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Privilege in the Workplace: The Missing Element in Antidiscrimination Law

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Articles

PRIVILEGE IN THE WORKPLACE: THE MISSING ELEMENT IN ANTIDISCRIMINATION LAW

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The workplace presents an example of how supposed neutrality in language, the very words we use to describe work and the location in which it occurs, masks systems of privilege. The invisibility of the operation of privilege in the workplace perpetuates the systemic nature of disadvantage. With Title VII of the 1964 Civil Rights Act, federal law aimed at ending workplace segregation by focusing on discrimination in employment. Antidiscrimination doctrine developed under this statute has ignored privilege, ensuring the replication of systems of subordination. The resulting denial of access to jobs and to promotions serves to maintain existing economic disparity that income would alleviate and serves to perpetuate systems of privilege.

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I. The Normalization of Privilege in the Workplace

To try to envision the invisible nature of systems of privilege in the workplace, consider the example of women in the workplace. When we think about women and the workplace we should imagine the whole earth, because indeed women work everywhere. Yet somehow our definition of work is attached to a location we call the workplace. Even the recent wave of feminism in the 1970s encountered difficulty with the rhetoric of work, making women who work in the home feel left out of its movement.[1] But the idea of women's work as the domestic sphere and men's work as the real work in the so-called public sphere has been deeply entrenched in our language and culture. White middle-class women are entering the world of work outside the home in increasing numbers.[2] Many women of color and working class women have long worked outside their homes.[3] At this historic time we need to expand the notion of work and the definition of where it is done, promoting a vision of women at work everywhere we do work.

When we contrast this vision of the wholeness of women's work, permeating all aspects of life, including giving life itself, with the narrower legal vision of workplace, the kind of place covered by federal and state antidiscrimination laws, we can begin to see the narrowness of law's vision. This narrowness is necessarily ours as well, we who work within the law. But we must push on that boundary, narrowly drawn to meet our cultural definition of work, and establish its elasticity. Keeping this larger vision of women as workers throughout the world in mind can help us to see what is missing from antidiscrimination law.

The very sense of the workplace has been defined, not by women, and not in our terms. To be in the workplace is to enter a male-defined world. Even the notion of workplace, which exists outside the home, privileges maleness, associating work with male values and culture. The sphere

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1. Mary "Rogue" Weiland, *Hey, We're in This Together*, CHI. TRIB., April 24, 1994, at Womanews 11 (objecting to the distinctions made between "working" versus "stay-at-home" mothers because although uncompensated activities are not always considered work, all of these tasks are work); *see also* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (chronicling the joint property rights claim of the 19th century women's movement and the struggle to define the housework of women as "work").

2. Women make up more than 45% of the American workforce and 99% of all women will work outside the home sometime in their lives. NEWSDAY, Oct. 15, 1994, at A33 (Business Section Shortcuts). According to the U.S. Labor Department, there are 54 million working women in the United States. Kara Swisher, *Giving Women a Voice Workplace Survey to Check on Concerns*, WASH. POST, May 4, 1994, at D1.

3. MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS 727-28 (1994).

outside the home has traditionally been the situs of male work, and therefore attached to the very definition of work. This privileging of maleness in the workplace has not stopped simply because women now work there as well.[4]

Thus, although workplace is an apparently neutral term, descriptive of a place of work, it is a term with a male tilt to it. The notion of "workplace" divides the earth into loci of work and non-work, defining only what occurs in a workplace as work. Yet this idea of workplace as a neutral ideal permeates our cultural thinking, obscuring the male point of view which it embodies. By imagining the workplace is neutral, many may not see the male point of view that it privileges.[5]

How women are treated and how we should behave in the workplace, that particular location that we have designated as the locus where work occurs, is contested and negotiated in many places outside the workplace.[6] These locations, although spatially separate, interconnect as spheres of influence on the definition of woman. How workers relate to their mothers, sisters, and daughters influences how they see and relate to women at work. If at home these workers are used to having their views privileged, then any different treatment they receive from women in the work environment may be viewed as the women "not doing a good job." If women are smiling and compliant in the media, then that view may be carried over into workplace expectations. Women work everywhere, and how we do it affects the dynamic in the workplace, as defined by Title VII.

Recently, work by space geographers, scholars examining the social construction of place, has uncovered its gendered nature.[7] Space

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4. At least some men now work in the home. But more men working in the home has not blurred the dichotomy between private and public space. Public space is still the norm of work. And as more women enter that public space, they still carry large burdens of work at home, work that has been described as a "second shift." *See* Arlie Hochschild, *The Second Shift: Employed Women are Putting in Another Day of Work at Home*, UTNE READER, Mar.-Apr. 1990, at 66 (commenting upon how women's disproportionate share of household and childrearing activities within the home, despite their employment outside the home, has lead to tensions within marriages, a "leisure gap" between men and women, and unequal feelings of responsibility for the home).

5. Thus a tantrum at a secretary, because it occurs at a location we call "work," is work, but the same tantrum at home is a tantrum, part of human relations, and probably unacceptable behavior. The tantrum at work may be viewed as a professional necessity, particularly if a male executive has one. Thanks to Trina Grillo for this example.

Furthermore, even workplace benefits continue to privilege men. "Pension laws and practices are designed for the way men traditionally work—with no breaks in employment, building earnings, often at a single company." *Pension Gap Widening Between Women and Men*, THE RECORD, May 15, 1994, at B03.

6. Expectations of how women should behave at work are negotiated in other spaces. DAPHNE SPAIN, GENDERED SPACES 7 (1992).

7. *Id.* at 38. Space geographers do not always see the interactions of the spaces that they survey. Spain implies that the point of the legal system is to preserve social order and says the legal system is constructed in the courthouse. *Id.* at 11. But of course it is not just there—it is in the

geographers have found that segregated space correlates to lack of power and knowledge on the part of the excluded group.[8] Women do work everywhere, yet the culture does not always define that labor as work. Work performed in sex-segregated isolation, such as in the domestic sphere, is a prime example of hard work that is neither recognized nor compensated.

The privileging that occurs in the workplace does not stop at maleness. Whiteness, heterosexuality, and middle class values are all privileged in the workplace, as they are privileged in our culture. This privileging is rarely acknowledged or recognized. Even where privileging is recognized, an analysis of how it operates is rarely articulated. Rather, the dominant culture proclaims that the workplace is a situs of neutral values and judgments based on merit and on who is doing a good job. But that claim of neutrality, often heartily believed, masks the very values that it privileges.[9]

Viewed through this lens of neutrality, workers are equivalent and interchangeable. The United States Supreme Court canonized the notion of interchangeable workers when it introduced the term "non-pregnant person" into early employment discrimination litigation. The Court declared that it was not sex discrimination to disadvantage pregnant workers.[10] Non-pregnant persons included women and men, the Court reasoned, implying that they were interchangeable in relation to pregnancy. In treating them the same, the Court promoted the idea of the workplace as neutral.

An awareness of privilege is missing from our cultural vision of the workplace. This inability to identify and to articulate privilege is also missing from antidiscrimination law as it is applied to the workplace. Antidiscrimination law has missed privilege, the flip side of disadvantaging, subordinate treatment. Eradicating such treatment cannot end discrimination because it will regenerate from the untouched, invisible

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workplace, in the definition of what is acceptable workplace behavior (and it is in many other places as well).

8. Segregation in itself may not indicate a lack of power. The question of who controls and defines the space is also significant. Virginia Woolf wrote many years ago of the need for a room of one's own as a way of having space from which to create words and even power. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 4 (Harcourt Brace Jovanovich 1981) (1929).

9. *See* Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 546-47 (1991) (discussing the difficulty of achieving neutrality in the law and that the default viewpoint, when neutrality is claimed, is white and male).

10. Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974) (holding that California did not violate the Equal Protection Clause by failing to insure pregnancy under its disability insurance system); *see also* Gilbert v. General Electric, 429 U.S. 125, 135 (1976) (citing *Geduldig* 417 U.S. at 496-97 n.20 (1974); applying *Geduldig* to Title VII pregnancy exclusion claims and finding no sex discrimination).

privilege that is its companion. As Adrienne D. Davis has written:

> [A]nti-discrimination advocates focus only on one half of the power system dyad, the subordinated characteristic, rather than seeing the essential companionship between domination that accompanies subordination, and the resultant privilege that accompanies that discrimination. . . . Thus domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra which will inevitably grow another head, if all are not slain, discrimination cannot be ended by focusing only on active acts of subordination and domination.[11]

The jurisprudential focus of the civil rights era has been upon discrimination. But attacking discrimination alone cannot end subordination, because systems of privilege regenerate the discriminatory patterns which maintain the existing hierarchies of oppression. Title VII law has missed the systemic nature of the discrimination it seeks to combat.

Overlooking the systemic nature of discrimination, Title VII fails to provide a remedy for that discrimination. In naming sex, race, national origin, color, and religion, Title VII articulates categories to be particularly scrutinized while looking for unfair treatment in the workplace. Case law development under Title VII has focused on discrimination based upon these categories, but not on the power systems that operate within and across each category to discriminate against some and to privilege many.[12] This deficiency in Title VII doctrine, ignoring the operation of privilege, has handicapped antidiscrimination law and doomed it to failure.

Privilege is the systemic conferral of benefit and advantage.[13] Members of a privileged group gain this status by affiliation, conscious or not and chosen or not, to the dominant side of a power system.[14] The

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11. Adrienne D. Davis, Toward a Postessentialist Methodology, or a Call to Countercategorical Practice 35 (Sept. 1994) (unpublished manuscript, on file with the *Texas Journal of Women and the Law*).

12. Noticeably absent in the list of categories for example, is sexual orientation. Recent articles argue that the system of privilege based on sexual orientation is a form of gender oppression. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197 (1988) (reviewing the history of anti-homosexual laws and social attitudes to conclude that contemporary negative laws and attitudes maintain gender-based norms and traditional male-female roles); *see also* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617 (1992) (arguing that homophobia serves to reinforce gender-role stereotypes).

13. Stephanie M. Wildman with Adrienne Davis, Language and Silence: Making Systems of Privilege Visible 34 SANTA CLARA L. REV. (forthcoming 1995) (manuscript at 8-9, on file with the *Texas Journal of Women and the Law*) (arguing that privilege is most correctly understood as a legal, systemic advantage, not a right or individualized benefit).

14. *Id.* at 12.

Title VII categories identify power systems. At a recent conference, Fran Ansley drew a horizontal line, labeled the power line, and asked participants to imagine where they were situated in terms of race, gender, sexual orientation, and other categories.[15] Everyone knew what she meant by the power line, which divided those attributes which are privileged from those which are not. Those above the power line shared privileged characteristics.

Affiliation with the dominant side of the power line is often defined as merit and worthiness. Those characteristics and behaviors most shared by those on the dominant side of the power line often delineate the societal norm or standard.[16] For example, skin color is often called "flesh-colored," calling forth a pale-skinned image.[17] Human skin comes in many different colors and shades, but whiteness is privileged to have the definition of human color associated with it. Hiring someone with an English or German accent, who is difficult to understand, may be acceptable; the accent is associated with upper class privilege. But hiring someone with a Filipino accent may bring the criticism that the person cannot speak English.[18] A loud voice is privileged in public speaking, such as in law school teaching. Yet, women are often demeaned for having powerful voices. One law professor I know was told on her evaluations that she would be a better teacher if she lowered her voice an octave. Women's voices are often described as "high and squeaky," bearing a negative connotation. But voices cannot be too masculine. We do not have negative words to describe a low-pitched voice, even "booming" is complimentary. Male privileging associates positive words with those characteristics.

The holder of privilege can opt in or out of struggles against oppression, again often unconsciously. Even the ability to maintain one's

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15. Fran Ansley, Address at the Society of American Law Teachers Conference, Diversity in the Law School Curriculum (Sept. 23, 1994).

16. Wildman with Davis, *supra* note 13, at 12.

17. "Flesh-color" is defined as "the colour of the flesh (of a 'white' human being) as seen through the skin; usually employed to denote a tint composed of "a light pink with a yello' (O'Neill Dyeing 1862)." The Oxford English Dictionary 316 (1978). Women's hosiery colors labeled "nude" are also a pale tone of nylon. *See also* bell hooks, *Straightening Our Hair*, Z(ZETA) MAGAZINE, September 1988, at 33; Kim Reen, *The Pain of Living the Lye*, ESSENCE, June 1993, at 38 (describing the chemical processing of hair undergone by Black women to conform to a white standard of appearance). Thanks to Nikol G. Alexander for calling these sources to my attention.

18. *See* Mari J. Matsuda, *"Voices of America,"* 100 YALE L.J. 1329, 1334-40 (1991) (describing how Manuel Fragrante was denied employment because of his accent, although he received the highest score on a civil service exam and "his command of the English language . . . exceeds that of many Americans."). My colleague Peter Kwan has commented that a British Colonial accent, as he describes his own way of speaking English, is not associated with privilege. The complexity of privilege, in this case accent, combined with race, gender, education, and many other facets of being are described *infra* note 21 and accompanying text.

silence in the face of the oppression of others is a privilege.[19] One may be silent in the face of some forms of oppression even with the belief that she is fighting oppression when it appears in another form.[20] Heterosexual white women are often unconscious of our sexual orientation and race privileges and the ways in which we perpetuate heterosexism and racism even while we are fighting sexism.[21]

Perhaps most importantly, privilege is not visible to the holder of the privilege; "it is merely there, a part of the world, a way of life, simply the way things are."[22] The presence of privilege often means a higher comfort level in social interaction to the holder of the privilege, who need not feel excluded when the norm describes her own actuality. One diversity consultant I know uses this example:

> Suppose you as a human are told to live in the ocean in a society of fish. You find it difficult to breathe. When you complain that oxygen is a problem, the fish would say this is simply the way the world is, and you should adjust. The fish might even feel beleaguered as you gasp. "You are getting tiresome," they say, "can't you think of *anything* besides oxygen?" Water is the only world they know, even though the fish did not create it.[23]

People of color and white women must learn the workplace world of white male supremacy, which they did not create, and master how to live in it, even though it deprives them of the equivalent of oxygen. Well-meaning people who function in that world as white males, like the fish, think that their world is normal, the way things are. For the most part, they do not mean to discriminate or disadvantage.

II. Title VII of the Civil Rights Act and Its Limitations

Analyzing privilege is complicated by the reality that one individual

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19. Wildman with Davis, *supra* note 13, at 14; *see also* Martha Mahoney, *White Working Men, Law, and Politics: Transformation and the Social Construction of Race* (1995) (unpublished manuscript, on file with the *Texas Journal of Women and the Law*).

20. *Id.* Many who are oppressed opt to be silent about that oppression. Audre Lorde explains, "And when we speak we are afraid that our words will not be heard nor welcomed." BELL HOOKS, TALKING BACK 17 (1989) (quoting Audre Lorde). The silence of those subordinated by a form of oppression provides emphatic reason for those who are privileged to speak.

21. *See* Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 89 (1995) (commenting that "[w]hite people are so eager to distance ourselves from racism and spend so much time trying to demonstrate that we are not racist, that we fail to see the systemic privileging of whiteness."); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326 (1989).

22. Wildman with Davis, *supra* note 13, at 15.

23. Conversation with Francie Kendall, Diversity Consultant (Albany, Cal.), in San Francisco, Cal. (Oct. 11, 1994).

may be privileged in one area and not another. If everyone were simply privileged or just subordinated, then the analysis of systems of privilege would be more obvious. But each of us lives at the juncture of privilege in some areas and subordination in others. The image that I believe best describes this reality is the koosh ball™:

> Imagine intersections in three dimensions, where multiple lines intersect. From the center one can see in many different directions. Every individual exists at the center of these multiple intersections, where many strands meet, similar to a koosh ball™. Picture hundreds of rubber bands, tied in the center. Mentally cut the end of each band. The wriggling, unfirm mass in your hand is a koosh ball™.[24]

I have described the rubbery strands of the koosh ball™ as consisting of threads of both subordination and privilege. Every individual is composed of these aspects of identity from above and below the power line. "In some contexts we are privileged and in some subordinated, and these contexts interact. Societal efforts at categorization are dynamic in the same way as the koosh ball™ is, changing, mutating, yet keeping a central mass."[25]

Thus the problem that discrimination law must address is far more complex than is acknowledged by the act of selecting a single basis for unfair treatment urged by statutory language. The koosh ball™ image seeks to address the categorizing problem that intersectionality analysis in feminist theory has identified, while adding the important dimension of seeing privilege as well as disadvantaging treatment as part of the analysis.[26] Re-examining Title VII of the 1964 Civil Rights Act illustrates the limitations of the statute in acknowledging the complexity of

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24. Wildman with Davis, *supra* note 13, at 21.

25. *Id.* at 22; Professor Elvia Arriola also has been working on the question of categories in legal thought and in life. She points out the complexity of identity and the ineptitude inherent in the legal system's efforts to reduce people to one or even two of these categories. Her work resonated for me because of the koosh ball™. We are both addressing the multi-dimensional nature of workplace discrimination. *See* Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994).

26. Professor Arriola sees this complexity as well, urging a "holistic/irrelevancy model" to examine discrimination. Arriola, *supra* note 25, at 141. She explains,

> The holistic/irrelevancy model recognizes the role of unconscious attitudes and the ways that interrelated factors create unique, compounded patterns of discrimination and affect special social identities. In doing so, it rejects the idea of arbitrarily separating out categories to address discrimination in our society. Instead, this model understands discrimination as a problem that arises when multiple traits and the stereotypes constructed around them converge in a specific harmful act. Traditional categories then become points of departure for a deeper, more subtle analysis that explores the historical relationships between certain social groups, as well as an individual's experience within each of these groups.

Id.

systems of privilege.

Federal antidiscrimination law has been described as "a patchwork of statutes and one major executive order."[27] Although Title VII is only a piece of this patchwork, it is the "centerpiece"[28] of federal employment discrimination law, and interpretations of Title VII are often applied to other antidiscrimination statutes.[29]

Title VII forbids an employer to "fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* with respect to his [sic] compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his [sic] employees or applicants for employment *in any way* which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [sic] status as an employee, because of such individual's race, color, religion, sex, or national origin."[30] This language has been interpreted to mean that intentional discrimination based on the forbidden classifications is illegal[31] and that actions having a disparate impact may be illegal as well.[32]

Given the problems of our language that push toward categorization as an intrinsic part of naming, it is unlikely that any new statute could avoid the pitfalls of categories. And the language forbidding an employer from limiting an employee or applicant because of any illegal classification could be used to encompass limits imposed because of the existence of systems of privilege. So the statutory language of Title VII could be used to encompass a vision of a workplace that did not privilege maleness, or any other system above the power line, even though Title VII case law has not developed in this manner.

We have come a long way since 1964 when the Civil Rights Act was passed and gender was added on the Senate floor as a joke, as a way to sabotage the bill.[33] The 1970s were marked by litigation that stressed formal equality, when women sought treatment equivalent to men's.

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27. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 12 (1992).

28. *Id.*

29. *Id.*

30. 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added).

31. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989) (citing the Griggs v. Duke Power Co., 401 U.S. 424 (1971) court as including both overt discrimination and disparate impact in Title VII); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 801, 806 (1973) (requiring more evidence of discrimination on remand after a civil rights activist was denied rehiring after participation in a "stall in" against company).

32. *Wards Cove Packing Co.*, 490 U.S. at 645-46, 650-55 (requiring on remand specific elements of hiring process that have significant disparate impacts); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (prohibiting a high school diploma prerequisite to employment since it was unnecessary to job performance and used only as a subterfuge to prevent African Americans from gaining employment).

33. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 201 (1988).

During that period women said, "Just give us a chance to be estate administrators or to derive benefits from the armed service. We can do the job as well as men can." And the doors opened a bit.[34]

But even the women's community quickly began debating the limits of formal equality. The discussion about the treatment of pregnancy, called equal/special or equal/accommodation treatment, depending on one's view of the resolution, highlighted the interpretive nature of equality theory. The lesson that we all see from a perspective which affects what we perceive emerged from the pregnancy debate. And so not surprisingly, feminist legal theorists turned to context with increased intensity. The anti-essentialism movement of the last decade has increased our wariness toward generalization and our fondness for particularity. Women of color have taught us that antidiscrimination law has failed to look at the intersections of subordination, thereby missing altogether the meaning of the discrimination which they experience.

During these developments in feminist legal theory, Title VII doctrine has evolved as adverse to discrimination plaintiffs' interests. In her description of Title VII's history, Martha West explains, "Since 1981, the Court has interpreted Title VII in ways that have created additional obstacles for plaintiffs, not just women, but all Title VII plaintiffs."[35] West continues to explain four "restrictive and unnecessary constructions" by courts that have undercut the possible effectiveness of Title VII as an antidiscrimination statute.[36] These constructions include the focus on employer discriminatory intent, the need to show that such intent was a motivating factor in the decision, the allowance that employers may prove the same result would have occurred absent the discrimination, and the view that discriminatory intent is a question of fact, inhibiting possible judicial review.[37]

West recognizes the existence of subconscious, unintentional discrimination and complains that the law has not developed in ways that are able to remedy that discrimination and its effects.[38] Describing discrimination as "the product of widely-held, but often unarticulated prejudices and assumptions," West acknowledges that discrimination has

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34. I am a law professor as a result of these new opportunities for women. *See also* Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625 (1990) (describing the efforts and obstacles involved in trying to integrate the legal academy by race and gender).

35. Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 95 (1994).

36. *Id.*

37. *Id.* at 95-96.

38. *Id.* at 97.

a systemic nature.[39] That systemic nature includes the usually unseen hydra head of privilege. The recognition of systems of privilege, complementing these systems of discrimination, would provide a full picture of the dynamic of subordination. Privilege, operating in conjunction with discrimination, has not been visible, accounting for the legal system's inability to understand fully the subordination dynamic.

Title VII says it is illegal to "otherwise discriminate" or to "limit . . . employees . . . in any way." This statutory language is broad enough to include an analysis of invisible systems of privilege and power, which operate based on sex, race, national origin, color, or religion to deprive individuals of employment opportunities. Systems of privilege and power, by privileging those with certain characteristics or behaviors, are discriminating against individuals who lack those characteristics and behaviors.

A selection of one individual system of privilege and power restricts potential litigants from describing the complexity of the privilege and subordination dynamic. Systems of privilege and subordination interact with each other within the workplace. An individual white lesbian may be disadvantaged by the heterosexual workplace culture, which Title VII does not explicitly prohibit. Yet that heterosexual culture is so connected to definitions of maleness and femaleness that this disadvantaging may not be separable from the privileging of maleness at work, which disadvantages the worker on account of her sex.

The statutory language of Title VII, as it is written, helps to mask the existence of these systems of privilege and power, as well as the interaction of these systems with each other. Several problems are created by the statutory language: 1) the analogy problem, which implies the fungibility of the categories; 2) the comparison mode, by which statutory language and case law development tilt toward comparing treatment of the discrimination plaintiff with another individual with characteristics or behaviors on the other side of the power line of a particular classification; and 3) perhaps primarily, the invisibility of privilege at all in either statutory language, case law development, or cultural consciousness.

A. The Analogy Problem in Statutory Drafting

Considering first the analogy problem in statutory drafting, Title VII of the 1964 Civil Rights Act, which has served as a model antidiscrimination statute forbidding discrimination in employment, illustrates how the statutory drafting implicitly analogizes the discrimination of one group to that of another. Title VII lists "race, color, religion, sex,

39. *Id.*

or national origin"[40] as the categories for which discrimination is forbidden. The goal of combatting discrimination in all these areas should be applauded. Yet the effect of this laundry list of groups, against whom discrimination is forbidden, implies a similarity between them, as well as shared characteristics which distinguish them from other groups not mentioned. The absence of non-discrimination against lesbians and gay men is a serious omission.[41]

The implicit emphasis on the similarities of the harm suffered from the various types of discrimination obscures the question of how those harms might be different. While the difference in the harms might not mean that the law should address remedying them differently, the exploration of those questions has not even been attempted and is implicitly discouraged. Differences in the harms are simply ignored; the categories are viewed as fungible. A Black man hired to lead a public interest organization was told by a white woman, "I'm upset you got this job, when there was a qualified woman." The woman to whom she referred was white. The woman's comment suggests she believed it would have been the same act for the organization to hire a Black man, a white woman, or perhaps even a woman of color for the leadership position. But hiring a white woman would have done nothing to combat the system of white supremacy; it would only have combatted the system of male dominance. To imply that these systems are the same ignores important realities of both forms of oppression in the workplace and in the culture that sustains it.

Just as the forms of oppression and discrimination are different, the privileging based on each statutory categorization takes place in different ways. The differences are made harder to see because of the implicit fungibility in the statute. In the workplace, whiteness and maleness may both be privileged as attributes of a leader, but sexual orientation is regarded as not visible. This perceived invisibility of sexual orientation privileges heterosexuality. Yet heterosexuality is very visible when workers display pictures of spouse and family. But visible displays of

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40. Section 2000e-2(a) states in full:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his [sic] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [sic] status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), (2).

41. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* BLOOD, BREAD, AND POETRY; SELECTED PROSE 1979-85 (1986) for an analysis of the system of sexual orientation that permeates our culture, disadvantaging lesbians.

sexuality are usually only acceptable for heterosexual workers. Many gay and lesbian workers do not feel safe displaying photos of their families in their work environments.

B. The Comparison Mode Veils the Operation of Privilege

The comparison mode needed to prove discrimination veils the operation of privilege. Many cases involving discrimination based on gender, race, and other Title VII categories will never be brought because the Title VII analysis has been based on a comparison mode. I first described the comparison mode used in Equal Protection analysis in a 1984 article.[42] The comparison mode has been used by an individual claiming disparate, disadvantaging treatment, "by comparing the treatment of the individual to treatment received by those in another social group. For example, a woman barred from the practice of law claimed that men could practice law and, therefore, that she should be admitted to practice."[43]

Similarly, in employment discrimination cases, a plaintiff claiming discrimination based on sex must show how men were treated differently in the workplace.[44] For example, one court has said, "It is significant to note that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment."[45] Yet offensive sexual conduct in the workplace supports a system of subordination of women by men that contravenes the goal of equal employment embodied in Title VII.[46]

Privileging of whiteness in the workplace can occur even when all participants are African-American. This privileging will remain invisible under the comparison mode. One litigator I know described a case that settled in which the African-American female plaintiff sued for discrimination under Title VII. Her supervisor was a white woman, but

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42. Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 271 (1984) (explaining that the practice of measuring equal treatment by comparing members of a discriminated group to a mainstream group has been raised to a jurisprudential model for all Equal Protection analysis).

43. *Id.* (citing Myra Bradwell's famous effort to become a lawyer).

44. "In practice, this often means that a female plaintiff must come forward with comparative evidence of a similarly situated man who secured more favorable treatment." Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2395 (1994).

45. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).

46. The development of case law doctrine concerning hostile environment harassment recognizes this connection. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 177 (1994) (describing sexual harassment as gender subordination).

the other co-workers in her department were also African-American women.

The plaintiff was a large, dark, and loud woman. The supervisor was small and demure. The plaintiff could not prove discrimination under Title VII, which would compare her situation to others. The evidence of other African-American women in the workplace would dispel her claim of race discrimination. That she was the "wrong kind" of African-American woman, because of societal preference for certain characteristics, could not be remedied under the statutory framework without an analysis of privilege.

The poverty of the comparison mode has been further demonstrated by feminist critical race scholars such as Kimberle Crenshaw,[47] Paulette Caldwell,[48] and Elvia Arriola,[49] who explain that African-American women are rendered invisible by such comparative thinking. Cases have found that they are not Black for race discrimination purposes and not women for sex discrimination purposes.[50] Surely, Title VII's drafters did not intend to leave out discrimination against women of color from the reach of the statute. Yet comparisons that render women of color invisible do have that effect.

C. *The Invisibility of Privilege*

Finally, the invisibility of privilege is perhaps the most pernicious part of what is missing in antidiscrimination doctrine. Certain work is neither defined as work nor seen as part of merit or as important in job performance. Caring for people is a significant aspect of work that is not privileged in the workplace.

For example, one administrator does the work of three people, but she is not paid accordingly. She cannot demonstrate sex discrimination; there is no similarly situated male administrator in her department. So under the comparison mode, she has no case; and she does have a job, so there was no discrimination in hiring. Her employer was willing to hire a woman. The employer would say, "We are employing a woman, so how can we be discriminating based on sex?" But much of this administrator's work is

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47. 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 (describing how Title VII doctrine renders African Americans invisible).

48. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (discussing how various employers prohibiting braided hairstyles devalues African-American women and minimizes their Title VII claim by bifurcating their race and gender).

49. Arriola, *supra* note 25.

50. *See, e.g.*, Moore v. Hughes Helicopter, Inc., 708 F.2d 475 (9th Cir. 1983) described in Crenshaw, *supra* note 47.

caring for people within the institution, being sure that their needs are met in myriad ways. This work is invisible work; it would never appear in a job description. Meeting needs and keeping people happy are tasks women do outside the workplace, in the home. When women arrive in the workplace, the gendered expectation is that they will still perform that caretaking role. Yet that caretaking role is not privileged.

One colleague once joked to me, in the era before the political Year of the Woman, by asking me if I knew why Congress did not get more accomplished. When I asked him why, he replied, "Because there aren't enough women in it." This "joke" illustrates some of the cultural complexities related to gender and workplace interaction. My colleague is trying to let me know that women do all the dirty work; they are the ones who get things done. But they presumably do that job in an uncomplaining, quiet, unseen way. He tells the story as a joke, but it is humor that hinges on all of us understanding the unrecognized work that women do.

The invisibility of privilege within Title VII doctrine is evidenced in *Price Waterhouse v. Hopkins*.[51] In *Price Waterhouse*, a woman's partnership candidacy in an accounting firm was held for reconsideration. Later, the partners in her office refused to re-propose her candidacy and she sued under Title VII claiming that the partnership process had discriminated against her on the basis of sex. Although the United States Supreme Court decision focused on the appropriate burden of proof in cases where an employment decision resulted from a mixture of legitimate and illegitimate motives, the case is useful for purposes of this essay for its discussion of sex stereotyping in decision-making.[52]

Plaintiff Hopkins appeared as a woman seen very differently by different partners. In one document she was described as "'an outstanding professional' who had a 'deft touch,' and who was of 'strong character, independence and integrity.'"[53] However, her interpersonal skills received negative comments, and she was described as "sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff."[54] Interestingly, the United States Supreme Court apparently did not consider criticism of her interpersonal skills to be gender-related, although it did concede that some partners reacted negatively to other

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51. *See* 490 U.S. 228 (1989) (holding that in a mixed nature claim under Title VII an employer must show that its non-discriminatory reason for not promoting an employee would have alone been a sufficient basis for the decision and exploring the effects of sex stereotyping in employment decisions).

52. *Id.*; *See also* Chamallas, *supra* note 44, at 2395 (discussing the *Price Waterhouse* decision as an example of structuralist theory applied to Title VII).

53. 490 U.S. at 234.

54. *Id.* at 235.

aspects of Hopkins' personality because she was a woman.[55] We can only speculate as to whether a man who behaved as Hopkins did would be described as "overly aggressive, unduly harsh, and difficult to work with," or whether he would be described as having rough edges in his enthusiasm to get the job done and as someone who needed seasoning.

But even the Supreme Court could not miss the gender stereotyping at work when one partner advised that plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[56] Hopkins was obviously being criticized for not meeting a stereotyped notion of femininity. However, one can imagine another employment situation where a woman who dressed with make-up and jewelry, conforming to this notion of attractiveness, could be told that she did not conform to the professional image the company wished to use. Discrimination means women cannot win; whatever they do is wrong because they are not men. For women, discrimination means lose, lose.[57]

What is missing in the Court's analysis of sex stereotyping is that it only sees in one direction when examining discrimination. This view misses privilege. A system of male privilege means that men are setting the standard to which women must conform. They are determining what kind of woman is the "right kind." If you behave at work in one particular way, you may be out; but if you perform in the other manner, you might still have a problem. An analysis of privilege that goes beyond simply stereotyping is necessary to examine the gender power system and how decisions based on it in the workplace harm women.[58]

In a recent visit to Title VII,[59] the United States Supreme Court further narrowed the legal requirements for proving discrimination. This interpretation has taken the Court a step further in the wrong direction as the Court is ignoring the dynamics of discrimination, concentrating on one narrow part, and making that narrow part the whole. In the case, plaintiff Melvin Hicks sued his employer, St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections, alleging intentional race discrimination.[60] According to the Court, Mr. Hicks had

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55. *Id.*

56. *Id.*

57. *See generally* MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 3 (1983) (describing the double bind that women are forced into due to gender roles, by using sexual activity as a metaphor).

58. In the sex discrimination arena, the recognition of sexual harassment as a harm is about recognizing privilege, naming the conduct of the perpetrator as negative, and thereby taking away that privilege. *See* Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). But male privilege remains in other forms.

59. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

60. He also alleged a violation of 42 U.S.C. § 1981, termination based on race, and a violation

a satisfactory employment record until John Powell became his supervisor, and Steve Long became the new Superintendent. Mr. Hicks became the subject of "repeated, and increasingly severe, disciplinary actions. He was suspended for five days . . . . He received a letter of reprimand . . . . He was later demoted from shift commander to correctional officer . . . . Finally he was discharged for threatening Powell during an exchange of heated words . . . ."[61]

In its description of the facts of the case in the second and third paragraph of the opinion, the Court describes Mr. Hicks as "a black man."[62] Evidently the Court believes it is appropriate to mention race because this case involves race discrimination. But the Supreme Court does not mention Mr. Powell's or Mr. Long's race, which might also be relevant if the case revolves around race discrimination. By its omission, the Court invites the reader to assume that their race is white, making white race the default, the norm, the privileged race.[63]

In contrast, the trial court opinion, in frequent footnotes, designates race stating that Mr. Powell is white, curiously omitting Mr. Long.[64] The Court of Appeals decision states that "Long and Powell are both white."[65] The avoidance of white race by the United States Supreme Court in its description of actors in the *Hicks* drama demonstrates the privileging of whiteness, not only in the workplace, but in the culture in which that workplace is being contested. But that privileging is not even visible to the Court itself.

The Supreme Court cites with approval the District Court conclusion that "although [respondent] had proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."[66] This separation of the racial from the personal is curious. The Court ignores race as a part of what a human "personally" is. This separation of our beings from our work identity contributes to the male tilt evidenced in the workplace. And to the extent the world is raced,

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of 42 U.S.C. § 1983, demotion and termination based on race. *Id.* at 2746. *See also* Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1245 (E.D. Mo. 1991) (explaining that the plaintiff filed a three count complaint against defendant and the superintendent of the facility).

61. *St. Mary's*, 113 S. Ct. at 2746.

62. *Id.*

63. *See also* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that discriminatory intent is difficult to prove due to the unconscious assumption of whiteness); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (detailing how the legal system has promoted whiteness as a tangible property interest).

64. *See Hicks*, 756 F. Supp. at 1246 n.3 ("John Powell, Sharon Hefele, and J.R. Wilson are white.").

65. Hicks v. St. Mary's Honor Center, 970 F.2d 487, 489 (8th Cir. 1992).

66. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748 (1993) (quoting *Hicks*, 756 F. Supp. at 1252).

it is hard to imagine that privileging whiteness played no part in the workplace drama that resulted in Mr. Hicks' termination.

Margalynne Armstrong has recently described the role of economic disparity in maintaining residential segregation.[67] The workplace is one location where economic disparities could be changed; access to work directly affects economic power. But the systems of privilege that she describes in the housing sphere exist in the workplace as well. Thus far, these systems have been insulated not only from Title VII review but also from the vocabulary of our cultural consciousness.

The 1970s feminist slogan "The personal is political" remains true. This slogan recognized the poverty of the private/public dichotomy that separated spheres of work from our spheres of life. We need to remember that the personal is part of our work and that where and how we work is very personal. We can start by examining the privileges that we each have.

67. *See* Margalynne Armstrong, *Protecting Privilege: Race, Residence and Rodney King*, 12 J.L. & INEQUALITY 351, 351(1994) (arguing that the legal system insulates economic discrimination by placing it beyond the reach of civil rights law).