They are proud and happy. They won, and want the world (or at least other lawyers) to know. As Marc Galanter puts it, "one possible source of this bias [in newspaper reports of verdicts] is the eagerness of plaintiffs' lawyers to broadcast news of their victories, thereby promoting coverage."<sup>131</sup> By contrast, most of the time losing lawyers would just as soon forget the verdict and hope that no one they know

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<sup>130</sup> P = 1.0.

<sup>131</sup> Galanter, *supra* note 7, at 746.



ever hears about it. But if winners had the same incentive to report their verdicts whether they were plaintiff's counsel or defense counsel, the increased likelihood of winners reporting verdicts would be inconsequential. They don't; it's not.

Among winners, plaintiffs' lawyers have a financial incentive to report their wins, while defense lawyers may not, and even if they do, these defense lawyers may have a conflict with their clients' best interest. Most plaintiffs' lawyers depend on referrals for new clients, and referrals are generated (at least in part) by reputation. The plaintiffs' lawyer who gains a reputation for winning employment law cases is likely to get more referrals of such cases (or, at least, and more importantly, is likely to believe that she will get more referrals). The bigger the win, the bigger the boost to her reputation. And, since most plaintiffs are former employees of the defendant (not current employees) and feel no loyalty toward the defendant (who fired them, then fought them in a lawsuit), they are not likely to be unhappy about their lawyer publicizing their verdict by reporting it.

By contrast, although some defense lawyers also depend on referrals for new clients, many do not. Those who are in-house counsel, or government attorneys, have no incentive to generate referrals, and thus a lesser incentive to generate publicity. And even among private defense counsel who seek to generate referrals, the jury verdict reports are not as likely a source as they are for plaintiffs' lawyers. Moreover, except in cases that have already been well publicized, employers are likely to abhor publicity, even publicity of their successful verdicts. The fact that they were sued for discrimination puts them in a bad light, which is only partly diminished by their vindication. Thus, the defense lawyer who seeks to report her successful verdict may find herself in conflict with her client.

This tendency should be somewhat offset by the fact that although losing defense lawyers have no discernable interest in reporting their verdicts, losing plaintiffs' lawyers may have some interest in reporting theirs. Because most defense lawyers are paid whether they win or lose, while most plaintiffs' lawyers are only paid if they win, as trial approaches, the lawyers' financial interests become an increasingly important factor (if often unacknowledged) in settlement discussions. The cost of losing a trial can be so high for a plaintiffs' lawyer that defense lawyers can expect many plaintiffs' lawyers to become more risk averse (or "gun shy") as their costs and hours mount. (Defense lawyers may also be risk averse, but the lawyer usually does not have a personal financial basis for her risk aversion, since she will be paid for trying the

case, win or lose. Her client, however, may become increasingly risk averse as costs mount and the prospect of a verdict looms closer.) Plaintiffs' lawyers who have a reputation for winning trials can, for obvious reasons, command a premium based on their reputation. But even plaintiffs' lawyers with a reputation for trying a mix of winners and losers believe they can still command a premium (if not as high) based on their reputation of being unafraid of trial. Thus, the plaintiffs' lawyer who loses a verdict may still decide to report it to a verdict service, concluding that it will at least enhance her reputation as someone who is not afraid to try her cases. While this ought to offset to some degree the reluctance of defense lawyers to report their winning verdicts, it seems unlikely that it would completely even the balance.

In sum, it seems that plaintiffs' verdicts are more likely to be reported than are defense verdicts, and that the actual plaintiff win rates and median verdict amounts are lower than those reported. I hope that someone will use these data to re-examine the court records of a few representative California counties to determine every verdict rendered in 1998 and 1999, and then report on the difference between those handed down and those reported.

#### IV. THE POLICY IMPLICATIONS OF THE DATA

This study suggests two important concerns for policy makers. First, jury verdict studies of wrongful discharge cases should not be used to decide policy questions about employment discrimination cases. Given that juries rule in favor of plaintiffs in 59% of wrongful discharge cases they decide, and 68% of the sexual harassment cases, but only 40% of discrimination (other than sexual harassment) cases, we cannot assume that all employment law cases merit the same restrictions. Second, we need to explore why California juries are significantly less likely to find in favor of women alleging sex discrimination (39%) and non-whites alleging race discrimination (36%) as compared with other employment law cases, and why they are particularly unwilling to render verdicts in favor of black women alleging race and/or sex discrimination (17%) and women alleging age discrimination (0%).

Part A of this section addresses the problem of generalizing about employment law verdicts. Part B addresses the problem of lower success rates for women and minorities in discrimination (other than sexual harassment) cases.

A. *Policy Makers Should Not Apply Common Law Discharge Verdict Studies to Statutory Employment Discrimination Issues*

As Eisenberg argued at the time the 1991 Civil Rights Act was under consideration,<sup>132</sup> we cannot generalize from undifferentiated employment law verdicts, or from common law wrongful discharge verdicts, in forming policy on employment discrimination issues. In 1991 the Congress capped Title VII damages in response to intense lobbying, much of it from California management-side employment lawyers using data on California wrongful discharge verdicts. The data were used to support the claim that if uncapped damages were available in Title VII cases, runaway juries would run roughshod over unprotected employers. The findings of this study demonstrate that employers had little to fear.

The continuing relevancy of this concern is illustrated by a recent law review article, which relied on the Rand study of California wrongful discharge verdicts, asserting that juries favor plaintiffs in employment discrimination verdicts. In an article in the *Vermont Law Review*, Charles Thompson writes "before a jury is the last place employers want to be. Although there is scant firm evidence to cite, it is clearly a widely held belief that juries are far more sympathetic to plaintiffs than to defendants in employment discrimination cases."<sup>133</sup> Thompson is, of course, clearly wrong. There is much evidence to cite, all of it contrary to his position; he merely fails to cite it. This study, and many that preceded it, demonstrate that juries favor employers over employees in employment discrimination cases and are particularly skeptical of race discrimination claims by African Americans.

B. *Why are the Success Rates for Women and Minorities in Race, Sex, and Age Discrimination Cases So Much Lower than the Overall Success Rates for Employment Law Cases?*

In this section I will consider, and reject, three possible explanations of the low success rate of women and minorities in sex discrimination, race discrimination, and age discrimination cases; I will then propose two additional explanations. I examine the following possibilities: first, that women and minorities have lower success rates in sex, race, and age discrimination cases because employers/defendants are repeat players;

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<sup>132</sup> See discussion *supra* at Part II.

<sup>133</sup> Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of Reeves v. Sanderson Plumbing Products, Inc.*, 26 VT. L. REV. 1, 1-2 (2001).

second, that women and minorities have lower success rates in sex, race, and age discrimination cases because employers/defendants have more at stake in such cases than employees/plaintiffs; third, that women and minorities have lower success rates in sex, race, and age discrimination cases because employers/defendants have greater resources and better information than employees/plaintiffs; fourth, that women and minorities have lower success rates in sex, race, and age discrimination cases because of judicial bias; and fifth, that women and minorities have lower success rates in sex, race, and age discrimination cases because of juror bias.

1. Do Women and Minorities Have Lower Success Rates in Sex, Race, and Age Discrimination Cases Because Employers/Defendants are Repeat Players?

Marc Galanter argues that where individual plaintiffs are suing repeat player defendants, as commonly occurs in employment law, we should expect the repeat players to have a higher success rate.<sup>134</sup> But the results of this study cannot be explained by Professor Galanter's theory, since individual plaintiffs do significantly better than their repeat-player former employers in sexual harassment and common law discharge cases; it is only the non-harassment discrimination cases where they do poorly, and even then only subgroups like black women and older women have substantially worse outcomes.

2. Do Women and Minorities Have Lower Success Rates in Sex, Race, and Age Discrimination Cases Because Employers/Defendants Have More at Stake in Such Cases than Employees/Plaintiffs?

In more recent work, George Priest and Benjamin Klein (in what some call the "Priest-Klein hypothesis") argue that the desire of litigants to maximize their benefits in litigation suggests that, regardless of the subject matter of a claim, plaintiffs should win approximately 50% of all verdicts.<sup>135</sup> The theory is also described as the "case-selection effect theory."<sup>136</sup> In brief, the theory is that easy cases settle, and cases that are tried are close cases where the litigants cannot predict success or failure.

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<sup>134</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

<sup>135</sup> See Priest & Klein, *supra* note 5, at 4-5.

<sup>136</sup> See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588-92 (1998) (describing case-selection effect theory).

Thus, employment law cases that are tried do not represent the universe of all employment law cases, but only of those selected cases that the litigants view as too close to call.

Where the verdicts heavily favor defendants, the Priest-Klein hypothesis suggests that an odd selection of cases is being tried because in this particular set of cases, defendants have more at stake than plaintiffs, thus skewing the selection process.<sup>137</sup> For example, plaintiffs may conclude they have only their potential damage awards and fees at stake, while defendants are concerned with collateral estoppel effects, bad precedents, poor publicity, or encouraging follow-up lawsuits. Siegelman and Donohue argue that this explains their finding that in employment discrimination cases heard in federal court, between 1978 and 1989, plaintiffs won only 20% of the cases litigated.<sup>138</sup>

But if the Priest-Klein hypothesis explains the differential, it is hard to discern why plaintiffs in sexual harassment cases do so well. Under the Priest-Klein hypothesis, their success rate of 68% suggests that employers perceive they have less at stake than do plaintiffs in sexual harassment cases, but more at stake in other employment discrimination cases. Given the high verdicts in sexual harassment cases, the comparatively small verdicts in other employment discrimination cases, and the sensational publicity that often accompanies sexual harassment charges,<sup>139</sup> it seems exceedingly unlikely that employers are less worried about sexual harassment claims than other discrimination claims.

### 3. Do Women and Minorities Have Lower Success Rates in Sex, Race, and Age Discrimination Cases Because Employers/Defendants Have Greater Resources and Better Information than Employees/Plaintiffs?

Another possible explanation is that plaintiffs' attorneys in discrimination cases may have two dependent disadvantages. They may lack the resources available to defendants, and have less information about likely outcomes than do defense attorneys.<sup>140</sup> If defendants are

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<sup>137</sup> See Priest & Klein, *supra* note 5, at 25; see also Clermont & Eisenberg, *supra* note 136, at 589; Peter Siegelman & John Donohue III, *The Selection of Employment Discrimination Disputes For Litigation: Using Business Cycle Effects To Test The Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 429-31 (1995).

<sup>138</sup> See Siegelman & Donahue, *supra* note 137, at 431, 449-50; Table 5, *supra* p. 408.

<sup>139</sup> See, e.g., *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998) (affirming judgment, but reducing verdict of \$7,000,000 to \$3,500,000) which generated gavel-to-gavel coverage and enormous negative publicity for the law firm Baker & McKenzie.

<sup>140</sup> Clermont & Eisenberg, *supra* note 136, at 589-90 (stating that "differences in the two

better able to pay litigation expenses, hire jury experts, research settlement values, and prepare for trial, the differential may reflect not their stakes, but their resources. This differential is exacerbated if plaintiffs' lawyers lack knowledge about their disadvantage. That is, they may be outgunned, but not realize it, or not realize the extent of their disadvantage.

But if this explanation is correct, there must be a division between plaintiffs' lawyers who specialize in sexual harassment and wrongful discharge cases and those who handle other discrimination cases, with the discharge/sexual harassment lawyers being better funded than the other discrimination lawyers. If, as I demonstrate herein, the same plaintiffs' lawyers are handling both groups of cases, then the resource/access to information hypothesis must fail.

In the absence of data, one might well posit that there is division between employment discrimination lawyers and sexual harassment and/or wrongful discharge lawyers. It would not be surprising to learn that employment lawyers who handle common law wrongful discharge and sexual harassment cases are best described as members of a branch of plaintiffs' personal injury lawyers, while those who handle non-harassment employment discrimination cases are more accurately described as civil rights lawyers.<sup>141</sup> It would not be surprising to learn that there are greater resources available to plaintiffs' personal injury lawyers than to civil rights lawyers, and thus a far better opportunity for personal injury lawyers to play on a level field when litigating against employers.<sup>142</sup> If this premise is true, if civil rights lawyers are disadvantaged compared with personal injury lawyers, one might expect them to have less successful results.<sup>143</sup>

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parties' access to information and competence in forecasting would also affect the win rate.").

<sup>141</sup> One might find some support for this distinction from a recent study of civil rights lawyers, including many from Northern California, which found that civil rights lawyers believe they are substantially disadvantaged in recovering fees for their work by the Supreme Court's decision in *Evans v. Jeff D.*, holding that civil rights clients may waive their attorneys' right to fees. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 217-19 (1997).

<sup>142</sup> *Id.*

<sup>143</sup> However, if they believe they are disadvantaged, they should be more risk averse. And if they are more risk averse, the Priest-Klein hypothesis suggests they should have greater trial success, because they see themselves as having more at stake when they go to trial. On the other hand, lawyers with a personal or political commitment to civil rights enforcement may have accepted the expectation that bringing such cases is more risky than bringing other employment law cases. That is, they may have internalized their greater risk or externalized it for non-economic (political or ideological) reasons.

With these concerns in mind, I conducted an analysis of the 1996 membership list of the California Employment Lawyers Association (CELA).<sup>144</sup> This is the state-wide organization of California lawyers who represent plaintiffs in various kinds of employment law and employment discrimination cases. All members listed in the directory list the areas in which they accept cases. The three areas listed most frequently were discrimination, sexual harassment, and wrongful termination. If there is a division between personal injury-type lawyers who handle common law claims and sexual harassment claims, and civil rights-type lawyers who handle discrimination claims, the division should be evident from these listings. I found, however, that an overwhelming majority of the lawyers who listed themselves as taking wrongful discharge or sexual harassment cases also take discrimination cases.<sup>145</sup> Of the 217 lawyers listed in the directory, 177 listed themselves as handling wrongful discharge cases; of those 177, 157 (84%) also handled both sexual harassment and employment discrimination cases. Another twelve (7%) handled wrongful discharge and discrimination (but not sexual harassment cases). Of the 177 plaintiffs' lawyers who described themselves as handling wrongful discharge cases, only eight (5%) declined to list themselves as also handling discrimination cases. Similarly, of the 186 of the 217 plaintiffs' lawyers who listed themselves as handling sexual harassment cases, 157 (84%) also handled both wrongful discharge and discrimination cases, while another twenty-five (7%) described themselves as taking both sexual harassment and employment discrimination cases (but not wrongful discharge cases). Only four of the 186 sexual harassment lawyers (2%) failed to list themselves as also taking employment discrimination cases. Finally, of the 201 lawyers who listed themselves as employment discrimination lawyers, 194 (97%) listed themselves as taking sexual harassment or wrongful discharge cases, or both. These results strongly suggest that there is no division between plaintiffs' discrimination lawyers and plaintiffs' wrongful discharge and/or sexual harassment lawyers. Although California sexual harassment plaintiffs in 1998-99 were winning 68% of their cases, and wrongful discharge plaintiffs were winning 59% of their cases, while discrimination plaintiffs were only winning 40% of their cases, the differential was apparently not caused by a difference in the lawyers representing them.

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<sup>144</sup> See CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION: MEMBERSHIP DIRECTORY (1996).

<sup>145</sup> See spreadsheet of CELA members (on file with author).

#### 4. Do Women and Minorities Have Lower Success Rates in Sex, Race, and Age Discrimination Cases Because of Judicial Bias?

Having eliminated the most obvious explanations for the lower success rates, the possibility of racial and gender-based prejudice must be considered. That is, bias by judges and/or juries may explain the low success rates of women and minorities in sex, race, and age discrimination cases. As Clermont and Eisenberg put it, "if the adjudicator appears to be neutral, but turns out to be unfavorable to the plaintiff, then the win rate would drop."<sup>146</sup> This Section considers the problem of judicial bias; the next addresses juror bias.

Eisenberg, Selmi and Beiner have independently offered judicial bias as the reason federal employment discrimination cases are unusually hard to win.<sup>147</sup> Judicial bias in employment discrimination cases can occur in three forms. First, as Selmi and Eisenberg both argue, judges acting as triers of fact in bench trials may be biased against women and minorities, and that bias may affect their judgment of the evidence. Selmi points out that while the federal court success rate for discrimination cases tried to a jury in 1995 to 1997 was 40%, the success rate in bench trials was only 19%.<sup>148</sup> Such bias may well be unconscious, and thus hard to uncover.<sup>149</sup> This theory is relevant to the data reported in the instant study, given that as of 1993, 89% of the Superior Court judges in California were white and 77% were white men; as of September 2001, there were nearly 1600 active federal judges, of whom fewer than 200 were people of color.<sup>150</sup> Concerns about judicial bias

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<sup>146</sup> Clermont & Eisenberg, *supra* note 136, at 590.

<sup>147</sup> Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in a New Millennium*, 36 U.C. DAVIS L. REV. 597, 603-604 (2003); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1597 (1989) (hypothesizing that judicial bias makes bench trials in employment discrimination cases even harder to win than jury trials); Selmi, *supra* note 19, at 561 (stating, "[t]he primary reason discrimination cases are so hard to prove has to do with the bias courts bring to their analysis.").

<sup>148</sup> Selmi, *supra* note 19, at 560; *see also* Civil Trial Cases and Verdicts in Large Counties, 1996, Bureau of Justice Statistics Special Report NCJ 173426 (1999), *available at* <http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm> (last visited Oct. 17, 2003) (showing in 1996 sample of over 200 employment discrimination verdicts, plaintiffs won 48% of jury trials but only 20% of bench trials).

<sup>149</sup> *Supra* note 21.

<sup>150</sup> JUDICIAL COUNCIL OF CALIFORNIA, FINAL REPORT OF THE JUDICIAL COUNCIL COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 4 (1995); *see also*, Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1009, 1111 (2003); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (describing legal/political consequences of fact that all Superior Court judges in Los Angeles county in 1968 were white, and all grand jurors named by judges



throughout our civil justice system have been well documented.<sup>151</sup> This form of direct bias by the fact-finder, however, cannot alone explain the results of this study, which is confined to cases where a jury, not a judge, acted as the trier of fact.

Second, judicial bias can affect the development of the substantive law, making it particularly hard for plaintiffs to prevail in discrimination trials. Jeb Rubinfeld has recently argued that the only way to understand the “new federalism” decisions of the United States Supreme Court is to recognize that the Court is driven by an “anti-antidiscrimination agenda.”<sup>152</sup> I have previously argued that one explanation for the rejection of traditional agency liability in federal sexual harassment appellate decisions is the fact that most of the judges deciding the early appellate cases were men, and were biased against such claims.<sup>153</sup> A wealth of scholarship can be found arguing that our courts are dominated by white men who are dismissive of discrimination claims by women and minorities. Thus, jurors may be particularly skeptical of discrimination claims by women and minorities because the substantive law directs it. One frequently discussed example of this is the Supreme Court’s decision in *St. Mary’s Honor Center v. Hicks*.<sup>154</sup> The Court held that a trier of fact in a Title VII case is free to conclude that a white defendant, who lied about his motive in firing a black plaintiff, fired the plaintiff because of a personality conflict. On that basis, the trier of fact may reject the plaintiff’s claim of race discrimination, even when the defendant had previously denied that a personality conflict

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were white).

<sup>151</sup> *Supra* note 150. A series of major studies have documented race and gender bias in U.S. courts. See, e.g., Barbara Allen Babcock, *Report of the Ninth Circuit Gender Bias Task Force: Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143 (1993); Hon. Dorothy W. Nelson, *Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 731 (1994); Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991) (discussing gender bias in federal courts); Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615 (1998) (showing consistency of many concerns raised from circuit to circuit demonstrate validity of gender bias task force’s findings of bias); Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of the Indifference or Opportunity*, 32 IND. L. REV. 1167 (1999) (stating race and ethnic task forces in twenty-seven state supreme courts and thirty-nine state supreme court gender task forces have identified many instances of institutional bias, with many of same concerns being shared amongst states).

<sup>152</sup> Jed Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

<sup>153</sup> See David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 CORNELL L. REV. 66, 147 (1995).

<sup>154</sup> 509 U.S. 502 (1993).

existed, having offered as his sole reason for the firing an explanation found by the court to be false.<sup>155</sup>

Third, judicial bias, communicated directly or indirectly as skepticism about parties or their claims, may easily affect jurors, even when the judge is neither deciding the facts (as in a bench trial) nor declaring the law (as a trial judge in dispositive motions or as an appellate judge). Thus, while no single study can conclusively document the source of the disparity between wrongful discharge and/or sexual harassment verdicts, as compared with other employment discrimination verdicts, the findings reported herein support the conclusion that judicial bias within the civil justice system against women and minorities helps to explain the disparate treatment.

It is hard to understand why plaintiffs' lawyers have not successfully accounted for judicial bias in making decisions about which cases to bring, and whether to settle or try them. They certainly know as well as anyone the barriers created by the law. If Professors Priest and Klein are correct, plaintiffs' employment discrimination lawyers should correct for judicial bias like any other factor influencing jury outcomes and should win approximately 50% of these cases.

##### 5. Do Women and Minorities Have Lower Success Rates in Sex, Race, and Age Discrimination Cases Because of Juror Bias, and Do Attacks on Civil Rights Law Affect Juror Bias?

Although the success rates in discrimination cases tried before a jury are higher than those for bench trials, they are still significantly below the success rates in other areas of employment law litigation, and below the rates social scientists would predict. Judicial bias may provide part of the explanation for the low success rates of women and minorities in employment discrimination cases, but our knowledge about the prevalence of race and gender bias throughout American society suggests that juror bias also plays a role. In this section I will review some of the current evidence of continuing bias against minorities generally, and employment discrimination plaintiffs in particular, and discuss how polemicists with an anti-antidiscrimination agenda are

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<sup>155</sup> *Id.* at 523. For criticism of the *Hicks* decision, see Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext and the "Personality Excuse,"* 18 BERKELEY J. EMP. & LAB. L. 183 (1997); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption,* 26 CONN. L. REV. 997 (1995); Stephen Plass, *Truth: The Last Virtue in Title VII Litigation,* 29 SETON HALL L. REV. 599 (1998). While *Hicks* was a bench trial, the rule of law announced by the Court, re-balancing the burden of proof in Title VII cases, is equally applicable in jury trials.

contributing to the problem.

If bias against women and minorities is affecting juror judgments about discrimination claims, we should expect that those groups who are most subject to social bias would be those whose success rates are the lowest. Legal theorists have argued for some time that women of color and other persons belonging to more than one subordinated group suffer greater discrimination than those with only a single subordination factor.<sup>156</sup> Thus, black women would be at greater risk of discrimination, both in employment and in the evaluation of their discrimination claims by jurors, than black men or white women. The fact that the lowest success rates are at the intersection of race and gender and at the intersection of age and gender, with women over forty and black women having the worst outcomes, provides further support for the proposition that some race- and gender-biasing factor is at work.

If jurors reflect the broader community,<sup>157</sup> African Americans have good reason to worry about how they will be seen by white jurors.<sup>158</sup> In the mid-1990s a majority of whites questioned in public opinion polls agreed that:

- Inequality between blacks and whites was not the result of discrimination;<sup>159</sup>
- Inequality between blacks and whites exists because blacks lack motivation;<sup>160</sup>
- If blacks would only try harder they'd be just as well off as

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<sup>156</sup> See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL. F. 139 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

<sup>157</sup> Blacks and other minorities on American juries are generally under-represented. See Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645 (1997).

<sup>158</sup> There is some evidence that juries on which minorities are well represented may be more likely to favor minority plaintiffs; a study by Theodore Eisenberg and Martin Wells reports a correlation between urban job discrimination jury awards and black population percentage in federal court verdicts, although these results were not found in state court verdicts. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?* 80 TEX. L. REV. 1839, 1865-66 (2002).

<sup>159</sup> HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 156-57 tbl.3.4A (1997) (citing 1996 National Opinion Research Council poll).

<sup>160</sup> *Id.*

- whites;<sup>161</sup>
- Blacks, not whites, are to blame for the present position they find themselves in;<sup>162</sup>
  - Blacks have as good a chance as whites to get any kind of job for which they are qualified;<sup>163</sup>
  - Blacks are not discriminated against in getting managerial jobs;<sup>164</sup>
  - The police treat blacks as fairly as they treat whites;<sup>165</sup>
  - Blacks are as well off or better off than whites with regard to access to health care;<sup>166</sup>
  - Blacks are as well off or better off than whites with regard to education;<sup>167</sup>
  - Blacks are as well off or better off than whites with regard to jobs;<sup>168</sup> and
  - Blacks are as well off or better off than whites with regard to losing their jobs.<sup>169</sup>

Each of these statements is false, but was nonetheless believed by a majority of white respondents. In the aggregate, they provide a substantial reason to expect white jurors to be pre-disposed to reject claims of employment discrimination by black plaintiffs.

Polemical attacks on civil rights and discrimination laws affect public opinion and may be exacerbating juror opinion. I suspect that jury pools, already affected by race and gender bias, are being unduly influenced by incorrect information about the civil justice system and employment discrimination law. In the past two decades we have seen a widespread attack on employment discrimination law, premised in part on the false assertion that civil rights claims are destroying the

<sup>161</sup> *Id.* (citing 1994 Institute for Social Research poll).

<sup>162</sup> *Id.* (citing 1995 Gallup poll).

<sup>163</sup> *Id.* (citing 1997 Gallup poll); *see also* Chen, *supra* note 150 (reporting that only 27% of whites surveyed in 1998 by San Francisco Chronicle believed that African Americans experience a lot of prejudice.)

<sup>164</sup> *Id.* (citing 1994 Institute for Social Research poll).

<sup>165</sup> *Id.*

<sup>166</sup> MOLLYANN BRODIE, *THE FOUR AMERICAS: GOVERNMENT AND SOCIAL POLICY THROUGH THE EYES OF AMERICA'S MULTI-RACIAL AND MULTI-ETHNIC SOCIETY — A REPORT OF THE WASHINGTON POST/KAISER FAMILY FOUNDATION/HARVARD SURVEY PROJECT 81-82 (1995)*.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

workplace, and that women and minorities have an unfair advantage in bringing discrimination lawsuits. A few examples illustrate the problem:

- In their best-selling book, *America in Black and White: One Nation, Indivisible*, Stephen and Abigail Thernstrom claim that employment discrimination law has been so distorted by the courts that it now requires employers to hire by quota, and that in the typical case, employers are forced to settle meritless claims or risk ruinous jury verdicts.<sup>170</sup>
- Another best-seller, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace*, by Walter Olson, argues that employment discrimination law has produced “spectacular injustice and irrationality” that undercuts employee competence and endangers public safety.<sup>171</sup>
- In *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Richard Epstein argues that Title VII and other employment discrimination laws have distorted American society, depriving us of the right to contract and associate freely, and that these laws should be repealed.<sup>172</sup>
- In *The Lost Art of Drawing the Line: How Fairness Went Too Far*, Philip K. Howard claims that plaintiffs’ employment lawyers view jury trials in race discrimination cases as “manna from heaven.” He also argues, echoing Epstein, that Title VII is a powerful disincentive to African American advancement.<sup>173</sup>
- In *Slander: Liberal Lies About the American Right*, Ann Coulter claims that “the gravest danger facing most black Americans today is the risk of being patronized to death.”<sup>174</sup>

As I write this, Coulter’s book is number one on the *New York Times* non-fiction bestseller list. Her claim that “the gravest danger facing most black Americans today is the risk of being patronized to death” is preposterous. It would be presumptuous for me to attempt to choose

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<sup>170</sup> STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 425-27, 429-33 (1997) (arguing law has been distorted by courts). See also *id.* at 433, 439 (arguing that employers are forced to hire by quota to avoid discrimination liability).

<sup>171</sup> OLSON, *supra* note 7.

<sup>172</sup> RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 75, 87, 149, 266, 500 (1992).

<sup>173</sup> HOWARD, *supra* note 7, at 185.

<sup>174</sup> ANN COULTER, *SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT* 1 (2002).

whether the gravest danger facing most African Americans today is discriminatory medical care, underfunded and underperforming schools, trigger-happy racial profiling police officers, reduced wages and employment opportunities because of employment discrimination, lack of access to good quality housing because of housing discrimination, or a criminal justice system that discriminates against African Americans at every stage from investigation to arrest, to charging, to plea bargaining, to sentence bargaining, to trial, to sentencing, to conditions of incarceration. But it is not surprising that Coulter relies on no evidence for her insulting claims; the well documented evidence of discrimination in American society is overwhelming.<sup>175</sup>

Howard's claim that plaintiff's employment lawyers view jury trials in race discrimination cases as "[M]anna from heaven" relies on a quote from an article about all kinds of employment discrimination cases (including sexual harassment cases), not race discrimination cases.<sup>176</sup> In discussing race discrimination claims, Howard also asserts that "discrimination-type employment claims increased threefold between 1990 and 1998, and both the success rate and the damages awarded increased significantly."<sup>177</sup> District court filings during the 1990s did increase dramatically, and the success rate in employment discrimination cases overall did increase, albeit from 23.8% to 35.5%, but the study Howard relied on actually shows that the median award dropped over the decade. Likewise, while the number of filings rose dramatically, the number of trials did not.<sup>178</sup> That study reveals that in the United States district courts there were 715 total employment discrimination cases terminated by trial in the year 1990, with a plaintiff success rate of 23.8% and a median award of \$450,000. By 1998, with millions more Americans in the labor market, the total number of employment discrimination cases terminated by trial had risen to 1,083, while the median verdict had dropped to \$137,000. While we do not know how many of these cases were race discrimination cases, this

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<sup>175</sup> See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1993) (discussing and documenting racial inequality in American society); David B. Oppenheimer, *Understanding Affirmative Action*, 23 *HASTINGS CONST. L.Q.* 921, 958-96 (1996) (collecting studies documenting racial and gender inequality in American society).

<sup>176</sup> See HOWARD, *supra* note 7, at 179 (citing Robert J. Grossman, *Law in the Slow Lane*, *H.R. MAG.*, July 2000, at 63, 66).

<sup>177</sup> *Id.* at 179-80.

<sup>178</sup> See BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: *CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS 1990-1998*, at 9, tbl.9 (2000) (listing winners and awards in civil rights cases terminated by trial verdict in U.S. district courts by type of case, 1990-1998).

study, as well as those that preceded it, suggests that the largest category of cases was sexual harassment, and that the plaintiff success rate in race discrimination cases was well below the overall success rate. Moreover, during this same period, the number of race discrimination claims filed with the Equal Employment Opportunity Commission actually dropped slightly.<sup>179</sup>

As to the Thernstroms' claim that employment discrimination law has been so distorted by the courts that it now requires employers to hire by quota, and that in the typical case, employers are forced to settle meritless claims or risk ruinous jury verdicts, their assertions fall in the face of readily available data.<sup>180</sup> The assertion that employers are so fearful of being sued for failure-to-hire discrimination that they defensively hire by quota, conflicts with the findings of this study and others that preceded it. Virtually all employment discrimination cases involve firing, not hiring. Of the 389 verdicts in this study, only six concerned failure to hire, of which two were won by the plaintiff; none of the six involved allegations of race discrimination. Failure-to-hire cases are so hard to uncover and prove that they are hardly ever filed. And the suggestion that employers fear ruinous race discrimination verdicts is belied by the fact that so few of the employment discrimination cases filed and tried are race cases, and the fact that African Americans so rarely win such cases.

But these highly publicized claims that juries favor plaintiffs, if widely believed, may help illustrate a broader social stereotype, endemic but incorrect, which may help explain the bias of juries against women and minorities in discrimination cases. If the American public is led (or misled) to believe that women and minorities are routinely winning meritless cases, jurors are likely to be increasingly skeptical about such cases. If we are led (or misled) to believe that our society is endangered by runaway verdicts in discrimination cases, we are likely to be cautious about contributing to the "problem" by finding discrimination. If the effect of the public attacks on civil rights law is to bias potential jurors against discrimination claims; and if the high plaintiff success rates in common law discharge cases are attributed to discrimination claimants,

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<sup>179</sup> In 1992 there were 29,548 race discrimination charges. In 1998, 1999, 2000, and 2001 the annual number was just below 29,000 each year. See CHARGE STATISTICS FROM THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FY 1992 THROUGH FY 2001 (2002), available at <http://www.eeoc.gov/stats/charges.html> (last visited Oct. 17, 2003).

<sup>180</sup> For a more comprehensive critique of the Thernstroms and other racial conservatives, see MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (The author is one of the seven co-authors of the book.).

these factors may exacerbate pre-existing jury bias. If trial is a gamble, the on-going campaign to convince the American public that our civil rights laws are out of control, and that employment discrimination plaintiffs are unfairly favored in the courts, is the gambler's equivalent of loading the dice.

#### CONCLUSION

From the available data, the case is strong that judges and juries in California are far more skeptical of race and sex-based employment discrimination claims brought by black women, and age-based employment discrimination claims brought by women over forty, than other employment law claims. The most likely explanation is judicial and juror bias against women and minorities, with particularly strong bias against "older" women and black women.

These data suggest that legislators and other public policy makers should not rely on broad studies or so-called "truisms" about employment law verdicts in formulating employment discrimination or other civil rights policies. Fears of runaway juries awarding high damages are not justified by the data. Rather, employment discrimination cases are hard to win, and usually result in rather modest verdicts. Placing limitations on verdicts in employment discrimination cases is unnecessary and exacerbates the already substantial problem of social prejudice against women and minorities.