DOES EQUALITY LAW MAKE A DIFFERENCE?

Social Science Research On the Effect of Discrimination Law on (Potential) Victims

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Due to their nature and focus, legal scholarship and legal practice often neglect the actual societal effects of legislation. Research from within social sciences can, in this regard, provide a ‘reality check’, by revealing the “complex nuances, challenges, and contradictions of the law and its implementation” (Berrey 2009, 28).

Social scientific research tends to complicate our understanding of important social facts and institutions, such as law, and its basic concepts, such as discrimination. In doing so, it calls into question explicit or implicit assumptions by lawyers and legislators about how humans and human interaction work. Law rarely (if ever) does exactly what it is envisioned to do. Discrimination law is no exception in this regard. Research shows that, at best, discrimination law provides partial protection and beneficial effects in some situations, while, at worst, leading to counterproductive effects or even inflicting its own harms on those it is supposed to protect.

This chapter focuses on some recent findings from within social sciences regarding discrimination law, and the way it impacts (potential) victims in particular.2 It will firstly address research concerning the way in which (potential) victims make use of the legislation (or fail to do so), i.e. their claiming and litigation behavior (§ 1). Afterwards, a number of intended and unintended

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2 Although this chapter does not focus on any particular country, much of the research that is discussed has been performed (only) in the US. The extent to which this impacts the validity of the research results for countries/systems outside the US is an open question, requiring replication of the research described.
effects, that empirical research suggests discrimination legislation may have for plaintiffs and potential victims, are discussed (§ 2).

1 GRIEVANCES, CLAIMING, AND LITIGATING IN DISCRIMINATION LAW

What do social sciences tell us about claiming and litigation behavior by victims, in situations of discrimination?

In a classic article Miller and Sarat (1981) develop the concept of the ‘dispute pyramid’ to illustrate the way in which perceived injuries and grievances may, or may not, result in formal claiming behavior and legal proceedings. The pyramid serves to demonstrate filtering effects due to a variety of influences and effects. Its bottom layer consists of perceived injurious experiences; these being the broad mass of personal injuries that people recognize. Only a small number of these perceived injurious experiences become grievances. Grievances are those injurious experiences of which the injured individual knows or believes that they involve an infringement of rights or entitlements. The next, and again more limited, level of the pyramid consists of claims: when an individual contacts and confronts the party responsible for the grievance in one way or the other, in order to seek redress. A certain segment of claims proceed to become disputes, i.e. when the party that is faced with a claim based on a grievance rejects it either in whole or in part. If subsequently a formal complaint is made, a dispute becomes a filing; and finally the smallest number of cases make it to the top of the pyramid, as trials: cases that are in fact adjudicated by courts.

In their original article, Miller and Sarat already made several observations concerning discrimination grievances in particular. More recently, Nielsen and Nelson (2005) analyzed the functioning of US discrimination law in greater depth, employing Miller and Sarat’s model. In the following, their analysis is taken as a point of departure, and additional research is discussed where and when such seems useful.
1.1 Perceived injurious experiences

Researching perceived injurious experiences is often considered one of the most difficult aspects of the pyramid to analyze for any given issue. That being said, two main – and seemingly opposing – perspectives are present in the literature. The first perspective suggests that chronic or potential targets of prejudice tend to minimize or underestimate the extent to which they are personally victimized by discrimination. The second perspective suggests instead that chronic targets of prejudice are especially vigilant for, and sometimes oversensitive to signs that they are being personally victimized by discrimination.

1.1.1 Underestimation

The most prevalent view in social science research finds that members of disadvantaged groups “typically miss, underestimate, or deny the extent to which they are personally targets of prejudice” (Major & Kaiser 2005, 286). Major and Kaiser list a host of research findings that support this view. For instance, members of disadvantaged groups often have difficulty recalling times when they were targets of prejudice; they also tend to report that they personally experience less prejudice and discrimination than they perceive other members of their group to experience, and they often avoid labeling negative treatment that they have received as discrimination even when the treatment objectively qualifies as such.

Several factors are identified in research that may serve to explain this underestimation. These are both of a cognitive and of a more social or motivational nature.

1.1.1.1 Cognitive factors

Several cognitive factors, partially specific to discrimination cases, contribute to why people may not recognize when they are victims of discrimination or might underestimate the extent to which this is the case.
This may be due, firstly, to the fact that individuals are unaware of what qualifies as discrimination (Marshall 2003). Harassment, disparate impact discrimination or indirect discrimination, and many other concepts employed in discrimination law tend to be unfamiliar to many people in society. This so-called ‘lack of rights awareness’ is traditionally identified as one of the main factors for under-reporting: if you do not know what counts as discrimination, you will be unlikely to be aware when you are being discriminated against.

This is further compounded by the fact that situations of (potential) discrimination tend to be highly ambiguous, when considered from an individual perspective. Overt expressions of prejudice and discrimination have become rare in most (Western) countries, since the initial introduction of discrimination legislation. Hence discrimination tends, these days, to be masked or disguised (cf. *infra* § 2.2.1). This leads to a situation, as Major and Kaiser describe, that “whenever two individuals differ on multiple attributes that are relevant to outcome, such as seniority, performance, etc. there may be several possible explanations for their differential outcomes” (Major & Kaiser 2005, 287).

Considered in isolation, actions that may be discriminatory (even if one is aware of the legal definitions) usually can have a number of possible causes. This almost inherent ‘attributional ambiguity’ makes it difficult to detect discrimination on a case-by-case basis.

Although a particular disadvantaging or exclusion may be due to discrimination, a number of other explanations are usually possible as well. As such, targets of discrimination often do not know or are uncertain about whether they have been discriminated against: judgments of personal discrimination are subjective, susceptible to human error, and prone to dispute.

Finally, so-called ‘social comparison biases’ are also seen to cognitively work against the detection of discrimination. Identifying discrimination requires, both legally and contextually, that you compare your situation with that of others. This may also serve to mask discrimination, since people tend to compare their situation with people like themselves, who are statistically likely to be other in-
group members, and who may be similarly treated unfairly (Major & Kaiser 2005).

1.1.1.2 Social and motivational factors

Given the cognitive uncertainty that is almost inherent in individual cases of discrimination, several social and motivational factors that are identified in research can lead people to underestimate the extent to and the frequency with which they are discriminated against.

Firstly, people tend to be motivated to believe that outcomes are under their personal control, and have difficulty acknowledging that they have limited control over events (‘belief in personal control’) (Langer 1975; Taylor & Brown 1988). Secondly, people are usually motivated to perceive the world as a just place in which people get what they deserve (‘just world belief’) (Lerner & Miller 1978; Lerner 1980). Acknowledging that one has been a victim of discrimination, requires the acceptance that outcomes are controlled by capricious or even bigoted others, which threatens this need to regard the world as just. As a result, even when situations may be interpreted as discrimination, people can nonetheless be motivated to neglect or ignore this, instead perceiving the situation as fair, or at least as due to causes other than discrimination (Major 1994; Sidanius & Pratto 1999).

Finally, making a mistake in claiming discrimination bears the risk of being costly: seeing discrimination that does not exist, can cause hostility and retaliation (infra § 1.2). This may not only lead people not to file a complaint, but it may also, unconsciously, lead them to be inclined not to perceive discrimination to begin with (Major & Kaiser 2005).

1.1.2 Vigilance and overestimation

A second view that can be found in the literature, although less commonly, is that the ambiguity that is inherent in many cases of discrimination, not only results in underreporting, but in overreporting as well. This research indicates that potential victims become increasingly vigilant to cues in their environment
indicating that they may be targets of prejudice and discrimination, and that they start seeing discrimination where it does not ‘objectively’, or at least legally, exist. Such findings may serve to explain why a relatively large number of discrimination complaints in most countries, both at the level of equality bodies and at the courts, are unfounded or inadmissible, as they bear an insufficient relation to discrimination in the legal sense.

Major and Kaiser cite several studies that substantiate this idea. For instance, members of minority groups have been found to become ‘on guard’ to signs of prejudice in others, and to develop a ‘hypersensitivity’ to the smallest of prejudicial cues (Allport 1954/1979). Other studies have demonstrated that people who realize that they may be discriminated against in a particular setting, tend to become vigilant to a wide range of cues in that setting that might indicate the presence of prejudice and negative stereotypes (Steele et al 2002). Similarly, it has been suggested that previous experiences with discrimination can lead to members of stigmatized groups to employ a so-called ‘zero miss’ strategy, in which even subtle cues of potential injustice trigger vigilance for discrimination, while also leading to increased perceptions of discrimination (Feldman-Barret & Swim 1998).

Several factors are seen to contribute to this increased vigilance among potential targets of prejudice. Cognitively, some of the same issues regarding the uncertainty and lack of clarity surrounding potential cases of discrimination (cf. supra) are relevant here as well. However, depending on different motivational factors being triggered, this may lead to opposing outcomes (Major and Kaiser 2005).

These motivational factors include the following. Firstly, research suggests that when social environments are hostile, the costs of missing cues or indications of prejudice and discrimination are considered greater than the cost of a ‘false alarm’, leading to a high degree of vigilance. Secondly, a host of ‘self-serving biases’ also underlie vigilance to prejudice and to perceiving discrimination when such may not be ‘legally warranted’. The self-serving bias, in general,
entails that individuals are motivated to protect self-esteem from threats. In the context of perceived discrimination people have been shown to engage in a variety of strategies to protect and enhance their personal (individual) and social (collective) self-esteem. Relatedly, external attribution – that is, blaming negative outcomes on external causes – has been shown to be relevant as well: blaming the prejudice of others in ambiguous cases, rather than internal causes, such as one’s own lack of ability, helps to protect self-esteem (Major, Kaiser & McCoy 2003).

Finally, for individuals from groups that have previously or historically been the object of discrimination, prejudice and discrimination are “likely to be repeatedly primed and highly accessible cognitive constructs”, which can be “easily activated in ambiguous circumstances” (Major & Kaiser 2005, 289).

### 1.2 Claiming, disputes, filing and trials

Research indicates that even people who believe they have been targets of discrimination, often fail to undertake further action. The fact that potential plaintiffs are reluctant to complain is an outcome of virtually all studies performed in this field. Individuals that believe they have been victims of discrimination very infrequently try to remedy this situation by directly confronting the perpetrator (claiming). This has shown to be the case even in situations in which the discrimination was blatant. Taking it to a further stage, like reporting discrimination to authorities, is rarer still. The (empirically corroborated) reasons for this are plentiful.

To begin with, there are the obvious factors of the high costs – both financially and time-wise – that tend to be associated with claiming, and litigating in particular. This is the case with litigation in general, but costs tend to be particularly high in discrimination cases, in which the plaintiff and the defendant – due to moral and social stakes involved – tend to invest a lot of time, energy, and resources (Fink 2008).
Furthermore, research has often revealed people to have a sense of shame regarding their victimhood, leading them to reject it (Bobo & Suh 2000; Suh 2000), and ‘lump it’, in the terminology of Miller and Sarat. This is compounded by the fact that friends, family and coworkers often also discourage potential claimants from thinking they were victims of discrimination; people often cannot count on support for their claim, but rather endure resistance and opposition when they try to even discuss the issue of discrimination. Connected to this is a frequent fear of not being believed (Fitzgerald et al. 1995).

The reluctance to claim and litigate also has to do with the (feared) negative social and interpersonal impact that can be associated with making discrimination claims. Moreover, research demonstrates those fears to be justified. Individuals who claim they are victims of discrimination are viewed negatively by other, even when the claim is justified (Major & Kaiser 2005). More generally, fears of retaliation by the perpetrator are often considered to constitute a greater risk than ignoring the problem (Swim & Hyers 1999).

Another commonly identified issue in research is for potential victims of discrimination to display a resistance to state institutions (such as courts and equality bodies) on personal or ideological grounds, which leads them to avoid claiming and litigating (Nielsen 2000; Nielsen 2004).3

Several additional considerations, especially those concerning the segment of claims that do make it to litigation and trial stages, will be discussed in the following section.

3 Conversely, individuals are more inclined and willing to report their experiences to in-group members or close others (friends, family). Major and Kaiser point out that this suggests “that contextual cues and settings that promote intergroup trust and harmony might also increase individuals’ willingness to report discrimination”: “For example, organization that promote diversity, recognize discrimination, and provide access to social support may create a safer environment for targets of prejudice to report experiences with discrimination” (Major & Kaiser 2005, 296). See, however, also infra § 2.2.2.2.
Legal scholarship often holds a formalistic conception of law (Sturm 2005), in which the implicit assumption tends to be that discrimination law is ‘effective’, in the (instrumental) sense that it does what the legislator intended, and that it does only that. Scholarship from within social sciences tends to take a different perspective concerning the effects and effectiveness of legislation, looking instead at what legislation does in practice; thereby sometimes pointing out positive and even intended consequences (§ 2.1), but having attention for unintended consequences as well (§ 2.2).

2.1 Positive and intended effects

The ‘net’ positive effect of discrimination law is hard or even impossible to measure. This is due, in part, to the fact that social science research does not offer an unequivocal answer concerning the exact impact that discrimination has on societal inequities to begin with.4 Current research does not allow for generalized conclusions in any single direction, in this regard. This, in turn, also serves to make it hard to ascertain the macro-effects that discrimination law has (or could have) on disadvantaged groups.

This is not to say, however, that social sciences have not demonstrated any beneficial effects of discrimination law. Firstly, qualitative empirical research points to the fact that discrimination law is important since the idea of being protected from unlawful discrimination is valuable in itself for potential victims.

4 Basically, one can identify two opposing camps in this regard (see Nielsen & Nelson 2005, 6-8). The first camp is skeptical about the significance of discrimination as a source of inequality, concerning labor market and other societal outcomes. These researchers firstly point to the historical decline, in most Western societies, in (blatant or conscious) discriminatory attitudes across a variety of discrimination grounds (e.g. racist, sexist and homophobic attitudes), as well as pointing to similar declines in other indicators of discrimination (e.g. pay gaps). Secondly, researchers from this camp argue that it is possible to explain differential outcomes by means of non-discriminatory factors, such as differences in schooling, and differential preferences. See e.g. Donohue & Siegelman 1991; Heckman 1998; Nelson & Bridges 1999
Researchers in the second camp instead see discrimination as (still) remaining a central cause and force of societal inequality. This camp does accept that historical trends in prejudice and discriminatory attitudes were declining up to a certain point, but believes that this decline is slowing down in our contemporary period. More importantly perhaps, the fundamental difference with the first camps consists in the fact that they believe the change in discriminatory public attitudes to be only superficial: overt and blatant forms of discrimination are claimed to have been replaced by more subtle forms. See e.g. Nelson & Bridges 1999; Bobo 2000; Sidanius et al. 2000.
For society as a whole, but especially for the members of traditionally disadvantaged groups, nondiscrimination law reaffirms principles of personhood and justice, adding to their confidence to participate more fully in society (Vrielink & Vandersteen 2011; Vrielink, 2010; Nielsen & Nelson 2005).

Secondly, nondiscrimination rights can also function as a transformative tool, which people can draw on rights as a symbolic resource to legitimate their claims and to gain leverage in everyday situations and negotiations (Albiston 2005). Moreover, some research in social sciences also suggests that the presence of the legislation in itself, and its ‘trickle down effect’, has a more general transformative capacity of culture as a whole, thereby contributing to declining historical trends in prejudice and discriminatory (Van Klink, 1998).

Finally, and more concretely, there are a few studies that suggest that antidiscrimination law correlates positively with how (some) minorities are effectively treated. For instance, research by Baron and Heble (2013) found the presence of discrimination law to have a significant positive correlation with the way in which gays and lesbians are treated in employment situations. The researchers performed comparative studies of localities in the US that offered protection against employment discrimination on the basis of sexual orientation, and those that do not. Their research revealed that public awareness of and support for sexual-orientation laws is heightened in communities with (versus without) antidiscrimination legislation. Furthermore gay and lesbian job applicants experienced significantly less interpersonal discrimination in areas with (versus without) this protective legislation, even when statistically controlling for religious and political views.

### 2.2 Unintended effects

The unintended consequences of discrimination law that are identified in social science research are relatively numerous (albeit often controversial). In the following I will discuss a number of them that are particularly relevant for
(potential) victims and plaintiffs. More specifically, the focus will be on what I will refer to as ‘shifting effects’ (§ 2.2.1), ‘masking effects’ (§ 2.2.2), and ‘harmful effects’ (§ 2.2.3) that discrimination law may sometimes have.

2.2.1 Shifting discrimination
An effect that may occur under the influence of discrimination law, is that discrimination is not so much eradicated or reduced, but that it ‘shifts' instead. The most commonly described (and widely accepted) shifting effect of the introduction of discrimination law is for overt discrimination to become more covert, and hence harder to tackle with legal means.

After the initial introduction of discrimination legislation instances of overt discrimination have tended to decrease relatively quickly, with the norm gaining familiarity (Green 2003a). At the same time, however, more elusive strains of discrimination and bias have emerged. Quite a lot of literature indicates, for instance, that employers have simply become more skilled at hiding their discriminatory animus, finessing discriminatory decisions so that they appear to be untainted by bias (Fink 2008; Bisom-Rapp 1999; Green 2003b). There are indications that other societal actors too have similarly learned to ‘mask’ their illegal conduct, developing mechanisms to make discriminatory decisions appear neutral.

Another, more controversial, shifting effect that is reported in some research, is for changes in the object and context of discrimination to take place. In the employment context, for instance, the idea of discrimination law is for firms to increase their hiring of protected groups, or at least to decrease their discriminatory refusal to do so. Some researchers believe, however, that the opposite takes place, leading to employers becoming more hesitant to hire minorities. The reason for this being that employers know that, firstly, more lawsuits are brought, and greater financial compensations are awarded, for successful claims of discrimination in firing, than for discriminatory refusals to hire them (Oyer & Shaefer 2003). Moreover, discriminatory ‘failure to hire’ suits are harder to prove than discriminatory discharge suits, especially if there are
multiple qualified candidates for a particular position (Fink 2008, 346). As such, there is both a greater likelihood and a greater financial risk in an employer being successfully sued for an alleged discriminatory termination than for discriminatory refusals to hire particular candidates. Employers, it is argued, will therefore try to protect themselves from this risk, and one way to do so, is to avoid hiring members of a protected class altogether.

Donohue and Siegelman predicted this effect as early as 1970. They claimed that the Civil Rights Act of 1964 had been successful in breaking down overt and flagrant discrimination in hiring, previously practiced by many employers, but that this shift was likely to “create a drag on the hiring of protected workers rather than the positive inducement it originally provided” (Donohue & Siegelman 1991, 1027). Since employers will ‘feel’ firing-based costs due to discriminatory decisions only if they decide to hire protected individuals in the first place, those costs as seen to act as an implicit ‘tax’ on hiring (Oyer & Shaefer 2003; Ayres & Siegelman 1996). In this sense, discrimination law is hypothesized to sometimes create a disincentive for employers to hire members of a protected class, rather than the incentive it is intended to constitute.

Although empirical data to substantiate (or refute) this hypothesis are scarce, there nevertheless is some research available that suggests that – correcting for other factors, and at least in some sectors of the economy – the introduction of discrimination law can lead to a marginally reduced hiring of individuals belonging to disadvantaged groups (Oyer & Schaefer 2003). Regarding dismissals, likewise, this same research has claimed there to be development for individuals belonging to protected groups to be dismissed increasingly as part of mass layoffs, since firms tend to face a greater risk of discrimination litigation when dismissing an individual worker, than when dismissing a worker as part of a mass layoff. Moreover, individual-specific discharges underlie most

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5 Compare, on a non-empirical basis i.a.: Posner 1987; Epstein 1992.
6 Jolls (2007), for instance, observes that “[d]efinitive empirical evidence supporting the hiring-disincentive account has been difficult to come by”.
7 The findings of Oyer and Schaefer’s research are, as regards hiring disincentives, limited to specific industries that, pre-1991, had employed few protected workers and had been building on this number (Oyer & Schaefer 2003); at the same time however it also led protected workers becoming more concentrated in sections where they already had enjoyed strong representation.
discrimination suits, while class action suits concerning discrimination are very rare (Donohue & Siegelman 1991; Oyer & Shafer 2003).

2.2.2 Discrimination Law as Masking Discrimination

Another unintended effect of discrimination law (or at least some forms thereof) that some research points to, is that it can serve – paradoxically – to mask or cover up discrimination, rather than contributing to its elimination or reduction.

2.2.2.1 The ‘endogenisation’ of discrimination law

Specifically on employment discrimination law, the work of Edelman and her colleagues is interesting in this regard. Edelman starts from the fact that discrimination law creates imperatives in organizations to achieve compliance with the law. Superficially, this seems like a positive development. However, due to what she terms the ‘endogenisation’ of discrimination, that compliance is often largely symbolic and not only fails to eliminate discrimination, but rather serves to obfuscate it, effectively ‘bulletproofing’ the organization against discrimination claims as courts subsequently incorporate the organizational norms and practices into legal rules (Edelman et al. 1999).

Edelman refers to law regulating organizations as ‘endogenous’, on account of the fact that legal meaning and practice “is formed in part through the actions of organizations and the models of organizational action that become institutionalized in organizational fields” (Edelman 2002, 201). The legal ambiguity that is inherent in discrimination law leads organizations to create internal legal structures that are designed to symbolize attention to law. These structures lead to struggles over the meaning of law, with professionals and other officials seeking to implement law within their organizations. Because of their training, experience and interests, organizational actors thereby construct law in ways that are consistent with traditional managerial prerogatives and goals: the rights protection machinery becomes ‘managerialized’. Through internal grievance procedures, for instance, organizations transform employee claims of rights violations into ‘misunderstandings’ that can be resolved without litigation (Edelman et al. 1993).
Edelman and her colleagues demonstrate that, as these and other constructions of discrimination law become institutionalized, they also strongly affect or determine how other social actors – including the judiciary – understand and interpret the meaning of the law, and of compliance with it. Their research finds that courts – themselves unsure about certain ambiguous aspects of discrimination law – “tend to assign legal significance to certain employer policies in discrimination cases” (Edelman 2005). Courts are shown to “exhibit an increasing tendency to excuse employers from liability if they have adopted certain organizational forms, such as internal complaint mechanisms”. Thereby judicial and organizational practices in fact become mutually constituted (‘endogenization’):

Rather than courts serving as a corrective to employing organizations when their policies stray from legal requirements, the courts’ rulings on law have been influenced by the compliance structures that employers have developed within an organizational field (Nelson, Berrey & Nielsen 2008).

So, although the development of internal nondiscrimination procedures by employers may seem like a positive development, these can in fact “serve to limit exposure to external legal scrutiny and gain further leverage in future disagreements with employees” (ibid.). Thereby employment non-discrimination rights are stripped of real impact, and the translation of formal discrimination law in organizational contexts paradoxically results in ‘bulletproofing’ these organizations against discrimination claims, rather than in remedying problems of discrimination (Sturm 2005; Bisom-Rapp 1999; Edelman et al 1993).

**2.2.2.2 Masking morality**

More generally, there is some research that suggests that ‘masking effects’ can, paradoxically, also result from an overly moral(istic) focus on discrimination.\(^8\)

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\(^8\) And/or from employing highly moralistic means to combat discrimination, such as a strong or even one-sided reliance on criminal sanctions.
Attaching severe moral implications to discrimination and discrimination law may give rise to counterproductive results. This finding is in fact connected to the legitimizing theories that were touched upon earlier in this chapter (supra 1.1.1.2); the just world belief in particular. The stronger the ideological and moral stigma that is attached to the equality and nondiscrimination discourse, the more people will tend to resist the idea that they and their organization discriminate. As such, a highly moralizing non-discrimination discourse may serve to mask, rather then counter, discrimination, since it renders the problem unmentionable and invisible: no-one ‘discriminates’ and no-one is a ‘racist’ or a ‘sexist’, since that is regarded as the utmost evil, but this leads to the extant structures of inequality being left untouched.

A study by Van den Broeck (2009), for instance, suggests – for the case of racial and ethnic discrimination in the employment context – that everyday racism en potential situations of discrimination are rendered invisible, especially in those organizations that explicitly propound equality, diversity and nondiscrimination as central moral values. Van den Broeck argues that the moral pressure and the resulting internalized wish and belief not to discriminate, serve to maintain daily practices and structures of inequality.

### 2.2.3 Harm

Finally, discrimination law – like many legal interventions – can also have its own harmful effects on victims and plaintiffs. Such effects can be direct, due to the harmful effect that legal or institutional intervention sometimes has on plaintiffs (§ 2.2.3.1). Some harmful effects on victims are also of a more indirect nature, due to the influence that discrimination law can have on other actors that in turn negatively impact victims of discrimination (§ 2.2.3.2).

#### 2.2.3.1 Direct harm

Some research indicates that (creating the possibility of filing) complaints concerning discrimination can inflict its own harm on those it is supposed to protect, even aside from issues of ‘blaming the victim’ and retaliation that were discussed previously (supra § 1.2).
A first type of harm has to do with the fact that most complaints that reach equality bodies or other competent institutions do not result in the case being taken to court, and many are – in the experience of the plaintiffs – also not (satisfactorily) dealt with extra-judicially due to limited manpower available to the institutions. Research suggests the impact of this to be highly negative among plaintiffs. Regularly plaintiffs even report experiencing forms of ‘secondary victimization’: after their experiences with discrimination, they feel ‘doubly’ denied and harmed if the complaint is not taken up by the equality body, or if the complaint fails to lead to a satisfactory outcome (Vrielink 2010; Vrielink & Vandersteen 2011). Similar types of harm occur if an equality body brings the case before a court, but if it results in an acquittal.

Finally, even plaintiffs in cases that came before a court and that had a favorable outcome, regularly report feelings of dissatisfaction, resentment or even harm, due to feeling ignored or ‘unheard’ in the legal proceedings, during which they feel they were insufficiently able to either tell their (side of the) story or to enter into dialogue with the opposing party (Vrielink 2010; Fink 2008). More generally, people in discrimination cases regularly feel ‘harmed’ by being involved in legal proceeding (cf. infra § 2.2.3.2). Plaintiffs in research by Nielsen, Nelson and Lancaster, for instance, recounted how they found themselves “in what seemed a maze of manipulative lawyers, judges in cahoots with employers, and unreasonable or mysterious rules that prevented them from ever telling their stories” (Berrey 2009).

2.2.3.2 Indirect harm: increasing bias?
Finally, some research even suggests that discrimination law, or at least particular modes of enforcement, may increase bias and the tendency to discriminate among those charged with discrimination, thereby – in turn – negatively impacting disadvantaged groups and individuals.
A study by Fink (2008), for instance, claims the existence of a phenomenon termed ‘litigation-induced group bias’.\(^9\) Fink starts from the fact that social science research has long shown that litigation is “a daunting and emotionally destructive process for all parties involved—plaintiffs, defendants, and witnesses alike”. Unsurprisingly then, the psychological and emotional response that defendants have towards plaintiffs turns out to “often consist in strong frustration, hostility, and anger” (Fink 2008, 334).

Whereas these effects tend to occur generally in litigation, Fink lists a number of reasons why they may be more pronounced in discrimination cases. This is the case, firstly, due to the strong moral and social stigma that is associated with discrimination claims, as compared to many other types of tort claims. This, Fink argues, leads to “a heightened degree of defensiveness and resentment by the defendant”. Secondly, the financial costs of being a defendant in a discrimination suit are relatively high, since defendants – in light of the aforementioned stigma – pour significant resources into trying to refute allegations of discrimination. According to Fink, these high costs contribute to added resentment towards the plaintiff. Additionally, Fink lists several (social-)psychological tendencies that further complicate how defendants view plaintiffs in discrimination cases, referring for instance to the research by Kaiser and Miller (2001) demonstrating that people who claim discrimination are perceived as ‘troublemakers’ even if the evidence clearly indicates the occurrence of discrimination (cf. supra).

Fink argues that the hostility that defendants experience in discrimination cases “extends beyond the individual plaintiff, ‘spilling over’ to other members of the protected class to which the plaintiff belongs” (Fink 2008, 334). In other words, the litigation experience induces a bias against all those who share the plaintiff’s protected characteristics.

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\(^9\) Fink does emphasize that discrimination litigation is, of course, not the only or most significant cause of employer bias (Fink 2008, 336).
To explain and substantiate this, Fink relies on social cognition research that shows that the mere introduction of so-called ‘groupness’\textsuperscript{10} into a situation – as allegations of discrimination inherently do – will exacerbate conflicts and generate various types of intergroup biases, like assumptions of homogeneity of out-group members (i.e. the plaintiffs, in discrimination cases).\textsuperscript{11} Fink also draws on research concerning experiences of personal failure to explain transference from attitudes towards plaintiffs to the entire group to which the plaintiff belongs: lowered self-esteem that results from personal failure (like being accused of discrimination) heightens individuals’ sensitivity to group status and therefore tends to elicit extreme reactions to out-group members in general, while serving to protect the superiority of one’s in-group.

Moreover, Fink claims that this increase in bias against members of the plaintiff’s protected class is not only of an unconscious and attitudinal nature, “but instead has a concrete, negative impact for these individuals by reducing their prospect of getting hired” (Fink 2008, 345).

\section{3 \textsc{Conclusion}}

All in all, the research described in this chapter paints a complicated picture of the effects and impact of discrimination law. While there is research which shows discrimination legislation to have a number of unequivocally positive effects, there seems reason for caution too, as other research suggests the legislation serves merely to shift or mask the phenomenon it purports to address, or that it may even lead to counterproductive effects.

In pointing to research on some of these unintended or counterproductive effects, I do not wish to suggest that these are the rule, or that they outweigh the benefits that discrimination law has. Especially since many of the identified issues are not necessarily \textit{inherent} effects of discrimination law. Instead, more

\textsuperscript{10}‘Groupness’ being understood as the psychological and social experience of feeling like one is in a group.
\textsuperscript{11}Fink refers, inter alia, to research by Linda Krieger: Krieger 1998; Krieger 1995.
often than not, they appear to be peculiar to specific measures and approaches, and would therefore seem to entail the possibility of solutions. In that regard, being conscious of the pitfalls may ‘make a difference’ in avoiding them.
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