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REVISITING SEX: KEYNOTE ADDRESS

MONEY, SEX, AND POWER: GENDER DISCRIMINATION AND THE THWARTED LEGACY OF THE 1964 CIVIL RIGHTS ACT

PROFESSOR MICHAEL MCCANN†

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INTRODUCTION

It seems entirely fitting at this point in time to hold a conference to assess the legacy of Title VII of the 1964 Civil Rights Act, which was animated by an effort to extend antidiscrimination civil rights law to the private workplace, among other settings. The initial goal was to reduce racial discrimination—although the meaning of race discrimination was unclear and the stipulated private, litigation-based regulatory mechanisms expressed at best a modest commitment to change. The fact that "sex" was added as a secondary cause of action, ostensibly for mixed motives, made gender discrimination the "orphan" of civil rights law, and discrimination against LGBT persons was not publically acknowledged at all. Given all that, we might wonder why there was any legacy

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of change at all. But I come here not to praise the Civil Rights Act so much as to reflect on the reasons for its limited impact and to speculate about the future of civil rights law, policy, and politics.

At the outset, I want to recognize the challenge for me, a straight white guy, to talk about the legacy of legislation, litigation, and related struggles to combat race and sex discrimination. I ask myself, "why me?" and it's a fair question. I should also recognize at the outset that I am not an attorney. I don't have a J.D., and that puts me in a very distinct minority in this room. Moreover, I have the unenviable task of following all of the great speakers who have preceded me today and yesterday. This has left me with a strong sense that everything has been said, and I already mentioned in one of my questions to a previous panelist that I need to change the name of my talk to "Summing Up," because I'm not sure I have a whole lot that's new to say, although I think there will be a little bit of a change in focus. And, finally, I have to recognize that I appear as someone who hails from Seattle, the land of the Seahawk, and I find myself in a world of the Bronco . . . .

So let me state at the outset the standpoint from where I do speak and what I'm going to try to bring to this talk. I grew up in the American South during the 1960s. I went to schools that did not begin to desegregate until over a decade after *Brown v. Board of Education*.[1] I worked in the construction industry, while a teen, which lead me to involvement in labor activism in the building trades and later among farm workers in northern Florida, during the same years that the EEOC was aggressively working with citizen groups to file lawsuits under Title VII of the 1964 Civil Rights Act. People yesterday talked about being nearly as old as the Civil Rights Act; well, I'm a lot older than the statute. I eventually moved to California, partly to get out of the South, but mostly to study political science at UC Berkley, where I became a sociolegal scholar interested in issues of class, gender, and race, with a focus in particular on the history of labor in American society and the contrast between the different trajectories of nation states in the U.S. and Europe. My primary interest since then has been to understand how law shapes relationships of hierarchical power, contests over asymmetric power, and the possibilities for change in power relations affecting ordinary working people. I have tried to balance my interest in class, gender, and race as a legal scholar, as a political analyst, and as a labor activist, much of it from various groups I've been associated with, but since 1991 as an affiliate of the Harry Bridges Labor Center, at the University of Washington, which in many ways is my proudest professional affiliation. Those commitments were evident in the book that I wrote about gender-based pay equi-

1. 349 U.S. 294 (1955).

ty, entitled *Rights at Work*.[2] It has been a great opportunity preparing for this talk because I have not worked directly on gender-based pay equity for a long time, although my scholarship has continued to address discrimination, civil rights, and the various ways in which law provides opportunities and constraints for struggles over social equality.

I have chosen as the title of my talk: *Money, Sex, and Power*. I really like that title, but it is not original. It owes to a good friend of mine, Professor Emeritus Nancy Hartsock at the University of Washington.[3] She wrote a classic book on feminist theory in the 1980s, and I thought it fit what I wanted to talk about. My focus will emphasize the lost potential of the 1964 Civil Rights Act for improving the capacities of women and people of color to earn good incomes, find good jobs, exercise a voice in the workplace, enhance their roles as providers for themselves and their families, and take on roles as active citizens. My address will focus to some degree on wage equity, but it will transcend that to talk about other related issues as well.

I. SOME FRUSTRATING FACTS ABOUT CONTINUING GENDER INEQUALITY

I begin by recognizing some important facts. I start with a graph that I take from a study by Laura Beth Nielsen and Bob Nelson that has been mentioned before by other speakers.[4] What this shows is the amount of employment-based civil rights litigation over the last forty years. Whatever we might say about the legacy of the 1964 Civil Rights Act, there has not been a shortage of litigation. There were tens of thousands of cases that have been pursued each year, especially with a big spike in the 1980s. And I will come back to that in just a moment.

With this legacy of litigation in mind, I turn to some frustrating facts about the status of women's income and earnings.[5] We all know that the earnings of women in 2012 working full-time, year-round were about 76.5 cents to every dollar paid to male counterparts. The wage gap was even larger for women of color. Black women who were working full-time, year-round made only sixty-four cents to the white male stand-

2. MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

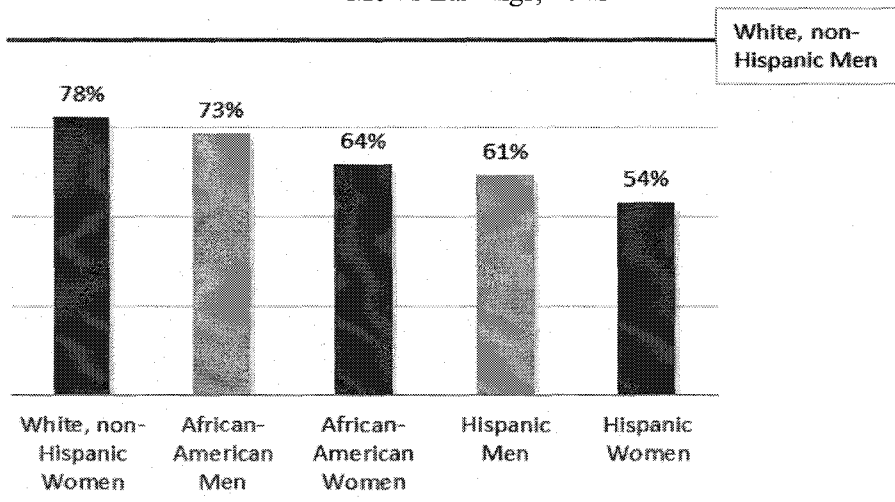
3. *See* NANCY C.M. HARTSOCK, MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM (1983).

4. A longitudinal bar graph was displayed in the talk, derived from a study by Laura Beth Nielsen and Robert Nelson. *See generally* LAURA BETH NIELSEN ET AL., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003, at 3 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf

5. The data referred to in the section on "frustrating facts" is primarily derived from the Bureau of Labor Statistics and is widely available. I relied on several web-based sources to obtain these findings. *See, e.g.*, *Women's Earnings and Income*, CATALYST (Mar. 24, 2014), http://www.catalyst.org/knowledge/womens-earnings-and-income.

point. Hispanic women made only fifty-four cents for every dollar paid to their white, non-Hispanic male counterparts. Median annual earnings for full-time, year-round women workers in 2012 were $37,791 compared to men's $49,398.

Figure A: Wage Gap as Compared to White, non-Hispanic Men's Earnings, 2012[6]



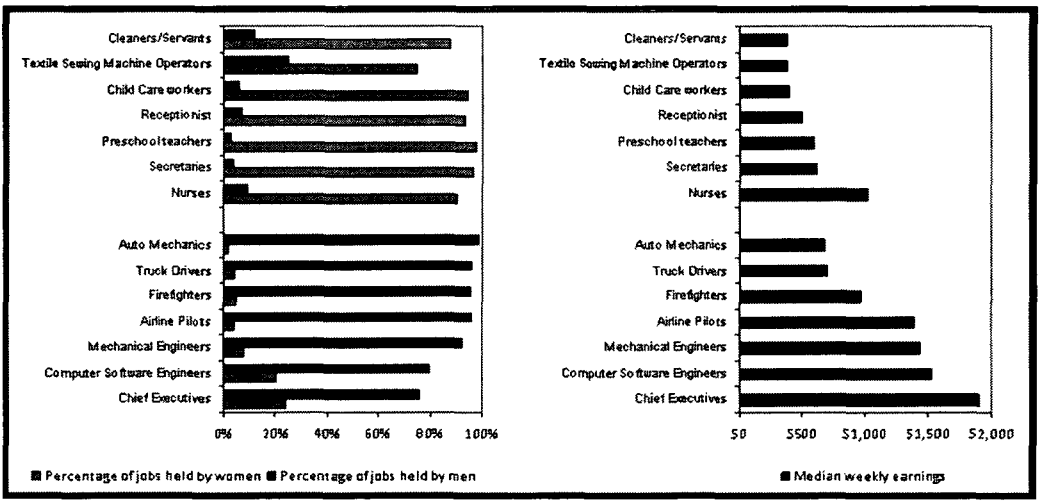
Now in some ways we can see this as a glass half full. When one compares these earnings ratios to the 1960s, when women made fifty-nine cents to every dollar that men made, the increase to nearly 77% is significant. But I want to suggest that the apparent gains in equity not only still fall far short, but they are less than simple aggregate ratios suggest. For one thing, the reasons for that decrease in the wage gap between men and women resulted partly from the advances of the roughly 15% of women who made it into the upper management positions where the pay is very good. If you take those increases out of the overall picture and look at the bottom two-thirds of women, then the data look a lot more discouraging and depressing. I think it is important to see that if we take out that upper crust, we see that women represent nearly two-thirds (61%) of minimum-wage workers. Nearly four in ten of these female minimum-wage workers are women of color. Women are, moreover, nearly two-thirds of workers in occupations that depend largely on tips; it is worth mentioning that the federal minimum cash-wage for tipped workers is $2.31 an hour. Moreover, data on full-time earners, as Nancy Reichman pointed out very appropriately, obscures the fact that a large percentage of women do not work full-time, but rather are relegated to part-time, temporary, contingent work, so that the earnings gap reflects

6. NAT'L WOMEN'S LAW CTR., FACT SHEET: THE WAGE GAP IS STAGNANT IN LAST DECADE tbl.2 (2012), *available at* http://www.nwlc.org/sites/default/files/pdfs/poverty_day_wage_gap_sheet.pdf.

not just unequal wages but the different number of hours that women tend to work.

Now there are many reasons that can be provided for why there is this gender-based wage gap, but labor economists tell us that certainly one of the primary reasons has to do with occupational segregation. Now that actually has not been talked about that much in this conference, so maybe everyone just took it for granted. The key point is that women historically have tended to be channeled into certain kinds of occupations. Those occupations tend to be paid less, even when the value of the work and the criteria for entering those jobs are comparable to men who are paid at much higher rates. The graph displayed (Figure B) is a little bit complicated, but on the left side you see different kinds of occupations; the red bars reflect level of female participation in those occupations, while the blue bars capture the levels of male participation in different jobs. This clearly captures the gender-intensive character of many occupations. On the right side you can see the earnings for the different occupations. You can see a direct correlation: the more red they are, the lower paid they are, the more blue they are, the higher paid they are. This is a classic comparison of occupational segregation and the ways in which wages tend to follow that split.

Figure B: Occupational Sex Segregation[7]



[7] *One of Twenty Facts About U.S. Inequality that Everyone Should Know: Occupational Sex Segregation*, STANFORD UNIV., http://www.stanford.edu/group/scspi/cgi-bin/fact6.php (last visited Aug. 1, 2014) (citing U.S. DEP'T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008: REPORT 1017 (2009), *available at* http://www.bls.gov/cps/cpswom2008.pdf).

Job segregation has surprisingly not changed that much since the 1960s. A recent study by labor economist Francine Blau, at Cornell, and her colleagues found that there was a significant change in the occupational segregation in the 1970s.[8] They found about a 6.1% decline in occupational segregation, and with that, women moving into higher paying jobs. But that rate of decline fell in the 1980s to 4.3%, and since then it's been nearly flat, with only 2% decline in occupational segregation in the 1990s; there has been virtually no change in occupational segregation in the 2000s. So that, in part, gives us a handle on the problem, as we can also see that moments of declining occupational segregation correlated directly with the declining wage gap. As the declining occupational segregation has slowed, so too has the decrease in the wage gap.

The larger picture is also complicated by the fact that the increase in wage equity has reflected in part the overall stagnation of wages since the 1970s. In particular, while women's wages went up some, part of the reason for the declining gap was that men's wages have been declining since the 1970s. So one of the problems with just focusing on wage equity is that equity is just about the comparison, either racial comparison or gender comparison. But if everyone in the bottom half or even two-thirds of wage earners is doing worse, then equity is actually a mixed cause for celebration at best. This has led to some interesting dynamics among married couples. The Pew Research Center looked at earnings data for married women and men in the United States aged thirty to forty-four in 2007. The study found that recent economic gains usually associated with marriage "have been greater for men than for women," and that is because women are making more money, and men are making less money.[9] So what used to be the benefit for women of marrying a man with a lot of money has actually been reversed, at least in a small kind of way.

Finally, the future does not look very encouraging. The projected job growth in the next decade is disproportionately in low-wage, female-dominated occupations. Of the thirty predicted high growth occupations in Bureau of Labor statistics, those occupations that are projected to grow the most tend to be female-intensive and low-paid. Disproportionately, 60% of the workers in the thirty jobs that are expected to grow most are female, and they are concentrated in low-wage occupations. Nearly two-thirds of the thirty high-growth jobs are female-dominated, within workforces that are 60% or more male. Almost half of those jobs that are projected for growth typically pay less than $13.50 an hour. Five of those job classes are very low-wage, typically paying less than $10 an

8. Francine D. Blau et al., *Trends in Occupational Segregation by Gender 1970–2009: Adjusting for the Impact of Changes in the Occupational Coding System* 4, 26–27 (Nat'l Bureau of Econ. Research, Working Paper No. 17993, 2012), *available at* http://www.nber.org/papers/w17993.

9. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 1 (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf.

hour. Among the thirteen lowest wage high-growth jobs, twice as many are female-dominated compared to male-dominated jobs. So not only do things look grim now, but they are not going in the direction we would like for the great majority of working women. Twenty-five years ago we might have thought things were getting better.

With low wages, also, it is important to realize there are fewer opportunities for upward mobility, for higher education skill development, and especially for voice and choice over the terms of work at the workplace. These are the jobs, low-paying jobs, that are often the most difficult to organize and to unionize, and they are the jobs that afford workers the least control over the terms of the work they perform. They are the most vulnerable jobs, not only in terms of income, but in almost all the ways we think about work as an important part of life. Add all that—low wages, low return, low opportunities—to the fact that female workers have to contend with costs in the U.S. that are greater than in many parts of the world, especially in the global north. The U.S. is far behind the world in paid family leave, guaranteed healthcare, daycare for children, and after-school programs. Single mothers are the most disadvantaged, but a great majority of women are still the primary caregivers in society and thus are negatively affected.

So that is just a quick trot through data suggesting the degree of continued injustice. And this prompts the question: Why, fifty years after the 1964 Civil Rights Act and after the Equal Pay Act, has there not been more change in the wages of women and decreases in occupational segregation and the other manifestations of gender and race-based discrimination in the workplace? As I mentioned, it's not for the lack of lawsuits. There have been tens of thousands of lawsuits filed alleging gender and racial-based discrimination in the workplace. So why has civil rights litigation made so little difference, and what can we expect in the future?

II. CRITICAL FEMINIST THEORY ON THE LIMITS OF RIGHTS-BASED STRATEGIES FOR CHANGE

One place to look for an answer is the abundant amount of scholarship on rights and rights-based litigation. Feminist theorists in particular offer many reasons why perhaps this rights-based, litigation-oriented strategy of challenging discrimination and producing social justice was very limited. I will just run through a couple of those arguments, although I am sure you are already familiar with many of the points.

One very basic argument, going back to Marx, is that rights at best are a "political lion's skin."[10] Rights tend to be useful for limiting arbitrary forms of harm, but are not very useful for challenging and transforming the structural hierarchies created by capitalist societies. Much of

10. KARL MARX, ON THE JEWISH QUESTION 13 (Helen Lederer trans., 1958) (1844).

feminist theory builds on that basic argument. Moreover, rights like those guaranteed by the 1964 Civil Rights Act enable victims of invidious wrongs to challenge injuries of discrimination, harmful exclusion, or marginalization, but such rights claiming arguably only compounds the problems. Scholars like Wendy Brown have argued that rights claiming ends up reinforcing and reifying the subordinate identity of the injured victim who needs the state's support and thus lacks the independence and social power of the fully entitled, rights-bearing individual.[11] Rights don't make people whole but rather institutionalize the stigmatized status of the claimant. This dynamic is supported by some empirical sociolegal studies of ordinary people in workplaces who have experienced discrimination. These studies show that women and people of color are very reluctant to even name the fact of discrimination or to claim rights, much less to call a lawyer and initiate a formal action.[12] This is very important. I have heard a couple times over the last day that existing law is pretty good at dealing with routine forms of overt, explicit discrimination. Well that may be true when cases get into the courtroom; the problem is that very little of the discrimination that actually occurs is ever challenged in the courtroom because people are very reluctant to demand their rights. Part of the reason is the stigma for rights-bearing individuals. Claiming rights is a way to mark oneself as less than fully independent and less than fully deserving of the rights that one claims: this is one of the great paradoxes of rights.

Moreover, as Wendy Brown further argues, even when rights grant momentary redress, inclusion, or even empowerment, they may "become at another time a regulatory discourse—a means of obstructing or coopting more radical political demands or simply the most hollow of empty promises."[13] It is not surprising that, historically, the conception of the rights-bearing subject has been based on demonstrating discipline and orderly conformity, and we have heard a lot at this conference about all the pressures that are increasing on people to go along with whatever their employers want in the workplace. That is going to be a theme that I come back to in a moment.

Other feminist theorists like Nancy Fraser offer a slightly different but related critique.[14] Her work has very clearly shown that struggles for equal rights often pursue along two different kinds of lines. One is a demand for respect, for *recognition*, to be recognized for one's difference in a way that is nonstigmatizing. This is what she calls "the politics of recognition." But another demand often goes along with claims of rights,

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11. Wendy Brown, *Rights and Identity in Late Modernity: Revisiting the "Jewish Question," in* IDENTITIES, POLITICS, AND RIGHTS 85, 87–89 (Austin Sarat & Thomas R. Kearns eds., 1995).

12. KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 1–4 (1988).

13. Brown, *supra* note 11, at 87.

14. Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 107–09 (2000).

which is demand for redistribution, in order to repair the injuries that are longstanding in society and which provide remedy for those harms; it is a demand for substantive material justice. But what Fraser argues is what often happens, and did happen in second-wave feminist politics in particular, is that the focus on recognition, on winning respect as a rights-bearing citizen, and not being treated in a differential way that stigmatizes, often trumps the focus on redistribution. The material claims for money or for a transformation in material relations often get lost in a claim of identity politics. It is easy to see that as a partial explanation for the lack of focus on economic justice for women. Lots of other critical arguments have been advanced about the limits and problems of rights. One is that rights inherently individualize claims in the workplace, so they divide workers in the workplace against each other. Workers have little in common, and rights encourage them to pursue their own claims for themselves in a way that diminishes the potential for solidarity and collective action. Fraser specifically links this dynamic to the splintering of the women's movement. The individualizing rights claiming impact has something to do with the loss of solidarity over time.

One of the interesting points Nancy Fraser made in one of her more recent books is a way in which feminism has become co-opted by, or merged comfortably with, neoliberalism. The propensity for claiming rights fits right in with the individualizing tendencies and even entrepreneurial ethic of neoliberalism. Moreover, the feminist attack on the old family-wage idea was not really matched with an alternative conception of living wages or minimum wages or minimum income to which people should be entitled. The state and state policies were attacked as being paternalistic, but with that went reliance on voluntarism and individualism again which prevented the kind of collective action that was necessary to challenge hierarchical organized power. Whereas in Europe and Canada women often aimed to infiltrate the state to influence state policy and state regulatory enforcement mechanisms dealing with questions of inequality at work, women in the United States and feminists in particular pursued rights-based strategies that were more individualistic and less transformative in the aggregate.

Partly for these reasons, I think there is some reason to believe that we are witnessing a cultural exhaustion with civil rights in America. We often think that the United States is a land where rights trump other kinds of claims,[15] but rights claims do not seem to carry the same kind of nor-

15. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974).

mative authority or faith that they once did. In fact, there is a palpable frustration with invoking civil rights types of claims.[16]

I offer one recent example supporting this claim. I am sure that many of you have read the recent Shriver Report, *A Women's Nation Pushes Back from the Brink*, sponsored by the Center for American Progress.[17] A lot of the economic data presented in that report matches the kind of frustrating facts that I just cited here and that has been talked about at this conference, and a lot of the report's policy prescriptions track those that have been talked about here as well. What I found really interesting about that pamphlet, though, is that there is virtually nothing about the Civil Rights Act, nothing about rights, nothing about law, and no lawyers anywhere in the text. You see a bunch of celebrities: Beyoncé, Eva Longoria, and even LeBron James! But there's nothing about the legacy of the Equal Pay Act, Civil Rights Act, litigation, lawyers, or framing these issues in terms of basic rights to deal with the problems of discrimination. I found that interesting and, perhaps, revealing about where we are politically.

Now I think there is much truth in all of kinds of claims about the limits of rights talk that I just listed briefly. But I want to suggest that this frustration and disenchantment with rights, and even with litigation, is a bit overblown. There should be no doubt that rights are a limited discourse, and they are linked to a history of constructing subjects in ways that individualize aspirations and actions. But that is not the only way to think about rights and how they work in social practice. Likewise, litigation by itself is a very limited kind of reform strategy, but litigation can also often be a part of broader-based movements and, when joined to other tactics, can be a very effective tactic. I understand critiques of rights—I gave a presidential talk for the Law and Society Association, where I made the case for the limitations and problems of rights as a resource for social change. I also used to be a part of a group of theoretically inclined empirical sociolegal scholars with the informal name the "Rights Suck" group. All that said, my primary point here is we shouldn't give up on rights, and we shouldn't give up on litigation, but we need to rethink why civil rights law has not been more consequential.

III. A DIFFERENT EXPLANATION: POWER AND POLITICS OF LAW

I want to offer a simpler explanation for what I think happened, for why I think the civil rights legacy was not more transformative than it was. My account is going to be a much more political story. It is a story

16. *See* George I. Lovell, *The Myth of the Myth of Rights*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 59, SPECIAL ISSUE: THE LEGACY OF STUART SCHEINGOLD 1, 8 (Austin Sarat ed., 2012).

17. MARIA SHRIVER, A WOMAN'S NATION PUSHES BACK FROM THE BRINK, SHRIVER REP. (Jan. 12, 2014), http://shriverreport.org/special-report/a-womans-nation-pushes-back-from-the-brink/.

about the politics that Title VII facilitated and which flourished for a particular moment, but then which was killed off by powerful opponents and forces. In some ways what I want to do is try and present a short story recovering the memory of what was killed off, not to urge repeating that history, but to learn from it and think about how we can reproduce it in new forms today.

First of all, we must recognize that it is arguably not rights or litigation per se, but the limitations of the Civil Rights Act in particular, that have been part of the problem. The Civil Rights Act was built to achieve at best modest change; it was designed to be a very limited resource for social transformation. The Act was vague about the terms of what counts as discrimination, as I mentioned at the outset. If we go back to the record of debates, we see that discourses about discrimination are all over the place and often no place at the same time. Moreover, the Act relied on private litigation as a mechanism of enforcement and deterrence, which puts the burden on victims to become plaintiffs and develop a legal claim.[18] The EEOC, the regulatory body authorized to enforce the Act, was given few resources, very little state capacity; it originally could not sue, it had a very small staff, and so forth. This was a new kind of social regulatory experiment and one that we know was designed not to disrupt the status quo a great deal. It also became a model for later forms of social regulation like the Environmental Policy Act. Finally, the inclusion of sex discrimination was an afterthought. There are many stories of how that happened. But by all accounts, in the early years, both in terms of the Act itself and the EEOC, the issue of sex discrimination was taken at best to be a marginal concern. The Act was primarily focused on racial discrimination. So it is not surprising that an Act that was designed not to have much impact did not lead to radical change. Again—to come back to my opening words—it is surprising that it's much of a legacy to talk about at all.

The second thing that I want to say is that a lot of critiques of rights only focus on the most limited, narrow, negative versions of rights grounded in the proprietarian, contract-based tradition of liberalism. But other conceptions of rights have more positive, transformative possibilities, and those rights have actually been recognized in our liberal tradition, and in fact were connected to some of the activism after the Act was passed. Everyone knows—it has been talked about at this conference—about the two basic standards for demonstrating discrimination in the 1964 Civil Rights Act. One is the disparate treatment standard; the other is disparate impact. Several people said that I would be talking about impact theory, and that is what I'm going to do now.

18. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 85, 94–95 (2010).

Disparate treatment depends on, for the most part, a showing of willful, intentional, or at least foreseeable indifference to harm against victims. It can be shown by "pattern or practice," but it generally goes to the logic of causation and demonstrated intent. Intentional discrimination is at the core of the disparate treatment test. It best fits cases where employers, or those working under employers, engage in a certain kind of hostile action that causes harm, usually to discrete, targeted individuals. So it is grounded in a very individualized model of harm and of redress. It tends to be very personalized and expressive of individual animus. The important implication of that model is that it presumes that discrimination—whether it's sexual discrimination, gender discrimination, or race discrimination—is anomalous in an otherwise just, market-based society. It at least implicitly enforces the view that markets for the most part work to ensure fairness, and we need a mechanism to deal with those anomalous moments when some sort of racial or gender animus is displayed. There's an overall kind of ideological trap that I want to suggest that goes hand-in-hand with that logic of discrimination. Again, I want to emphasize that such logic of individualized action, of individualized modes of discrimination and redress, are ones that are available still, and courts are often pretty good on those types of simpler issues we might say. However, again, we know from studies of individuals that women and people of color are very reluctant to make claims in the workplace out of fear of retaliation; even if you win a claim and get momentary change, it's going to cost you in the long run. Especially in increasingly difficult work conditions, where jobs are scarce and wages are low, the assumption of risk that claiming and naming rights against intentional discrimination in the workplace imposes is not something that many people seize upon very quickly.

But I want to talk mostly about the other logic under the Civil Rights Act, that of disparate impact, and to some degree the logic of "pattern or practice," which I've always thought bridges the disparate treatment and disparate impact, so I will include that under the broader logic of impact here. I want to suggest that disparate impact is not just a different standard of demonstrating discrimination; it's a whole different theory of discrimination. It is, moreover, linked at least potentially to wholly different repertoires of action demanding change. This conception of discrimination and response to discrimination was grounded in a legacy of going back to early in the century, well before the Civil Rights Act. It was embraced by many of the initial activists in the EEOC during the late 1960s and was embraced by many groups that seized upon the 1964 Civil Rights Act and tried to make it work. Many people identify disparate impact with the *Griggs*[19] decision, and I think that is right, but I want to move beyond the narrow legalist understanding of this precedent

19. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

to talk about what activists did in expanding the logic of harm and remedy much further than what courts actually fully recognize. Creative progressive activists could always point to court decisions to justify this way of thinking about action, but, nevertheless, it would be wrong to say that this expansive vision was settled law at any particular moment. We might say that the EEOC and *Griggs* opened a door, but the room of possible workplace political actions beyond the door was very large.

I want to suggest that there are seven features that distinguish disparate impact, as imagined by worker activists in and beyond the pay equity movement, which is where I engaged in a lot of scholarly and activist work in the 1980s.[20] These key features were common in both gender- and race-based disparate impact claims from the late 1960s until the late 1980s.[21]

A. Discrimination Is Structural

The first and most important feature that distinguishes disparate impact from disparate treatment theory is in understanding discrimination not as anomalous and unusual in a market society, but rather that discrimination—race-based, gender-based, and sexuality-based discrimination—permeates institutionalized processes and practices. Race and sex and sexuality discrimination is structurally embedded; it is all over the place. That is the norm. The norm is not fairness and equal treatment; racial, gender, and sexual hierarchy is the norm. Discrimination is not a matter of individual, personal animus necessarily, but it permeates a host of norms, practices, and relationships, both within the employment sphere and beyond in broader social relations that channel women and people of color into some jobs rather than others. Those structural forces impede mobility up ladders and across to other job ladders, to occupations that are grounded in assessments that undervalue female and racial minority workers' worth in those jobs and what women and people of color want and deserve from work. These discriminatory norms are reproduced often unconsciously by practices, expectations, and assumptions that are reproduced over time. And they are rationalized by a host of ideological constructs that are largely on their face blind to gender and to race—ideological rationales about markets, merit, supply-and-demand, and efficiency. So that is the basic premise of disparate impact claims.

20. *See generally* MCCANN, *supra* note 2.

21. This discussion of disparate impact doctrine, its key features, and its demise is outlined in greater detail in an unpublished paper on file with the author. Michael McCann et al., Executing "Good" Civil Rights Law: A Political History of *Wards Cove v. Atonio* 1–2 (unpublished manuscript) (on file with author).

B. Dispensing with Demonstrations of Intent

The structural impact is important because in many ways it dispenses with the formality of having to prove intentional discrimination. First of all, intent is not the basis of disparate impact claims. The challenge is not trying to prove that there are some bad people who mean to harm other people. The focus instead is on institutionalized practices and protocols that reproduce hierarchy. Good people often reproduce gender and race discrimination. The focus is on identifying oppression, not oppressors.

C. Enhanced Empirical Evidence

Moreover, proving intent is very difficult. That is the other really important point here. The case for disparate impact is often empirically much stronger than that for disparate treatment. It is often harder to prove intentional discrimination, which focuses on a person's cognitive processes. But it is often somewhat easier to prove disparate impact, largely because lots of large organizations have elaborate job charts that enable comparing wages to what people in different occupations make and show that ladders from one job to another job do not connect to other jobs. There are many types of institutional data that show the ways in which work organization is unequally structured and the ways in which wages of women in particular and people of color are systematically produced by that job segregation. Plaintiffs can put those data together with testimony of workers in depositions and on the stand at trial, thus providing quite a compelling account about the reasons why there are disparities in wages and limited opportunities for mobility within and among organizations.

D. Loosening Standards of Direct Causality

To empirically demonstrate patterns of discrimination is not only easier, but it is often grounded in a logic that loosens the positivist causal connection that is often demanded in law. If discrimination is a product of a whole variety of interrelated practices and norms and relationships, trying to find a single specific practice that accounts for the unequal outcome is rather futile. The disparate impact logic invites a much more holistic, complex, institutional way of understanding things. And in one of the cases in which I was a part of in the 1980s, that was exactly the way in which the cases were presented—days and days of testimony of women's experience, along with charts of all the ladders among jobs that can be put that next to the wages, enabling plaintiffs to paint a much more complicated but compelling, convincing story. And it is very important that it was empirically easier to demonstrate, but it does not require that causal connection to a specific business practice. Some federal court decisions in the 1970s supported this inclination to loosen that causal link between specific practices and discriminatory impact.

E. Structural Solutions for Structural Problems

If the problem is defined in structural terms, then, the solution has to be structural. If the problem is comprehensive and built into all of these interrelated practices, norms, and relationships, the solution has to be multidimensional and comprehensive, and it probably will take a long time to implement. In discussions about pay equity and comparable worth, those terms are often used together, but I think it's very important to distinguish them. Comparable worth is a technocratic fix. Most of the campaigns for pay equity that I learned about did not seek a technocratic fix, which the experts and consultants often wanted. As advocates used to say, it will take at least fifty years to undo what took hundreds of years to happen. And the solution is going to require lots of different reforms proceeding concurrently. Activists in most cases did not look for or expect or even want a one-time fix.

F. Facilitating Collective Worker Action

Meaningful structural reform not only adopts the victim's perspective,[22] as we often say, but the victims themselves have to be part of naming the problem and shaping the reforms themselves. One of the things that's distinctive about the pay-equity movement, and a lot of other race-based movements about which I am researching now, is that it was critical not only to organize workers at the level of filing claims and then at the discovery process and then at building the case in court, but it was especially important in building worker participation into the implementation of negotiated remedies. Remedies meant that workers had to have more of a role in forming committees that would engage in long-term monitoring processes and deal with all the connected issues of wage equity, hiring, job promotion, building new ladders among jobs, and so forth.

G. Expanding the Rights Agenda

And then, finally, once women and workers generally organize to deal with those issues, they often begin to recognize other rights-based issues that they share in common: the need for family leave, the lack of health benefits, the lack of good retirement benefits, the lack of daycare. A key part of the story I tried to tell about pay equity in *Rights at Work* is that, once women organize, they not only become less reluctant to begin to claim rights, but they began to think about a lot of other issues in terms of rights that badly needed to be addressed. That was a central point I was trying to make in the book—I interviewed hundreds of women around the country who were involved in these campaigns, and I doc-

22. The "victim's perspective" is a concept developed in Alan Freeman's classic essay. Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 285, 287–88 (David Kairys ed., 1998).

umented what often is called a developing "rights consciousness." A lot of women said: "I never really thought about rights, I never took them that seriously. I never considered myself a feminist; that is what white, college-educated women do. I never considered myself a union activist. But now I do, I consider myself a feminist union activist demanding rights, after going through the struggle for fair pay." The political process of claiming rights and shaping remedies changed the way they looked at their work lives, and how they viewed themselves; it reconstructed their subjectivities.

IV. THE EXECUTION OF GOOD CIVIL RIGHTS LAW

So we saw this explosion of workplace activity around institutional racism and sexism around the country, starting in the late 1960s with black construction workers and taking off more broadly in the 1970s. When I was researching about pay-equity politics, I documented at least 100 campaigns at workplaces at local and/or state levels around the country. Now much of this was below the radar of social scientists and of law professors, because in most of these cases, lawsuits were filed and they often settled. And that was the point—not to have to go to trial, or at least to a judgment, but to get the trial, leverage for settlement or collective bargaining success, and then let the organized women workers take over. And then continue to say we will go back and refile the lawsuit or pursue a new lawsuit if necessary. So all this politics did not make a big impact on case law, but it did depend on a perception that the courts were open to these types of claims. So now we must ask: what happened? The story I will relate now is fairly simple and tragic: if the advances that were made during this time were due to a politics of rights at the local level, it was also politics that undid all of this. It was macro-politics at the national level.

The key case that I would pinpoint as a turning point in ending the collectivist politics challenging institutional sexism and racism was *Wards Cove Packing Co. v. Atonio*[23] in 1989.[24] I ended my 1994 book, *Rights at Work*, long ago by recognizing the impact of that case, and I am writing a book about the actual *Wards Cove* case now, twenty-five years later after I did that original work. Our[25] focus is on the social history of *Wards Cove*. *Wards Cove* developed from a lawsuit that was filed by Filipino activists who worked in the Alaskan salmon canneries, where work conditions were structured on a modified race-based plantation model that had been around for hundreds of years. This plantation model was adapted from southern slavery and reproduced around the Pacific Rim canneries in Hawaii and Alaska, as well as in the agricultural sectors

23. 490 U.S. 642 (1989).

24. *See* McCann et al., *supra* note 21, at 1.

25. The developing book and related articles are co-authored with my colleague, George Lovell, also at the University of Washington. The book will be titled *A Union by Law*.

of seasonal work in California, Oregon, and Washington. The Filipino American plaintiffs challenged the fact that the entire workforce was segregated—that Filipino workers and Native Americans were the only ones who worked in the factory line doing all the cleaning and cutting up of the fish in very dangerous and unhealthy conditions. Whereas all of the lower level jobs were held by Asian American and Native American workers, jobs in the middle to higher levels were all held almost exclusively by white workers. Workers lived in different quarters, ate different food, assumed very different risks, lived in different worlds. This was a quasi-slave-based kind of system. And the plaintiffs challenged that system as invidiously discriminatory.

The *Wards Cove* case was one of three cases that the Filipino cannery workers filed. The first two won at the trial level and then settled. These cases advanced very important efforts by the plaintiffs to not only change workplace conditions, but also to take over a union from corrupt, unresponsive leaders who slipped into control during the McCarthy Era, and who had brought in gambling rings and prostitution rings that were basically exploiting the workers when they would go up to Alaska. The strategy of organizing rank-and-file workers around the lawsuits worked. As a result of filing these lawsuits, the dissident workers formed the Alaska Cannery Workers Association, kicked out the old leaders, and enabled a group of young, radical Filipinos and a multiracial group of allies to take over the union.

A third prong of what the strategy, believe it or not, was to bring down Ferdinand Marcos, the autocratic Philippine leader. The plaintiffs were young democratic socialists and part of a broad alliance in the Puget Sound area fighting against American imperial activities around the world, including the support for Marcos. Their ambitious venture incurred great risks for the activists. Two of the leaders who planned the three cases, Gene Viernes and Silme Domingo, were murdered in 1981 by Filipino gang thugs in Seattle. A later civil trial for wrongful death showed that the thugs worked for the corrupt union boss—his gun was the murder weapon—and that the money came from Ferdinand Marcos, most likely with some CIA knowledge. That is a very interesting side story—please read the book when it comes out.

Nevertheless, the minority plaintiffs of color, which included some females, challenged the conditions at work in ways similar to legions of black construction workers before them and women demanding pay equity after them. But what happened was that the *Wards Cove* claim, the third lawsuit, unexpectedly ended up before the U.S. Supreme Court and marked a turning point in the history of disparate impact doctrine and the collectivist workplace politics that it facilitated.[26] It was a turning point

26. *See Wards Cove*, 490 U.S. at 656–60.

for a lot of things we've talked about today. Case law was all over the place in the 1970s and '80s in interpreting disparate impact. Nevertheless, demonstrations of statistical disparities and remedies that were proportional to the violation were upheld in some cases.

What the majority said in *Wards Cove* was stunning. The first thing they did was erase basic precedents. It was mentioned the other day that some of the precedents from the 1970s still exist. What was interesting about the majority decision is that it did not recognize that they were ignoring or overturning any precedents. The majority just disregarded them in defining new standards. In fact, that is what the dissenting minority Justices, Stevens and Blackmun, said: Justice Stevens, writing for four justices, referred to the "majority's facile treatment of settled law"[27] and stated that their "casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs* is most disturbing."[28] Stevens added that the majority was "[t]urning a blind eye to the meaning and purpose of Title VII" and lamented the conservative majority's "latest sojourn into judicial activism."[29]

Specifically, one thing that the majority did was to change the burden of proof. The majority ruling put the burden of persuasion on the plaintiffs from start to end, which was a change in law. Moreover, the majority demanded a clear showing of a direct causal link between specific business practices and the alleged discriminatory impact. As such, they required a disaggregation of interrelated, historically developed institutional relations into discrete elements of the labor supply line in ways that implicitly gutted the structural logic of disparate impact claims. The majority also expanded the "business necessity" defense to the point where, as Justice White implies at one point, the prerogatives of employers almost always will and should prevail. And the majority expanded the market defense in the process, so that, as one female pay equity activist whom I interviewed long ago put it, "discrimination is all right if everyone else does it."

Another key point was the allegation that the workers did not show sufficient interest in the better jobs because they could not demonstrate that any one worker engaged in protracted efforts to move out of the line jobs into the management jobs. This is in an industry where for eighty years, only Asian-Americans and Native Americans worked on the floor processing fish, and only whites were hired in the other jobs! The plaintiffs were blamed because they did not try hard enough to break that historically rigid barrier. The Court held that each aggrieved worker would have to bring an individual lawsuit, and each lawsuit would have to show that the plaintiff made a strong effort to break into those jobs. The prob-

27. *Id.* at 664 (Stevens, J., dissenting).
28. *Id.* at 671–72.
29. *Id.* at 663.

lem is that the workers needed to be more entrepreneurial, as neoliberals put it. We've heard this about workers, right? This is the new model that Nancy Reichman was talking about. That is what the majority of Justices reasoned in *Wards Cove*. It is an interesting claim for lots of reasons, not least that one of the "unskilled" plaintiffs went on to become an architect and another a graduate student in public administration. In dismissing the plaintiffs' claims, Justice White made clear whose interests should be the base line: "Courts are generally less competent than employers to restructure business practices; consequently, the judiciary should proceed with care before mandating that an employer must adopt a[n] alternative . . . hiring practice in response to a Title VII suit."[30] The dissenters again questioned these claims by the majority about legal justification for judicial deference to employer prerogatives.

In short, this case erased both precedents and critical social facts.[31] And in the pay-equity movement in 1989, everybody saw this ruling as the death of pay-equity claims. If these were the new standards articulated by the highest court in the land, then the possibilities for those elements of disparate impact that were critical to the structural challenge to discrimination in the workplace were now erased history. Many of the activists in the pay-equity movement joined the *Wards Cove* plaintiffs and other activists to push for the 1991 Civil Rights Act. As many of you know, that Act did make some changes that were favorable to certain elements of disparate treatment cases, but the Act did little to restore those elements that were favorable to disparate impact. We know the outcome of this. If you look historically at legal activity after 1991—here I'm using the Nielsen and Nelson data—there was a dramatic increase from 1987 to 2003 in the amount of employment litigation under the Civil Rights Act. But what they show is that almost all of the legal action was individualized disparate treatment cases. To refer to their data, only 6% of the cases included between two and ten plaintiffs. Only .05% of cases had more than ten plaintiffs, which is a minimum for any meaningful class action. "Collective legal mobilization is rare," they conclude.[32] That's a dramatic change from the 1970s, when studies show that far more civil rights cases were class action cases.

So how did this dramatic change occur? I think this was a pivotal moment when the Court begins to take apart structural challenges in a number of rulings. And we've seen other cases that have been talked about over the last two days where this has continued on in various other

30. *Id.* at 661 (majority opinion) (citation omitted) (internal quotation marks omitted).

31. Justice Blackmun's dissent speaks to the erasure of social facts: "One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was." *Id.* at 662 (Blackmun, J., dissenting).

32. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 189 (2010).

elements: undercutting capacity for class action, for challenging vicarious liability, the *Ricci*[33] and *Walmart*[34] cases—all of which were outcomes of rulings making structural challenges and collectivist kinds of remedies difficult if not impossible.

I should mention—and this is the part of the book that we're writing—that this was certainly not a matter of just the courts acting alone; this shift was part of a concerted coalitional strategy. Big business began to organize in the early 1970s with the Business Roundtable, and the Chamber of Commerce began to make a concerted effort to take away these efforts of workers to regain voice and position and to challenge systematic discrimination and empower unions in the workplace. They developed sophisticated strategies to achieve those ends, and that included working through the Reagan Administration. We see in the beginnings of the Reagan Administration that one of the key tools was the claim about racial and gender "quotas." Disparate impact claims, it was claimed, were all about installing quotas. This is interesting because the briefs in the *Wards Cove* case that mentioned quotas were from the Chamber of Commerce, from the U.S. government, and other business interests. However, the plaintiffs in the case never asked for quotas as remedies. We went back through the whole history of the case, and they never mention quotas once. Then the Supreme Court comes along and says that the case was about quotas, even while the majority never talks about actual conditions in the workplace. Instead they wrote along the lines of "Let's imagine that if we granted plaintiffs what they requested in this case, what would employers do? They'd have to create quotas. We have said quotas are not appropriate responses to the problem of discrimination, so therefore the employers would become discriminators if they used quotas." This is curious logic not only because it is ungrounded in the case history and purely hypothetical, but also because many scholarly studies have shown that employers almost never create quotas in response to these kinds of problems.[35] It's all fantasy.

And that is, I think, the situation we find ourselves in today. All of what we've seen is that we're dealing with a context in which big business has been very, very effective in preventing collective action by workers, both through unions and through class action litigation. I coauthored a book called *Distorting the Law*,[36] which is about the attempt of big business to undercut tort litigation, and to create the stigma of the individual tort litigant as being frivolous, filing frivolous lawsuits and being selfish and greedy, and the tort lawyer as just a greedy, self-

33. Ricci v. DeStefano, 557 U.S. 557 (2009).

34. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

35. Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOC. Q. 13, 29–36 (2001).

36. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

interested thug. The same thing has gone on in workplace discrimination cases. There's been massive public campaign to stigmatize those who would speak up about discrimination and injustice in the workplace. And that is one key part of what we usually talk about with regard to the neoliberal era. Neoliberalism is the reassertion of the priority of markets, of property ownership, contracts, and competition over the premises of equality.

This development requires us to reconsider the basic promises of legal equality and rights in a liberal society. On one hand, we have a tradition of property-based, market-based, contractarian rights about ownership and about the power and prerogative of private business owners. But we also have rights to equality, to equality as citizens to participate together in collective governance. In the simplest or broadest terms, those equality rights have always been the key normative resource for subaltern groups—people of color, women, immigrants, low-income workers, the poor—to challenge the persistent material reality of social inequality. But what has happened now is that the language of equality has been eviscerated so that the whole political realm is permeated by practices and premises that are grounded in contractarian, proprietarian, market-based logics. The worker is now imagined as the entrepreneur in competition with everyone else for scarce, low-paying jobs, individualizing struggle in ways that only make it more difficult for collective challenge to hierarchical power. Key legal resources that enabled such collective challenges have been erased, or at least eroded, in civil rights law. And in the process, the older structural logics of discrimination have been forgotten. As Robert Cover once argued, the legal system systematically "forgets" a lot of visions of rights and justice, because only the winners of lawsuits continue on as part of the story, and those who either settle or maybe lose are just forgotten in history.[37] And that is what happened in these struggles to a large extent. So again, my interest as a sociolegal scholar is to recover that part of history.

CONCLUSION

To sum up, I want to say that the problem is not the intrinsic limitations of rights. It's not necessarily the limitations of litigation. The problem is in the killing of those legal resources of specific rights constructions and litigation opportunities that once supported collective workplace politics, what Robert Cover called "jurisgenetic" politics of visionary social justice from below.[38]

I put up on the screen before my talk a picture of Tyree Scott. Scott was an African-American who fought as a marine in Vietnam, came back

37. *See* Robert M. Cover, *The Supreme Court, 1982 Term–Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47–49 (1983).

38. *See id.* at 11.

home, but could not find work as an electrician with his father because they were squeezed out of the building trades in Seattle, which were controlled by all-white unions. Tyree formed his own all-black union. He set up a public interest law firm of nonlawyers, called LELO (Labor and Employment Law Office). The LELO leaders were the architects of the *Wards Cove* case. The picture I put up before was a letter from LELO worker activists that expressed some disagreement with their lawyer over continuing to litigate under the 1991 Civil Rights Act. Their whole argument was that law is not neutral and apolitical. Law is simply a site of the contestation between the haves and the have-nots. We have to view law in that way, Tyree always stressed, as in denying it we will miss what is really going on. His aim was not to dismiss law and rights as meaningless, but rather to raise the bar for figuring out how to make rights real.

And that is how I think about that moment of political activism around workplace discrimination in the 1970s and 1980s. Again, it was not just around gender-based wage pay equity; a lot of activism was around race, by blacks and Asian-Americans and Latinos. The trio of cases that included *Wards Cove* was part of a broad, diffuse, largely uncoordinated movement involving legal cases by minority and female workers—all expressing similar political aspirations for equality and justice, from the bottom up, each mobilizing around lawsuits and Title VII claims just like we see in pay equity cases.

So where does leave us now? One strategy might be to imagine how can we reclaim the 1964 or 1991 Civil Rights Acts or write a new Civil Rights Act. The plaintiffs in the *Wards Cove* case, immediately after what they thought was a failure of the 1991 Civil Rights Act, formed a national campaign and went around trying to build support for what they called the Third Reconstruction of Civil Rights. Their goal was a new Civil Rights Act that restored disparate impact and related challenges to institutionalized inequality. However, they gave up after a number of years, as even during the Clinton years there was no support for the cause. They could not find a sympathetic public, the labor unions gave up, women's groups focused on other issues, and there was no one in federal government paying attention. I do not want to rule out the vision of restoring a new civil rights act, but I am skeptical.

I think, at the very least, what we need to do instead is to draw on the power and importance of the structural challenges—structural logics of inequality—in a host of new, more disaggregated ways. I tend to think that antidiscrimination, despite the ongoing radical success of LGBT advocates, is exhausted as a framework for challenging systemic economic inequality that most affects people of color and women. I am not urging abandoning intent-based civil rights advocacy, but we need to move beyond it. If we want to take the next step forward, we need to focus directly on the bottom two-thirds of society, which is radically

underpaid, exploited, and insecure. We need to think about a menu of different but interrelated ways that we can bring empowerment through wages and work opportunities to them. Then we can continue to deal with the other manifestations of race, gender, and sexual discrimination. If we really want to deal with the economic issues, with money, sex, and power, we need to think and talk about it differently. Change can happen, but it is going to have to come from below.

This means that we need to build stronger bonds among progressive groups committed to social justice. At the policy level, I suggest several priorities. First, we need to raise dramatically minimum wage standards, both at local levels and at the national level. The struggle to raise the state minimum wage in Washington to $15, which has already succeeded in some local levels, is a place to begin. I also propose that we go back to the Fair Labor Standards Act and begin to think about various ways to build on that. Maybe go back to the old protective legislation model, which paved the way for a variety of the 1930s reforms that were not gender-specific, and think about what we might do about issues with hours, what we need to do with family-leave policies, and the like. I will be honest that I don't have the answers, except that I think we need to look for new angles to deal with the big problems.

In short, we need a comprehensive set of reforms. The 1964 Civil Rights Act did not offer that, but many people took inspiration from the Act to think broadly, and we should take inspiration from that past. But even if we shift focus away from the logic of antidiscrimination, we should not give up on rights. Rights are very important resources. Our legacy of liberal rights authorizes claims of equal citizenship, and jobs, work activity, and work income are very important preconditions for becoming a respected, active citizen in public life. We find ourselves in a period where those claims of equality have been significantly diminished and overpowered by the claims of markets and property ownership and private prerogative. But, I think that is where we have to resume the struggles—back on the core terrain of making equal rights mean something again. Let us not abandon that part of the fight.

One last, closely related point: I think that we must make the important move to begin to appeal much more to positive socioeconomic rights embedded in international human rights traditions. The United States is woefully behind the world in taking human rights seriously. When I look around and say, "what discursive resources can be a lever for change?" I repeatedly come back to the human rights principles of positive socioeconomic rights. This tradition animated A. Philip Randolph and Martin Luther King, a host of feminist activists including today Martha Nussbaum, and the Filipino cannery worker activists who were defeated by the neoliberal logic of the U.S. Supreme Court. Making human rights discourse a reality is not going to happen tomorrow in the United States; it is not going to happen even in my lifetime. But I do

believe it is among the most promising routes for progressive, egalitarian, democratic change. Social rights fits well with claims of higher living wage, gender- and race-based wage equity, accessible health care for all, family leave, and a host of other causes that we have discussed at this conference. Framing claims as human rights will not guarantee a better world, but it is one of the most promising normative strategies for making equal rights a real, meaningful agenda for social transformation.

CHAPTER INTRODUCTION: BIAS IN LITIGATION AND AMONG THE JUDICIARY

DIANE S. KING†

Whereas our justice system has long acknowledged our faith in juries as a bedrock of our judicial system, due to the value of the combined wisdom of people with different backgrounds and beliefs, this concept is not applied when it comes to judges. Why not? Why do we assume that judges do not, or should not, bring their experiences to bear on their interpretation of a set of circumstances?

The "Bias in Litigation and Among the Judiciary" panel was composed of Judge Christine Arguello of the United States District Court for the District of Colorado, Pat Chew, Salmon Chaired Professor and Distinguished Faculty Scholar, University of Pittsburgh School of Law, and Jason Bent, Assistant Professor of Law, Stetson University College of Law.

When then-nominee for the United States Supreme Court Judge Sonia Sotomayor remarked about the "wise Latina judge," this remark ignited considerable controversy. Some claimed that the nominee could not possibly be objective or fair, while others claimed that she was just stating the obvious. Though coming at the issue from very different directions, the articles by Professors Chew and Bent examine the underlying assumptions our system of justice makes as to the role played by the backgrounds of judges.

Professor Chew's essay, entitled *Anticipating the Wise Latina Judge*,[1] explores how alternative race and gender perspectives bring insight into cases where those perspectives are relevant. By its very title, Professor Chew captures the nub of the problem. There are those who argue that any sort of diversity, be it sex, race, or otherwise, predisposes a judge towards inappropriate bias. Professor Chew explores whether fears of bias are justified.

Professor Chew compares and contrasts the application of both the formalist model of decision making and the realist model of decision making. Under the formalist model, the judicial analytical process is supposed to be systematic and uniformly executed. Under the realist model, there is an acknowledgement that judges cannot help but bring their backgrounds and experiences to the bench.

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1. 91 DENV. U. L. REV. 853 (2014).

As a practical matter, there are differences based upon gender and race. Professor Chew cites to empirical research exploring how the race and gender of judges impacts their judicial decision making when race and gender are salient parts of the case. For example, the likelihood of a plaintiff's success in a sex discrimination case increases by 10% when the judge is a woman.

Professor Chew explores whether the fears regarding a "wise Latina" make sense. Her point is that there is irony in the fear of the Latina judge—why fear the Latina judge and not any other judge? Why not fear the white male judge who is far less likely to have actually experienced illegal discrimination? There is no empirical evidence that judges of a particular gender or race are more likely than any other gender or race to ignore legal principles and instead substitute their own political or personal preferences.

Professor Chew applies salience theory to explain differences in perception. Salience theory is the explanation for why, when individuals are bombarded with information, certain bits of that information stand out more than other bits of the information. This theory offers explanations as to why judges may have different perspectives when faced with the same information. Professor Chew concludes that since "individuals can be trained to find salient stimuli that would otherwise not be noticed," judges should use a "deep" analysis of the factual circumstances and the applicable legal principles in order to gain awareness of their potential bias. This "deep" analysis involves a collaborative and introspective process where the decision maker examines the perspective of, for example, a minority judge's world view in order to understand the judge's alternative assumptions and saliencies.

Judge Christine Arguello, who spoke on the panel, is herself a wise Latina, having had a hardscrabble childhood and having been a partner in several major law firms, a law professor, Managing Senior Associate University Counsel, and Colorado's Deputy Attorney General prior to joining the bench. Her talk reinforced the points that Professor Chew makes. Judge Arguello emphasized that no judge is a blank slate. She questioned why, given that fact, being a woman and Hispanic would be perceived as a "problem" instead of an asset. Judge Arguello gave examples where her background influenced her decision making, but for the better. Those examples emphasized that in certain circumstances, she had an enhanced understanding and increased sensitivity that lead her to make more informed decisions. In addition, her background and sensitivity influences her vocabulary; whereas Justice Alito uses the label "illegal alien," to refer to individuals in the country illegally, Judge Arguello prefers the label "non-citizen." Last, her background has led her to treat pro se litigants with patience and respect. Judge Arguello's overarching theme was that bringing a diverse perspective to the bench is an asset, not a detriment.

Professor Bent, in his paper *Hidden Priors: Toward a Unifying Theory of Systemic Disparate Treatment Law*,[2] makes the point that judges make fundamental assumptions based upon their backgrounds and beliefs. These fundamental assumptions, or "hidden priors," lie buried and often hidden beneath layers of legal doctrine and analysis. By way of example, Professor Bent looks at the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[3] and examines the hidden priors in the decision. He uses the decision to both analyze the impact of the case on disparate-treatment law and to argue that despite the fact that there are shortcomings in the use of statistical evidence which were exposed by the Court, that statistical evidence is still important and should be examined in conjunction with the underlying assumptions.

In the *Wal-Mart* decision, Professor Bent exposes the hidden priors in *Wal-Mart*, which are the Court's preconceptions about the background rates of discrimination. Quoting the Court,

> [L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.[4]

It is telling that Justice Scalia cites to no authority for the above statement. Based upon this hidden prior, articulated by Justice Scalia, the majority went on to articulate an entirely new, and more rigorous, standard to be applied in a systemic disparate treatment case—to establish a prima facie case, the plaintiff must establish both a gross statistical disparity and the identification of a particular policy or mechanism responsible for generating the observed disparity. This new second element can be satisfied through evidence of a policy of discrimination, a common discriminating decision maker or anecdotal evidence on a larger scale than what was produced by the plaintiffs in *Wal-Mart*.

Professor Bent attributes the Court's doctrinal shift to the fact that the Court's underlying assumption about the prevalence of discrimination in society has changed from the 1970s, when discrimination was very prevalent, to now, when at least the Court assumes that discrimination is relatively rare (this point is obviously open to debate). He goes on to argue that the scholarship on systemic disparate treatment has, thus far, not articulated the proper role and importance of statistical evidence; thus, there has been no coherent theory that both advances the goals of the doctrine, on the one hand, without overstating the reach of statistical evidence, on the other hand. In his article, Professor Bent proposes a

2. 91 DENV. U. L. REV. 807 (2014).
3. 131 S. Ct. 2541 (2011).
4. *Id.* at 2554.

theory of systemic disparate treatment that embraces hidden or Bayesian priors and takes them into account in evaluating claims.

HIDDEN PRIORS: TOWARD A UNIFYING THEORY OF SYSTEMIC DISPARATE TREATMENT LAW

JASON R. BENT†

ABSTRACT

Did the Court's procedural decision in *Wal-Mart Stores, Inc. v. Dukes* undermine the substance of the systemic disparate treatment theory of employment discrimination? The answer to that question hinges on understanding the theoretical foundation for what one scholar calls the "most potent and least understood of the various Title VII causes of action." The current scholarly efforts to understand systemic disparate treatment law can be sorted into two distinct strands—methodological and contextualist. Scholars in the methodological strand question whether statistical techniques currently used by courts are sufficient to support an inference of discrimination. In the contextualist strand, scholars urge a conceptual expansion of the systemic disparate treatment theory that would impose liability on employers for wrongdoing located at the organizational level, rather than simply aggregating individual-level claims. These two strands have advanced independently, with scholars in each strand often overlooking the implications of progression in the other. This Article is the first attempt to unify these two scholarly strands. It does so by exposing the inescapable role of hidden Bayesian priors—preconceptions about background rates of discrimination—in the interpretation of statistical evidence. Taking a Bayesian view, the shortcomings of traditional statistical evidence identified by methodologists are not fatal. Yet, the Bayesian view also provides the conceptual space needed for further development of the organizational approach advanced by contextualists. The *Wal-Mart* decision presents an opportunity to radically rethink this misunderstood area of antidiscrimination law, and this Article takes the first step in developing of a coherent theory of systemic disparate treatment that embraces Bayesian priors.

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† Associate Professor of Law, Stetson University College of Law; J.D., University of Michigan Law School (2000); B.A., Grinnell College (1997). Earlier versions of this paper were presented at the 2012 Annual Meeting of the Southeastern Association of Law Schools and at the 2012 Annual Colloquium on Current Scholarship in Labor and Employment Law. Thank you to the participants of both conferences for their helpful comments and suggestions. The paper was substantially improved by comments received from Theresa Beiner, David Kaye, Jason Palmer, J.J. Prescott, Gowri Ramachandran, Charles Sullivan, Louis J. Virelli III, Steven Willborn, and Michael J. Zimmer, as well as illuminating conversations on the subject with Shaina Bent, Deborah Weiss, Charlotte Alexander, Scott R. Bauries, Zev J. Eigen, Michael Z. Green, and Michael D. Smith. Lindsay Houser and Michael Labbee provided exemplary research assistance. The faculty and administration of the Stetson University College of Law generously supported this research project.

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INTRODUCTION

What, if anything, remains of the systemic disparate treatment theory of employment discrimination? This question is raised by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.[1] Although *Wal-Mart* was ostensibly a procedural case about the commonality requirement for class certification, the opinion will have important, if deeply uncertain, implications for the substantive law of systemic disparate treatment.[2] Several scholars have questioned whether, as a practical matter, the theory survives *Wal-Mart* at all.[3] One thing is certain: systemic disparate

1. 131 S. Ct. 2541 (2011).

2. *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011) ("But the Court did more than pull the procedural rug out from under the decade-long lawsuit; it called into question the future of systemic disparate treatment law."); *see also* Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 387 (2011) ("Although *Wal-Mart* formally is a case about class certification, the procedural analysis takes shape in the shadow of the substantive theory of liability.").

3. *See* Green, *supra* note 2, at 397–98; L. Camille Hébert, *The Supreme Court's 2010–2011 Labor and Employment Law Decisions: A Large and "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279, 309 (2011); Natalie Bucciarelli Pedersen, *The Hazards of* Dukes*: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 137 (2012). Professor Pedersen states:

> The majority has rewritten the systemic disparate treatment standard to require some type of corporate policy calling for the use of discrimination by its supervisors or else discrim-

treatment law now sits at a historic crossroads.[4] Whether it survives, and in what form, depends on the articulation of a coherent theory of systemic disparate treatment that advances the remedial goals of antidiscrimination law without overstating the probative reach of statistical evidence of observed disparities in employment outcomes.[5]

The scholarship on systemic disparate treatment discrimination has, thus far, been unable to articulate such a coherent theory. Rather, the discourse has diverged into two separate analytical strands each focusing on a distinct aspect of systemic disparate treatment law. In the first strand, which can be described as the methodological strand, scholars question the ability of current statistical methodologies to support an inference of unlawful discrimination based only on observed quantitative disparities in employment outcomes.[6] In the second strand, which may be called the contextualist strand, scholars argue that the systemic disparate treatment theory should be conceptually expanded to impose liability on employers for wrongdoing located at the organizational level, rather than simply functioning as a narrow doctrinal tool for aggregating individual-

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inatory acts of one supervisor that reach an entire class of plaintiffs and can be held to constitute a pattern or practice. Neither seems very viable.

Pedersen, *supra*, at 137 (footnote omitted); *see also* Zatz, *supra* note 2, at 387 ("Now *Wal-Mart* threatens to turn that avenue into a dead end, in part by extending to Title VII this Court's general hostility to the class action device." (footnote omitted)); Michael J. Zimmer, Wal-Mart v. Dukes: *Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 457 (2012) ("If taken seriously, that interpretation of *Wal-Mart* would eliminate most systemic disparate treatment pattern or practice cases."); Charles A. Sullivan, *Maybe Systemic Disparate Treatment Isn't Dead Yet?*, WORKPLACE PROF BLOG (Dec. 10, 2012), http://lawprofessors.typepad.com/laborprof_blog/2012/12/maybe-systemic-disparate-treatment-isnt-dead-yet.html. *But see* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 434–35 (2012) (analyzing lower "court opinions from 2005 to mid-2011" and questioning whether the *Wal-Mart* opinion will have a significant practical effect on lawsuits "challenging subjective employment practices").

4. In recognition of this, a group of scholars led by Professors Tristin Green and Noah Zatz recently organized a *Working Group on the Future of Systemic Disparate Treatment Law* (Working Group). The stated purpose of the Working Group was to consider what exactly the substantive law of systemic disparate treatment means and to "get a head start on thinking about the post-*Wal-Mart* landscape." *See* Zatz, *supra* note 2, at 387–88. The Working Group's work was published in Volume 32 of the Berkeley Journal of Employment and Labor Law. *See id.* at 388; Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 513, 513 (2011); Green, *supra* note 2, at 398–99 (advancing "a 'context' model of organizational wrongdoing" and direct liability as superior to models focused on identifying individual instances of discrimination); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 457–58 (2011); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 481 (2011) (arguing that a statistical showing alone is no longer sufficient to establish a systemic disparate treatment claim and that "it is incumbent upon plaintiffs to explain the story the statistical presentation is telling").

5. *See* Green, *supra* note 2, at 454 (calling for an "open and frank debate about the theoretical grounding for and shape of systemic disparate treatment law"); Zatz, *supra* note 2, at 391 ("What systemic disparate treatment theory needs is an account that grounds employer liability in firm-level conduct—the connective tissue—[]not simply in dispersed individual disparate treatment, and does so without relying exclusively on the extreme case of connective disparate treatment." (emphasis omitted)).

6. *See infra* Part II.A.

level claims of wrongdoing.[7] Although there is significant tension between these two strands of scholarship, authors writing in each strand rarely engage the key arguments or insights developed in the other. As a result, courts are left without a coherent theory to make sense of a perplexing subject lying at the intersection of antidiscrimination law and statistical theory. This Article is the first attempt to reconcile the key differences between the methodologists and the contextualists and represents the first step in developing a unified theory of systemic disparate treatment.

The path forward for systemic disparate treatment theory post-*Wal-Mart* requires acknowledging the role of Bayesian priors—preconceptions about background rates of employment discrimination.[8] At present, the Bayesian priors held by judges and juries in systemic discrimination cases are obscured beneath a veneer of formalistic legal reasoning.[9] But these hidden priors operate nonetheless, invisibly affecting the outcome of all systemic disparate treatment cases.[10] As this Article will demonstrate, hidden priors can be located in the formative cases that defined systemic disparate treatment theory in the late 1970s,[11] as well as in the Court's recent *Wal-Mart* decision, which threatens to severely limit the theory.[12]

The objective of this Article is to develop a unifying path forward for systemic disparate treatment law by exposing the inescapable operation of hidden Bayesian priors. The Article urges courts to openly acknowledge the undeniable role of Bayesian priors in systemic disparate treatment litigation and further urges scholars and courts to take up the

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7. *See infra* Part II.B.

8. As the concept is used in this Article, a Bayesian prior is generally a pre-formed or preconceived estimate of the likelihood that any given employer engaged in unlawful employment discrimination, made *before* considering any given piece of additional information. Bayesian priors may be used in an iterative fashion, such that the "prior probability" is informed by general preconceptions about background rates, as updated by a cumulative assessment of all the nonstatistical evidence in the case, but *before* considering the purely statistical evidence. *See infra* Part III.A.

9. *See* Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1741 (2011) (observing that both the majority opinion and the dissent in *Wal-Mart* "clearly turn on background assumptions that are not well-grounded in evidence").

10. *See id.* at 1701 ("[J]uries enter the courtroom with pre-existing views about the societal pattern of discrimination and cannot be forced by the fiat of evidentiary exclusion to turn off their views about that societal pattern."). Judge Richard Posner explains that Bayesian priors can operate at an unconscious level, using discrimination cases as an example. *See* RICHARD A. POSNER, HOW JUDGES THINK 67–68 (2008) ("I used the example of a sex discrimination suit because it is the kind of suit in which judges' priors are likely to differ along political lines or along racial, religious, or gender lines that are correlated with (and often influence) political leanings, or because of different personal or professional experiences or differences in personality.").

11. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 300 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977). *Teamsters* is generally considered the seminal case on systemic disparate treatment theory. *See, e.g.*, 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 3.01, at 145 (3d ed. 2002); David G. Karro, *Common Sense About Common Claims*, 25 HOFSTRA LAB. & EMPL. L.J. 33, 45 (2007) (calling *Teamsters* "the seminal pattern-or-practice case").

12. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); *see also* Weiss, *supra* note 9, at 1740–41.

difficult challenges posed by recognizing the operation of priors. This Article will be the first step in the development of a unified theory of systemic disparate treatment employment discrimination. Embracing priors will open up several challenging questions and new lines of scholarly inquiry about the proper management of priors in antidiscrimination legislation and litigation. As just one example of these challenging questions: whose priors should be determinative?[13] This Article will highlight some of these second-order questions and frame the future debate over such questions. A related article includes my own suggestions for the proper management of priors in employment discrimination law.[14] The point of this Article, however, is to convince courts and scholars that priors operate even when they are hidden or overlooked—meaning that difficult questions about the management of priors should be openly debated rather than simply ignored.

This Article proceeds in four parts. Part I provides a brief introduction to the systemic disparate treatment theory, including an examination of its foundational cases. Part II illustrates the critical juncture at which systemic disparate treatment law now sits, exploring the two divergent strands of legal scholarship on systemic disparate treatment theory and the potential substantive implications of the *Wal-Mart* decision. Part III lays out the Bayesian path toward a unified theory of systemic disparate treatment law by bringing hidden priors into clear focus. Part IV briefly identifies some of the difficult second-order questions regarding the management of priors and lays out a scholarly agenda for addressing those questions.

I. THE FOUNDATION OF SYSTEMIC DISPARATE TREATMENT LAW

To discern what remains of systemic disparate treatment law, we must first examine the theory's origins. Professor Michael Selmi, in his insightful contribution to the *Working Group on the Future of Systemic Disparate Treatment Law* (Working Group), aptly described the systemic disparate treatment theory as the "most potent and least understood of the various Title VII causes of action."[15] Professor Selmi, along with Professor Tristin Green, was no doubt correct in characterizing systemic disparate treatment law as "under-theorized."[16] Indeed, systemic disparate treatment law has been under-theorized from its inception, a point to be

13. Possible answers to this question include the trial judge, the fact-finder, the appellate court, or the legislature.

14. Jason R. Bent, *P-Values, Priors, and Procedure in Antidiscrimination Law*, 63 BUFF. L. REV. (forthcoming Dec. 2014).

15. Selmi, *supra* note 4, at 478 (referring to systemic disparate treatment claims as "pattern or practice claims").

16. *See* Green, *supra* note 2, at 418, 421; Selmi, *supra* note 4, at 500. Prior to *Wal-Mart*, the Court and scholars had focused their attention primarily on the disparate impact theory of systemic discrimination, rather than systemic disparate treatment. *See* Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 798–99, 799 n.5 (2011); Selmi, *supra* note 4, at 478.

demonstrated herein. The theoretical and statistical foundation for systemic disparate treatment law was never properly laid by the Court, leading to the current doctrinal and scholarly confusion.

As originally enacted, Title VII of the Civil Rights Act of 1964 prohibited discrimination "because of race, color, religion, sex, or national origin," but the text of the statute said nothing about proving unlawful discrimination with statistical evidence of disparities in employment outcomes.[17] In 1977, the Supreme Court recognized the "pattern or practice," or systemic disparate treatment, theory as one type of proof framework that plaintiffs could employ to establish a prima facie case of discrimination.[18] The theory originated as the Supreme Court's gloss on the statutory prohibitions found in the text of Title VII.[19] The birth of the systemic disparate treatment theory through judicial construction is similar to the judicial creation of the first individual disparate treatment proof framework in *McDonnell Douglas Corporation. v. Green*[20] and the disparate impact theory in *Griggs v. Duke Power Company*.[21] All of these proof frameworks developed originally as judicial scaffolding built on top of the vague and general statutory prohibitions found in Title VII.

The two formative cases for the systemic disparate treatment theory are *International Brotherhood of Teamsters v. United States*[22] and *Hazelwood School District v. United States*,[23] both decided in 1977. After 1977, the Supreme Court would not directly address the systemic disparate treatment theory again until *Wal-Mart*, decided in 2011.[24] The basic

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17. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 254 (1964) (codified as amended in scattered sections of 42 U.S.C., primarily 42 U.S.C. §§ 2000e to 2000e-17). In amendments enacted as part of the Civil Rights Act of 1991, Congress codified a proof structure for establishing unlawful discrimination under the disparate *impact* theory. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (1991) (codified at 42 U.S.C. § 2000e-2(k)). Congress, however, has not explicitly codified a proof structure for the systemic disparate treatment theory. *See* 42 U.S.C. § 2000e (2012).

18. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 358 (1977) (describing the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), as only one method of establishing a prima facie case of discrimination in violation of Title VII).

19. In laying out a proof structure for systemic disparate treatment, or "pattern or practice" cases, the *Teamsters* Court drew upon language found in Section 707 of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-6(c). *Teamsters*, 431 U.S. at 328 n.1. This subsection originally granted the Attorney General the authority to investigate and act upon a charge of a "pattern or practice of discrimination." Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(c), (e) (1964). That authority was subsequently transferred to the Equal Employment Opportunity Commission (EEOC) in 1972. *See id.* § 2000e-6(e).

20. 411 U.S. 792 (1973).

21. 401 U.S. 424 (1971).

22. 431 U.S. 324 (1977).

23. 433 U.S. 299 (1977).

24. *See* Selmi, *supra* note 4, at 478 ("In no other area of substantive antidiscrimination case law—indeed, perhaps no other area of law—are the leading cases three decades old."). Even in *Wal-Mart* the substance of the systemic disparate treatment theory was at issue only through the prism of a procedural class certification question. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561–62 (2011). As discussed below, the Court did touch upon the systemic disparate treatment theory in its 1986 decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), which approved the use of multiple

idea underpinning the systemic disparate treatment theory is that unexplained statistical evidence of a quantitatively skewed distribution of hiring, firing, promotion, or other employment outcomes can be evidence that the employer unlawfully and intentionally discriminated against a protected group.[25] As the *Teamsters* Court famously put it:

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.[26]

In *Teamsters*, the Court considered the government's claim that an employer "had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers."[27] The government alleged that minorities who had been hired by the employer "were given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against with respect to promotions and transfers."[28]

The *Teamsters* Court promulgated a two-phase framework for evaluating this type of systemic claim of employment discrimination. In Phase I, plaintiffs may establish a prima facie case of systemic discrimination by showing "that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers."[29] The Court unequivocally approved the use of statistical evidence in making this Phase I determination.[30] If plaintiffs meet this initial burden, "[t]he burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant."[31] If the employer fails to defeat the plain-

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regression analysis. *See infra* note 55 and accompanying text; *see also Bazemore*, 478 U.S. at 399–401.

25. *See* Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997 (1994).

26. *Teamsters*, 431 U.S. at 339 n.20. This Article focuses on the importance of the words "absent explanation" in that statement and approaches those words from a Bayesian statistical perspective. *See also* Paul Meier et al., *What Happened in* Hazelwood*: Statistics, Employment Discrimination, and the 80% Rule*, *in* STATISTICS AND THE LAW 1, 20–21 (Morris H. DeGroot et al. eds., 1986) (arguing that the assumption described in *Teamsters* is untenable and can only be taken as an aspirational statement of a court's impartiality); Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477, 482–83, 503–05 (1993) (critiquing this "[c]entral [a]ssumption").

27. *Teamsters*, 431 U.S. at 329.

28. *Id.*

29. *Id.* at 360.

30. *Id.* at 339 ("'[S]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." (quoting Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974))).

31. *Teamsters*, 431 U.S. at 360.

tiffs' prima facie showing of a pattern or practice of discrimination in Phase I, then plaintiffs are entitled to an award of prospective relief, such as an injunctive order.[32] In Phase II, plaintiffs may seek individual relief for each person in the alleged group of aggrieved individuals.[33] The determination that the employer engaged in a pattern or practice of discrimination in Phase I leads to a rebuttable presumption that the employer's pattern or practice of discrimination affected each individual claimant for purposes of Phase II.[34]

In *Teamsters*, the Court held that the government had carried its initial burden in Phase I by offering evidence of a statistical disparity in the hiring of line drivers, along with the testimony of affected individuals to bring the "cold numbers convincingly to life."[35] The *Teamsters* case involved an extreme case of statistical disparity. The government showed that of 1,828 line drivers only eight were African-American, and all of those eight were hired after the litigation commenced.[36] Responding to the employer's challenge to the specific statistical comparisons used by the government, the Court noted that no amount of fine tuning of the statistical comparisons would change the "inexorable zero"—there had been no African-American line drivers prior to the lawsuit.[37]

In *Hazelwood*, systemic disparate treatment theory's second formative case, the Court reiterated its approval of the use of statistical evidence to shift the burden of disproving discrimination onto the defendant.[38] While the statistical showing in *Teamsters* consisted of a very simple descriptive analysis highlighting the inexorable zero among a relatively large number of line drivers, the statistical analysis at issue in *Hazelwood* was more sophisticated.[39] There, the government alleged that the Hazelwood School District had engaged in a "pattern or practice" of discrimination in hiring teachers.[40] The government offered statistical evidence in the form of a binomial distribution analysis, a concept explored in depth in Part II of this Article.[41] The government argued that a statistical comparison of the percentage of African-American teachers employed by the school district to the percentage of African-American teachers in the relevant comparison labor market could serve as proof of

32. *Id.* at 361.
33. *Id.*
34. Allan G. King, *"Gross Statistical Disparities" as Evidence of a Pattern and Practice of Discrimination: Statistical Versus Legal Significance*, 22 LAB. LAW. 271, 282 (2007) ("[T]he presumption created primarily by this statistical proof applies to each and every class member and requires the employer to rebut that presumption in each specific instance.").
35. *Teamsters*, 431 U.S. at 339–40, 342–43.
36. *Id.* at 337.
37. *Id.* at 342 n.23 (citation omitted) (internal quotation mark omitted).
38. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977).
39. *See, e.g.*, Zimmer, *supra* note 3, at 422.
40. *Hazelwood*, 433 U.S. at 301 (internal quotation marks omitted).
41. *Id.* at 303, 308; *see infra* Part II.A.I.

a discriminatory pattern or practice in the district's hiring of teachers.[42] The Court drew upon the reasoning in *Teamsters* and stated that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."[43] The *Hazelwood* Court endorsed the use of binomial distribution analysis to show the required "gross statistical disparities."[44] If the difference between the expected number of African-American teachers (calculated by reference to the relevant labor pool, or "reference class") and the observed number of African-American teachers actually hired by the district "is greater than two or three standard deviations," the Court stated, the "hypothesis that teachers were hired without regard to race would be suspect."[45]

Teamsters and *Hazelwood* remained the leading cases on the systemic disparate treatment theory until *Wal-Mart*.[46] As statistician Paul Meier explained, after *Teamsters* and *Hazelwood*, "a flood of statistical tests of significance, confidence intervals, and multiple regressions thundered forth from the lower courts."[47] More recently, systemic theories of discrimination have become a centerpiece of the EEOC's enforcement strategy. The EEOC's newly-released Strategic Plan for Fiscal Years 2012–2016 emphasizes the importance of systemic cases, and it includes performance measures unequivocally requiring that an increasing percentage of the EEOC's cases be systemic cases.[48] How the *Wal-Mart* decision will impact private and EEOC systemic disparate treatment liti-

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42. *Hazelwood*, 433 U.S. at 303, 308–09.

43. *Id.* at 307–08 (citing *Teamsters*, 431 U.S. at 339); *see also* Selmi, *supra* note 4, at 480 (noting that the early systemic disparate treatment cases were "almost entirely statistical in nature"). After *Hazelwood*, lower courts have frequently acknowledged that a prima facie case of systemic disparate treatment discrimination may be established by statistical evidence alone. *See, e.g.*, EEOC v. Olson's Dairy Queens, Inc., 989 F.2d 165, 168 (5th Cir. 1993) (relying on statistical comparisons alone to reverse district court's decision that no prima facie case had been established under the *Teamsters* framework); Satchell v. FedEx Express, No. C 03-2659 SI, 2006 WL 3507913, at *1 (N.D. Cal. Dec. 5, 2006) (plaintiffs can prove their prima facie case "with or without anecdotal testimony"); McReynolds v. Sodexho Marriott Servs., Inc., 349 F. Supp. 2d 1, 17 (D.D.C. 2004) ("[P]laintiffs may sustain their burden at the prima facie stage exclusively on statistical evidence, for 'no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities.'" (quoting Segar v. Smith, 738 F.2d 1249, 1278 (D.C. Cir. 1984))).

44. *Hazelwood*, 433 U.S. at 307–08.

45. *Id.* at 308 n.14 (quoting Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977)) (internal quotation mark omitted).

46. *See* Selmi, *supra* note 4, at 492–93.

47. *See* Meier et al., *supra* note 26, at 3.

48. *Strategic Plan for Fiscal Years 2012–2016*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm (last visited Aug. 1, 2014). The Strategic Plan anticipates that the EEOC will adopt a performance measure based on the percentage of the cases in the litigation docket that are systemic cases and anticipates that the target for this performance measure will increase every year from 2012 to 2016. *See id.* (Performance Measure 4 for Strategy I.A.3 of Strategy Objective I). As envisioned by the Strategic Plan, the EEOC adopted an accompanying Strategic Enforcement Plan that also emphasizes systemic discrimination litigation. *Id.* (app. B – Strategic Enforcement Plan & Quality Control Plan Timelines).

gation remains to be seen and is the subject of Part II.C below.[49] But it is clear that systemic disparate treatment law is at a critical juncture. The next Part illustrates the current divide in the legal scholarship about the proper course of systemic disparate treatment law and considers how *Wal-Mart* may represent a turning point.

II. SYSTEMIC DISPARATE TREATMENT AT A CROSSROADS

A. Methodological Strand: The Limits of Statistical Evidence

Statistical evidence forms the cornerstone of most systemic disparate treatment cases.[50] But the mechanism through which statistical evidence is thought to justify an inference of unlawful discrimination has been frequently misunderstood, or at least glossed over, by courts and scholars.[51] The first major strand of systemic disparate treatment scholarship to develop in the wake of *Teamsters* and *Hazelwood* carefully detailed the inferential limitations of the statistics offered in systemic discrimination cases. Authors writing in this methodological strand took courts to task for misinterpreting and misapplying statistical evidence to arrive at unwarranted conclusions that discrimination, rather than chance or luck, was the most likely explanation for a statistically significant disparity in employment outcomes.[52]

Understanding the nature of the methodological critiques requires a closer look at the types of statistical evidence commonly offered in systemic discrimination cases. Two types of statistical evidence have been explicitly approved by the Court for use in employment discrimination cases: binomial distributions, approved in *Hazelwood*,[53] and multiple regressions, approved by the Supreme Court in *Bazemore v. Friday*,[54] decided in 1986.[55] In both binomial distribution and multiple regression, statistical experts look for statistically significant results. Courts often

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49. Notably, *Wal-Mart*'s holding on the commonality issue is inapplicable to systemic claims brought by the EEOC. The EEOC's systemic discrimination cases need not comply with the class certification requirements of Federal Rule 23. *See* Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 323 (1980).

50. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 135 (7th ed. 2008); Meier et al., *supra* note 26, at 3; Selmi, *supra* note 4, at 485.

51. *See* Bent, *supra* note 16, at 833 n.145 (explaining how courts misinterpret statistical evidence of discrimination); Browne, *supra* note 26, at 486-88 (illustrating where "courts have gone wrong" in the use of statistical evidence of discrimination); Kinsley R. Browne, *The Strangely Persistent "Transposition Fallacy": Why "Statistically Significant" Evidence of Discrimination May Not Be Significant*, 14 LAB. LAW. 437, 437, 441–42 (1998); Richard Lempert, *The Significance of Statistical Significance: Two Authors Restate an Incontrovertible Caution. Why a Book?*, 34 LAW & SOC. INQUIRY 225, 237–41 (2009).

52. *See infra* Part II.A.3–4.

53. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977).

54. 478 U.S. 385 (1986).

55. *Id.* at 387 (involving a claim of salary discrimination); *see also* Roberto Corrada, Ricci*'s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 249 n.59 (2011) (identifying binomial distribution and multiple regression as the two types of statistical analysis approved by the Supreme Court).

consider statistical significance sufficient to establish a prima facie case of systemic discrimination under Phase I of *Teamsters*, thus establishing liability and shifting onto the defendant the burden of disproving discrimination as to the individual claimants or class members.[56]

Many, though not all, antidiscrimination scholars consider these two statistical methodologies adequate to support an inference of unlawful discrimination.[57] But it is important to understand exactly how such an inference has been justified. The inference of discrimination arises not because binomial distribution or regression analysis directly proves the likelihood that the employer in question discriminated. Instead, the inference is indirect.[58] The statistical techniques of binomial distribution and multiple regression allow a statistician to conclude that chance alone would be relatively unlikely to lead to the observed disparities given the important assumption that employment decisions were made at random.[59] This assumption—that employment decisions were made at random—is called the null hypothesis.[60] If, *assuming the null hypothesis to be true*, pure chance would lead to the observed disparity in less than some predetermined statistically significant level of repetitions (often set at 5% or .05), then a (frequentist)[61] statistician will believe the evidence supports rejection of the null hypothesis.[62]

If an observed disparity is statistically significant and the null hypothesis of random decision-making can be rejected, proponents of statistical evidence argue, reason and logic should allow the court or fact

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56. *See* King, *supra* note 34, at 272 (noting that in pattern or practice cases applying the *Teamsters* framework "lower courts frequently have turned to 'statistical significance' as the measuring rod"); Meier et al., *supra* note 26, at 20–21; Ramona L. Paetzold, *Problems with Statistical Significance in Employment Discrimination Litigation*, 26 NEW ENG. L. REV. 395, 395–96 (1991) ("Although [hypothesis testing] has only been used for a few decades in legal proceedings, it has become the predominant method of statistical analysis used in employment discrimination cases."); Selmi, *supra* note 4, at 481–82; *see also* Green, *supra* note 2, at 403 (reading *Teamsters* and *Hazelwood* as "instruct[ing] that if the disparity after accounting for legitimate factors is statistically significant—meaning that it is unlikely due to chance—then an inference of internal systemic disparate treatment can be drawn and entity liability imposed").

57. *See, e.g.*, RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES § 4.13 (2005); ZIMMER ET AL., *supra* note 50, at 144–45 ("When any one of these techniques is used to conclude that the null hypothesis . . . should be rejected, the next step, based on reason and logic, should be to draw the inference that systemic disparate treatment discrimination has occurred."). *But see* Browne, *supra* note 26, at 488, 489 n.41 (arguing that neither binomial distribution analysis nor regression analysis should give rise to an inference of unlawful discrimination because the court cannot know the prior unconditional probability of discrimination).

58. *See* Steven L. Willborn & Ramona L. Paetzold, *Statistics Is a Plural Word*, 122 HARV. L. REV. F. 48, 48 (2009) ("Statistics is imperfect as proof of causation in the same way that every other type of proof is imperfect—it is messy, indirect, uncertain, and subject to varying interpretations.").

59. *See* PAETZOLD & WILLBORN, *supra* note 57, § 4.13, at 38–41, § 12.03, at 7–8; ZIMMER ET AL., *supra* note 50, at 142; Corrada, *supra* note 55, at 249 n.59.

60. PAETZOLD & WILLBORN, *supra* note 57, § 4.11, at 36; ZIMMER ET AL., *supra* note 50, at 142.

61. See *infra* Part III.B for a brief discussion of the ongoing philosophical debate between frequentists and Bayesians in the statistics literature.

62. *See* PAETZOLD & WILLBORN, *supra* note 57, § 4.12, at 37.

finder to take the next step and indirectly infer that the employment decisions at issue were likely the result of discrimination and were not likely caused by chance or some other non-discriminatory factor.[63] Not all scholars are comfortable making this indirect inference from evidence of a statistically significant disparity in employment outcomes. Some authors writing in the methodological strand have repeatedly highlighted the limitations of the binomial distribution and multiple regression methodologies currently accepted by courts, and some argue that these statistical techniques are simply inadequate to perform the role prescribed for them by the *Teamsters* and *Hazelwood* opinions.[64] The statistical techniques at issue, and the methodological critiques, are discussed in further detail below.

1. Binomial Distribution

In a binomial distribution analysis, the statistician typically compares the *observed* percentage of members of a protected group, say African-Americans, that were actually hired by the employer (or promoted, terminated, or subjected to other employment action) to the *expected* percentage of members of that group that would have been hired if the employment decisions were made at random.[65] Thus, in *Hazelwood*, the government offered evidence comparing the percentage of African-American teachers hired by the Hazelwood School District to the percentage of African-American teachers in St. Louis County and the City of St. Louis, which the government considered to be the proper comparison labor market.[66] Defendants disputed the relevance of that comparison market by arguing that the City of St. Louis had made special attempts to seek a 50% African-American teaching staff, thus distorting that comparison pool.[67] The Supreme Court ultimately approved the use of binomial distribution analysis for comparing the racial composition of Hazelwood's teaching staff to "the racial composition of the qualified public school teacher population in the relevant labor market."[68] The Court, however, left it to the district court on remand to decide the proper comparison labor market.[69]

In performing a binomial distribution analysis, a statistician might find that the disparity between the observed and expected percentage of

63. *See* ZIMMER ET AL., *supra* note 50, at 144–45.

64. *See infra* Part II.A.3–4.

65. *See* Meier et al., *supra* note 26, at 6–7; ZIMMER ET AL., *supra* note 50, at 145–51. There are several variants on this simple binomial distribution analysis, including one-sample models, two-sample binomial model, and one- and two-sided significance tests. *See* Meier et al., *supra* note 26, at 6–15. The methodological details of the variants are beyond the scope of this Article, and the differences between the variants are not important for purposes of the analysis that follows in this Article.

66. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310 (1977).

67. *Id.* at 310–11.

68. *Id.* at 308.

69. *Id.* at 312–13 ("It is thus clear that a determination of the appropriate comparative figures in this case will depend upon further evaluation by the trial court.").

African-American hires is statistically significant. A finding of statistical significance at the .05 level in a binomial distribution analysis means that random chance would lead to the observed disparity (or an even more skewed disparity) only 1 time in 20 repetitions of the hiring process, assuming that employment decisions in each repetition of the hiring process were made at random.[70] Based on this result, the statistician has some basis for rejecting the null hypothesis that employment decisions were made at random. Importantly, however, a finding of statistical significance at the .05 level *does not* mean that there is a 95% likelihood that the employer unlawfully discriminated, nor does it mean that there is a 5% likelihood that the disparity was caused by chance.[71]

2. Multiple Regression

Multiple regression analysis involves a more sophisticated technique that can model the relationship of multiple independent, or explanatory, variables—such as education level, experience, and gender—with the employment outcome or other dependent variable in question—such as salary—given certain modeling assumptions. In a regression analysis the statistician constructs a model that includes a number of selected independent variables that are thought to have some predictive relationship with the dependent variable in question and then attempts to isolate the predictive effects of each particular independent variable by conditioning on the other included independent variables.[72] The multiple regression model attempts to determine the characteristics of a mathematical function that best fits or explains all the observed data points for all the included variables in the model.[73]

One reason that multiple regression models are appealing is that they are able to provide results in the form of a coefficient for each inde-

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70. *See* Paetzold, *supra* note 56, at 400 ("In other words, if the p-value is 0.05 or smaller, the discrepancy between actual hiring practices and assumed hiring practices is considered to be statistically significant. If the p-value is greater than 0.05, then the discrepancy is not statistically significant."). Setting the cutoff for statistical significance "is somewhat arbitrary." *Id.* There is no mathematical rule requiring that it be set at .05, but that level is commonly used in the social sciences to identify significant results. *Id.* For a discussion of the historical origins of the .05 level of statistical significance, the work of R.A. Fisher, and Fisher's acknowledgment that the choice of .05 was subjective, see Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771, 823–24 (2010).

71. *E.g.*, Browne, *supra* note 51, at 449. These common misstatements of statistically significant results are examples of the transposition fallacy. *See infra* Part II.A.3.

72. *See* ZIMMER ET AL., *supra* note 50, at 151–55; Delores A. Conway & Harry V. Roberts, *Regression Analyses in Employment Discrimination Cases*, *in* STATISTICS AND THE LAW, *supra* note 26, at 107, 126 ("Multiple regression, as opposed to simple regression, permits simultaneous investigation of the relationship between salaries and multiple job qualifications."). *See generally* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 535–36 (2008) ("[A] perusal of the hornbooks and looseleafs discussing the use of statistics as evidence in civil rights litigation suggests that the field is fixated on methods introduced decades ago, particularly regression, despite judicial dissatisfaction." (footnote omitted)); Willborn & Paetzold, *supra* note 58, at 49 (referring to regression as the "predominant statistical technique used in civil rights litigation").

73. *See* Greiner, *supra* note 72, at 541–42.

pendent variable that tell the statistician the direction and estimated magnitude of the effect of a unit change in each particular independent variable on the dependent variable of interest—salary, in this example.[74] A regression result may indicate that a change in the gender variable from male to female has a negative effect on annual salary (direction) and that a change in the gender variable from male to female results in a decrease in annual salary of $1,000 (magnitude). A statistician would have some degree of confidence in these coefficient estimates only if certain diagnostic tests for model fit[75] are satisfied and only if the results found for the independent variable of interest—in this example, gender—are statistically significant.[76] As with a binomial distribution model, determining whether the coefficient is statistically significant means that the statistician tests the regression results against a null hypothesis. Here, the null hypothesis is that the independent variable we are interested in (gender) has no correlative relationship with the dependent variable (salary). In other words, the null hypothesis is that the coefficient for the gender variable equals 0. A multiple regression result for a given independent variable will be statistically significant at the .05 level—or have a *p*-value of less than .05—if, *assuming the null hypothesis to be true*, pure chance or randomness would have led to the observed correlative results—or even stronger evidence of a correlative relationship—in 5% or less of many repetitions of the analysis.[77]

3. The Transposition Fallacy Challenge

A key critique levied by authors in the methodological strand, and persuasively articulated by Professor Kingsley Browne, is that courts regularly misinterpret statistically significant results obtained from binomial distribution or regression analysis by committing what is often referred to as the "transposition fallacy."[78] Courts commit the transposition fallacy, sometimes with the inadvertent help of testifying statistical experts, by forgetting that binomial distribution and regression analyses

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74. *Id.* at 541.

75. *See generally id.* at 542 ("When a [regression] diagnostic shows a lack of fit . . . a conscientious analyst alters the model.").

76. *See* Willborn & Paetzold, *supra* note 58, at 59.

77. For additional information on interpreting the results of multiple regression analyses, see *Interpreting Regression Output*, PRINCETON UNIV., http://dss.princeton.edu/online_help/analysis/interpreting_regression.htm (last visited Apr. 8, 2014).

78. *See* DAVID H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 12.8.3.a nn. 22–23 (2d ed. 2010) (collecting cases where the error is committed); Browne, *supra* note 51, at 447 ("The error committed by courts engaging in the transposition fallacy is remarkable, however, for its ubiquity; the vast majority of courts that describe the meaning of a *p*-value explain it in terms embodying the fallacy."); David H. Kaye, *Statistical Significance and the Burden of Persuasion*, 46 LAW & CONTEMP. PROBS. 13, 21–23 (1983).

For an interesting discussion of the transposition fallacy in the context of DNA evidence in a criminal case, see David H. Kaye, Commentary, *"False but Highly Persuasive": How Wrong Were the Probability Estimates in* McDaniel v. Brown*?*, 108 MICH. L. REV. FIRST IMPRESSIONS 1 (2009).

are limited to testing a null hypothesis.[79] Professor Browne documents "cases from virtually all the circuits" that misstate the import of statistical evidence by committing the transposition fallacy.[80] Thus, in the case of a binomial distribution analysis, a typical misstatement by a court about statistical significance is: "[T]he .05 level of significance . . . [is] certainly sufficient to support an inference of discrimination. [T]he .05 level . . . indicates that the odds are one in 20 that the result could have occurred by chance."[81]

This statement is incorrect. As Professor Browne points out, it confuses two different conditional probabilities: First is the conditional probability that the employer selected employees randomly given the observed disparity—what the court incorrectly claims is shown by the statistics.[82] Second is the conditional probability that we would see the observed disparity given the assumption that the employer selected employees randomly—what the statistical results actually show.[83] A finding of statistical significance at the .05 level means that an employer known or assumed to hire employees at random would nonetheless arrive at results as skewed with respect to the protected characteristic as the actual observed disparity in no more than 1 in 20 repetitions of the hiring procedure. Importantly, statistical significance at the .05 level *does not mean* that it is 95% likely that this employer's actual hiring in this particular case was non-random, discriminatory, or otherwise suspect. Statistical significance at the .05 level does not mean—contrary to the D.C. Circuit's assertion—that "the odds are one in 20 that the result could have occurred by chance."[84]

As Professor Browne emphasizes, the probability that the defendant selected employees discriminatorily is actually a function of another

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79. Browne, *supra* note 51, at 447, 447 n.25 (documenting expert testimony that appears to include the transposition fallacy).

80. *Id.* at 447; *see also* KAYE ET AL., *supra* note 78, § 12.8.3.a. nn.22–23 (collecting state and federal opinions committing the transposition fallacy); Browne, *supra* note 26, at 491–92 (collecting examples from appellate courts, district courts, statistical expert witnesses, and commentators).

81. Palmer v. Shultz, 815 F.2d 84, 92 (D.C. Cir. 1987) (citations omitted) (quoting Segar v. Smith, 738 F.2d 1249, 1282–83 (D.C. Cir. 1984)) (internal quotation marks omitted), *quoted in* Browne, *supra* note 25, at 491 n.46.

82. *See* Browne, *supra* note 26, at 507.

83. *See id.*

84. *Palmer*, 815 F.2d at 92 (quoting *Segar*, 738 F.2d at 1282) (internal quotation mark omitted). Notably, the district court in *Wal-Mart* committed the transposition fallacy when describing statistical significance. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 156 n.23 (N.D. Cal. 2004), *aff'd* 474 F.3d 1214 (9th Cir. 2007), *opinion withdrawn and superseded on denial of reh'g*, 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011) ("Statistical significance is measured by standard deviations. The standard deviation is a number that quantifies the probability that chance is responsible for any difference between an expected outcome and the observed outcome in a sample containing two groups."). For examples of courts committing the transposition fallacy in the context of DNA match evidence in criminal cases, see KAYE ET AL., *supra* note 78, § 12.8.5 n.96, § 14.1.2.a, and Andrea Roth, *Safety in Numbers? Deciding when DNA Alone Is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1150–56 (2010) (urging courts to apply Bayes' Theorem in DNA match cases).

number: "the likelihood of discrimination prior to making the employment decision."[85] In other words, the base rate or background rate of discrimination matters when interpreting statistical evidence. If it were known as fact that only 1% of all employers are discriminators, for example, then a binomial distribution analysis finding a disparity statistically significant at a *p*-value = .05 would mean that for every 100 employers tested we would expect to find 6 "positive" test results—5 false positives due to chance plus 1 true positive due to the employer being guilty of discrimination.[86] If we assume the base rate of discrimination is only 1%, a positive binomial distribution test (one finding a statistically significant disparity with *p*-value = .05) does not make it *more likely than not* that the defendant before the court is guilty of discrimination. Rather, in the absence of any evidence other than the base rate assumption and the positive statistical test the probability would be 1 in 6—or about 0.17—that the employer is a discriminator.[87] Given the base rate assumption of 1%, the statistical evidence from the binomial distribution should therefore be insufficient by itself to establish liability, contrary to *Teamsters* and *Hazelwood*.[88]

A leading employment discrimination text counters Professor Browne's critique by noting that there is no reason necessarily to assume "that base rate discrimination is especially rare."[89] If the base rate of dis-

85. Browne, *supra* note 26, at 488 ("In the discrimination context, the probability that an employer's work-force disparities are a consequence of chance is completely dependent upon a statistic which the courts never have: the likelihood of discrimination prior to making the employment decision.").

86. It should be noted here that this is a simplified example designed to illustrate the importance of the base rate, or background rate, of discrimination. This simplified example ignores the possibility of false negatives—cases in which the employer actually discriminates but the statistical test results are not statistically significant. The relationship between false negatives (or Type II error) and false positives (or Type I error) is complex. "By adopting a standard that minimizes the number of Type I errors, the chance of identifying discrimination when it actually occurs is reduced." PAETZOLD & WILLBORN, *supra* note 57, § 2.04. One statistician's model estimates that if the level of statistical significance is set at .05, meaning that there is a 5% risk of Type I error, the corresponding risk of Type II error will be approximately 50%. John M. Dawson, *Scientific Investigation of Fact—The Role of the Statistician*, 11 FORUM 896, 906–08 (1976). Despite the simplifying assumption used in these examples, the central point remains that prior probabilities will necessarily influence the interpretation of the statistical data, and in some cases different prior probabilities will lead to drastically different conclusions about the likelihood of discrimination in any given case, even though the statistical evidence remains exactly the same. This simplified example is used in ZIMMER ET AL., *supra* note 50, at 144.

87. *See* ZIMMER ET AL., *supra* note 50, at 144.

88. It is not clear precisely where the threshold should be drawn for shifting the burden of proof onto the defendant under the *Teamsters* framework. Absolute certainty is, of course, not required. But what estimate of the probability of discrimination should be considered sufficient to shift the burden onto defendant? In earlier work, I articulated one possible test for determining when to shift the burden of proof under *Teamsters* that considered three factors: the unconditional prior probability of discrimination, or estimates of background rates of discrimination; the strength of the statistical evidence of disparity; and the parties' relative access to information. Bent, *supra* note 16, at 802.

89. *See* ZIMMER ET AL., *supra* note 50, at 144 (acknowledging that Professor Browne is "theoretically correct" but pointing out that he "fails to demonstrate why the legal system should conclude that base rate discrimination is especially rare"). Professor Zimmer et al., also point out the limited legal effect of a statistical showing establishing the plaintiffs' prima facie case. The defendant has

crimination was assumed to be 10% instead of 1%, then for every 100 employers tested we would find 15 "positive" results—5 false positives due to chance plus 10 true positives due to the employer being guilty of discrimination.[90] In the absence of any other evidence, the probability would then be 10 in 15—or about 0.67—that the defendant-employer is guilty of discrimination.[91] Given this higher base rate assumption of 10%, it might make sense to shift the burden of proof onto the defendant upon a showing of statistical evidence with a *p*-value = .05. But rather than refuting Browne's argument, this point only underscores the importance of the base rate, i.e., the prior probability, of discrimination. A change in base rate from 1% to 10% made all the difference!

The base rate problem is a flaw that undermines our current understanding of the *Teamsters* approach to systemic disparate treatment law. Reasonable people can disagree about the true base rate of employment discrimination and therefore can disagree about the prior probability of discrimination in any given case. Hence, reasonable people can disagree about whether an inference of discrimination or the imposition of liability for systemic disparate treatment should attach upon a showing of a statistically significant disparity with a *p*-value = .05.[92]

Professor Browne's attack leads him to conclude that current statistical methods for proving systemic disparate treatment should probably be "abandoned altogether."[93] Browne also suggested, however, that traditional statistical proof might be acceptable if a more rigorous standard of statistical significance than .05 were applied and if courts required "strong[] anecdotal evidence" to buttress the statistical showing.[94]

"the opportunity to rebut by offering proof that it does not discriminate. Sufficiently strong testimony might convince the jury that it was chance that explained the disparity." *Id.*

90. *See id.*

91. *See id.*

92. *See id.* ("The problem is a 'base rate' one . . . .").

93. Browne, *supra* note 26, at 553 ("Hypothesis testing, with its reliance on the assumption that the resultant p-value represents the probability that the observed distribution was a consequence of chance and its declaration of results as 'statistically significant,' should be abandoned altogether. Such evidence is simply irrelevant to the ultimate question." (footnote omitted)).

94. *Id.* at 541–42, 554. Browne appears to acknowledge the possibility of a continuing role for statistical evidence but only where "substantially more rigorous criteria" are applied. *Id.* at 554. He contends that if statistical analyses are to be used, courts should require that they show "gross statistical disparities," rather than just ordinary statistical significance (often set at the .05 level), that they be accompanied by "strong anecdotal evidence" of discrimination, and that courts adhere to proper allocations of burdens of proof. *See id.* at 541–42, 549, 554. Professor Browne concludes:

> If statistical proof of discrimination is still to be acceptable at all in court—which perhaps is doubtful—courts must pay more than lip service to the principle that throughout the litigation it is the plaintiff's burden to demonstrate that impermissible discrimination is "the company's standard operating procedure—the regular rather than the unusual practice."

Id. at 555 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

4. The Potential Outcomes Challenge

Professor Browne is not alone in criticizing traditional statistical evidence offered to show systemic disparate treatment.[95] Professor D. James Greiner recently levied an attack on the use of multiple regression analysis in discrimination cases.[96] He argues that multiple regression analysis often "give[s] the wrong answer, or contradictory answers" to the questions that are actually important in systemic discrimination litigation.[97] The key problem, as Professor Greiner sees it, is that regressions "lack . . . a framework for causal inference."[98] According to Greiner, the legal community seems to believe, erroneously, "that one can measure the causal effect of any variable by including it on the right-hand side of the equals sign in a regression equation."[99]

Professor Greiner focuses on several specific shortcomings of multiple regression models, ranging from the judgment calls required in selecting which independent variables to include in the model to the potential for analyst bias in specifying the regression model and testing for fit.[100] Fundamentally, he argues that regression models cannot support a causal inference and therefore cannot tell judges and juries what they actually would like to know—how likely is it that the observed disparities in employment outcomes were caused by the defendant's unlawful discrimination?[101]

Professor Greiner recommends an alternative quantitative tool for attempting to measure causal inference in discrimination cases—potential outcomes analysis.[102] In contrast to multiple regression, the potential outcomes technique attempts to approximate, to the extent possible, a randomized experiment using only observational data drawn from observed employment outcomes.[103] The potential outcomes model matches up pairs—or sometimes small groups—of observational data points that are closely correlated in all potentially relevant explanatory covariates (e.g., position, performance evaluations, years of experience,

95. *See also* Ben Ikuta, Note, *Why Binomial Distributions Do Not Work as Proof of Employment Discrimination*, 59 HASTINGS L.J. 1235, 1235 (2008).

96. *See* Greiner, *supra* note 72, at 534.

97. *Id.* at 538.

98. *Id.* at 543.

99. *Id.* at 544.

100. *See id.* at 544–56.

101. *Id.* at 556–57.

102. *Id.* at 557. Potential outcomes analysis is also sometimes referred to in the literature as "matching," the "counterfactual" model, or the Rubin Causal Model. *See, e.g.*, ROBERT B. SMITH, MULTILEVEL MODELING OF SOCIAL PROBLEMS: A CAUSAL PERSPECTIVE 13 (2011). The modern revival of the potential outcomes method of causal inference is often attributed to Donald Rubin. See Guido W. Imbens & Donald B. Rubin, Causal Inference in Statistics and Social Sciences § 1.1–1.12 (Jan. 30, 2012) (unpublished manuscript) (on file with author), for a detailed explanation of the potential outcomes model.

103. *See* Greiner, *supra* note 72, at 537–38, 557–58.

education, training) but that diametrically differ on the explanatory variable of interest (e.g., gender).[104]

In a potential outcomes model, this matching is typically performed by creating a sort of index statistic that measures the combination of each individual's covariate characteristics, called a "propensity score."[105] Once the data is sorted into matched pairs using propensity scores, it can then be considered a rough approximation of a randomized, controlled experiment in which one group is the control group (male) while the other is the treatment group (female).[106] The benefit of matching is that it allows the researcher to "borrow" the unobserved, counterfactual potential outcome for any given individual from the other individual in the matched pair.[107] In other words, a potential outcomes model provides some basis for inferring what the counterfactual state of the world would look like—a female's salary, if that female had been male, but in all other respects identical.[108] After matching, employment outcomes are compared across the matched pairs to estimate the average treatment effect i.e., the average effect on salary of any given individual being female, rather than male.[109] The researcher can further narrow the results by looking at the average treatment effect on salary for only those in the treatment group—females—or for only those in certain portions of the salary distribution.[110]

By isolating matched pairs, the potential outcomes technique has the benefit of controlling for covariates using research model design, rather than relying on a multiple regression analysis with built-in assumptions about linearity and constant effects across the salary distribution.[111] Further, a statistician conducting a multiple regression analysis will usually need to peek at the regression coefficients and p-values before evaluating whether the regression model was a satisfactory fit to the data set.[112] Professor Greiner emphasizes the importance of this difference, noting that an expert using a potential outcomes analysis is more credible because the model can be fully specified *before* peeking at the results.[113]

The potential outcomes approach may represent an improvement over regression in many cases, and it has unquestionably increased in

104. *See id.* at 570–73.
105. *See id.* at 574–75.
106. *See id.* at 575–76.
107. *See id.* at 562 (referring to donated values for counterfactual states).
108. *See id.*
109. *See id.* at 558–60.
110. *See id.* at 567–68.
111. *See id.* at 548, 580–81.
112. *See id.* at 544.
113. *See id.*

popularity in the social sciences.[114] Nonetheless, it still falls short of the "gold standard" of a completely randomized experiment, as does any technique that relies on observational data.[115] Whenever a research design includes an "assignment mechanism"—that is, the force that determines whether an individual ends up in the treatment group or the control group–that is outside the researcher's control and that is non-random, the results will necessarily be open to challenge as a basis for causal inference.[116] Of course, in the context of employment discrimination litigation the assignment mechanism is always non-random and is always out of the researcher's control. A researcher obviously cannot randomly assign individual employees to a gender treatment group—male or female—and then observe the results. Without a controlled, randomized experiment, the potential exists that unobserved covariates are confounding the analysis making the results misleading. Unobserved covariates cannot be controlled for in a regression model and cannot be included in a propensity score calculation to match individuals in a potential outcomes model.

The potential outcomes model suffers from other drawbacks as well, as highlighted by Professors Steven Willborn and Ramona Paetzold.[117] Importantly, a potential outcomes analyst must make "complex decisions about which variables to include" in performing the task of matching pairs.[118] These decisions are similar to the difficult choices that regression analysts make when determining which covariates to include in their regression models. If the calculation of propensity scores misses certain important unobserved variables, then it is open to bias in much the same way as a regression.[119] Second, the potential outcomes approach usually requires a process called "trimming," which throws out some potentially relevant data—those data points for which there is no match close enough on the covariates in the other group.[120] The outliers in the tails of the distribution of covariates are simply disregarded on the justification that they do not provide much useful information for drawing inferences anyway.[121] Throwing out data may amount to ignoring

114. *See* STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH 87 (2007) ("[A]mong social scientists who adopt a counterfactual perspective, matching methods are fast becoming an indispensable technique for prosecuting causal questions, even though they usually prove to be the beginning rather than the end of causal analysis on any particular topic.").

115. *See* Willborn & Paetzold, *supra* note 58, at 50; Imbens & Rubin, *supra* note 102, § 15.1.

116. *See* Imbens & Rubin, *supra* note 102, § 8.1, § 15.1.

117. *See* Willborn & Paetzold, *supra* note 58, at 48–56.

118. *See id.* at 52 ("Inferences about outcomes are only as good as the covariates that have been included. A similar point is also true for regression—variables that are not included in the regression model are not controlled and their effects on the outcome cannot be ascertained."); *see also* KAYE ET AL., *supra* note 78, § 12.5.3 n.43 (noting that a potential outcomes "mode of analysis also demands an appreciation of potential confounders and adequate data if it is to 'balance covariates'").

119. *See* MORGAN & WINSHIP, *supra* note 114, at 122 (noting that matching is vulnerable to a "selection on the unobservables" bias).

120. *See* Willborn & Paetzold, *supra* note 58, at 55.

121. *See id.*; Greiner, *supra* note 72, at 566.

potentially relevant evidence of discrimination.[122] Further, by trimming the data to only those areas of the distribution of covariates where the treatment group and the control group have sufficient overlap, a conscientious potential outcomes analyst will properly report the results as the estimate of a defined local average treatment effect—that is, the average treatment effect only for those individuals falling in the overlap region.[123] This means that the analyst cannot make causal claims about the effect of gender on wages for those who fall outside the region of covariate overlap, which may very well include some plaintiffs.

Finally, and most fundamentally, as Professors Willborn and Paetzold explain, the potential outcomes model ultimately requires the same indirect causal inference to discrimination that regression models require.[124] After matching, trimming, and generating an estimated local average treatment effect, the final step in a potential outcomes analysis is to calculate the standard error for the estimate so that the researcher can determine whether the estimated effect is statistically significant.[125] That is, the analyst will attempt to determine how often random chance would lead to the observation of an average treatment effect as large or larger than the one observed and test the null hypothesis that the treatment—gender = female—has zero effect. If the researcher rejects the null hypothesis, then it may permit an indirect inference that unlawful discrimination caused the observed outcome disparities. This indirect mode of inferring a causal effect means that potential outcomes results are vulnerable to the same type of misinterpretation via the transposition fallacy as the examples discussed in the preceding subpart.

So where does this discourse in the methodological strand leave us? Professors Browne and Greiner both appear to believe that the currently-used statistical methodologies of binomial distribution and regression modeling are inadequate to justify an inference of discrimination. Professor Greiner advocates the use of potential outcomes models to avoid implausible assumptions and potential analyst bias involved in regression analysis.[126] Professors Willborn and Paetzold freely admit the messy and indirect nature of statistical inference using the traditional techniques, but nonetheless contend that flawed statistical evidence—whether binomial distributions, regressions, or potential outcomes—can still convey *some*

122. Willborn & Paetzold, *supra* note 58, at 55.

123. *See* MORGAN & WINSHIP, *supra* note 114, at 117 ("Resulting estimates are then interpreted as estimates of a narrower treatment effect: the common-support treatment effect for the treated.").

124. *See* Willborn & Paetzold, *supra* note 58, at 60 (stating that nonstatistical circumstantial evidence, regression, and potential outcomes all use the same causal framework by "answering the question of how likely it is that we would see this outcome in the absence of discrimination").

125. *See* MORGAN & WINSHIP, *supra* note 114, at 118 ("After computing a matching estimate of some form, most researchers naturally desire a measure of its expected variability across samples of the same size from the same population, either to conduct hypothesis tests or to offer an informed posterior distribution for the causal effect that can guide subsequent research.").

126. *See supra* notes 98–117 and accompanying text.

relevant information and therefore has *some* value in litigation, just like any piece of nonstatistical, circumstantial evidence of discriminatory intent.[127] Meanwhile, in the absence of a coherent methodological critique from the legal academy, courts continue to rely on binomial distributions and multiple regressions and regularly misinterpret the meaning of statistically significant results obtained therefrom.[128]

B. Contextualist Strand: Organizational Causes of Discrimination

The second strand of scholarship on systemic disparate treatment theory has an entirely different focus. Led by Professor Tristin Green's contribution to the Working Group, the contextualist strand represents an attempt to expand the conception of systemic disparate treatment law to impose liability on employers at the entity level.[129] Under this view, systemic disparate treatment was not meant to be a simple aggregation of multiple instances of discrimination occurring at the individual level. Rather, systemic disparate treatment law serves a broader purpose: "[T]he employer's responsibility under this model turns not on identification of a single instance or even multiple instances of disparate treatment; rather, its responsibility turns on its own role in producing disparate treatment within its walls."[130] Professor Green, drawing upon the literature on corporate criminality and organizational studies, urges that employers be held *directly* responsible for what the entity itself has done wrong—encouraging or allowing discrimination to thrive by the entity's "set of attitudes and positions, which influence, constrain, and at times even define the modes of thinking and behavior of the people who populate it."[131]

Instead of asking whether an entity can be held vicariously liable for negligence in supervising its individual policymakers or employees,[132] Professor Green's context model would seek to locate wrongdoing at the

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127. *See supra* notes 118–29 and accompanying text. The difficulties identified by scholars writing in the methodological strand are nicely encapsulated by Professor Selmi in a story he relates in his contribution to the Working Group:

> The role statistics play in systemic discrimination cases has always been a bit of a mystery, a fact that was brought home to me recently at a conference I attended with mostly philosophers present. During a discussion of the *Wal-Mart* case, one of the philosophers asked, rather incredulously, how can statistics prove intent? . . . [W]e had a difficult time providing an answer, other than to point to some of the cases.

Selmi, *supra* note 4, at 480.

128. *See supra* notes 82–86 and accompanying text.

129. *See* Green, *supra* note 2. Professor Green's proposed entity-level conceptualization of systemic disparate treatment appears to be an idea with which Professors Hart and Ford generally concur. Hart, *supra* note 4, at 456 n.2; *see* Ford, *supra* note 4, at 513–14 (advancing a "collective justice" approach to systemic disparate treatment).

130. Green, *supra* note 2, at 439.

131. *Id.* at 439 (quoting Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 686 (2000)) (internal quotation mark omitted).

132. As Professor Green observes, "[E]ntity liability for systemic disparate treatment has never turned on these concepts." Green, *supra* note 2, at 429.

entity level. In her words, the context model "asks whether the entity is producing wrongdoing on an aggregate basis within its walls rather than asking exclusively whether an identifiable high-level policy maker or low-level decision maker acted with purpose or intent to harm or whether the entity has done enough to police wrongdoing of individual actors."[133]

Professor Green's proposal of a contextual model is an important step in systemic disparate treatment scholarship. By drawing upon studies of organizational dynamics, the contextual model appropriately recognizes that organizations can produce disparate treatment within the organization even though it may be "difficult to isolate identifiable wrongdoers."[134] The *Wal-Mart* case itself may present an example of such a situation. There, Walmart left promotion decisions to the subjective discretion of store managers.[135] The plaintiffs alleged that this decentralized, discretionary promotion policy resulted in discrimination against female employees in the aggregate at Walmart stores across the country.[136] When each individual promotion decision in a case like *Wal-Mart* is examined in isolation it may not be possible to affirmatively identify a definitive instance of intentional disparate treatment discrimination. Yet, social science evidence suggests that an observed company-wide disparity in promotion outcomes may nonetheless be caused by certain organizational influences, attitudes, and cultures that "creat[e] the environment in which interactions and decisions take place."[137]

Professor Green's approach places a focus on understanding the causal relationship between organizational dynamics and employment outcomes, but it does not tackle the fundamental problems of inference highlighted by the ongoing debate in the methodological strand. In her context model of systemic disparate treatment, Professor Green would determine liability by "ask[ing] whether the entity is producing wrongdoing on an aggregate basis within its walls," but Professor Green would appear to accept statistically significant results from binomial distributions and multiple regression analyses to answer that question.[138] She argues that "[s]tatistics serve as evidence of regular, widespread internal disparate treatment."[139] Professor Green explains her view of the power

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133. *Id.* at 398–99. Professor Selmi would not ascribe to this view if it would go so far as to impose direct liability on employers for "passively facilitating discrimination" that is not at least causally connected to the employer's "broader cultural norms within the firm." Selmi, *supra* note 4, at 503. Professor Selmi argues that such a conceptualization of systemic disparate treatment "would come close to requiring employers to implement some form of affirmative action, something no court is likely to require." *Id.*

134. Green, *supra* note 2, at 436.

135. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

136. *See infra* Part II.C (discussing the facts and holding from *Wal-Mart*).

137. Green, *supra* note 2, at 440; *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 662–63 (2003).

138. Green, *supra* note 2, at 398.

139. *Id.* at 444. Professor Green refers to "sophisticated statistical analyses" that can control for external factors, an apparent reference to multiple regression. *Id.*

of statistical evidence "[s]tatistics cannot tell us whether one would see a particular observed disparity in the absence of discrimination, but *they can indicate the likelihood that an observed disparity (after accounting for legitimate variables) is due to chance.*"[140]

Other scholars have made similarly inflated claims about the power of statistics in systemic discrimination cases to prove the likelihood that observed disparities are due to chance. Professor Selmi may not fully endorse Professor Green's contextual model,[141] but he nonetheless echoes her claim about statistical evidence: "In the context of discrimination claims, that [statistically significant] disparity will generally be attributed to discrimination since the function of the standard deviation analysis is to *rule out chance fluctuations.*"[142] Professor Michael Zimmer, discussing binomial distribution analysis in a recent article about *Wal-Mart*, states: "If there is a statistically significant relationship between sex and promotions, that relationship makes it *extremely unlikely* to be the result of chance."[143]

The foregoing statements all exaggerate, to greater or lesser degrees, the power of statistical evidence obtained from binomial distribution and multiple regression analyses to cast doubt on chance as the likely explanation for observed disparities. Just like the D.C. Circuit in the passage quoted above in Part II.A,[144] scholars frequently convert statistical significance into something that it is not. A statistically significant result *does not* justify the conclusion that chance can be ruled out as an explanation for an observed disparity in a particular case, at least not absent some hidden assumption about background rates of discrimination.[145] Nor can a statistically significant result, in the absence of base rate information, provide us with a quantified likelihood that observed disparities are due to chance rather than discrimination.[146] To rule out chance as an unlikely explanation for observed disparities, one must consider the statistical results in light of information or estimates about the

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140. *Id.* at 403 (emphasis added).

141. Selmi, *supra* note 4, at 503 n.107. Professor Selmi would require that the disparate employment outcomes are somehow traced to particular employees or at least to "broader cultural norms within the firm." *Id.* at 503.

142. *Id.* at 482 (emphasis added). Likewise, Professor Ford in his contribution to the Working Group writes: "Of course that [statistical evidence] can be and often is manipulated too, but good statistical analysis can distinguish real evidence from spin." Ford, *supra* note 4, at 521. Ford explains that as sample sizes increase, the "potential for chance to affect the analysis" decreases. *Id.* This is a recognition that large sample sizes tend to more easily produce statistically significant binomial distribution or regression results. *See* PAETZOLD & WILLBORN, *supra* note 57, § 4.15.

143. Zimmer, *supra* note 3, at 442 (emphasis added). Professor Zimmer makes a more modest claim about the results of multiple regression analysis: "Holding all the variables other than sex constant, the technique shows whether there is a statistically significant relationship between pay and sex. If there is, the null hypothesis that sex and pay are unrelated should be rejected." *Id.* at 442–43.

144. *See supra* text accompanying note 82.

145. *See supra* Part II.A.3; *see also* Weiss, *supra* note 9, at 1746.

146. *See supra* text accompanying note 87.

base rate of discrimination.[147] Unfortunately, statistical analysis of observational data alone, without some hidden assumption about background rates, cannot "indicate the likelihood that an observed disparity (after accounting for legitimate variables) is due to chance."[148]

Recall that if the background rate of discrimination is assumed to be 1% in the simplified example, then a statistically significant finding at exactly *p*-value = .05 would mean that the likelihood is 1 in 6—or about 17%—that the observed disparity is due to discrimination (true positive) and 5 in 6—or about 83%—that the observed disparity is due to chance (false positive).[149] This result patently falls short of truly "rul[ing] out chance fluctuations."[150] When operating with a 1% base rate assumption, chance is actually a much more likely explanation for the observed disparity than discrimination. What the statistically significant results do show, given a 1% base rate assumption, is that it now appears relatively more likely that the employer in question discriminated (17%) than we would have estimated without the benefit of the observed statistical evidence of disparity (1%). The statistical showing of a disparity does offer valuable and probative information that should be considered, but it simply does not and cannot rule out chance as an explanation for observed disparities.[151]

Neither Professor Green nor Professor Selmi, in their contributions to the Working Group, nor Professor Zimmer, in his separate work on the substantive implications of *Wal-Mart*, directly address the methodological arguments about the limitations of statistical evidence advanced by Professors Browne and Greiner. Although authors in both scholarly strands are trying to make sense of systemic disparate treatment law, the two scholarly strands have, unfortunately, rarely intersected. The methodological critics focus intently on the limitations of statistical evidence without addressing legitimate, larger questions about the importance of organizational influences on observed employment outcomes and the difficulty of identifying and proving discrimination.[152] Yet, the contextualists advocating a more expansive conceptualization of systemic disparate treatment tend to gloss over the very real limitations of statistical evidence as a tool for reliably identifying employers that are actually guilty of "producing disparate treatment within [their] walls."[153] For sys-

147. *See supra* text accompanying note 87.

148. Green, *supra* note 2, at 403; *see also supra* text accompanying note 143.

149. *See supra* text accompanying notes 88–94.

150. Selmi, *supra* note 4, at 482.

151. *See* KAYE ET AL., *supra* note 78, § 12.8.2.b ("Chance affects the data, not the hypothesis. With the frequency interpretation of chance, there is no meaningful way to assign a numerical probability to the null hypothesis.").

152. *See supra* Part II.A.3–4.

153. *See* Green, *supra* note 2, at 439. Interestingly, Professor Ford chalks up general skepticism toward statistical evidence as a product of cognitive bias. *See* Ford, *supra* note 4, at 519–20. Under Professor Green's conceptualization of systemic disparate treatment we would, by the definition of statistical significance at the .05 level, necessarily expect at least 5% of all employers covered

temic disparate treatment law to survive as an important tool in the anti-discrimination toolbox, the important theoretical advancements made in both strands must be harmonized. With apologies to Professor Zatz, what systemic disparate treatment *really* needs is an inclusive rethinking of its theoretical foundations that incorporates the contributions of both the methodological critics and the contextualists.[154]

C. Wal-Mart*: The End of Systemic Disparate Treatment?*

Unexplored tensions between the methodologists and the contextualists were manifested in the *Wal-Mart* decision. *Wal-Mart* was nominally a case about the requirements of commonality and typicality under Federal Rule of Civil Procedure 23 governing class certification.[155] But Justice Scalia's majority opinion in *Wal-Mart* has potentially profound implications for the substantive law of systemic disparate treatment given the skepticism with which the majority viewed statistical evidence of observed outcome disparities.[156]

Wal-Mart involved claims of discrimination on the basis of sex in the promotion and pay practices at the giant retail chain.[157] Walmart is the largest private employer in the United States, and the purported class seeking Rule 23 certification included about 1.5 million female current and former Walmart employees.[158] Plaintiffs claimed that a decentralized decision-making structure at Walmart led to discrimination against women.[159] Plaintiffs brought claims under both the systemic disparate treatment theory and the disparate impact theory—a point that is somewhat obscured by the Court's decision.[160] The plaintiffs' theory, as described by Justice Scalia, was "that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discre-

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by antidiscrimination laws to be held liable for "producing disparate treatment within [their] walls" based on a finding of statistically significant outcome disparities. *See* Green, *supra* note 2, at 439. This is true because, assuming that decisions were made at random, *by chance alone* we would expect to observe such statistically significant disparities at a rate of 5%, regardless of the number of covered employers that, in truth, are guilty of unlawful discrimination.

154. *Cf.* Zatz, *supra* note 2, at 391 ("What systemic disparate treatment theory needs is an account that grounds employer liability in firm-level conduct—the connective tissue—[]not simply in dispersed individual disparate treatment, and does so without relying exclusively on the extreme case of connective *disparate treatment*.").

155. To the extent that *Wal-Mart* is truly limited to application of Rule 23, it should have no bearing on systemic disparate treatment actions brought by the EEOC on behalf of groups of aggrieved persons. EEOC pattern or practice claims are not governed by the class certification requirements of Rule 23. *See* Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 327 (1980).

156. Green, *supra* note 2, at 405. Professor Green states:

> If the Supreme Court continues down the path set by the majority opinion in *Wal-Mart* and adopts an individualistic theoretical foundation for systemic disparate treatment law . . . the Court's 'procedural' decision will result in drastic change in the substantive law of systemic disparate treatment as it has been practiced for more than three decades.

Id.

157. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

158. *Id.*

159. *Id.* at 2548.

160. Green, *supra* note 2, at 407 n.45.

tionary decisionmaking of each one of Walmart's thousands of managers."[161]

The district court certified the proposed class under Rule 23(b)(2), and a divided en banc Ninth Circuit Court of Appeals affirmed the certification.[162] A majority of the Supreme Court reversed, finding that the Rule 23 requirement of commonality had not been met.[163] The Court, relying heavily on *General Telephone Co. of the Southwest v. Falcon*,[164] determined that commonality in a case like this could be shown in one of two ways: (1) where the purported class members were subjected to the same biased testing procedure for purposes of evaluation by the employer; or (2) where the plaintiffs could show "[s]ignificant proof that an employer operated under a general policy of discrimination" it might be conceivable to have a broad class including both applicants for hire and incumbent employees who are denied promotion.[165]

From this, the Court reasoned that commonality was lacking because plaintiffs had adduced no "'significant proof' that Walmart 'operated under a general policy of discrimination,'" as the majority thought the *Falcon* Court's second prong demanded.[166] Instead, the Court thought there was evidence of the opposite, finding it significant that "Wal-Mart's announced policy forbids sex discrimination."[167] In a revealing passage, the Court explained why commonality must be lacking in Walmart's decentralized decision-making system:

> [L]eft to their own devices *most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.* Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional

161. *Wal-Mart*, 131 S. Ct. at 2548.

162. *Id.* at 2549.

163. *Id.* at 2556–57.

164. 457 U.S. 147 (1982).

165. *Id.* at 159 n.15. The *Falcon* case was focused on the question whether, given Rule 23's commonality and typicality requirements, a single class under Rule 23 could include two separate groups of individuals: (1) those who were denied hire by the defendant, and (2) those who were denied promotion by the defendant. *Id.*; *see also* Green, *supra* note 2, at 410. In the early development of systemic disparate treatment law, cases would often proceed as "across the board" discrimination cases, where the class of aggrieved individuals would include combinations of different protected groups and combinations of different adverse employment actions (such as failure to hire, failure to promote, and termination). Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 818 (2004).

166. *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). The first prong of *Falcon* was inapplicable, because the plaintiffs in *Wal-Mart* did not allege that they were subjected to any biased uniform testing procedure or evaluation method. *Id.*

167. *Id.* Importantly, the defendant in *Hazelwood* had a similar official policy of nondiscrimination, providing that the School District would "hire all teachers on the basis of training, preparation and recommendations, regardless of race, color or creed." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 303–04 (1977).

> discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manger's use of discretion will do nothing to demonstrate the invalidity of another's.[168]

Professor Green rightly notes that Justice Scalia's majority opinion appeared to embrace a policy-required view of the systemic disparate treatment theory, representing a break with the Court's precedent.[169] Nothing in *Teamsters* or *Hazelwood* required the plaintiffs to identify a specific policy or a specific individual decision-maker that caused the observed disparity. Rather, the Court in *Hazelwood* plainly allowed statistical evidence of a gross disparity alone to establish a prima facie case of systemic disparate treatment discrimination without requiring the plaintiff to single out any particular policy or mechanism responsible for generating the observed disparity.[170] Identifying a particular employment practice or policy leading to a disparity is required in *disparate impact* cases,[171] but until *Wal-Mart*, it had never been required in systemic disparate treatment cases.[172]

The *Wal-Mart* opinion nicely highlights a tension between the two scholarly strands. On a contextual view, the *Wal-Mart* plaintiffs established all that was necessary to show that Walmart was producing disparate treatment within its walls—statistically significant employment outcome disparities. Under Professor Green's model, this would be sufficient to hold *Wal-Mart* directly liable for its own entity-level wrongdoing. The various differences between class claimants, including their store location, their supervisors, their managers, their job duties, and so on, would be entirely irrelevant to this determination, making class certification appropriate. Methodological scholars criticizing overreliance on tests of statistical significance, however, would likely reach exactly the opposite conclusion. For scholars like Professor Browne, the statistically significant results of traditional statistical techniques, without something more, would not be sufficient to justify an inference of disparate treatment. The *Wal-Mart* majority appears to have sided with the methodological critics. Justice Scalia demanded more than just statistical evi-

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168. *Wal-Mart*, 131 S. Ct. at 2554 (emphasis added) (citation omitted).

169. Green, *supra* note 2, at 408, 410; *see also* Selmi, *supra* note 4, at 503 (discussing Judge Ikuta's dissent in the Ninth Circuit's en banc decision).

170. *Hazelwood*, 433 U.S. at 307–08 ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

171. Civil Rights Act of 1964, Pub. L. No. 88-352, 42 U.S.C. § 2000e-2(l)(A)(i) (2012); *see also* Michael Selmi, Theorizing Systemic Disparate Treatment Law 5 (2011) (unpublished draft of Selmi, *supra* note 4) (on file with author) ("In a disparate impact claim, it is generally possible to pinpoint a decision—to locate an agent or an explicit policy that is at the center of the allegations, and it is mostly a specific act.").

172. Green, *supra* note 2, at 397 (calling the majority's policy-required view a "drastic reshaping of systemic disparate treatment law"); Selmi, *supra* note 4, at 503 ("This is why many, like Judge Ikuta of the Ninth Circuit and the late scholar Richard Nagareda, seek a policy or practice as proof of discrimination, although a formal policy is not required and if there was one it should be adjudicated under other causes of action." (footnote omitted)).

dence of a disparity. He required some "glue" to bind the class members' claims together—evidence of a policy of discrimination, a common rogue decision-maker, or perhaps anecdotal evidence on a much larger scale.[173] As demonstrated below, the majority's demand for some "glue" binding together the class members' claims reflects a change in the Court's hidden priors from *Teamsters* to *Wal-Mart*.

III. THE BAYESIAN PATH FORWARD

"Bayesian theory is a way of systematizing the elementary point that preconceptions play a role in rational thought."[174]

Can systemic disparate treatment law survive *Wal-Mart*? If, as Professor Green argues, *Wal-Mart* represents a substantive shift to a new, policy-required view of systemic disparate treatment law, then the proof framework elucidated in *Teamsters* and *Hazelwood* is no more. This Part argues, however, that there is a viable path forward for systemic disparate treatment law that explains the outcome in *Wal-Mart* and that can also successfully reconcile some of the key concepts advanced by methodologists and contextualists. That path will require courts to embrace a Bayesian view of statistical evidence that acknowledges the importance of preconceptions.

A. Bayesian Inference

Recall the simplified base rate examples set forth in Part II.A. In the base rate examples, we see that when identical statistical evidence is viewed in the context of two different base rate assumptions, we arrive at very different likelihoods that the defendant discriminated.[175] This outcome is explained by the operation of Bayes' Theorem. Bayes' Theorem describes in mathematical terms how a decision-maker can rationally process new information—here, an observed disparity in employment outcomes—by combining it with the decision-maker's prior knowledge or belief—here, the assumed base rate of discrimination—and use the end result (usually called a "posterior probability") to make a decision under uncertainty.[176] In a Bayesian model of discrimination analysis the

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173. *Wal-Mart*, 131 S. Ct. at 2552.

174. POSNER, *supra* note 10, at 67. Judge Posner later substitutes the term "Bayesian priors" for the term "preconceptions," given the pejorative connotation associated with the word "preconception." *Id.*

175. *See supra* notes 88–92 and accompanying text.

176. How a judge or jury processes information received in the form of pleadings, testimonial evidence, documentary evidence, or statistical evidence is the subject of a continuing debate in evidence literature. *See, e.g.*, Ronald J. Allen, *A Reconceptualization of Civil Trials*, *in* PROBABILITY AND INFERENCE IN THE LAW OF EVIDENCE: THE USES AND LIMITS OF BAYESIANISM 21, 43 (Peter Tillers & Eric D. Green eds., 1988) (arguing that juries engage in a "relative plausibility" analysis, in which they choose from competing, but fully specified, alternative stories by deciding which story best explains the evidence). Some scholars suggest that a relative plausibility model is not necessarily inconsistent with Bayesian processing. Peter Tillers, *Trial By Mathematics—Reconsidered*, 10 LAW, PROBABILITY & RISK 167, 170 (2011) ("[I]t was a mistake [for critics of trial by mathematics]

decision-maker begins by assigning some prior probability distribution to the question at issue and then updates that probability distribution with observed information about employment outcome disparities.

The calculations are generally more complex in Bayesian statistical analysis than in the traditional analyses described above, but several authors have provided examples in the discrimination context.[177] Professor Ramona Paetzold succinctly illustrates Bayesian inference with the following example. Imagine an employer makes twenty new hires, six of whom were women and fourteen of whom were men, even though the employer drew from a pool of qualified applicants that contained 52% women and 48% men.[178] The question is: should an inference of discrimination arise from this evidence outcome disparity? The answer likely depends on the decision-maker's priors, or preconceptions about the likelihood that the employer discriminated, before viewing the observed statistical data.

A Bayesian analyst begins by assigning a prior probability distribution.[179] In Professor Paetzold's example, she first assumes that the decision-maker assigns a 0.5 probability to the proposition that the hypothetical employer did not discriminate at all in making hiring decisions (i.e., the true chance that any particular hire would be female from the qualified applicant pool was exactly equal to 0.52) and that the remaining 0.5 probability is spread uniformly over all the remaining possible values (other than 0.52) for the chances that any particular hire would be female.[180] Applying Bayes' Theorem to update the prior in light of the observed disparity, the decision-maker in this case would arrive at a posterior probability of 0.357 that the employer did not discriminate.[181]

The posterior probability in the foregoing example might still be sufficient to support an inference of discrimination, but it is sensitive to changes in the prior. If the assigned prior probability distribution is changed—either by building in a higher or lower probability that the employer did not discriminate or by changing how the remaining probability is distributed among the possible values for the true chance that any particular hire would be female—then the posterior outcome changes. Where the observed disparity in employment outcomes is not over-

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to suppose that storytelling is inconsistent with Bayesian or mathematical analysis of evidence with cardinal numbers . . . ." (footnote omitted)).

177. *See, e.g.*, Paetzold, *supra* note 56, at 406–07; David Kaye, *Statistical Evidence of Discrimination*, 77 J. AM. STAT. ASS'N 773, 779 (1982).

178. Paetzold, *supra* note 56, at 406–07.

179. *Id.*

180. *Id.* at 407.

181. *Id.* at 407 n.59 (providing the Bayesian calculation). Based on the assumed prior distribution, combined with the observed data reflecting an employment outcome disparity, the decision-maker would estimate that there is approximately a 64% chance that the employer discriminated in the hiring process, and approximately a 36% chance that the employer did not discriminate. *Id.* at 407.

whelming, the effects of varying the assigned prior can be dramatic. As Professor Paetzold notes, it is possible for traditional statistical analysis and Bayesian analysis of the same data to reach diametrically opposite conclusions about whether an employer likely discriminated.[182] A traditional statistical analysis of a given data set might yield a statistically significant result with a *p*-value of .05, while a Bayesian analysis of that very same data might (depending on priors) yield a posterior probability that the employer did *not* discriminate of 0.95.[183]

As the foregoing illustrates, estimates of priors can make the difference between deciding that a defendant more likely than not engaged in systemic disparate treatment and deciding *exactly the opposite*, even where the parties offer the exact same statistical evidence. Recognition of the limitations on indirect statistical inference, the base rate problem, and the role of prior probability estimates is critical to understanding the evolution of systemic disparate treatment theory from *Teamsters* and *Hazelwood* through *Wal-Mart*. The future of systemic disparate treatment law depends on courts and scholars recognizing this fundamental problem and developing a theoretically sound way of managing it. To begin this task first requires a brief introduction to a long-running philosophical debate in the field of statistics.

B. The Bayesian/Frequentist Divide

The problem of assigning a prior probability distribution, which will necessarily be at least somewhat subjective and possibly deeply uncertain, is the primary criticism of the Bayesian—or subjectivist—philosophy of statistical analysis.[184] Another school of statistical thought, frequentism—or objectivism—represents the more traditional approach to statistical inference.[185] A full discussion of the contours of the frequentist–Bayesian divide is beyond the scope of this Article; however, a short introduction to this philosophical debate is in order before examin-

182. *Id.* at 396–97 (citing Dennis V. Lindley, *A Statistical Paradox*, 44 BIOMETRIKA 187 (1957)).

183. *Id.* at 408.

184. *See* PAETZOLD & WILLBORN, *supra* note 57, § 12.05 (noting that traditional frequentist methods are often thought to be more objective than Bayesian methods because "they appear to rely on the sample evidence alone, without the inclusion of prior probabilities"); *see also* MICHAEL J. ZIMMER ET AL., EMPLOYMENT DISCRIMINATION: SELECTED CASES AND STATUTES—2011 47 (Supp. 2011); Mikel Aickin, *Issues and Methods in Discrimination Statistics*, *in* STATISTICAL METHODS IN DISCRIMINATION LITIGATION 159, 163 (D. H. Kaye & Mikel Aickin eds., 1986) ("Satisfactory rules for formulating such 'prior' probabilities are not well-developed, and it is far from clear that people do, or should, formulate and use them in the 'Bayesian' fashion stipulated by subjectivists.").

185. *See* PAETZOLD & WILLBORN, *supra* note 57, § 12.01 (describing the "traditional school of thought in statistics" as "based on frequentist notions of probability"); Aickin, *supra* note 183, at 161 ("Speaking very roughly, most statisticians can be categorized with regard to their attitudes towards probability as being either *frequentists* or *subjectivists*."); Rory Bahadur, *The Scientific Impossibility of Plausibility*, 90 NEB. L. REV. 435, 457 (2011) ("The two main philosophies of probability theory are the Frequentist and Bayesian models of probability.").

ing how courts can manage the role of Bayesian priors in systemic disparate treatment cases.

The frequentist view eschews the notion of specifying prior probabilities altogether.[186] Instead, the frequentist looks at the statistical data merely as evidence in favor of rejecting the null hypothesis without attaching any particular probability to the likelihood that the employer *in this particular case* actually discriminated when it made its hiring decisions. A frequentist finding a gender disparity statistically significant at the .05 level might believe the statistical evidence is sufficient reason to reject the null hypothesis that employers hire from the labor pool at random with respect to gender.[187] But the frequentist does not form any specific opinion about the likelihood that *this* employer, during *this* particular set of hiring decisions, acted discriminatorily. Instead, the frequentist rejects the null hypothesis using the following *predictive* logic:

> [T]o say that an event [here, random hiring leading to the observed disparity by chance] has probability 0.05 is not so much a statement about any *particular* occurrence or nonoccurrence of the event, but is rather a *prediction* about future repetitions of the setting in which the event might occur.[188]

In other words, the frequentist imagines an infinite repetition of the set of hiring decisions and determines the frequency with which random hiring would lead to the observed disparate result. This frequentist view of statistics appears, at least initially, to be more objective than the Bayesian view because it does not require the decision-maker to specify and employ a subjective, uncertain, or imprecise prior probability.

The frequentist critique of Bayesianism holds force for settings where experiments can be repeated many times, especially when using experimental conditions rather than observational data, but the critique is less potent in the context of judicial decision-making. A judge or jury must make a ruling based on the evidence presented in the single case before it, and does not have the luxury of repeating a hypothetical hiring process or a controlled hiring experiment many times over to observe a multitude of outcomes.[189] Thus, some scholars, including Professor Rory

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186. *See infra* text accompanying notes 195–96.

187. *See* Paetzold, *supra* note 56, at 399–400.

188. Aickin, *supra* note 184, at 162 (second emphasis added); *see also* KAYE ET AL., *supra* note 78, § 12.8.2.b. ("With the frequency interpretation of chance, there is no meaningful way to assign a numerical probability to the null hypothesis."); Paetzold, *supra* note 56, at 401 ("It should be noted that this traditional method of testing is referred to as the 'frequentist' method of testing because the p-value represents a 'long-run frequency' interpretation of probability. . . . In order for the probability to be accurately interpreted, it must be possible to conceive of an infinite number of relevant, nearly identical hiring decisions facing the employer.").

189. Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 MICH. L. REV. 931, 969 (1999) ("[T]he classical statistical method seeks to ascertain recurrent patterns, using observations about occurrences in the past to predict

Bahadur and Professor Ramona Paetzold, have argued that Bayesian reasoning is the better way to view statistical proof in the courtroom. Professor Bahadur argues:

> Frequentist models are ill-suited for use in the legal system because they involve computing probability in idealized, non-real-world contexts, and they are incapable of incorporating preexisting information into the decision process. . . . Bayesian probability analysis, by contrast, is an approach to statistics which "formally seeks to utilize prior information." . . . Bayesian probability, like legal inference, essentially seeks to process information in a manner that yields the most optimal inferences based on the information.[190]

Likewise, Professor Paetzold has argued for a switch from frequentism to Bayesianism in the specific context of employment discrimination cases.[191] She notes that the information provided by frequentist statistical methods, including testing the null hypothesis of random hiring decisions, is so "at odds" with the purpose of a judicial proceeding that it leads to confusion and error, including the transposition fallacy.[192] Professor Paetzold writes:

> In order for the . . . [*p*-value from frequentist analysis] to be accurately interpreted, it must be possible to conceive of an infinite number of relevant, nearly identical hiring decisions facing the employer. In other words, the frequentist approach requires consideration of hypothetical evidence (i.e., hypothetical hiring decisions) that were not actually a part of the employer's past hiring practices. The correct interpretation of p-values is sufficiently at odds with the factfinder's needs that courts often have difficulty in interpreting the statistical evidence.[193]

Although many statisticians can generally be categorized as frequentist or Bayesian in their philosophies, some take a more nuanced view by using "whichever approach seems to be appropriate to the nature of the problem at hand."[194] The Bayesian approach seems especially apt in systemic disparate treatment cases in light of the base rate and causal inference problems highlighted by the methodological critics. Further, the frequentist disdain for using subjective prior probabilities is misleading in the context of judicial decision-making. Making liability decisions about an individual employer's set of employment actions based on a frequentist rejection of the null hypothesis necessarily carries with it the

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the future. . . . Adjudication, by contrast, usually seeks to determine the truth about a particular dispute, which usually concerns events in the past.").

190. Bahadur, *supra* note 185, at 457–58 (footnotes omitted).

191. Paetzold, *supra* note 56, at 412 ("There are strong reasons for switching to Bayesian methods of statistical inference in employment discrimination cases.").

192. *Id.* at 401.

193. *Id.* (footnote omitted).

194. Aickin, *supra* note 184, at 162.

use of an implied, hidden prior probability. The following subparts illustrate the hidden role of Bayesian priors in judicial decision-making in systemic disparate treatment cases, including *Teamsters*, *Hazelwood*, and *Wal-Mart*.

C. Hidden Priors in Judicial Use of Frequentist Statistics

Frequentists decry Bayesians' reliance on unknowable, subjective prior probabilities.[195] But when a decision-maker draws an inference of discrimination in a particular systemic disparate treatment case based on a finding of statistical significance at the .05 level, the frequentist encourages the use of a built-in, unstated, and unexamined prior probability. Courts and juries relying on frequentist statistical significance to shift the burden of proof or determine liability use built-in priors without realizing it. As Professors Paetzold and Willborn explain:

> Although traditional methods are often viewed as more objective in the sense that they appear to rely on the sample evidence alone, without the inclusion of prior probabilities, virtually any inference that a frequentist makes implies a corresponding Bayesian inference with respect to some assignment of prior probabilities. In other words, the traditional approach can be viewed as operating with a built-in set of prior beliefs. The fact-finder in a discrimination case would arguably be better served by examining explicitly a wide range of prior beliefs, for it is only then that the fragility or robustness of the inference about discrimination can be assessed.[196]

This point is illustrated by revisiting one of the simplified examples from Part II.A.3. Assume that a systemic disparate treatment case is brought against Employer A. In Phase I of the *Teamsters* framework, the plaintiffs present statistical evidence in the form of a binomial distribution analysis of Employer A's hiring patterns. The frequentist statistician expert testifies that the *p*-value for the observed disparity in Employer A's hiring data is exactly .05, making the results just statistically significant at the .05 level. Recall that the correct interpretation of this statistical finding is as follows: Assuming that Employer A hired randomly from the relevant labor pool, we would expect to see results showing this level of disparity only 5 times in every 100—or 1 in 20—repetitions of the hiring process. Assume that no other evidence is offered by either plaintiffs or Employer A. From this statistical evidence alone, the fact-finder determines in Phase I that Employer A *more likely than not* engaged in an unlawful pattern or practice of discrimination, and Employer A is therefore liable for a systemic violation of Title VII. Such a finding

195. *See, e.g.*, Samuel R. Lucas, *The Road to Hell . . .: The Statistics Proposal as the Final Solution to the Sovereign's Human Rights Question*, 30 WIS. INT'L L.J. 259, 319–20 (2012).

196. PAETZOLD & WILLBORN, *supra* note 57, § 12.05 (footnotes omitted). As Paetzold and Willborn note, this is a point that commentators often miss when dismissing Bayesian methods. *Id.* § 12.05 n.2.

appears to be justified, and possibly even prescribed, by the Court's opinion in *Hazelwood*. Per *Teamsters*, this finding in Phase I has the effect of establishing Employer A's wrongdoing, justifying prospective relief, and shifting the burden of proof to Employer A for Phase II, in which individual relief for the class members will be considered.

By drawing this inference of systemic discrimination and imposing liability at Phase I from only the frequentist statistical proof presented, the fact-finder has actually applied a built-in Bayesian prior probability without realizing or acknowledging as much. The fact-finder in this simplified example has implicitly assumed that the prior probability of discrimination must be greater than 5%. At a base rate of exactly 5% discrimination, with an observed statistical disparity having a *p*-value of .05, one would expect exactly 5 true positives and 5 false positives when performing the statistical test on 100 employers. A fact-finder considering this statistical evidence under a 5% base rate assumption would therefore believe the evidence to be precisely in equipoise as to whether Employer A engaged in an unlawful pattern or practice of discrimination. It is exactly as likely that the defendant before the fact-finder is one of the true positives as it is one of the false positives. Given that plaintiffs bear the initial burden of establishing by a preponderance of the evidence that the defendant engaged in a pattern or practice of unlawful discrimination,[197] the fact-finder should find in favor of Employer A if it believed the base rate to be exactly 5% or less.[198] But if the fact-finder assumed any base rate of discrimination higher than 5%, it would find that plaintiffs succeeded in showing that it is more likely than not that Employer A engaged in unlawful discrimination.

By determining that Employer A engaged in systemic discrimination based on only the statistical evidence with a *p*-value of .05, the fact-finder in this simplified example has implicitly assumed a base rate of discrimination exceeding 5%. It may well be that assuming a base rate of systemic discrimination higher than 5% is justified, but this point is never considered by the litigants, the statistical experts, the court, or the fact-finder. Instead, the implied prior probability assumption is obscured—hidden within the steps of indirect logical inferences drawn from the statistics. The frequentist interpretation of statistical probability, at least as it has been applied by courts in systemic discrimination cases, is no

197. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

198. This analysis would be complicated if the inquiry involved not just consideration of whether the employer more probably than not engaged in unlawful discrimination. I have previously argued elsewhere that because the systemic disparate treatment theory is fundamentally a burden allocation scheme, at least as to recovery for individual class members, the parties' relative access to information should also be considered in Phase I. Bent, *supra* note 16, at 818. The addition of other factors, such as the parties' information costs, would complicate the formula and change the critical cutoff number from > 0.5 (representing the preponderance of the evidence) to some higher or lower figure, but it would not change the fact that hidden priors will play a role in the probability component of the analysis.

less subjective than the Bayesian approach; it just appears that way on the surface. Such hidden priors have influenced the development of systemic disparate treatment law beginning with *Teamsters* and *Hazelwood* and continuing through *Wal-Mart*.

D. Hidden Priors in Teamsters *and* Hazelwood*: The Foundational Flaw*

The systemic disparate treatment theory of unlawful discrimination was first clearly articulated by the Supreme Court in 1977 in *Teamsters* and *Hazelwood*.[199] Title VII of the Civil Rights Act of 1964 was still a relatively new development in the employment landscape, and intentional, open discrimination against minorities and women was still prevalent.[200] Professor Selmi, in his contribution to the Working Group, notes the importance of the era in which these seminal cases were decided:

> [I]n the 1970s, it was relatively easy to draw inferences of discrimination based on statistics, even relatively crude statistics as were offered in *Teamsters* and *Hazelwood*. In these early cases, there was not much of a need to explain the source of the statistical disparity given that employers routinely discriminated against African Americans and women prior to the passage of the 1964 Act, and those habits appeared to die quite slowly.[201]

In other words, the possibility of intentional discrimination on the basis of race or gender was an ever-present and obvious potential explanation for observed disparities in hiring, promotion, or other employment practices. The role of statistics in the early cases, Professor Selmi argues, was to demonstrate that chance was not a very likely explanation for the observed disparity.[202]

Of course, as explained above, the statistics do not *eliminate* the possibility that observed disparities were the product of chance. The statistics do not even necessarily make it more likely than not that the observed disparities were caused by chance. That will depend on the level of statistical significance (or the *p*-value) obtained in the statistical analysis, combined with estimated background rates or priors.

Teamsters and *Hazelwood* were built upon hidden priors. Professor Selmi is surely correct when he notes: "It was not just the companies' own history of discrimination that allowed for an inference of discrimination but it was also *the prevalence of discrimination at the time*."[203] As he puts it, the foundational cases "were of a particular era" and "social conditions have surely changed."[204]

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199. *See supra* Part I.
200. Selmi, *supra* note 4, at 485–86.
201. *Id.*
202. *Id.*
203. *Id.* at 486 (emphasis added).
204. *Id.* at 487.

This observation reveals the importance of prior probabilities operating beneath the surface in the foundational cases. The prevalence of discrimination at the time *Teamsters* and *Hazelwood* were decided generally influenced estimates or preconceptions about how likely it was that any given employer was engaged in unlawful discrimination, before any consideration of other evidence in the case. Statistical showings in cases like *Hazelwood* had to be considered in the context, and against the backdrop, of those prior beliefs about the background rates, or prevalence, of employment discrimination. As Professor Selmi points out, once a statistically significant disparity was shown, and if an employer could not convince the court of some alternative explanation for the observed skew in hiring numbers, the Court was prepared to accept the next most obvious explanation at that time: intentional disparate treatment.[205]

Unsurprisingly, the Court did not openly discuss prior probabilities or base rates of discrimination in *Teamsters* or *Hazelwood*. In both cases, the Court appears to begin with an unstated assumption that the base rate of intentional discrimination was relatively high; hence, discrimination becomes the obvious explanation for observing statistically significant hiring disparities.[206] The very structure that the *Teamsters* opinion prescribes for analyzing systemic disparate treatment cases is underpinned by an unstated prior belief that sufficient baseline levels of discrimination existed to make discrimination a reasonable explanation in the face of statistically significant disparities. In *Hazelwood*, the Court reinforced that notion, reflecting a similar, unstated prior baseline belief.[207] The theoretical and statistical foundations of systemic disparate treatment law were flawed from the beginning because of the Court's failure to recognize the hidden role of priors. Unstated prior probabilities have been lying beneath the surface of systemic disparate treatment law since 1977.

E. Hidden Priors in Wal-Mart*: How Changing Priors Changed Substantive Doctrine*

Professor Suzanna Sherry argues that shifts in the Supreme Court's "intuitions about how the world works," or to use her term, "foundational facts," can result in shifting legal doctrine even where the Court denies that a doctrinal shift has occurred.[208] This sort of shift in foundational facts is precisely what occurred in *Wal-Mart*. The Court's changing intuitions about the background likelihood of discrimination led it to apply systemic disparate treatment doctrine in ways that threaten to undercut *Teamsters* and *Hazelwood* entirely.

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205. *See id.* at 485–87.

206. *See supra* text accompanying note 202.

207. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–09 (1977).

208. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146–47 (2011).

Why did the *Wal-Mart* Court demand more of plaintiffs than it did in *Teamsters* or *Hazelwood* for an inference of systemic discrimination?[209] Professor Selmi contends that discrimination has become a less obvious explanation for observed statistical disparities than it was in the 1970s and much of the 1980s.[210] He notes:

> [O]nce we moved farther away from the era of plain and open exclusionary policies, it has become less clear, at least to the courts, that discrimination provides the best explanation for the observed disparities. Importantly, while social conditions have surely changed, the theory underlying the pattern or practice cause of action has not, and indeed, the mid-1970s cases of *Teamsters* and *Hazelwood* remain surprisingly relevant today.[211]

Neither Professor Selmi nor the Court refers expressly to changes in Bayesian prior probabilities—no doubt because the Bayesian view of statistical inference has not been widely accepted in employment discrimination law[212] and because the hidden priors are buried beneath frequentist inferential reasoning.[213] But Professor Selmi's basic point can be recast in Bayesian terms: the prior probability of discrimination, or the base rate against which the observed statistical disparity should be judged, has significantly declined since the 1970s. The estimated background likelihood that any particular employer is engaged in systemic discrimination has declined enough to make it "less clear" that "discrimination [always] provides the best explanation for the observed disparities."[214]

Glimpses of changed priors can be observed by comparing language in *Wal-Mart* to language found in the early cases. As Professor Deborah Weiss notes, Justice Scalia's ruminations about what "most managers in any corporation" would do are particularly revealing.[215] One can certainly question the empirical accuracy of Justice Scalia's assertion that most managers, if left to their own devices, would choose "sex-neutral, performance-based criteria" to evaluate employees,[216] but there can be little doubt that the same statement would not likely have appeared in a Su-

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209. On this point, it may be argued that *Wal-Mart* did not speak directly to the substance of systemic disparate treatment law, but only to the procedural question involving Rule 23. But given that most systemic disparate treatment claims (other than those filed by the EEOC) are brought as class actions under Rule 23, and that the merits inquiry often merges with the certification inquiry, it may make little difference. *See* Selmi, *supra* note 4, at 480, 493.

210. *Id.* at 487.

211. *Id.*

212. *See* PAETZOLD & WILLBORN, supra note 57, § 12.01 ("One increasingly popular school of statistical inference is the Bayesian school. Although the school is well-known among statisticians and some social scientists, it is only marginally recognized at law.").

213. *See supra* Part II.B.

214. *See* Selmi, *supra* note 4, at 487.

215. Weiss, *supra* note 9, at 1687, 1741; *see also supra* text accompanying note 172 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011)).

216. *See supra* text accompanying note 172 (quoting *Wal-Mart*, 131 S. Ct. at 2554).

preme Court opinion in 1977. Whether Scalia's unsupported observation is accurate or not, it is reasonable to presume that it is at least *closer* to a true statement about *intentional* discrimination now than it would have been if the same words had been written in 1977. Justice Scalia's unsupported assertion reflects his intuition about how the world works, and his intuition is that discrimination is not common.[217]

Further evidence of changed priors can be found in the importance that the majority places on Walmart's official policy of non-discrimination, as compared to its treatment of a similar School District policy in *Hazelwood*. The *Wal-Mart* majority noted: "Wal-Mart's announced policy forbids sex discrimination, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity."[218] As described above, the *Wal-Mart* majority believed this official company policy prohibiting discrimination undermined the commonality requirement because individual managers would not likely have discriminated in the face of the official policy.[219]

Contrast this to *Hazelwood*. There, the Hazelwood School District had an "officially promulgated policy 'to hire all teachers on the basis of training, preparation and recommendations, regardless of race, color or creed.'"[220] Yet, this evidence did not appear to affect the Court's assessment of the requirements for a prima facie showing of systemic disparate treatment in the slightest. After mentioning the existence of this policy, the Court focused exclusively on the relative merits of the statistical showing.[221] The Court devoted substantial attention to identifying the proper comparison labor pool—or reference class—for purposes of conducting a binomial distribution[222] and to considering whether hiring discrimination taking place before Title VII prohibited public employers from discriminating might have affected observed disparities.[223] But nowhere did the *Hazelwood* Court suggest that the government would need to identify particular rogue decision-makers who allegedly acted discriminatorily in contravention of the official non-discrimination policy.[224] Rather, the Court made clear that statistical evidence of gross disparity alone may "in a proper case" constitute a prima facie showing of a pattern or practice of discrimination—apparently in spite of an express non-discrimination policy.[225]

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217. *See* Weiss, *supra* note 9, at 1687.
218. *Wal-Mart*, 131 S. Ct. at 2553 (citation omitted).
219. *Id.* at 2554.
220. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 303–04 (1977).
221. *Id.* at 306–12.
222. *Id.* at 308, 311–12.
223. *Id.* at 309, 309 n.15.
224. *See id.* at 306–13.
225. *Id.* at 307–08.

Finally, the Court in *Wal-Mart* played up the importance of anecdotal evidence of discrimination in systemic discrimination cases. While *Hazelwood* indicated that statistical evidence alone could in a proper case establish a prima facie case of systemic discrimination,[226] the *Wal-Mart* ruling appears to call that statement into question. Justice Scalia points out the weaknesses of the anecdotal evidence offered by plaintiffs:

> In *Teamsters v. United States*, in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, and the class itself consisted of around 334 persons[.] The 40 anecdotes thus represented roughly one account for every eight members of the class. . . . Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. . . . Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination."[227]

Traditionally, a prima facie case of systemic disparate treatment has "relied almost entirely on statistics."[228] According to Professor Selmi, the "anecdotal evidence is always of marginal significance in a pattern or practice claim."[229] Although the *Teamsters* Court highlighted the anecdotal evidence that "brought the cold numbers convincingly to life,"[230] that anecdotal evidence did not appear to be dispositive and the Court in *Hazelwood* clarified that statistical evidence alone could be sufficient.[231] One potential reading of *Wal-Mart* is that it has changed the substantive law of systemic disparate treatment such that some "significant" or sufficient level of anecdotal evidence is now required to explain what is going on in the observed statistical disparity.[232]

The Court now seems less willing to infer systemic discrimination on the basis of only statistical evidence of an observed company-wide, statistically significant disparity in hiring, promotions, or pay, without something more—the identification of a particular policy, mechanism, or rogue decision-maker that produces the observed disparity. The Court's

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226. *Id.*

227. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011) (alteration in original) (citations omitted) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)). Justice Scalia also notes that in *Teamsters* the forty anecdotes came from employees "spread throughout" the company. *Id.* (internal quotation marks omitted).

228. Selmi, *supra* note 4, at 485.

229. *Id.* at 501.

230. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

231. *Hazelwood*, 433 U.S. at 307–08; *see also supra* note 43 (listing lower court decisions stating that statistical evidence alone may be sufficient to establish a prima facie case of systemic disparate treatment discrimination).

232. *See Wal-Mart*, 131 S. Ct. at 2556.

intuitions about the way the world works—or its hidden Bayesian priors—appear to have changed.[233] Statistically significant evidence suggesting a rejection of the null hypothesis alone was not enough for the *Wal-Mart* Court to endorse the inferential leap to discrimination as the next most obvious explanation for observed disparities.[234] Instead, the Court looked harder for other potential explanations for observed statistically significant disparities.[235] After *Wal-Mart*, the Court may demand evidence of a policy of discrimination, or at least some story or narrative to explain the data, as Professor Selmi suggests. Alternatively, it might demand some additional pieces of evidence such as a higher volume of anecdotal testimony to nudge the probability of discrimination over the line.

The *Wal-Mart* Court's approach is generally consistent with, and can be explained by, a Bayesian view of systemic disparate treatment law with two major caveats: (1) the *Wal-Mart* Court did not openly acknowledge the role of prior probabilities, and (2) the *Wal-Mart* Court used its own unstated priors, but disregarded social framework evidence that would have helped a fact-finder form or adjust its own priors. The majority's unsupported assertion about what most managers would do was not recognized as a challengeable, and empirically testable, assumption about the non-case-specific background likelihood of discrimination.[236] Yet, the majority cast aside expert testimony on social frameworks that would have provided valuable information about the background likelihood of discrimination in certain organizational settings precisely because the expert was not able to offer case-specific information.[237]

F. Reconciling the Methodological and Contextualist Strands by Exposing Hidden Priors

As the preceding discussion shows, Bayesian priors are at work in systemic disparate treatment cases whether courts choose to

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233. The idea that the Court's prior estimate of the base rate of discrimination would change over the course of more than thirty years is generally consistent with statements the Court has made regarding changing societal attitudes toward racial classifications. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also* Sherry, *supra* note 208, at 164–65. ("It is reasonable to suppose, however, that the passage of time might lessen the likelihood that employers are deliberately discriminating, especially in the context of disparate impact. By the late 1980s, was it still more likely than not that any employer who adopted an employment practice with a disparate impact had a covert discriminatory intent? The Court apparently thought not."). Professor Sherry highlights changes in disparate impact doctrine and individual disparate treatment burden-shifting doctrine that she contends are attributable to the Court "chang[ing] its mind about the overall prevalence of racially discriminatory motives among American employers." *Id.* at 166.

234. *See supra* text accompanying notes 169–73.

235. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554–55 (2011).

236. Weiss, *supra* note 9, at 1687.

237. *Id.* at 1678.

acknowledge them or not.[238] A Bayesian view of systemic disparate treatment would expose the role of hidden priors, rebuild the flawed theoretical and statistical foundations of the doctrine, and bring coherence to the most misunderstood category of antidiscrimination claims. Further, a Bayesian view also holds the potential to reconcile methodological and contextualist strands of legal scholarship described in Part II.

For critics writing in the methodological strand, use of Bayesian priors would prevent courts and experts from falling into the transposition fallacy trap and would focus fact-finders on the conditional probability in which they are truly interested—the probability that the employer unlawfully discriminated, given the observed disparities in employment outcomes. Professor Browne may remain skeptical of our judicial system's ability to generate usable estimates of prior probabilities and convey them in an understandable way, but these are questions about the source and management of priors. Part IV of this Article identifies some of these difficult practical questions and proposes a scholarly agenda for addressing them. For now, it is enough to note that the use of Bayesian statistics is not unheard-of in litigation, especially in paternity cases and DNA match criminal cases.[239] Despite potential difficulties in implementation, the introduction of Bayesian logic in systemic disparate treatment cases is now overdue.

The Bayesian approach also provides conceptual space for the contextualist view advanced by Professor Green. The contextualist view posits that certain organizational or cultural dynamics operating at the entity-level can generate disparate employment outcomes, even though individual intentional wrongdoers cannot be identified.[240] This is, essentially, an argument that society underperceives the extent and relative likelihood of employment discrimination because we cannot identify individual wrongdoers in all cases.[241] In formulating this argument, Professor Green draws on the work of social scientists studying organizational behavior.[242] Taking a Bayesian approach in the courtroom, those same social scientists could provide expert testimony about the ways in which organizational dynamics can and do lead to disparate treatment in employment outcomes, even where individual intentional wrongdoers are

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238. *See id.* at 1678–79 (contending that the application of priors are unavoidable in discrimination law generally).

239. *See infra* Part IV.

240. *See supra* Part II.B.

241. *See* Green, *supra* note 2, at 433. Professor Green states:

> As a practical matter, disparate treatment is often difficult to discern on an individual basis—it occurs subtly in day-to-day interactions, in decisions that do not lend easily to immediate comparison, and in unstated judgments and perceptions of value and skills—and therefore can frequently only be identified in the aggregate, where it can be shown that members of a particular group are being denied more promotions or provided less pay.

Id. (citation omitted).

242. *See supra* text accompanying note 138.

not observed. This expert testimony would help fact-finders estimate prior probabilities. For example, expert, non-case-specific social framework testimony about organizational causes of discrimination could appropriately adjust the fact-finder's estimates of prior probabilities.

One of the strengths of the Bayesian approach is its ability to incorporate newly-learned information in a rational and logically consistent way by updating probability estimates. This built-in flexibility in the Bayesian approach provides a distinct advantage over the status quo, with its more rigid decision rule that turns on a finding of frequentist statistical significance, and the accompanying doctrinal shifts that occur periodically as the Supreme Court's hidden priors change over time. If social scientists make additional breakthroughs in our understanding of the extent or causes of employment discrimination, that new information can be conveyed to the fact-finder in the courtroom (and, of course, subjected to challenge and rebuttal by the opposing party). Priors can be updated accordingly, and statistical evidence can be correctly interpreted in a way that avoids the transposition fallacy and is consistent with Bayes' Theorem. In this way, social framework evidence like that offered by Dr. William Bielby in the *Wal-Mart* case can and should be used to adjust the fact-finder's priors, even though it is not case-specific.[243]

The Bayesian view of systemic disparate treatment law provides a workable path forward that accommodates the contributions made by both the methodological critics and the contextualists. It also explains the doctrinal arc of systemic disparate treatment law from *Teamsters* to *Wal-Mart*. Changing priors have changed the substantive law. Acknowledging the influence of priors is the first step in developing a coherent theory of systemic disparate treatment law that accords statistical evidence of outcome disparities its appropriate weight, yet also incorporates our changing understandings of how discrimination operates in the workforce.

IV. A SCHOLARLY AGENDA FOR THE MANAGEMENT OF PRIORS

Acknowledgment of the importance of priors is only the first step in developing a unified theory of systemic disparate treatment law. A num-

243. Weiss, *supra* note 9, at 1679 ("Social framework evidence promises to go some way to replacing the personal views of judges and juries with a more objective perspective."). Social framework evidence can be relevant even though it is not case-specific, because it provides information about potential misperceptions of background rates of discrimination. The *Wal-Mart* majority dismissed the social framework testimony offered by plaintiffs' expert, Dr. Bielby, because he "could not . . . determine with any specificity how regularly stereotypes play a meaningful role in employment decisions *at Wal-Mart*." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) (emphasis added) (internal quotation mark omitted). Once the role of Bayesian priors is exposed, however, it becomes clear that Dr. Bielby's testimony was relevant to a proper interpretation of the observed statistical disparities in employment outcomes, even though he could not offer case-specific testimony about the true causes of disparity at Wal-Mart specifically. *See* Weiss, *supra* note 9, at 1683–87 (noting the relevance, under a Bayesian view, of "pure social framework evidence").

ber of difficult second-order questions are immediately raised by the recognition that prior probabilities influence the interpretation of statistical evidence of outcome disparities. These questions include:

1. Whose priors matter?[244] Possible answers include the trial judge, the trial fact-finder, appellate judges, and the legislature.

2. Relatedly, how should evaluation of priors fit into civil litigation pretrial procedure, including key dispositive procedures such as motions to dismiss and motions for summary judgment?

3. How can Bayesian statistical inference be presented to fact-finders at trial? Other scholars have discussed possible techniques for conveying Bayesian information to jurors, including the use of charts that provide different posterior probabilities for a number of selected possible prior probability distributions.[245] Something similar has even been required by at least one court in the context of Bayesian statistical inference in the paternity testing context.[246]

4. What are legitimate or illegitimate sources of priors? Here, potential answers range from pure unsupported guesses to empirical evidence on background rates of discrimination to expert testimony about social framework causes of discrimination. Which sources are legitimate? Should some sources receive more deference than others?

In a related paper, I offer my views on these difficult second-order questions.[247] Although these questions pose practical challenges to the use of Bayesian statistical inference in systemic disparate treatment litigation, they are not intractable. Courts already use Bayesian statistical inference regularly in some DNA matching and paternity testing cases.[248] Some scholars and statisticians have long been optimistic that courts can adapt to the use of Bayesian statistics in discrimination cases.[249]

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244. Professors Paetzold and Willborn identify this question, but do not attempt an answer. *See* PAETZOLD & WILLBORN, *supra* note 57, § 12.05 n.10 ("An important legal issue would involve whose prior probabilities should be represented. Because the Bayesian view of probability is subjective (represents an individual's uncertainty), courts would need to decide whose uncertainty the prior distribution should represent.").

245. *See, e.g.*, KAYE ET AL., *supra* note 78, § 14.3.1 (discussing the potential use of prior probability charts in DNA match case).

246. Plemel v. Walter, 735 P.2d 1209, 1219 (Or. 1987); *see also* D.H. Kaye, Plemel *as a Primer on Proving Paternity*, 24 WILLAMETTE L. REV. 867, 875–82 (1988).

247. Bent, *supra* note 14.

248. The following search in the ALLCASES Westlaw database returned 114 results: (BAYES! or "PRIOR PROBABILIT!" or "PRIOR ODDS") & ("DNA MATCH" or "PATERNITY"). *See also* KAYE ET AL., *supra* note 78, §§ 14.3.1–14.4.3.

249. *See, e.g.*, Stephen E. Fienberg, *The Increasing Sophistication of Statistical Assessments as Evidence in Discrimination Litigation*, 77 J. AM. STAT. ASS'N. 784, 784 (1982) ("I believe that with

The existence of difficult second-order questions does not counsel in favor of ignoring prior probabilities. As demonstrated above, when decision-makers ignore prior probabilities and draw inferences to impose liability based on frequentist statistical significance they are, in effect, operating with a hidden, built-in, unexamined prior. The point of this paper is not to answer all of the difficult second-order questions that come with acknowledging priors but rather to get the discussion started. Once courts and scholars come to recognize the inescapable role of prior probabilities, they can turn their attention to the second-order questions and develop a more fully-formed system for managing priors in the courtroom.

CONCLUSION

Wal-Mart represents a substantive move away from the systemic disparate treatment theory as formulated in *Teamsters* and *Hazelwood.* While evidence of a statistically significant disparity was once sufficient to establish a prima facie case of systemic disparate treatment, the *Wal-Mart* Court demanded more. This Article shows that the Court's substantive doctrinal shift can be explained by recognizing the cracks in the statistical and theoretical foundations of systemic disparate treatment law tracing back to 1977. The foundational cases rested on an unstated and unexamined assumption about prior probabilities that a majority of the Court seemingly no longer holds. A change in hidden priors has led to a change in the law.

This Article challenges courts and scholars to openly acknowledge the importance of priors in evaluating systemic discrimination cases so that the discussion of the difficult challenges we face in managing priors can begin. The future shape of systemic disparate treatment law will depend on whether courts make the operation of priors more transparent. Acknowledging hidden priors will bring together the academic insights of the methodologists and the contextualists, clearing the way for consideration of the second-order issues of prior management and for the inclusion of social framework and other evidence of organizational causes of discrimination. *Wal-Mart* should be viewed not as the death knell for systemic disparate treatment law but rather as the instigator for a fundamental change in how statistical evidence of an outcome disparity is interpreted in antidiscrimination law.

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the proper training both statisticians and judges could and should learn to present and understand the results of a proper Bayesian analysis.").

ANTICIPATING THE WISE LATINA JUDGE

PAT K. CHEW[†]

ABSTRACT

Sonia Sotomayor's famous "wise Latina" quote provoked a conservative critique. The first part of the critique proposes that Judge Sotomayor's gender and racial background would affect her judicial decision making. The second part fears that her Latina background would result in bias, prejudice, and unfair judicial decisions.

This Essay explores this conservative critique and discusses it more generally. It reviews the realism model of judicial decision making, social science research on salience theory, and empirical research on judges' race and gender—ultimately concluding that the first part of the conservative critique is correct: judges' gender and racial backgrounds affect their decision making, at least in some cases. The Essay, however, discusses why the second part of the critique is problematic. It argues that we should have the same positive associations, and the same anticipation of judicial insights, about judges' gender and racial backgrounds that we do about the other biographical details of judges' backgrounds. It suggests that judges engaging in "deep analysis" of alternative gender and racial perspectives would move them toward empathic understanding rather than fear of bias, prejudice, and unfair results.

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INTRODUCTION

President Barack Obama nominated Sonia Sotomayor to the U.S. Supreme Court in 2009.[1] She became the first Hispanic and only the third female judge to serve on the Court.[2] She was such an impressive candidate, credentialed in all the traditional ways,[3] that you would think that her appointment process would have been smooth sailing with no objections.

Instead, there were publicized attempts to derail her nomination.[4] This was prompted in part by Judge Sotomayor's now famous quote: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[5] The language in this quote puts gender and race front and center, given that, for instance, the term "Latina" indicates both gender and race simultaneously.

There were a variety of responses to her statement. Some were supportive.[6] Others were critical, as illustrated by the strong conservative reactions of Senator Jeff Sessions, the ranking Republican on the Senate Judiciary Committee.[7] He interpreted her quote in the following way: that her background and experiences as a Latina were indicative of her potential bias and prejudice in judicial decision making, thereby suggesting that she would not be suitable or qualified as a Supreme Court Justice.[8] He feared that her personal preferences would prevail over a commitment to upholding the law, thus resulting in unfair judicial decisions.[9]

This conservative critique of the "wise Latina" quote can best be understood by breaking it down into its two parts. The first part is the belief that Judge Sotomayor's gender and racial background would affect her judicial decision making. The second part is the fear that her gender and racial background would affect her judicial decision-making process

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1. Peter Hamby et al., *Obama Nominates Sonia Sotomayor to Supreme Court*, CNN (May 26, 2009, 20:27 EDT), http://www.cnn.com/2009/POLITICS/05/26/supreme.court.

2. *Id.*

3. She was educated at Princeton and Yale and was an experienced federal court judge. *Id.*

4. *See Sen. Jeff Sessions Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASH. POST (July 14, 2009, 10:35 AM), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071401155.html (transcript of hearing).

5. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002); *see also* Dana Bash & Emily Sherman, *Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches*, CNN (June 8, 2009, 13:39 EDT), http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/ (indicating Sotomayor's use of the phrase in other speeches).

6. Caitlin Taylor, *Sotomayor's Controversial 2001 Remarks—and Their Context*, ABC NEWS (May 27, 2009, 8:46 AM), http://abcnews.go.com/blogs/politics/2009/05/sotomayors-cont.

7. *See Sen. Jeff Sessions Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, *supra* note 4.

8. *See id.*

9. *See id.*

negatively, namely that the effect would be bias, prejudice, and unfair results.

This Essay explores this critique of the "wise Latina" quote in a broader context. We consider the first part of the critique by reviewing the realism model of judicial decision making, highlighting social science research on the salience theory, and finally, discussing the empirical research on judges' gender and race. Part II of the Essay explores the second part of the critique, the problematic inference of judicial bias and unfair results. Part III suggests a methodology of "deep analysis" to consciously integrate the full array of judicial experience into judicial decision making.

I. CONFIRMING THAT GENDER AND RACIAL BACKGROUNDS MATTER

A. Realist Model of Judicial Decision Making

Described in dozens of books on legal reasoning, law students are tutored in the basic lawyerly skills[10]: spotting the legal issues, identifying the legal principles, determining the relevant facts, and applying the principles to the facts to reach a legal conclusion. Students learn to use judicial opinions and statutes to convince judges of their particular advocacy position.

As law students learn, however, the process of judicial analysis and decision making is not as cut and dry as it might first appear.[11] Judges are required to filter and interpret. Among other inquires, judges must ask the following: Which are the appropriate legal principles? What do they mean? Which are the believable facts, and of these, which are relevant given the applicable legal inquiries? When parties disagree about the facts—which almost always occurs—which version is the most persuasive and how is that determination made?

How do judges engage in this complicated and often nuanced process of legal filtering and interpreting? Two models of judicial decision making offer contrasting answers.[12] The formalist model envisions these processes of judicial filtering and interpreting as systematic and uniformly executed.[13] Judges meticulously utilize the appropriate legal formula

10. *See, e.g.*, TERESA KISSANE BROSTOFF & ANN SINSHEIMER, UNITED STATES LEGAL LANGUAGE AND CULTURE 77–211 (3d ed. 2013) (describing in detail for beginning students the American legal system using cases, using statutes, synthesizing cases, and appellate advocacy); E. SCOTT FRUEHWALD, THINK LIKE A LAWYER: LEGAL REASONING FOR LAW STUDENTS AND BUSINESS PROFESSIONALS (2013) (similarly describing the fundamentals of basic legal reasoning).

11. *See* LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? (1999) (acknowledging and explaining further the complexity of judicial decision making).

12. *See* RICHARD A. POSNER, HOW JUDGES THINK 19–56 (2008) (describing nine theories of judicial behavior).

13. *See* Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 420–21 (1992) (describing formalist judges).

for the dispute at hand, following the specified steps and ending up with reasonably predictable results. The formalist model suggests there is little opportunity for a judge's particular experiences and background to play a role in his or her decision making, since judges have very few degrees of freedom to exercise latitude in their interpretation. The process is presumed to be unambiguous and dictated; the "humanness" of judges is not relevant.

As described by Judge Posner, the formalist model, what he labels as "legalism," envisions the following:

> The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the "canons of construction"), so that interpretation too becomes a rule-bound activity, purging judicial discretion.[14]

In contrast, a realist model of judicial decision making acknowledges that judges are individuals who bring their background and life experiences with them to the bench. When judges put on their formal robes and enter the courtroom, they do not leave their gender, race, education, religion, former occupations, and upbringing behind.[15] Their humanness brings a contextual richness to their thinking. On the other hand, judges also bring their stereotypes and cognitive biases.[16]

Nonetheless, the realism model is not contrary to principled legal analysis. Gibson and Caldeira explain that judicial "decisionmaking involves far more than 'applying' the law to the facts in a mechanical or

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14. POSNER, *supra* note 12, at 41.

15. As described by Judge Kozinski: "We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts." Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 115, 119 (David M. O'Brien ed., 4th ed. 2013).

16. Brest and Krieger, for instance, explain how common cognitive biases are found in the legal context. PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 267–302 (2010). To illustrate, people in general tend to be influenced by externally-given reference points in their decision making, what social scientists call the "anchoring and adjustment bias." *Id.* at 267. In one study by Guthrie, Rachlinski, and Wistrich:

> [F]ederal judges [were given] the facts of a personal injury case, in which the plaintiff had been hospitalized for several months and was left paraplegic and confined to a wheelchair. One group was anchored by being informed that the defendant had moved for dismissal on the ground that the case did not meet the $75,000 jurisdictional minimum for a diversity case; the other group was given no such anchoring information. Though almost none of the judges granted the motion to dismiss, the average award in the anchored group was $882,000 compared to $1,249,000 in the unanchored group.

Id. at 269 (footnote omitted).

syllogistic fashion," and "inevitably involves and implicates judges' personal values."[17] At the same time, they observe:

> [T]his is a matter of degree—to reject mechanical jurisprudence is not necessarily to assume unfettered discretion but only to recognize that, within the context of the rule of law, judges have choices in their decisions and that their choices often if not typically reflect their own ideological predispositions. [18]

In practice, judges typically exercise discretion in a principled fashion, not in a strategic self-interested way, thereby protecting judicial legitimacy. They are not "merely politicians in robes."[19] Judge Kozinski further notes that judges exercise discretion, but that discretion is constrained by judges' own self-respect, colleagues' oversight, and the political process, including, in some jurisdictions, removal of judges by voters.[20]

B. Salience Theory

Salience theory, as studied by social scientists, is also consistent with the realists' perception of judicial decision making. Salience theory explains that when individuals are bombarded with lots of possible stimuli, for instance, myriad pieces of information, some stimuli stand out more.[21] These stimuli appear to garner the individual's attention and have heightened relevance. That is, these pieces are more salient than other pieces of information. For example, if you are thinking about buying a new car, you will start noticing different car models and colors more than under normal circumstances.

The concept of salience has been discussed in varied contexts. Nisbett, a cultural psychologist, for instance, found that in study after study East Asians and Americans responded in qualitatively different ways to the same situation.[22] In one experiment, Japanese and Americans viewed the same animated underwater scenes then reported what they had seen:

> The first statement by Americans usually referred to a large fish in the foreground . . . . They would say something like, "There was what looked like a trout swimming to the right." The first statement by Japanese usually referred to background elements: "There was a

17. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 201 (2011).

18. *Id.* at 214.

19. *Id.*

20. Kozinski, *supra* note 15, at 116–17.

21. *See generally* Duane M. Rumbaugh et al., *A Salience Theory of Learning and Behavior: With Perspectives on Neurobiology and Cognition*, 28 INT'L J. PRIMATOLOGY 973 (2007) (providing background information on salience theory).

22. RICHARD E. NISBETT, THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY (2003).

> lake or a pond." The Japanese made about 70 percent more statements than Americans about background aspects of the environment, and 100 percent more statements about relationships with inanimate aspects of the environment, for example, that a big fish swam past some gray seaweed. [23]

In other words, East Asians are more likely to attend to the whole, while Westerners are more likely to focus on a particular object within the whole.

Thus, we learn from Nisbett's work that our experiences and socialization shape our perceptions of the world. People from different backgrounds pay attention to different things; that is, among the array of pieces of information and stimuli that we could pay attention to, some things are more salient than others.

Research in medicine provides another example of salience, or in this case, the lack of it. Credentialed radiologists were asked to look at five lung CT scans, each which contained about ten nodules or abnormalities.[24] They were asked to click on anything strange on the scans.[25] On the final scan, a figure of a dancing gorilla about forty-eight times the size of an average nodule was placed in the upper right hand quadrant.[26] Twenty out of the twenty-four radiologists admitted they were unable to see the gorilla even though they scrolled past it an average of 4.3 times and twelve had looked directly at it.[27] After being asked if they were able to see the gorilla, the radiologists were shown the slide again and asked if they saw anything unusual.[28] They all were able to see the gorilla this time,[29] thus suggesting that individuals can be trained to find salient stimuli that would otherwise not be noticed.

Thus, we learn from this study that training someone to be an expert often means training them to pay particular attention to certain things. As a consequence, however, the training may also result in these experts ignoring other things, even when they are right before their eyes. This tendency has been called "inattentional blindness."[30]

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23. *See The Geography of Thought: How Culture Colors the Way the Mind Works*, REGENTS U. MICH. (Feb. 27, 2003), http://www.ns.umich.edu/Releases/2003/Feb03/r022703a.html (internal quotation marks omitted) (describing Nisbett's research).

24. Trafton Drew et al., *The Invisible Gorilla Strikes Again: Sustained Inattentional Blindness in Expert Observers*, 24 PSYCHOL. SCI. 1848, 1849 (2013).

25. *Id.*

26. *Id.*

27. *Id.* at 1850.

28. *Id.*

29. *Id.*

30. *Id.* at 1848.

C. Empirical Research on Judges' Gender and Judges' Race

Substantial empirical research on judges' gender and race also indicates that different backgrounds can affect judicial decision making, and thus further supports the realism model of judicial decision making and salience theory.[31]

1. Judges' Gender

Consider this hypothetical: A judge hears a female employee's detailed complaint of her supervisor's sexual harassment. Consistent with applicable legal principles,[32] her lawyers argue: (1) the harassment was because of her sex; (2) the harassment was so "pervasive and severe" that it created a "hostile work environment"; and (3) therefore the defendant's actions were illegal. The judge then hears the supervisor and employer argue that the plaintiff-employee has not established the legal requirements for sexual harassment. Instead, they posit that (1) if there was harassment, it was not because of her sex but attributable to something else; (2) even if there was sexual harassment, it was not "severe or pervasive" enough to create a "hostile work environment"; and (3) therefore their conduct was not illegal.

How do judges analyze these arguments? Well-established case law directs judges to ask: What would a reasonable person conclude?[33] It turns out that if we attach a gender to the reasonable person, you get different conclusions about whether a set of facts is perceived as sexual harassment or not.[34] The reasonable man and the reasonable woman do not see eye to eye; they instead view what constitutes sexual harassment with very different lenses.[35] These findings suggest that the "reasonable person standard" is more variable than the formalist model would indicate, leaving the judge to essentially project his or her own beliefs onto what is supposed to be some objectively-defined reference point.

Given the differences among men and women in general, the realism model of judicial decision making would predict that female judges and male judges also would differ in their perceptions of sexual harassment and sexual discrimination. Indeed, the weight of empirical research

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31. *See, e.g.*, CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 107–22 (2d ed. 2009) (describing research on the effects of judges' race and gender on outcomes in criminal law cases).

32. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (clarifying the elements of a hostile environment claim); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (indicating that the harassment must be because of the protected status).

33. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); *see also* Ross v. Commc'ns Satellite Corp., 34 Fair Empl. Prac. Cas. (BNA) 260, 265 (D. Md. 1984), *rev'd on other grounds*, 759 F.2d 355 (4th Cir. 1985).

34. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35 (1998); Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES, no. 1, at 151, 154 (1995).

35. Gutek & O'Connor, *supra* note 34, at 155.

on judges' gender supports that prediction.[36] A review of fourteen studies found that female judges in federal appellate courts have decision-making patterns distinct from male judges in sexual discrimination cases.[37] Namely, female judges are more likely to hold for plaintiff employees, who are most likely women.[38] In Peresie's study of sex discrimination and sexual harassment cases in the federal courts, she found that female judges and male judges differed in their decision-making patterns.[39] Male judges held in favor of the plaintiffs 24% of the time; female judges held in favor of the plaintiffs 39% of the time.[40] Another study by Boyd, Epstein, and Martin also found that, when dealing with sex discrimination suits, female judges found in favor of plaintiffs more frequently than male judges.[41] In fact, they conclude that the likelihood of a plaintiff's success increases by about 10% if the judge is a woman.[42] Thus, it appears that female judges had different perceptions than male judges about what was salient; they saw things that male judges did not see. Conversely, male judges apparently saw things that made them rule more often in favor of the defendants.

2. Judges' Race

The realism model is also supported in empirical research on judges' race. Again, let me offer a hypothetical similar to the gender-based one above: A judge hears a black employee's detailed complaint of racial harassment. As required by the applicable legal principles,[43] his lawyers argue that (1) the harassment was because of his race; (2) the harassment was so "pervasive and severe" that it created a "hostile work environment"; and (3) therefore the defendants engaged in illegal conduct. The judge then hears the supervisor and employer argue that the plaintiff has not established the legal requirements for racial harassment. Instead, they argue that (1) if there was harassment, it was not because of his race but is attributable to a non-race-related reason; (2) even if there was racial harassment, it was not "severe or pervasive" enough to create a "hostile work environment"; and (3) therefore their actions were not illegal.

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36. *See* Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359, 366 (2011).

37. *Id.* at 366; *see also* SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY *REALLY* MATTER 28 (2013) (reviewing research).

38. *See* Chew, *supra* note 36, at 366.

39. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

40. *Id.* at 1769.

41. Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–92 (2010).

42. *Id.* at 390.

43. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (clarifying the elements of a hostile environment claim); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (indicating the harassment must be because of the protected status).

The law again refers judges to the "reasonable person" in her or his filtering and interpreting process.[44] Yet if we attach a race to the reasonable person, different conclusions result about whether racial discrimination has occurred.[45] Thus, a reasonable African-American and a reasonable white American may well have different reasonableness perceptions.

And again, consistent with the realism model, empirical research establishes that judges' race makes a difference in legal conclusions in racial harassment cases.[46] In two studies of federal district court cases, Kelley and I found that judges of different races had distinct decision-making patterns: African American judges held for plaintiffs 46% of the time, Hispanic judges 19% of the time, and white judges 21% of the time.[47]

Contrary to what a "monolithic minority judge" model would suggest, African-American judges and Hispanic judges had significantly different decision-making patterns, with African-American judges much more likely to hold for plaintiffs than Hispanic judges (or judges of any other racial group).[48] In fact, when Hispanic judges are studied independently of other minority judges, their decision-making pattern is more similar to that of white judges.[49] Furthermore, judges of every race, including white judges, end up being more pro-plaintiff when the plaintiff is of the same race.[50] This finding suggests that judges of all races identify more readily with plaintiffs of the same racial background.

Thus, the empirical research indicates that there are cases where judges' gender and race make a difference. For judges' gender, it includes sex discrimination and sexual harassment disputes; for judges' race, it includes race discrimination and racial harassment disputes. An explanation for these results, consistent with the realism model and salience theory, is that individuals of different genders and of different races have different life experiences and these varied backgrounds affect how they determine if sex discrimination or race discrimination has occurred.

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44. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); *see also* Ross v. Commc'ns Satellite Corp., 34 Fair Empl. Prac. Cas. (BNA) 260, 265 (D. Md. 1984), *rev'd on other grounds*, 759 F.2d 355 (4th Cir. 1985).

45. *See, e.g.*, K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 1 (2002), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf (indicating that white workers are far more likely than minority workers to believe that everyone is treated fairly at work).

46. *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117 (2009) [hereinafter Chew & Kelley, *Myth of the Color-Blind Judge*]; Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91, 91 (2012) [hereinafter Chew & Kelley, *The Realism of Race*].

47. Chew & Kelley, *Myth of the Color-Blind Judge*, *supra* note 46, at 1143; *see also* Chew & Kelley, *The Realism of Race*, *supra* note 46, at 103–07.

48. Chew & Kelley, *The Realism of Race*, *supra* note 46, at 104.

49. *Id.* at 100.

50. *Id.* at 110.

Note, however, that the judges' sex and race does not appear to make a difference in all cases. For example, Kelley and I found that female and male judges did not have distinct decision-making patterns in racial harassment cases.[51] Boyd and her colleagues found no gender-related differences in twelve subject areas.[52]

II. QUESTIONING THE FEAR OF BIAS

Recalling the conservative critique of the wise Latina quote, it appears that the first part of the critique is correct: that is, that Justice Sotomayor and other judges' gender and racial backgrounds affect their decision making. As described in Part I of this Essay, the realism model of judicial-decision-making, salience theory, and empirical research on judges' gender and race all support that conclusion.

But now I want to shift gears and focus on the second part of the conservative critique's logic, that is, the fear that Justice Sotomayor's gender and racial background will lead to judicial bias, prejudice, and unfair results. I think this second part of the conservative critique is problematic. If indeed bias exists in the judiciary, why would we be more suspicious of a Latina judge than any other judge? Why not the male judge? Why not the white judge? Indeed, why should we presumptively accuse any of these judges of bias because of their gender or race? Would this not be a form of gender or racial profiling? I know of no empirical evidence that judges of a particular gender or race are more likely than any other gender or race to ignore legal principles and instead substitute their own political or personal preferences.[53]

Let's try a "thought experiment." Judges have all kinds of backgrounds and experiences. Here are some miscellaneous details from the biographies of current and former judges:

> Judge 1's background: Father was a plant manager with Bethlehem Steel; has adopted children; has had recurring seizures.[54]
>
> Judge 2's background: Has diabetes; former partner in a commercial litigation law firm in Manhattan specializing in litigation against alleged counterfeiters of Fendi goods.[55]

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51. Chew & Kelley, *Myth of the Color-Blind Judge*, *supra* note 46, at 1143 (showing that plaintiffs are successful 26% of the time before female judges and 21% of the time before male judges).

52. Boyd, Epstein & Martin, *supra* note 41, at 390.

53. Unfortunately, there are judicial abuses of professional duties. We can all recall, for instance, cases of judicial corruption, but the perpetrators are not disproportionately white or minority, male or female. As noted earlier, judges as a group are subject to cognitive biases, but again, there is no evidence that these biases are more prevalent in one gender or race than in others. *See supra* text accompanying note 16.

54. Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES, July 21, 2005, at A1; Michael D. Shear, *Chief Justice Suffers Seizure Roberts Is Fine, Spokeswoman Says*, WASH. POST, July 31, 2007, at A01.

55. Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1.

> Judge 3's background: Served in naval intelligence as a code breaker; started his own law firm specializing in antitrust law.[56]
>
> Judge 4's background: Grew up on a cattle ranch in Arizona; pre-college education in a private all-girls school in El Paso, Texas; spouse suffered from Alzheimer's for many years.[57]

My question to you: Will these judges' experiences affect their decisions in cases where those experiences are relevant? For examples, might Judges 1 and 2 draw from their own health care experiences when analyzing a health care case? Or would Judge 3's experience in naval intelligence affect his thinking in a case dealing with national security? Or in a case dealing with property rights, might Judge 4 draw on her background growing up in a ranching family?

Will these judges' backgrounds affect their decisions in cases where their experiences are salient? Of course. So Judges 1 and 2, Justices Roberts and Sotomayor respectively, would likely draw from their health care experiences when analyzing a health care case. And Judge 3, former Justice Stevens's experience in naval intelligence would inform his thinking in a case dealing with national security. And Judge 4, former Justice O'Connor, also might draw from her ranching experience in a dispute over property rights. Thus, consistent with the first part of the conservative critique, a judge's background may well play a role in her or his decision making.

But here is a second question: Did these background details prompt you to question the judges' commitment to following the law? Did you fear that Justice Roberts or Justice Sotomayor, in deciding a case dealing with health care laws, would act on their personal or political preferences rather than adhere to established legal rules and precedents? Did you fear that that Justice O'Connor would be biased in a case dealing with a ranching-related dispute; or that Justice Stevens would be biased when analyzing a case dealing with naval intelligence?

My guess is that you did not have those fears. As you considered their backgrounds and their qualifications to be judges, I am guessing that you viewed this information about their backgrounds neutrally. Or perhaps you even associated their backgrounds and their judicial decision making positively. Your reasoning would be that their backgrounds might provide useful insights and particular attentiveness to cases where their knowledge of the health care system, ranching, or military intelli-

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56. Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES, Sept. 23, 2007, at 650.

57. *Sandra Day O'Connor*, THE OYEZ PROJECT, http://www.oyez.org/justices/sandra_day_oconnor (last visited Mar. 7, 2014); Adam Bernstein, *John J. O'Connor III, 79; Husband of Supreme Court Justice*, WASH. POST, Nov. 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111119571.html.

gence would be salient. While their perceptions may vary from individuals without these particular experiences, you might plausibly assume that their varied perceptions could enhance rather than corrupt the judicial process; that they would be able to offer insights about the facts and legal principles that others would be unable to offer, drawing from their background for more nuanced, better-informed, and fairer judicial decisions.

So if our reaction to this broad array of backgrounds is neutral, or even positive, why not also think positively about individuals' gender and racial backgrounds and perspectives? Why not similarly anticipate that individuals of varied gender and racial backgrounds would offer insights about the facts and legal principles in cases where their background is salient; that they can draw from their experiences so that there are more nuanced, better-informed, fairer judicial decisions.

Based on my own experience in interactions with hundreds of judges,[58] I think judges themselves illustrate a contrary impulse—an impulse to view the worldviews of judges of other races as somehow biased or faulty.

When presented with our empirical findings that judges of different races have different decision-making patterns, judges sometimes have both speculative and defensive reactions.

For example, some judges, who are often but not always white, are on the defense. They argue that minority judges' legal conclusions must be incorrect, while white judges' legal conclusions are correct.[59] Their implicit assumption is that white judges in racial harassment cases set the standard; it is their interpretation of the law that should be the norm. They presume that minority judges favor minority plaintiffs in unfair ways or that minority judges' legal analysis is otherwise lacking. Perhaps they are thinking that minority judges are affirmative action law students who are presumptively not as skilled or intelligent as non-minority students. Thus, that same inferior skill and intelligence makes them less skilled and intelligent as judges.

A second group of judges, who are often but not always minority, are also defensive. They argue that it is the white judges who are incor-

58. Among other events, I led workshops and was a featured speaker at the following: (1) National Workshops for Federal Magistrate Judges, Federal Judiciary Center, Denver and Miami (2012); (2) Annual Meeting of the National Consortium on Racial and Ethnic Fairness in the Court (May 2009); (3) ABA Midyear Presentation, Judicial Division and over twenty other sponsors (2010). Also, I received dozens of comments from judges and others on articles describing my research. *E.g.*, Mike Green, *Report: Race Matters in Judicial Decision-Making*, HUFFINGTON POST (Feb. 13, 2010, 5:40 PM), http://www.huffingtonpost.com/mike-green/report-race-matters-in-ju_b_461526.html; Edward A. Adams, *Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find*, A.B.A. J. (Feb. 6, 2010, 19:20 CDT), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba/.

59. This is based on my experiences, described *supra* note 58.

rect and the minority judges that are correct. They presume that white judges are biased, perhaps unconsciously, against minority plaintiffs. They assume that even in a post-Obama world, whites are still naive about how discrimination occurs and how pervasive and impactful stereotyping continues to be. They believe that white judges, for instance, do not see the subtle bias that pervades the workplace, and thus are less likely to call harassment racially based or sufficiently serious to result in a hostile workplace. Meanwhile, from their vantage point, minority judges see and experience ongoing subtle bias and, therefore, find minority plaintiffs' claims of it persuasive.

III. MOVING FORWARD

The challenge is how do we move forward from the conservative critique and defensive positions that are not constructive? How do we take advantage of the varied perspectives of all judges, of all genders, of all races?

How do we move from Senator Sessions's fear that Justice Sotomayor's Latina background will result in judicial bias, prejudice, and unfair results to an alternative attitude? This alternative mindset is anticipation that her Latina background (and all the other details of her and other judges' background) will result in judicial insight, more nuanced understanding of facts and law, and therefore fairer results.

A. Deep Analysis

Drawing from anthropologists Avruch and Black's work on intercultural conflicts, an approach they call "thick"[60] and I call "deep analysis," appears particularly apt—at least as a starting point.

1. Acknowledge Opaqueness

"Acknowledging opaqueness" is the first of two steps in the deep analysis process. Judges and others can begin by recognizing that there is a range of legitimate perspectives distinct from their own. These alternative perspectives may not be immediately understandable or familiar. Avruch and Black would describe these as "opaque" perspectives because, on their face, they do not seem comprehensible or correct.[61] In contrast, one's own perspective and those of individuals who share your perspective are "transparent"; that is, they are readily understandable, naturally sensible, and familiar to you. This transparency is particularly reinforced if your perspective is also the norm.

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60. *See* Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, *in* THE CONFLICT AND CULTURE READER 7, 10 (Pat K. Chew ed., 2001) (internal quotation mark omitted).

61. *Id.* at 9.

Thus, for example, if you are a male judge who shares the reasonable man's view of what constitutes sexual harassment, then you will naturally interpret the facts in a sexual harassment claim in a way that is sensible and familiar to you. In contrast, the view of a female judge who shares the reasonable woman's view of sexual harassment will not make much sense to you. It will be an unfamiliar and less comprehensible interpretation of the facts; it will be opaque to you. As a male judge, your own interpretation will be transparent and because it is also the norm, it will be easy to be confident that your view is correct. Avruch and Black, however, recommend that male judges begin by acknowledging there is an alternative perspective and that it is opaque to them.[62]

2. Pause and Empathically Assess

Once one recognizes that there is an alternative perspective, Avruch and Black suggest our first impulse is to dismiss these alternative views because they are inconsistent with our worldview.[63] Our inclination is to reconcile differences in our worldview by comparing them to our set of norms, values, and beliefs. If they do not match up, our tendency is to dismiss or criticize them. Instead, Avruch and Black suggest you pause and suspend any judgments.[64] As Judge Kozinski suggests in describing judicial decision making generally: allow yourself to doubt and question your own impulses.[65]

Instead of assuming that others holding alternative views are biased, consider instead how novel perspectives may hold particularly valuable insight to the issues at hand. Ask how these alternative worldviews might expand your thinking and deepen your understanding of what is occurring. In other words, think "deeply" about these alternative perspectives. Try to understand the underlying assumptions and premises of the alternative view and how they might differ from your underlying assumptions.

Thus, male judges in sexual harassment cases should resist the impulse to discount an alternative view offered by a "reasonable woman" judge. Avoid or at least suspend a presumption of her prejudiced bias in favor of one party in a way that is unfair and unmerited. Instead, they should query what are the underlying assumptions of the alternative view. What does the female judge find most salient and why does that factor seem so relevant to her? If she is inclined toward a different legal conclusion, empathically try to understand why. What insights can you gain? That is, how does her perspective help you gain a more accurate and meaningful understanding of the laws and of the facts? (Of course,

62. *Id.* at 10.
63. *Id.* at 11.
64. *Id.* at 10.
65. Kozinski, *supra* note 15, at 119.

female judges would do the same exercise when listening to their male colleagues.)

While the above examples of deep analysis deal with male and female judges in sexual harassment cases, the same process could be applied to judges of different races in racial harassment cases. Thus, a white judge can begin by acknowledging the legitimate alternative perspectives of black or Hispanic judges. Rather than immediately assuming that their perspective is correct, white judges should pause to do a deep analysis of the minority judge's worldview, empathically understanding these alternative assumptions and saliences. Instead of framing the alternative worldview as bias, consider it as judicial insight. (Again, minority judges should do the same.)[66]

B. Evidence of Deep Analysis

This analysis of gender-related and race-related judicial saliences may not be as abstract and impractical as one might think at first glance. In fact, while they do not label the process as deep analysis, there is inferential evidence that judges already engage in some version of this collaborative and introspective process. In particular, the research on the effect of mixed-gender and mixed-race judicial panels is telling.

Boyd and her colleagues found in their study of sex discrimination cases that a male judge on an appellate panel was more likely to rule in favor of a plaintiff if at least one female judge sat on the appellate panel.[67] The difference between all-male versus mixed-gender panels had measurable consequences for litigants.

> [The probability of an all-male panel] supporting the plaintiff in a sex discrimination dispute never exceeds 0.20—not even for the most liberal of male judges. But for mixed sex panels the probability never falls below 0.20 for even the most conservative males. For males at relatively average levels of ideology, the likelihood of a liberal, pro-plaintiff vote increases by almost 85 percent when sitting with a female judge.[68]

Another example is Cox and Miles's study of voting rights cases.[69] They investigated whether the presence of an African-American judge on a judicial panel affects the votes of his or her colleagues.[70] They found that it made a significant difference, with white judges more likely to

66. To take it a step further, even though white and Hispanic judges hold for the plaintiff with similar frequency (21% and 19% respectively), white judges should not assume that Hispanic judges reached their decision in a similar fashion (and vice versa). *See supra* note 47 and accompanying text. Different facts or legal interpretations may have been salient to each group.

67. Boyd, Epstein & Martin, *supra* note 41, at 406.

68. Chew, *supra* note 36, at 367.

69. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

70. *Id.* at 34.

vote in favor of liability when they sit with an African-American colleague.[71] The researchers theorized that white judges' view of the merits of the case might change when they deliberate with African-American colleagues who share their different experiences and information relating to discriminatory practices.[72]

Thus, one explanation of these research findings is that when judicial panels are confronted with facts and issues on which women or minorities have particular insight, the panels pause to more deeply analyze what is occurring. It would appear that male judges listen and are willing to learn from the alternative perspectives of female judges, while white judges are willing to learn from the alternative perspectives of black judges. Moreover, it appears that jurists might decide a case differently than they would have without this deep analysis of their varied perspectives.

CONCLUSION

Conservative critics interpreted Justice Sotomayor's wise Latina quote to mean two things: first, that her gender and racial background would affect her judicial decision making; and second, that her background would affect her decision making negatively, namely that it would lead to bias, prejudice, and unfair results. This Essay agrees with the first part of the conservative critique and discusses it more broadly, ultimately finding substantial support that judges' gender and racial backgrounds do indeed affect their decision making in certain cases. However, this Essay finds the second part of the conservative critique problematic. It argues that we should anticipate that information about a judge's gender and racial background should prompt a positive association with judicial decision making, rather than a fear of bias and prejudice. Finally, the Essay suggests that judges engage in a deep analysis when they encounter alternative perspectives from judges of other genders and races, thus anticipating constructive insights for the judicial decision-making process.

71. *Id.*
72. *Id.*

CHAPTER INTRODUCTION: PAY INEQUALITY, ACCESS TO WORK, AND DISCRIMINATION

NANTIYA RUAN[†]

At the half-century anniversary of Title VII of the Civil Rights Act of 1964, it is high time to address the pervasive and well-entrenched pay inequity women face in American workplaces. As the presenters on the "Pay Inequality, Access to Work, and Discrimination" Panel observed, progress on the gender wage gap is at a standstill. For full-time, year-round workers in 2012, the median salary for women was 76.5% of the median salary for men—nearly identical to the gap reported in 2001.[1] Moreover, today's workforce is filled with part-time female workers who are at the mercy of their supervisors for their pay (e.g., the number and scheduling of hours they work). The number of part-time workers has steadily increased over the last decade, with the total number of part-time workers exceeding twenty-seven million.[2] Two-thirds of part-time workers are women, and as the Congressional Joint Economic Committee has recognized, the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full-timers.[3] Most commentators agree that if the overall rate of change from 1964 to today remains the same going forward, women in today's labor market will never experience gender wage parity during their working lives.[4]

Professor Martha Chamallas set the backdrop for our discussion on America's persistent wage inequality by reminding us of the revisionist history of Title VII. Professor Chamallas is best known for her work on the intersection of anti-discrimination and tort law, but her 1986 article on pay inequality based on the predominance of women in part-time work was groundbreaking in this field of study. In her talk titled "Vicarious Liability under Title VII: A Vanishing Act," Professor Chamallas

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1. *See* Ben Penn, *Gender Pay Gap Won't Close Until 2058, IWPF Projects, as Democrats Push for Law*, 181 DAILY LAB. REP. A-12 (2013) ("While women have made tremendous strides in their earnings relative to men since 1960, none of that progress has taken place since 2000 . . . .").

2. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Economic News Release Table A-8: Employed persons by class of worker and part-time status*, (July 03, 2014), http://www.bls.gov/news.release/empsit.t08.htm.

3. *See* Staff of Joint Econ. Comm., 111th Cong., The Earnings Penalty for Part-Time Work: An Obstacle to Equal Pay 1–2 (2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=74203874-3821-44e4-b369-4efbe14d8745.

4. *See* Penn, *supra* note 1; *see also* Jillian Berman, *Gender Pay Gap Likely Won't Go Away Until After You Retire: Study*, HUFFINGTON POST, Sept. 23, 2013, http://www.huffingtonpost.com/2013/09/23/gender-pay-gap-close_n_3975638.html.

reminded us that who is held responsible for workplace harms is a vital inquiry to address the inequalities faced by working women. As yet another example of inappropriate incorporation of tort doctrines into anti-discrimination protections, agency principles that limit the reach of responsible parties impair anti-discrimination efforts by shielding accountable parties, including co-workers. Professor Chamallas left the audience with a glimpse into a future where we revive a modern day Civil Rights Restoration Act to address the courts' continued dismantling of Title VII protections.

Professor Melissa Hart focused attention on one particular case of wage inequality in the legal academy's own backyard as a vehicle to analyze key issues surrounding the gender pay gap. In her talk titled "Missing the Forest for the Trees: Gender Pay Discrimination in Academia," Professor Hart told the story of University of Denver Professor Lucy Marsh's wage-discrimination litigation against her law-school employer to address gender disparities amongst tenured male and female professors, as well as to get access to pay data (a hidden trove of evidence in private institutions). By looking closely at the narrative surrounding Professor Marsh's lawsuit, Professor Hart unpacks the system justification relied upon by employers for individual difference in pay. As seen in other areas of discrimination law, the gender pay-gap debate ignores structural causes, such as biased evaluation systems and unfair gender stereotyping, because "the pull of individual explanations is overwhelmingly strong." Professor Hart concludes that to meet Title VII mandates and adequately address the persistent gender pay gap, employers must resist resorting to individual explanations for each pay decision and instead, look closely at the structural differences that undergird such decisions.

This proved a perfect segue to Professor Gowri Ramachandran's presentation on "Pay Transparency," which squarely addressed how to achieve procedural and substantive justice for women caught in the pay gap. As the Lilly Ledbetter case proved, women too often have to rely upon happenstance and luck in discovering that they are paid unfairly in relation to their male counterparts. Forcing employers to reveal salaries publically would uncover the oft-hidden disparities. Professor Ramachandran convincingly showed us that the defenses to such pay transparency are nothing but a straw man set up by resistant employers. By addressing such myths as women's weaker negotiation skills and the need to preserve the status quo, Professor Ramachandran concludes that pay transparency can pave the way to closing the pay gap that continues to allude us.

Addressing business concerns in order to most effectively close the pay gap was also at the center of Professor Nancy Reichman's talk on "Equal Pay for Equal Work: Some Observations and Worries." As the Chair of Colorado's Pay Equity Commission, as well as an empirical

socio-legal scholar, Dr. Reichman relied upon her experience negotiating treacherous political waters to share insights into how to best collaborate with employers to reach compromise on critical issues for low-wage working women. As employers prioritize containing labor costs over cultivating employees, many workers in low-wage jobs are forced to adapt to non-standard, often chaotic scheduling made possible because of advances in scheduling technologies. Dr. Reichman convincingly argued that it is time to change the way we think about pay equity. Workplace fairness between women and men should no longer be framed merely by total disparities in pay, but also by disparities in hours given to women seeking as much work as their male counterparts. Doing so recognizes the realities of many female workers in today's workplace and addresses the shortfalls thus far absent from the civil rights conversation about pay equity. Dr. Reichman made the business case for gender pay equity by addressing how deterrence and diversity improve the bottom line.

Provocative and compelling, our final presenter was Professor Michelle Travis, who challenged the causal narratives that sustain our gender compensation divide in her talk, "Disabling the Gender Pay Gap: Lessons from the Social Model of Disability." Many social commentators encourage women to "lean in" and take responsibility for their second-class employment status by exhaustively working to "fix" themselves and their situations. Professor Travis explains that the resilience of the gender pay gap has been fueled in part by simplified and strategic causal narratives (such as "women don't ask") that move responsibility away from the employers that have built and sustained gender pay inequality as a standard feature of the American workplace. To combat this, we should take cues from the disability rights movement—a movement that effectively provided a new causal narrative that shifted both the public's attention and the law's focus from a medical model of difference to the role of employer practices and structures in producing inequality for individuals with impairments, which are not themselves inherently limiting. By changing the narrative to center on the shortcomings of employers' structured employment practices, instead of inadequacies of women in these structures, Professor Travis argues effectively that the equal pay movement can make better strides towards parity in pay.

Those in attendance to these excellent presentations agreed that our five panelists provided a thorough and thought-provoking framework by which to re-conceptualize pay equity in today's varied workplaces. This civil rights anniversary should have been celebrated by congratulating ourselves on achieving gender pay parity. Instead, we must galvanize for the next fifty years to ensure that pay equality is a reality for the next generation of female workers.

MISSING THE FOREST FOR THE TREES: GENDER PAY DISCRIMINATION IN ACADEMIA

MELISSA HART[†]

ABSTRACT

Women in virtually every job category still make less than men. Academia is no exception. This Article will explore some of the structural explanations for this continued disparity and the continued resistance to seriously confronting those structural barriers to equality. Using the still-unfolding story of a charge of discrimination filed against a university, this Article examines the script that has become all-too-familiar in discussions about the gender pay gap, whether in academia or elsewhere. The basic storyline in pay discrimination litigation is this: Evidence is presented about the existence of a gap between men's earnings and women's earnings. The response is that the numbers cannot be looked at as a group because there are individual explanations for each pay decision. With this move, the focus of attention is shifted from an evaluation of the troubling structural picture to an evaluation of an individual employee. Until we are willing to resist that shift, it will be nearly impossible to address the root causes of continued pay inequity.

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† Professor, University of Colorado School of Law. Many thanks to Karin Ross for her research assistance, to Rachel Arnow-Richman and Helen Norton for reading and providing thoughtful feedback, and to the editors of the DU Law Review for their work on the symposium itself and on this and the other articles that were the product of the event.

INTRODUCTION

> Any gap in the pay of men and women, whether forty or ten or one percent, is an implicit statement to our children that we value the work of our daughters less than that of our sons.
>
> —*Dreves v. Hudson Group Retail, L.L.C.*[1]

Although it has been illegal to discriminate on the basis of sex in setting pay for more than fifty years now, women in academia—like women in virtually every job category—still make less than their male counterparts. Discussions about why that pay gap persists tend to break down into uncomfortable disagreements about whether it can best be explained by lower performing or less ambitious women or by sexist supervisors. In fact, the reasons for pay disparities rarely fit within either narrative. Instead, continued pay inequity in academia is more plausibly explained as a function of the structure of academic jobs and the highly subjective ways that the academy has come to define merit. As in other areas of discrimination, however, it is hard to keep the focus of the gender pay gap debate on its structural causes. The pull of individual explanation is overwhelming strong.

The pull of individual explanation is also, perhaps not surprisingly, a central element of litigation over pay disparities, even when the claim reveals structural disparities that seem to reach well beyond any individual employee's rate of pay. This Article will use the still-unfolding story of a charge of discrimination filed against a university to examine the script that has become all-too-familiar in discussions about the gender pay gap, whether in academia or elsewhere. Here is the basic storyline: Evidence is presented about the existence of a gap between men's earnings and women's earnings. The response is that the numbers cannot be looked at as a group because there are individual explanations for each pay decision. What this script does is to shift the focus of attention adroitly from an evaluation of the troubling structural picture to an evaluation of an individual employee—usually to the woman who has raised concerns about the structural problem.

This Article will first tell the story of Professor Lucy Marsh's charge of discrimination, filed against the University of Denver Sturm College of Law in July 2013. It will then examine the ways in which the circumstances that create pay disparity in academia are in fact structural—even when they are described as individual. Finally, the Essay will consider why the move from the systemic to the individual in the pay discrimination narrative is so persistent—why do we continue to miss the forest for the trees?

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1. No. 2:11-CV-4, 2013 WL 2634429, at *13 (D. Vt. June 12, 2013).

I. PROFESSOR LUCY MARSH'S LAWSUIT

In July 2013, Professor Lucy Marsh, a forty-year veteran of the University of Denver Sturm College of Law (DU Law), filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC).[2] The charge alleges violations of both Title VII of the Civil Rights Act of 1964 and the Equal Pay Act (EPA), stemming from the fact that Professor Marsh's salary is lower than those of her male colleagues.[3] In addition to challenging her own salary as discriminatory, the charge filed by Professor Marsh observes that the gender pay disparity at DU Law is systemic, stating that "female professors at the Law School were discriminated against with respect to compensation because of their gender, and were paid less than men performing substantially equal work under similar conditions in the same establishment."[4]

Professor Marsh's charge followed the circulation of a memo to the DU Law faculty in December 2012 in which Dean Martin Katz explained a set of competitive merit raises he had recently awarded to top-performing faculty members as a result of a university-wide initiative.[5] After explaining the raises he did give, the dean went on to explain that the funds for this round of raises were allocated "without regard to trying to correct potential inequities."[6] He did, however, look at the school's salary structure "to see if there appeared to be any significant gender disparities," and he found, among other things, that:

> The median salary for female Full Professors was $7,532/year less than that for males before this round of raises and $11,282/year less than that for males after this round of raises. The mean salary for female Full Professors was $14,870/year less than that for males before this round of raises and $15,859/year less than that for males after this round of raises.[7]

It was these numbers that prompted Professor Marsh to file her charge with the EEOC.

Professor Marsh's discrimination claim garnered national attention in part because it coincided with the fiftieth anniversary of the enactment of the EPA and the continued prevalence of gender pay disparity had been a recently announced focus of concern for the EEOC.[8] Among aca-

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2. Colleen O'Connor, *DU Professor Files Gender-Based Wage-Bias Case Against Law School*, DENV. POST, July 10, 2013, at 6A.

3. *Id.*

4. PROFESSOR LUCY MARSH: ATTACHMENT TO EEOC INTAKE QUESTIONNAIRE, *available at* http://www.scribd.com/doc/152792415/EEOC-addendum.

5. Memorandum from Martin Katz, Dean, Univ. of Denver Sturm Coll. of Law, to the Faculty of Univ. of Denver Sturm Coll. of Law: Faculty Salary Competitiveness Initiative (Dec. 13, 2012), *available at* http://www.scribd.com/doc/152790023/DU-Faculty-Competitiveness.

6. *Id.* at 3.

7. *Id.* at 3–4.

8. O'Connor, *supra* note 2.

demics, her claim received attention as well because it told a familiar story; the gender wage gap in academia is not unique to DU Law School. A 2006 study of salaries by the American Association of University Professors found that the average salary for female full professors was 88% of male faculty members at the same rank.[9] The wage gap across the academic spectrum remains at about 81%, in large part because the ranks of tenure-track and full professors are still dominated by men, while women make up the majority of the lower status, untenured teaching positions at universities.[10]

Professor Marsh's case is also remarkably similar to other instances of gender wage disparity in the way that her employer responded to evidence of a gender wage gap. In his December 2012 memo to the faculty, after reporting the median salary difference among full professors of over $11,000 and mean salary difference of almost $16,000, Dean Katz asserted that "there is only so much that one can glean from looking at these figures."[11] These numbers have less meaning, according to the memo, because:

> there are at least three significant determinants of individual salary differences: (1) differential starting salaries (accounting for teaching and legal experience), as well as any special circumstances or deals that may have affected that number, (2) differential merit raises, often over many years, and (3) other circumstances in individual salary histories, such as offers from other schools or lasting salary effects from holding administrative positions. Accordingly, to determine whether a salary gap reflects inequity requires an individualized analysis.[12]

While the dean invited individual faculty members to talk with him if they had concerns about the numbers his memo had revealed, he closed by noting that "unless I have strong evidence to the contrary, I will need to assume that all of my predecessors' merit raises were accurate reflections of performance."[13]

Dean Katz's explanation does two things that are particularly notable. First, his response to the numbers he has just revealed shifts the focus of attention. The question that he asks us to focus on is not, Why is the average salary among female professors at DU Law School nearly $16,000 lower than that among their male colleagues? Instead, it is whether Lucy Marsh—or any other female faculty member—is good enough to be earning more. The consequences of that shift cannot be

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9. MARTHA S. WEST & JOHN W. CURTIS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 11 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf.

10. John W. Curtis, *Faculty Salary Equity: Still a Gender Gap?*, ON CAMPUS WITH WOMEN (2010), http://www.aacu.org/ocww/volume39_1/feature.cfm?section=2.

11. Katz, *supra* note 5, at 4.

12. *Id.*

13. *Id.*

overstated. In addition to refocusing from the structural to the individual, the dean's memo makes a starting assumption—that all past merit raises accurately reflected performance—that itself rests on a necessary additional assumption that the gender pay disparity reflects a corresponding gender performance disparity. Women have been paid less because they have performed less well. Neither of these aspects of the memo is unique. But the fact that this is how conversations about salary disparities in academia tend to go does not mean that they should.

II. THE STRUCTURES THAT CONTRIBUTE TO GENDER PAY DISPARITY IN ACADEMIC WORK

Much of the explanation for gender pay inequity in academia today is structural, embedded within the assumptions that have come to define merit and status in the academic job market. The mix of scholarship, teaching, and service that generally defines the academic job privileges scholarship significantly over the other facets of the job, but women are more regularly pressed into additional teaching and service obligations. Even within the broad categories of teaching, service, and scholarship, women's work is systematically undervalued. While similar patterns of gender stereotyping, segregation, and second tiering occur throughout the academy, this discussion will focus specifically on women in legal academia. In doing so, it will draw from the work of other scholars who have examined how law faculties reproduce gender stereotypes by focusing "on those invisible law school structures and practices that have a disparate effect on women faculty members."[14]

Gender inequity in law school faculties, as in other parts of the academy, begins with segregation and stratification. There are significantly fewer women than men on the tenure track and it remains the case that women are generally steered into lower status, lower security positions at law schools.[15] The most recent data from the American Association of Law Schools (AALS) show very slow increases in the number of women faculty members in the most prestigious roles in law schools. In the thirteen years between academic year 1995–1996 and academic year 2008–2009, the percentage of women full professors increased from 18.1% to just 29.9%.[16] During that same time period, the percentage of

14. Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 105.

15. *Id.* at 101–04; *see also* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANO-LATINO L. REV. 169, 175–76 (2006); Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 314 (2000) (finding that "*everywhere* in legal education the line between the conventional tenure track and the lesser forms of faculty employment has become a line of gender segregation").

16. *See* THE ASS'N OF AM. LAW SCH., AALS STATISTICAL REPORT ON LAW FACULTY (2000–09), *available at* http://www.aals.org/resources_statistical.php (compare the data in Table 2A of the 2001–02 Report with the data in the Titles section of the 2008–09 Report); Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1747.

women law school deans went from 8.4% to 20.6%.[17] By contrast, in 2008–2009 the percentage of lecturers and instructors who were women was 60.2 and 66.4% respectively, a drop of less than 10% in either category from the 1995–1996 academic year.[18] Looking at the tenure track itself, while the percentage of assistant professors who are women has been nearly 50% (and higher in many years) since 1993, the percentage of full professors who are women has yet to exceed 30%.[19] Women who start on the law school academic ladder don't stay on it or move up it at the same rate that men do. This segregation and stratification is an important piece of the inequity puzzle, particularly in the ways that it reinforces stereotypes about gender and status.

Job segregation does not, however, explain the gender pay gap *within* the rank of full professor at DU Law (and, no doubt, at other law schools). This is an important point because job segregation is so often identified as explaining wage disparity and as being a function of individual men's and women's choices. Even putting to the side the questions about how freely these choices are made, choice cannot explain the persistence of pay disparity. "Too often, both women and men dismiss the pay gap as simply a matter of different choices, but even women who make the same occupational choices that men make will not typically end up with the same earnings."[20] The explanations for wage disparities between men and women within the same job category must be something other than job segregation.

At law schools accredited by the AALS, faculty members are supposed to be evaluated based on scholarship, teaching, and service.[21] At most schools, the stated formula for evaluation is 40% scholarship, 40% teaching, and 20% service. Conventional wisdom is that this formula understates the importance of scholarship and overstates the importance of both teaching and service to actual annual evaluations. Whatever the actual formula might be, an overarching concern about evaluation in the legal academy is that the job of law professor has come to be defined in ways that demand more than full-time commitment and availability. In this way, law schools—like law firms—are what organizational theorists

17. THE ASS'N OF AM. LAW SCH., *supra* note 16. In 2011, only 20.6% of law school deans were women. ABA COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2011, at 3 (2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf.

18. THE ASS'N OF AM. LAW SCH., *supra* note 16. In 1995–1996, AALS categorized lecturers and instructors as a single group, rather than dividing them into two distinct groups. During that academic year, 70.8% of lecturers and instructors were female. *Id.*

19. *Id.* Note that this finding is based on the most recent data in the 2008–09 Report.

20. JUDY GOLDBERG DEY & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., BEHIND THE PAY GAP 2–3 (2007), *available at* http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf.

21. THE ASS'N OF AM. LAW SCH., BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. §§ 6-4, 6-6 (2008), *available at* http://www.aals.org/about_handbook_bylaws.php.

describe as "gendered organizations."[22] A gendered organization is one "defined, conceptualized, and structured in ways that puts a premium on masculine characteristics, including a willingness to work 'on demand,' free from domestic responsibilities."[23] When the demands of the organization put a premium on absolute availability, structural bias flowing from these demands may call into question nominally neutral conceptions of merit.[24]

While scholarly excellence sounds like a gender-neutral evaluation criterion, there is much in the definition of scholarly excellence that fosters or permits inequity. Several scholars have argued that the focus on scholarship as the near exclusive measure of merit on law school faculties has a disparate negative impact on women.[25] In part, this may be because the "trial period" of the scholarly track to tenure disadvantages women because of its timing; most law professors are developing toward tenure between twenty-seven and thirty-seven years old.[26] This is also the time in life when most women who are going to have families start those families. The demands of scholarly productivity and the demands of young children are at best inconsistent. As Paula Monopoli has recently observed, these demands become even more unrealistic when scholarly productivity is expected to be simultaneous with a regular schedule of teaching and service.[27]

Moreover, excellence in scholarship is an extremely subjective standard. Law schools often turn to publication venue as a proxy for excellence because of the difficulties with evaluating excellence in any other way.[28] But the assumption that placement reflects merit is suspect in a field where the vast majority of law reviews are run by and articles selected by students with one or two years of legal studies. A 2010 study of the authors published in the top law journals found "significant gender disparity in publication" in these top journals.[29] Scholarly excellence is also defined, or significantly shaped, by the author's reputation in the field.[30] And reputation in the field, in turn, is shaped not only by the merit of any individual piece of scholarship, but also by participation in con-

22. *See* Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515, 519 (2013).

23. *Id.*

24. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139, 148–50 (1990).

25. *See, e.g.*, Monopoli, *supra* note 16, at 1759–60.

26. McGinley, *supra* note 14, at 120–21.

27. Monopoli, *supra* note 16, at 1760.

28. *Cf.* Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 771 (1998) (using publication in a "top-twenty" journal as a measure of the quality of an article).

29. Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 386 (2010).

30. See, e.g., Christine Hurt & Tung Yin, Blogging While Untenured and Other Extreme Sports, 84 WASH. U. L. REV. 1235, 1248 (2006) ("The goal of a junior professor who wishes to advance in academia is to be recognized nationally as a capable scholar.")

ferences and other forms of national outreach. The marketing time required to develop the "national reputation" that many schools now define as the touchstone of scholarly excellence is significant. The explosion of the blogosphere has only exacerbated these phenomena. Being visible on the Internet has become an important part of developing a national reputation but the time-consuming and time-sensitive nature of maintaining a blog is hard to square with an effort to balance work and family commitments.[31] Unfortunately, the premium placed on being invited to, and accepting invitations to, conferences around the country adds to the subjectivity of the excellence measure, as conference organizers will tend to invite the people they know and feel comfortable with. The extensive scholarship on the risks of bias in systems built on subjective evaluation has tended to focus more on evaluation internal to an organization,[32] but the same phenomena are at play with evaluations made across institutions.

A willingness to be considered for lateral moves is also a significant contributor to national reputation—and the existence of a lateral offer (or even the possibility that one might be in the offing) is a common explanation for salary differentials.[33] But willingness to relocate continues to be a gendered attribute, as women continue to be more constrained by their partners' careers and their family obligations.[34] In the absence of significant social change, using this factor as either a measure of excellence or as an independent salary variable will consistently and predictably disadvantage women.

Turning from scholarship to the less valued but still-required areas of teaching and service, the evidence that bias infects evaluation and work allocation in these areas is abundant. In terms of allocation of responsibilities, a number of studies have found that women in academia spend more time on teaching and on service than their male counter-

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31. See, e.g., Paul M. Secunda, Tales of a Law Professor Lateral Nothing, 39 U. Mem. L. Rev. 125, 130–32 (2008) (discussing the importance of blogging to developing a national reputation and getting noticed in the lateral hiring market).

32. *See, e.g.*, Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051 (1991); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 151–152 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995).

33. *See, e.g.*, Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 36 (2008) (discussing the need to increase a faculty member's salary in the face of competing offers).

34. *See, e.g.*, Rosa Brooks, *What the Internet Age Means for Female Scholars*, 116 YALE L.J. POCKET PART 46, 47 (2006) ("Start with a relatively uncontroversial premise. In American society, women—including women employed full-time outside the home—still do far more 'care-taking' than men. They do more housework, cook more meals, and spend more time caring for children. Some men, of course, do more of these tasks than many women—but the average man does not. Many professional men with children have wives who don't work outside the home, at least if there are young children in the picture; meanwhile, very few working women, mothers or otherwise, have husbands who don't work outside the home.").

parts.[35] And within each area, women often have to work harder than men to be viewed as equally good. For example, studies have found that women faculty members have to prove their competence in the classroom more than men do.[36] Other studies have demonstrated that female faculty are segregated in lower-status course offerings.[37] Women professors also often find themselves with busier office hours and more student questions than their male counterparts.[38]

In the area of service work, female faculty again tend to get the short end of the stick. As Nancy Levit has aptly described it, much of the work that women are asked to do on law school faculties is the "housework" of the institution.[39] Women are more often asked to chair or serve on the lower status committees that address student life and experiences rather than on the more powerful committees such as appointments or tenure and promotion.[40] Even more disturbing is the possibility, suggested by Ann McGinley, that as women take on the more prestigious roles— associate deanships or chairs of the once higher status committees—"[i]nternal work seems to be less important to the prestige of the school and, concomitantly, to the career of the faculty member."[41] Service work that once was important, and handled by male faculty members, has become less important as women have broken into its ranks.[42] Now even the once-important service work is left to women, leaving the men free to focus on their own individual scholarship and the work of developing the requisite national reputation through participation in conferences and the Internet self-promotion that has become such a central element of legal academic production.[43]

An over-arching challenge to all of these measures of evaluation—scholarship, teaching, and service—is that excellence in each is hard to

35. John W. Curtis, Persistent Inequity: Gender and Academic Employment 5 (Apr. 11, 2011) (unpublished report), *available at* http://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf.

36. *See, e.g.*, Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334 (1996); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 265–67 (2008).

37. *See, e.g.*, Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 295–96 (2004); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 258–273 (1997). When women teach in lower-status areas, their scholarly production is likely also to be in those lower-status fields. This job segregation may thus contribute to the challenges women face gaining national recognition as scholars as well. Merritt & Reskin, *supra*, at 267.

38. *See, e.g.*, Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993, 999–1000 (1997).

39. Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 777 (2001).

40. *Id.* at 786–87; *see also* Apel, *supra* note 38, at 1000–02.

41. McGinley, *supra* note 14, at 150; *see* Kristen Monroe et al., *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions*, 6 PERSP. ON POL. 215, 219–20 (2008).

42. *McGinley*, *supra* note 14, at 150–51.

43. *Id.*; *see also* Levit *supra* note 39, at 785–89.

define without resorting to extremely subjective standards. And yet, the more informal and subjective an evaluation system is, the more likely it will be applied unevenly.[44] This may be one piece of why, as one district court recently recognized, "women who have earned professional degrees, work longer hours, or hold management positions are subject to some of the largest pay disparities."[45] Academia, like many other fields requiring professional degrees, has developed evaluation metrics that are extremely difficult to standardize. An evaluation of whether these metrics are being applied correctly or fairly is consequently more difficult.

III. THE SHIFT FROM THE STRUCTURAL TO THE INDIVIDUAL

While these structural attributes of legal academia are very likely to be major contributors to gender pay disparities, conversations about pay inequity tend to move—like Dean Katz's memo—quickly to individual explanations and a focus on what might explain why any individual female faculty member receives lower pay than her male peers.

A number of factors might explain this instinct to focus on the individual, rather than the structural. First, the law that governs pay discrimination claims pushes to individual explanations. Second, for those inside the structures of legal academia, it is uncomfortable to consider the implications of structural biases. Solutions for these structural problems are also not immediately apparent. It is easier to focus on individual employees, to look for the aberration, than it is to consider that the entire system may be broken.

A. Legal Standards Push to the Individual Explanation

The law of pay discrimination has been written and interpreted to favor the individual instead of the structural explanation for disparities. Both the EPA and Title VII incorporate elements and defenses that focus attention on specific employees and discrete employment decisions.

A prima facie case under the EPA requires a woman to prove that she was paid differently from male employees for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[46] The defendant is then able to respond with one of four statutorily defined affirmative defenses.[47] Of the four, the one that is most common in academic settings is an argument that the differential is "based on any other

44. *See, e.g.*, Sterling & Reichman, *supra* note 22, at 520–21.

45. Dreves v. Hudson Grp. Retail, L.L.C., No. 2:11–cv–4, 2013 WL 2634429, at *12 (D. Vt. June 12, 2013); *see also* U.S. BUREAU OF LABOR STATISTICS, REPORT 1045: HIGHLIGHTS OF WOMEN'S EARNINGS IN 2012, at 9, 11 (2013), *available at* http://www.bls.gov/cps/cpswom2012.pdf (showing an earnings ratio of 73% between women and men who have earned a bachelor's degree or higher, and a pay ratio of 71.6% for women in management, professional, and related occupations).

46. 29 U.S.C. § 206(d)(1) (2012).

47. *Id.*

factor other than sex."[48] Both the prima facie case and the "factor other than sex" defense result in extensive discussion of not only an individual plaintiff, but also specifically identified opposite sex comparators, even in instances where the challenged employment practices are structural. *Brock v. Georgia Southwestern College*[49] offers a particularly clear example of this in the academic context. The Department of Labor (DOL) brought this case as a result of its investigation into employment patterns at the college, first among custodial employees and then within the faculty ranks.[50] While DOL challenged the college's hiring and pay-setting practices at a structural level—arguing that the college's entire approach to employment decision making was excessively subjective—the focus of the court's decision is on six specific women and their specific comparators.[51] The structural challenge is relegated to a footnote, as the EPA's statutory requirements push the court into the one-to-one comparisons that dominate the opinion.

One of the most significant challenges of an EPA claim for an academic is that "plaintiffs in non-standardized jobs have a difficult time showing that they can even compare themselves to their peers."[52] Some courts and commentators question whether the EPA even applies to jobs in fields such as academia.[53] The argument is that the statute was really designed for standardized jobs in which it is evident that two people are performing the "same" work. In academia, where professors do different amounts of research and writing, teach different classes with different numbers of students, and provide different services to the law school or the legal community, it is hard to know whether two people can ever reasonably be described as doing the same work.[54] This argument puts

48. *Id.* The other available defenses are the presence of a seniority system, a merit system, or a system that "measures earnings by quantity or quality of production." *Id.*

49. 765 F.2d 1026 (11th Cir. 1985).

50. *Id.* at 1029.

51. *Id.* at 1030–33 & 1030 n.6.

52. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 31 (2010).

53. *See id.* at 39–41 (discussing the difficulties of applying the EPA to situations involving professionals in high-level, non-standardized positions).

54. *Cf.* Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 699–700 (7th Cir. 2003) (looking behind nearly identical job titles to evaluate whether the particular circumstances of a female professor and her male comparator were different and concluding that their jobs were not the "same"); Fisher v. Vassar Coll., 70 F.3d 1420, 1452 (2d Cir. 1995) (highlighting that although plaintiff and comparator were both assistant professors teaching biology, plaintiff had not established a prima facie case under the EPA because, "at one point, [plaintiff] acknowledged that [comparator] had responsibilities [plaintiff] did not share"); Strag v. Bd. of Trs., 55 F.3d 943, 950 (4th Cir. 1995) (describing how the plaintiff failed to establish a prima facie case under the EPA because her proposed comparator taught in the biology department, while she taught mathematics); Spaulding v. Univ. of Wash., 740 F.2d 686, 696–97 (9th Cir. 1984) (finding that the nursing faculty at the university failed to establish proof of sufficiently similar work when comparing nursing work to work in other disciplines of the university), *overruled by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987). *See generally* Ana M. Perez-Arrieta, Note, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring "Equal Work" and "Any Other Factor Other Than Sex" in the Faculty Context*, 31 J.C. & U. L. 393, 399–403 (2005).

too heavy a burden on plaintiffs.[55] The better approach is to accept the employer's job titles—Assistant Professor or Professor, for example—as defining the job and leave questions about quantity or quality of work actually performed as part of the employer's defense.[56] Either way, however, the comparison of the plaintiff's work to the work of other identified employees directs attention to the individual faculty members and away from the structures of the workplace and its system of evaluation.

For an academic plaintiff who makes out a prima facie case, she is likely to face a relatively predictable set of "factor other than sex" affirmative defense arguments. Many of them, in fact, were included in Dean Katz's memo to the DU Law faculty. In particular, "differential starting salaries . . . [and] special circumstances or deals that may have affected that number" and "other circumstances in individual salary histories, such as offers from other schools" are two common explanations—both in litigation and out—for pay disparities.[57] These defenses are most often discussed in terms of "market factors" in judicial opinions, and many courts—though not all—have accepted the argument that market factors can be the non-sex-based explanation for gender wage disparities.[58] The use of market factors to explain differential pay should, however, be carefully examined. Insights from social science research have taught us a great deal about the limits of the "market" as a neutral source of information about men's and women's actual potential or performance.[59] Indeed, Nicole Porter and Jessica Vartanian recently argued that "[p]rior salaries and outside competitive offers are not always neutral; they are often tainted with bias, and we should eliminate the effect of that bias by precluding employers from relying on these factors when setting pay."[60] Some courts have similarly recognized the gender bias that infects the market and have expressed reluctance to incorporate that bias into the law.[61] Even those courts, however, have ultimately allowed

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55. It also seems to ignore the fact that, when Congress created exceptions to the Fair Labor Standards Act for professional employees in 1972, the legislature specifically provided that professional employees remained protected by the EPA. *See* 29 U.S.C. § 213(a)(1) (2012).

56. *See, e.g.*, Brock v. Ga. Sw. Coll., 765 F.2d 1026, 1033–34 (11th Cir. 1985) ("We hold, however, that plaintiff can meet its burden of going forward by showing that the teachers compared are in the same discipline and that their job is to teach classes to students in that discipline. To require plaintiff to do more would be unrealistic, for it would require plaintiff to prove the absence of any conceivable difference between teaching class X and teaching class Y, without defendant even having to allege specific differences." (footnote omitted)).

57. *See* Katz, *supra* note 5, at 4.

58. *See* Perez-Arrieta, *supra* note 54, at 409–13 (collecting cases in which courts have considered such market forces as the basis for pay disparities).

59. Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 183–90 (2011).

60. *Id.* at 190.

61. *See, e.g.*, Kouba v. Allstate Ins. Co., 691 F.2d 873, 877 n.7 (9th Cir. 1982); Drum v. Leeson Elec. Corp., 550 F. Supp. 2d 1071, 1078 & n.9 (W.D. Mo. 2008), *rev'd*, 565 F.3d 1071 (8th Cir. 2009). *But see* Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470–71 (7th Cir. 2005) (concluding that criticizing the market as being gender-biased will not defeat a defendant's reliance on the market as a factor other than sex).

the market arguments to shield defendants from liability without looking too closely at the structural dynamics at play in that market.[62]

A third element that the DU Law memo raised as an explanation for the significant gender gap in full-professor salaries at the law school was "differential merit raises."[63] This is certainly among the most common factors other than sex raised to explain pay disparities.[64] As discussed above, however, a university's evaluation metrics and their application may suffer from structural flaws that contribute significantly to salary inequities.[65] In *Kovacevich v. Kent State University*,[66] the Sixth Circuit Court of Appeals, recognizing this reality, reinstated a jury verdict because the appellate court concluded that the jury could reasonably have been suspicious of a "merit award system [that] was driven largely by an opaque, decision-making process at the administrative level . . . and rewarded men disproportionately to women."[67] The *Kovacevich* decision is unique among reported appellate cases to acknowledge that a system described by neutral qualities such as merit may nonetheless be applied in ways that create sex-based disparities that violate the EPA.

Academic plaintiffs are not often successful in pursuing challenges under the EPA. A 2010 study of federal appellate EPA cases found that of the twenty-three such cases involving university professors, the plaintiffs lost 65% of the time, frequently at summary judgment.[68] In these cases, courts have tended to treat a university's evaluation of teaching ability and scholarship, as well as the university assessment of market demand, with a great deal of deference.[69] Indeed, some courts view the need for deference to universities to be even greater than the need for deference to other employers because they see faculty hiring as tied directly to academic freedom, and academic freedom to the First Amendment.[70] As the First Circuit expressed it in an early EPA case:

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62. For a remarkable exception to this general approach, see Dreves v. Hudson Grp. Retail, L.L.C., No. 2:11-cv-4, 2013 WL 2634429, at *13 (D. Vt. June 12, 2013).

63. *See* Katz, *supra* note 5, at 4.

64. *See, e.g.*, Wu v. Thomas, 847 F.2d 1480, 1485 (11th Cir. 1988).

65. *See supra* text accompanying notes 21–45.

66. 224 F.3d 806 (6th Cir. 2000).

67. *Id.* at 827. One of the things that made *Kovacevich* rather unique among EPA decisions is that the appellate court had the benefit of a jury verdict to review; most EPA cases from academic settings, despite the fact-driven nature of the EPA inquiry, have been dismissed by courts at summary judgment. Eisenberg, *supra* note 52, at 33–34.

68. *See* Eisenberg, *supra* note 52, at 33.

69. This deference to universities and its impact on the viability of discrimination claims in academic institutions has been long recognized. *See, e.g.*, Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1318 (1992) ("Courts in the United States have traditionally exercised restraint in cases involving the academic decisions of colleges and universities."); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 69 (1994) (noting that "the federal courts have always deferred to academic institutions and hesitated to scrutinize the faculty personnel process").

70. *See, e.g.*, Keyishian v. Bd. Of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amend-

> A university is, of course, not free of the Equal Pay Act, but when it is confronted with possibly opposing pressures or obligations, some of which involve the difficult subject of gender, it must be allowed substantial room to maneuver, rather than find itself between the devil and the deep blue sea. Otherwise, instead of some measure of academic freedom, it will face the constant prospect of judicial reproof.[71]

The invocation of academic freedom as a barrier to judicial evaluation of pay disparities risks insulating significant structural inequity from any review in the academic setting. Together with a more general judicial reluctance to look behind individual explanations for the structural causes of disparity, this judicial deference to academic employers has made the EPA a very tough path for women professors challenging pay inequities.

Pay discrimination claims can, of course, also be pursued through the prohibitions against sex discrimination contained in Title VII. This route presents a slightly different set of hurdles for plaintiffs challenging gender-based pay disparities. While Title VII does not require that plaintiffs identify specific comparators performing similar work to pursue a claim, a disparate treatment claim does demand that the plaintiff provide sufficient evidence to suggest that the employer intentionally discriminated based on sex in making pay decisions. The focus on employer intent operates in much the same way that the EPA requirements do, to push parties and the court to individual explanations for decision making. Moreover, Title VII specifically incorporates the affirmative defenses contained in the EPA, so the "factor other than sex" analysis is effectively the same under the two statutes. Ultimately, as Tristin Green has noted, "[t]raditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static."[72]

Many scholars, including Green, have argued in recent years for application of antidiscrimination laws in ways that recognize the structural nature of discrimination and that shift focus away from the individualized model to recognize and remedy systemic harms.[73] This scholarly push was paralleled during the 2000s by impact litigation efforts led by national public interest law firms like Equal Rights Advocates and the

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ment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 265–67 (1989).

71. Winkes v. Brown Univ., 747 F.2d 792, 797 (1st Cir. 1984) (footnote omitted).

72. Green, *supra* note 32 at 112.

73. *Id.* at 111–12; *see also, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 4–20 (2006); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 767–88 (2005); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 641–42 (1998).

Impact Fund.[74] These lawsuits, most famously the challenge mounted by Betty Dukes and other plaintiffs against pay and promotion discrimination at Wal-Mart, challenged the excessively subjective, unguided decision-making policies that led to significant gender inequities at Wal-Mart Stores all over the country.[75] For many years, these suits seemed to be making inroads into the individual-focused presumptions in discrimination liability. Unfortunately, however, the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*[76] made systemic challenges under Title VII much more difficult precisely because of the Court's reluctance to permit challenges that do not have "significant proof" linking complained-of structural problems to individual decisions.[77]

B. Challenging Structure Is Hard

Even outside of litigation, discussions of pay equity tend to drift to consideration of individual employees or decision makers. At bottom, it is easier to talk about whether one person or another is making the right amount of money than it is to talk about whether an entire system of evaluation and pay setting is flawed.

Asserting that the structure of a job or a workplace is biased is relatively easy from outside of that job or workplace. But making the same claim from within is much harder. For law professors evaluating a gender pay gap in legal academia, there is a natural push away from condemning the system itself as biased. Social science research on "system justification" demonstrates that both those who benefit from and those who are harmed by implicit structural biases will take great pains to justify the status quo of the systems within which they are operating.[78] Part of the challenge that contributes to system justification is that acknowledging systemic flaws requires a person to then decide whether to address them or ignore them. Neither choice is easy.

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74. *See generally* Hart, *supra* note 73, at 778–88. As the Impact Fund explains on its website, the Fund "maintains an active litigation docket in order to stay at the forefront of the class action and collective action legal field and to demonstrate the means for using these legal mechanisms to achieve broad social change." *Litigation*, IMPACT FUND, http://impactfund.org/litigation/ (last visited July 18, 2014). Similarly, Equal Rights Advocates has "transformed the law for hundreds of thousands of women and girls for over four decades through impact litigation, advice and counseling, and policy reform." *Fighting for Women's Equality*, EQUAL RTS. ADVOCS., http://www.equalrights.org/our-work/ (last visited July 18, 2014). Interestingly, Equal Rights Advocates has been working with Lucy Marsh on her dispute with the University of Denver. *See* Cynthia Foster, *Client Professor Lucy Marsh Called "Champion for Fair Pay" by Colorado Law Week*, EQUAL RTS. ADVOCS. (Jan. 9, 2014), http://www.equalrights.org/client-professor-lucy-marsh-called-champion-for-fair-pay-by-colorado-law-week/; *see also* O'Connor, *supra* note 2.

75. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011); *see also* Melissa Hart, *Learning from* Wal-Mart, 10 EMP. RTS. & EMP. POL'Y J. 355, 359–65 (2006).

76. 131 S. Ct. 2541 (2011).

77. *Dukes*, 131 S. Ct. at 2553–54 (internal quotation marks omitted).

78. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 883 (2004) (emphasis omitted).

Imagine you are a legal academic (if you are reading this law review article, you probably *are* a legal academic): you have decided to join a profession in which the metrics that are being used to define merit include excellence in scholarship, teaching, and service. If you've been a legal academic for any amount of time, you've been trying to write law review articles, agonizing over which law journals accept or reject them, worrying about whether your articles are cited in other articles, and whether you are invited to national conferences, or asked to guest blog on some much-read site or another. You've been working long hours to succeed in these efforts, and we haven't even gotten to teaching or service yet. If you open up the Pandora's Box of questions about whether the system of evaluation that has pushed you to work so hard at these things suffers from structural bias, you not only have to question what you have been spending all of these hours doing, but you also have to decide whether to keep doing it or to push for some different system. If you have received positive feedback for your success within this system, you would have to ask whether your success is truly meaningful if the evaluation system is flawed. And even if you have not received the kind of feedback you might have hoped for, you have still been striving within this system, and rejecting or questioning it means questioning your own choices.

Moreover, if you were to decide to push for a different system, it isn't immediately obvious what that different system would be. Even in the current climate of uncertainty for law schools and critique of legal education, it is hard to find serious proposals for restructuring the current system of responsibilities and rewards in legal academia. Paula Monopoli recently made an interesting suggestion for decoupling productive teaching years from productive scholarly years in recognition of how difficult it is to do both things well simultaneously.[79] The ABA Task Force on the Future of Legal Education has gently suggested moving away from tenure for law professors.[80] Their concerns are not with gender pay equity, but with the costs of legal education.[81] It is possible, though, that a shift away from a tenure system that privileges scholarship might have gender-leveling effects. It seems equally likely that the job of law professor in schools that adopt that regime will, much like the current positions of instructor and lecturer, become sex-segregated with women dominating the new, lower status field and men moving on to something else.

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79. Monopoli, *supra* note 16, at 1764–74.

80. *See* ABA TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 7, 14–16, 31 (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

81. *Id.* at 31 (discussing the tenure standards as standards that should be reevaluated in light of their impact on the cost of a JD education).

The structural problems are equally difficult from the perspective of a well-intentioned decision maker. DU Law's Dean Katz is, I believe, just such a decision maker. Put yourself for a moment in his shoes. You've looked at the spread of salaries for full professors, and you have found that the median salary for female full professors is far below the median salary for male full professors. What should you do?[82] You could decide to provide across-the-board increases for female faculty members to address the disparity. That is what Virginia Commonwealth University did in 1996.[83] In response, male faculty members brought a lawsuit challenging the raises as sex discrimination.[84] And litigation risk is not the only reason that an across-the-board equity adjustment may not be the best choice. At some point, focusing on the forest can lead one to ignore the individual trees. What do you do about a hard-working, talented male professor who will be leapt over in an across-the-board adjustment? It is not difficult to see why a more nuanced approach to salary adjustment would be appealing. And yet, if you decide not to do a uniform adjustment, but to only adjust certain salaries, you are moving to individual evaluation.

It is not entirely surprising that one of the common structural solutions proposed to address gender pay gaps, in academia and elsewhere, is a system of lockstep pay increases. The argument for lockstep pay recognizes that "[a]s long as salaries are determined primarily by private individual negotiation or administrative discretion, inequities will reemerge."[85] Lockstep salaries, set at years of service, avoid the subjectivity of annual evaluations of merit. They also eliminate the salary maneuvering that can occur with lateral offers, and the "special deals" made at hiring. As a mechanism for salary equity, lockstep pay is pretty perfect. As a mechanism for job equity, it may not be. Lockstep pay ensures that people are paid the same amount at each year of service. It does not ensure that they work as hard. Before reformers embrace lockstep pay as a solution to the pay equity problem, they should consider carefully what inequities might unintentionally be created by such a system.

Most scholars who examine gender disparities among academics emphasize the need for salary transparency as a first step to addressing these disparities.[86] Professor Marsh's story is instructive in this regard.

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82. In the months following his December 2012 memo to the faculty, Dean Katz hired a consulting firm to conduct an equity study of salaries at the Law School to assess "whether there are individual or structural factors that have contributed to pay distinctions on the basis of gender." E-mail from Martin J. Katz, Dean, Univ. of Denver Sturm Coll. of Law, to Denver Law Community (Feb. 27, 2014, 2:26 PM) (on file with author). The results of that study will be released to the law school, and it remains to be seen whether equity adjustments or other changes will occur.

83. *See* Smith v. Va. Commonwealth Univ., 84 F.3d 672, 674–75 (4th Cir. 1996).

84. *Id.* at 674; *see also* Maitland v. Univ. of Minn., 155 F.3d 1013, 1015 (8th Cir. 1998) (male professors brought a lawsuit arguing that implementation of a gender-based salary adjustment discriminated against them).

85. Curtis, *supra* note 10.

86. *See* Eisenberg, *supra* note 52, at 63–64; Sterling & Reichman, *supra* note 22, at 518.

While Marsh and other women had raised questions about whether there was salary disparity at DU Law, the University of Denver is like most private employers in maintaining secrecy about salaries.[87] Only when the dean of the law school, in an effort to be more transparent, circulated a memo to the faculty identifying a significant difference in median pay for male and female full professors did the possibility of a direct challenge to that disparity become evident.

There certainly may be benefits to transparency. One of the common explanations offered for pay disparities is that "[w]omen don't ask."[88] Without transparency, however, it is at best complicated to place the blame for disparity at the feet of those being paid less. "Unless wage rates are published, women do not know what to demand."[89] Thus, transparency might encourage negotiation. Transparency might also encourage better behavior by schools, as decision makers will be called on to articulate explanations for inequities. Transparency is also hard. When colleagues are aware of who is being paid more and who is being paid less, the opportunities for hurt feelings and anger are significant. Transparency risks having a corrosive impact on workplace culture. The benefits may outweigh those risks, but it is not immediately obvious that they will.

IV. A POSSIBLE ALTERNATIVE TO MISSING THE FOREST FOR THE TREES

The fact that challenging structure is hard does not mean it shouldn't be done. It might even mean just the opposite—we should be challenging structure precisely because it is hard. To that end, perhaps the most troubling line in Dean Katz's memo to the DU faculty is his statement that "unless I have strong evidence to the contrary, I will need to assume that all of my predecessors' merit raises were accurate reflections of performance."[90] With that starting assumption, current salary disparities are frozen in place as presumptively reflecting the relative merit of the individual faculty members. Embedded in that assumption, given the gender disparities in full professor salaries, seems to be a further assumption that male faculty members are, on the whole, better performers than female faculty members.

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87. *See, e.g.*, Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043, 1044 & n.1 (2012) (noting that studies show that most employees in the United States work for employers who maintain salary confidentiality rules).

88. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE ix–x (2007).

89. Eisenberg, *supra* note 52, at 65; *see also* Paula A. Monopoli, *In a Different Voice: Lessons from* Ledbetter, 34 J.C. & U.L. 555, 556–57 (2008) ("Any good negotiation relies in large part on information . . . . Without reliable data on where one stands in the faculty array vis-à-vis male colleagues, and with amorphous standards of merit that rule in the academy, women are at a significant disadvantage.").

90. Katz, *supra* note 5, at 4.

What would it look like to make a different assumption? What if a dean, confronted with systemic gender disparities, were to assume instead that these gender disparities would not have developed absent discrimination in either the standards being applied or the way those standards are being applied? How would that starting point affect pay decisions?

One principle that might be properly applied in such a circumstance is "first, do no harm."[91] Perhaps an employer who encounters a significant gender pay disparity should be barred from offering raises that exacerbate the disparity. Once a pay disparity, like that in the salaries of full professors at DU Law, comes to light, available raise pools can only be allocated in ways that either decrease or maintain the disparity. This "do no harm" approach would be analogous to the three-part test applied in evaluating claims under Title IX, which prohibits gender discrimination in funding for educational programs.[92] In the Title IX context, a university facing a challenge to its funding of athletic programs must show either that it provides proportionate funding for male and female athletic programs; that it is engaged in a "continuing practice of program expansion" to meet the interests of the underrepresented sex; or that "it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."[93] The practical result of this test is that a university cannot make an existing funding inequity worse. In order to demonstrate that it is meeting one of the three requirements, the university will have to show either that there is no existing inequity or that progress is being made toward addressing an existing inequity.

Applied in the context of salary setting, this approach would allow a decision maker tasked with offering merit raises, or competitive-salary raises, to make the individual assessments necessary for that type of raise. But it would also require that decision maker to acknowledge the structural problem presented by the wage disparity—and to acknowledge it as a structural problem, rather than simply as a series of individual stories.

CONCLUSION

The frustrating persistence of gender pay inequity is a systemic problem, and yet pay equity is just one of many employment contexts in which structural causes are too often overlooked as discussion turns instead to individual explanations. Unfortunately, the move from the struc-

91. This expression, from the Latin *primum non nocere* is a basic principle of bioethics. *See* Stedman's Medical Dictionary 1226 (27th ed. 2000).

92. 20 U.S.C § 1681(b) (2012).

93. 44 Fed. Reg. 71418 (Dec. 11, 1979); *see also* DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 62–82 (2010).

tural to the individual significantly diminishes the likelihood of systemic change. It is a move we can no longer afford.

DISABLING THE GENDER PAY GAP: LESSONS FROM THE SOCIAL MODEL OF DISABILITY

MICHELLE A. TRAVIS[†]

ABSTRACT

As we celebrate the fiftieth anniversary of Title VII's prohibition against sex-based compensation discrimination in the workplace, the gender wage gap remains robust and progress toward gender pay equity has stalled. This Article reveals the role that causal narratives play in undermining the law's potential for reducing the gender pay gap. The most recent causal narrative is illustrated by the "women don't ask" and "lean in" storylines, which reveal our society's entrenched view that women themselves are responsible for their own pay inequality. This causal narrative has also embedded itself in subtle but pernicious ways in antidiscrimination doctrine, which helps shield employers from legal liability for gender pay disparities.

The disability civil rights movement has faced a similar challenge, and its successful response provides a potential path forward on gender pay issues. The causal narrative that erected barriers for disability rights was engrained in the medical model of disability, which also identified internal deficits as the source of individuals' own limitations. The disability rights movement responded with a reconceptualized "social model," which explains disability instead as the result of the environment in which an individual's characteristics interact. The social model of disability provides an alternative causal narrative: one that shifts focus onto the role played by employer practices and organizational norms in producing inequality. This Article explores how a social model approach to women's compensation could help shift the causal focus away from the manner in which women negotiate and onto the institutional practices that produce unequal results. In doing so, the social model may help resuscitate Title VII's disparate impact theory to allow challenges to employment practices that base compensation on employees' individual demands, thereby moving us toward more effective structural solutions to the gender pay divide.

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† Associate Dean for Faculty Scholarship and Professor of Law, University of San Francisco School of Law. I would like to thank the University of Denver Sturm College of Law for organizing the symposium on "Revisiting Sex: Gender and Sex Discrimination Fifty Years after the Civil Right Act," which provided a valuable forum for discussion. Thanks are also due to Tristin Green, Nicole Porter, and Gowri Ramachandran for their insights, to Alyse Pacheco for her research assistance, and to Richard Dickson for his support.

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INTRODUCTION

For the past decade, progress on the overall gender wage gap has come to a virtual standstill.[1] For full-time, year-round workers in 2012, the median salary for women was 76.5% of the median salary for men—a gap that was nearly identical to the gap reported in 2001.[2] Gender pay disparity is much larger for some women than others, particularly for women of color,[3] and it exists even after controlling for factors such as education, skill level, and hours worked.[4] If the overall rate of change from 1960 to 2012 remains the same in the future, most women in the paid labor market today will never experience gender wage parity during their working lives.[5] At the same time that we are celebrating the fiftieth anniversary of Title VII's prohibition against sex discrimination in the workplace,[6] experts are actually extending their projections for the length of time that it will take to eventually close the gender pay gap.[7]

Although designing successful legal tools to combat the gender pay gap does not necessarily require a complete understanding of why the

1. *See* Meghan Casserly, *The Geography of the Gender Pay Gap: Women's Earnings by State*, FORBES (Sept. 19, 2013, 8:30 AM), http://www.forbes.com/sites/meghancasserly/2013/09/19/the-geography-of-the-gender-pay-gap-womens-earnings-by-state/ ("For more than a decade now, the comparison between the median earnings of full-time employed men and women in the U.S. has remained a stubborn 77% . . . ."); Ben Penn, *Gender Pay Gap Won't Close Until 2058, IWPF Projects, as Democrats Push for Law*, DAILY LAB. REP., Sept. 18, 2013, at A-12 ("While women have made tremendous strides in their earnings relative to men since 1960, none of that progress has taken place since 2000 . . . .").

2. *See* Penn, *supra* note 1, at A-12.

3. *On Pay Gap, Millennial Women Near Parity—for Now*, PEW RES. CENTER (Dec. 11, 2013), http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/ (providing details about the gender wage gap based on survey data from October 2013).

4. *See* Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1049–51 (2012) (summarizing the "great deal of evidence that women . . . still experience large pay gaps," even when controlling for other factors).

5. *See* Penn, *supra* note 1, at A-12; *see also* Jillian Berman, *Gender Pay Gap Likely Won't Go Away Until After You Retire: Study*, HUFFINGTON POST (Sept. 23, 2013, 11:42 AM), http://www.huffingtonpost.com/2013/09/23/gender-pay-gap-close_n_3975638.html.

6. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

7. *See* Berman, *supra* note 5.

gap exists, causal narratives have played an enormously influential role in Title VII's relative lack of success in the arena of sex-based wage discrimination. Because both our social and our legal assessments of responsibility typically follow our attributions of causation, causal narratives are powerful tools for shaping the law's effect, whether or not our causal assessments are accurate, sufficiently nuanced, or legally relevant.[8] According to social scientists who study causal attribution theory—i.e., the cognitive processes by which we arrive at explanations for social events[9]—we are not exceptionally skilled at this task. Although our causal attribution process is efficient, often unconscious, and highly adaptive, it is also systematically biased.[10]

One causal attribution bias is toward oversimplification, which often shows up when several causes are necessary for an event or outcome to occur.[11] Tort law refers to this scenario as one involving "multiple necessary causes."[12] In such a scenario, we tend to single out and identify one of the multiple necessary circumstances as *the* cause, which then becomes the target for placing responsibility, be it credit or blame.[13] The gender pay gap is just such a multi-causal social phenomenon. The resilience of the gender pay gap has been fueled in part by simplified—and strategic—causal narratives that have directed responsibility away from the employers that have built, entrenched, and sustained gender pay ine-

8. *See* Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 53–54 (2009); *see also* STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 232 (2007) ("Our concept of causation is indispensable to our attribution of credit and blame in everyday life.").

9. *See* Travis, *supra* note 8, at 54 ("Causal attribution theory is the branch of social cognition theory that studies the process by which people arrive at explanations for social events."); *see also* MILES HEWSTONE, CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS 37–38 (1989) (describing causal attribution theory); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY 337, 338–39, 348–49 (Leonard Berkowitz ed., 1978) (same); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 509–10 (2002) [hereinafter Travis, *Perceived Disabilities*] (same).

10. Travis, *supra* note 8, at 54; *see also* HEWSTONE, *supra* note 9, at 61 (describing the adaptive but biased nature of our causal attribution processes); Travis, *Perceived Disabilities*, *supra* note 9, at 509–42 (summarizing the social science research on causal attribution biases).

11. *See* PINKER, *supra* note 8, at 213.

12. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 26 cmts. c, i, 27 cmts. d, e (2010); *see also* John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2709 & n.232 (2003) (describing the Restatement's distinction between multiple necessary causes, which are "members of a causal set which are in themselves necessary to cause the harm, even if they are insufficient to do so by themselves," and multiple sufficient causes, which "occur where there are two forces, operating independently, and each is sufficient to cause the harm"); Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual "But For" and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241, 251–52 (2001) (distinguishing multiple necessary cause situations in which several causes "are necessary but neither alone is sufficient," from multiple sufficient cause situations in which either of two causes would be sufficient by itself to produce the outcome but "neither alone is necessary").

13. *See* PINKER, *supra* note 8, at 213–14 ("People somehow distinguish just one of the necessary conditions for an event as its *cause* and the others as mere *enablers* . . . even when all are equally necessary.").

quality as a standard feature of the American workplace. This Article explores this important role that causal narratives play in sustaining the gender compensation divide.[14]

Social psychologists generally characterize causal attributions as either "internal" or "external."[15] Internal attributions are ones that identify the primary cause of a social event as some characteristic, feature, or trait of an actor involved in the event, while external attributions are ones that identify the primary cause as some aspect of the situation or environment in which the event took place.[16] When an observer concludes that a particular outcome was caused by an actor's effort, intelligence, ability, attitude, personality, emotions, or physical or mental condition, the observer is making an internal attribution.[17] If the observer instead deems the cause to be the weather conditions or the difficulty of the task, for example, an external attribution is being made.[18] In other words, internal causal attributions focus on "something about the person," while external causal attributions focus on "something about the situation."[19]

Under this taxonomy, internal causal attributions for the gender pay gap focus on characteristics of the women who are being paid less than men for their work. External causal attributions, in contrast, focus on aspects of either of the two environments in which women are interacting: aspects of the particular employer that is compensating women less than men, or aspects of the broader labor market within which all employers and employees operate. When an employer is charged with sex-based compensation discrimination, the employer thus has two targets for shifting causal attribution away from itself: either to the labor market or to the women who are being underpaid.

In Title VII's early years, employers successfully sold a narrative that identified "the market" as *the* cause of the gender pay gap. Employers portrayed themselves as passive price-takers who simply set wages based on external market forces, which resulted in lower pay for women than for men.[20] Courts readily accepted this single, external causal attribution as a basis for shifting legal responsibility away from employers for

14. *Cf.* Travis, *supra* note 8 (analyzing the role of causal attribution narratives in combating pregnancy discrimination in the workplace).

15. *See* HEWSTONE, *supra* note 9, at 30–31. This causal attribution dimension has also been referred to as the "person" versus "environment" dimension, or the "dispositional" versus "situational" dimension. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See* Christopher Peterson et al., *The Attributional Style Questionnaire*, 6 COGNITIVE THERAPY & RES. 287, 288 (1982).

20. *See* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 596 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)) (describing the causal narrative "of employers as passively paying the going rate for labor"—i.e., employers' assertion that "the 'market made me do it'").

sex-based compensation disparities.[21] In 1999, however, two sociologists, Robert Nelson and William Bridges, published an influential empirical analysis debunking that oversimplified causal narrative and revealing the additional, necessary role played by employers' own wage scales, personnel bureaucracies, and other organizational practices that decouple individual employers' wages from labor market prices.[22] Feminist legal scholars quickly leveraged this research to help reveal the multi-causal nature of the gender pay gap and to challenge employers' market-based defenses to gender pay discrimination claims.[23] Nelson and Bridges' research provided an empirical basis for undermining the causal narrative that the market dictates employers' pay decisions, thereby making more salient the necessary causal role of individual employers in sustaining the gender pay gap.[24]

Employers then seized upon another oversimplified—and even more strategic—causal narrative: one that focused instead on women themselves. Early on, this causal narrative was framed in terms of women's "lack of interest" in and "choice" not to pursue high-paid positions and job opportunities.[25] Courts also readily accepted this internal causal attribution, once again allowing employers to evade legal responsibility for sex-based compensation disparities.[26] But although the lack of interest causal narrative effectively shifted blame for between-job pay differ-

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21. *See* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 348–49 (2003) (compiling case law allowing employers to use a market defense to Title VII disparate impact claims alleging gender pay discrimination).

22. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA 2–3, 8, 9, 14, 51, 76, 310, 313–15 (1999) (using in-depth case studies to show that much of the between-job gender pay gap cannot be explained by external market forces); *see also* Chamallas, *supra* note 20, at 580 (describing how Nelson and Bridges demonstrated that employers are not "merely following the market," but rather that "a sizeable portion of the pay differential—resided in the employers' own actions in setting internal pay scales to suit their organizations' needs and values").

23. *See, e.g.*, Chamallas, *supra* note 20, at 581, 600, 607, 612 (arguing that evidence identifying a causal role for the gender pay gap within organizations "paves the way for disparate impact theory under their new analysis of the causes of gender wage disparities").

24. *See* NELSON & BRIDGES, *supra* note 22, at 51 (concluding from case study analysis that a significant portion of the gender wage gap "arises inside or is perpetuated by employing organizations"); *see also* Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 819 (2010) (arguing that because "[t]he market defense draws its strength from the assertion that wages are determined by external forces," employers should no longer be able to use that defense once that premise is "questioned by empirical analysis"); Travis, *supra* note 21, at 352 (explaining how Nelson and Bridges "provided a factual basis for undermining courts' causation analysis" through case studies "identifying specific organizational practices that help generate gender pay differences").

25. *See* Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1750 (1990); *see also* Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 F.I.U. L. REV. 447, 449–50 (2013) (demonstrating how the "blame game" and the "autonomy myth" about women making unconstrained choices that are free from gender stereotypes and norms contributes to our failure to scrutinize structural discrimination in the workplace (internal quotation marks omitted)).

26. *See* Travis, *supra* note 21, at 348–49 (summarizing case law allowing employers to defend gender pay discrimination claims by raising a "choice" or "lack of interest" defense (internal quotation marks omitted)). *See generally* Schultz, *supra* note 25 (analyzing case law).

entials, it could not address the gender pay gap that exists within the same jobs and for employees with the same skills and education. That is where the "women don't ask" causal narrative stepped in to fill the void.

The women don't ask narrative identifies women's inability or unwillingness to negotiate for wage parity as *the* cause of the gender wage gap. This internal causal attribution focusing on women as a source of their own pay inequality has become deeply entrenched in our society, internalized by women, and built into our antidiscrimination law in subtle and pernicious ways. Moreover, unlike the external market narrative, internal causal attributions are typically more difficult to disrupt. Actors generally are more salient than the situations in which they act, so we are biased toward overestimating the causal role of people's internal characteristics and underestimating the causal role of situational factors that constrain behavior and dictate outcomes.[27] This bias is so pervasive that social scientists call it the "fundamental attribution error."[28]

This bias will make it difficult to launch a simple empirical attack on the accuracy of the women don't ask causal narrative, in part because a simple reading of the social science research does indeed demonstrate differences in women's and men's wage negotiation approaches and results.[29] The research also demonstrates, however, that women's wage negotiation approaches are constrained by biased employment practices and that women's wage negotiation results are negatively affected by gender stereotypes,[30] which certainly should be highlighted as part of a strategy for disrupting the women don't ask causal story. But the depth and pervasiveness of this narrative makes it unlikely that a major shift will result solely from a more nuanced reading of the negotiation research.

Combatting the causal attribution to women as the responsible agents for the gender pay gap will require a broader theoretical tool. That tool may be borrowed from the disability civil rights movement, which has successfully achieved a very similar goal of disrupting a pervasive internal causal narrative. That narrative was housed within the medical model of disability, which—like the women don't ask narrative—identified internal deficits within impaired individuals as the primary source of employees' limitations.[31] But unlike in the gender context, where this type of internal causal narrative remains entirely acceptable,

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27. *See* HEWSTONE, *supra* note 9, at 50; *see also* Travis, *Perceived Disabilities*, *supra* note 9, at 519–20 (describing the causal attribution bias by which we "overestimate the role of an actor's internal, dispositional characteristics and . . . underestimate the power of the situation in controlling the actor's behavior").

28. *See* Ross, *supra* note 9, at 348–49 (coining the term and noting that this robust bias "has been noted by many theorists" and "disputed by few").

29. *See infra* notes 56, 134–35 and accompanying text.

30. *See infra* notes 75–78, 136–40 and accompanying text.

31. *See infra* notes 47–51 and accompanying text.

the disability civil rights movement has effectively shifted the causal focus of inequality onto the workplace itself.

Disability theorists achieved this success by reconceptualizing disability under the "social model," which understands disability as the result of the environment in which an impairment interacts.[32] The social model of disability provided a new causal narrative that shifted both the public's attention and the law's focus onto the role of employer practices and structures in producing inequality for individuals with impairments, which are not themselves inherently limiting.[33] In the same way, a social model approach to women's compensation could shift the causal focus away from women's own negotiation techniques and onto the institutional practices that render those non-inherently limiting approaches "disabling" with respect to women's pay. In this way, the social model has the potential to move us toward more effective structural solutions to gender pay inequality, including resuscitating Title VII's disparate impact theory to allow challenges to facially neutral practices that base compensation on employees' individual wage demands or requests.

Part I begins by exploring the common ground that is shared by the women's rights movement and the disability rights movement—both of which must actively resist internal causal attributions that place responsibility for workplace inequality onto their own members. While recognizing the historic ambivalence of many feminists to join forces with the disability rights community, this Part explains how the women don't ask narrative presents an analogous hurdle to that presented by the medical model of disability. Part II discusses the potential benefits of borrowing the social model approach from disability civil rights to reframe the discussion about women's pay. The social model is best understood as a theory of causation that identifies employers as one of the multiple necessary causes in workplace inequality, which is a critical move that has been missing in attempts to combat the gender pay gap.

I. COMMON GROUND: RESISTING INTERNAL CAUSAL ATTRIBUTION

Despite facing many similar obstacles and sharing many similar goals, the women's rights movement generally has been reticent to join forces with the disability rights movement in their shared quest for workplace equality.[34] This reticence is in part a vestige of the equal treatment side of the "equal treatment vs. special treatment" debate,

32. *See infra* notes 121–25 and accompanying text.

33. *See infra* notes 121–25 and accompanying text.

34. *See* Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 16 (2012) (explaining that "feminist legal advocates historically have been hesitant to ally with the disability rights movement").

which historically divided the feminist legal community.[35] This debate arose when making difficult strategic decisions about whether women's workplace equality would be advanced more effectively by highlighting women's and men's similarities and seeking formal equality, or by acknowledging women's and men's differences and seeking gender-specific policies or workplace restructuring that takes those differences into account.[36] The equal treatment approach distanced the women's rights movement from the disability rights movement, which expressly embraces a difference approach to equality that is now reflected in the accommodation mandate of the Americans with Disabilities Act (ADA).[37]

The focus on accommodations for individuals with disabilities lead many feminists to fear that aligning women with the disabled might magnify gender stereotypes of women as weak, incapable, and in need of paternalistic legal protections.[38] Although this fear itself reflects disability bias and comes with the cost of inhibiting women's access to valuable workplace accommodations,[39] it is also understandable given the "special treatment stigma" that attaches to marginalized groups that are perceived to be in need of extra assistance or care.[40] This resistance to aligning the women's movement with the disability rights movement is illustrated by many feminists' opposition to characterizing pregnancy as a disability.[41] Even under the recently expanded ADA, the Equal Employment Opportunities Commission (EEOC) continues to take the position that pregnan-

35. *See id.* at 17 (internal quotation marks omitted) (describing how this historic "fissure" in the feminist community has affected contemporary legal advocacy for women's workplace equality).

36. *See generally* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

37. *See* 42 U.S.C. § 12112(b)(5) (2012).

38. *See* Alemzadeh, *supra* note 34, at 17–18, 25–26 (arguing that the backlash against the ADA raised concerns that linking women's rights to disability rights might evoke the same type of protectionist and paternalist responses that the women's movement was trying to attack). A similar dynamic has taken place within the transgender community. *See* Zach Strassburger, Note, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337, 349–50 (2012) (explaining how some activists have recognized "that transpeople are hesitant to identify as disabled because they see disability as a flaw").

39. *See* Alemzadeh, *supra* note 34, at 21, 24 (arguing that "[f]eminist disavowal of pregnancy as a disability has the potential to reinforce discriminatory attitudes towards both disabled people and women," and that when feminist legal advocates "steer[] clear of disability discourse," they effectively "engag[e] in the same discriminatory attitudes they have been subjected to").

40. *See* Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1108–15 (2014) [hereinafter Porter, *Mutual Marginalization*]; *see also* Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 802–03 (2010) [hereinafter Porter, *Synergistic Solutions*] (describing the "special treatment stigma" that attaches to accommodation recipients and that is manifested by "both co-employee resentment as well as employers' reluctance to hire or promote" (internal quotation marks omitted)).

41. *See* Alemzadeh, *supra* note 34, at 3, 16, 21, 29 (describing the "historical reticence in the feminist community to advocate for a pregnancy rights framework grounded on the premise that pregnant women are disabled persons," which has led to a "[f]eminist disavowal of pregnancy as a disability").

cy is not an impairment for purposes of disability discrimination law,[42] so many feminists purposely work around that characterization when seeking to advance pregnant women's rights.[43]

Now that both movements have achieved some level of success in combatting stereotypes and employment discrimination in their respective spheres, however, some scholars and advocates have begun to argue that the potential benefits of joining forces outweigh the potential risks.[44] This is particularly true in the context of pregnancy, where there is a move to bring pregnancy under the disability umbrella.[45] This shift has also been fueled by work/family scholars, who recognize that the shared interest in workplace flexibility is a unifying objective for many individuals with disabilities and workers with caregiving responsibilities.[46]

This increasing willingness of women's advocates and feminist legal scholars to leverage successful aspects of the disability civil rights movement provides an opportunity to make progress with the seemingly

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42. *See* EEOC, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 FED. REG. 16,978, 17,007 (March 25, 2011) (revising 29 C.F.R. § 1630.2(h) to reiterate that "conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments").

43. *See, e.g.*, Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 110, 114–19 (2013) (accepting that pregnancy itself is not a disability but arguing that "a broad range of pregnancy-related conditions" are disabilities under the amended ADA); *see also* Alemzadeh, *supra* note 34, at 24–25 (explaining "why feminist legal advocates may fear inheriting ADA backlash if they use the ADA to obtain accommodations for pregnant women").

44. *See* Alemzadeh, *supra* note 34, at 35 (urging greater examination of "the intersections of disability theory and feminist legal theory"). Members of the transgender community have grappled with a similar question of whether "gender-variant" individuals should or should not seek protection under disability law. *See* Strassburger, *supra* note 38, at 338. Advocates recently have been arguing that the benefits of doing so outweigh the potential risks. *See id.* at 338–39, 375 (arguing that "both transsexuals and the existing disability rights movement will benefit from the cooperation" and by "[f]orming a strong partnership").

45. *See, e.g.*, Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 443 (2012) (arguing that pregnancy should be deemed a disability under the ADAAA); *see also* Alemzadeh, *supra* note 34, at 21, 24 (arguing that "the bifurcation of pregnancy from disability rights discourse ignores critical junctures at which feminist and disability theories converge, " and urging pregnancy rights advocates to "band with the disability rights movement to dismantle stereotypes about the able-bodied worker"). A similar movement is taking place within the transgender community. *See* Strassburger, *supra* note 38, at 350 (explaining that "the disability and trans communities have already begun to work together on issues largely ignored in broader LGB activism, such as gender-neutral public restrooms").

46. *See, e.g.*, Porter, *Mutual Marginalization*, *supra* note 40, at 1102 (arguing that the distinctions between caregivers and individuals with disabilities "pale in comparison to the experiences that these two groups share in common," and arguing to extend the right to reasonable accommodations to cover caregivers); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 353 (2009) (highlighting the potential for coalition-building between work/family advocates and disability rights advocates); *see also* Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 621–22 (2004). *See generally* Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 306–07, 327–28 (2004) (discussing working parents' need for flexibility and accommodation in their work life); Kelly Timmerman, Note, *Accommodating for the Work/Family Conflict: A Proposed Public Policy Exception*, 8 J. GENDER RACE & JUST. 281, 283 (2004).

intractable gender wage gap that still remains robust even fifty years after Title VII's enactment. Moreover, unlike in the pregnancy and work/family contexts in which the use of disability theory typically seeks to advance accommodation rights with all of their attendant "special treatment" baggage, disability rights theory has the potential to help reframe the gender wage debate in ways that may move women forward even within the confines of a very conventional antidiscrimination framework. The starting point for such leveraging is identifying a common source of inequality against which the disability rights movement has made more headway than have advocates for women's rights. That common source of inequality is the shared need to resist and unsettle an internal causal attribution for inequality. For individuals with disabilities, an internal causal attribution was entrenched within the medical model of disability, while an internal causal attribution for women implicitly resides in the women don't ask narrative that pervades discussions of the gender wage gap.

A. The Medical Model of Disability

Although the disability rights movement is a pluralistic endeavor with diverse participants and goals,[47] one objective became both a unifying force and a critical catalyst for achieving legal change for individuals with disabilities: dismantling the medical model of disability.[48] The medical model conceptualized disability as a personal and intrinsic deficit that needed to be fixed or cured.[49] By locating the causal source of disability within individuals, the medical model made it easy to deflect responsibility for employment inequality away from employers, and it implicitly blamed individuals with disabilities for their own lack of success in the workplace.[50] Rather than empowering courts, the medical model bestowed tremendous power upon medical "experts," who were needed both to identify the deficits and to suggest a treatment or deliver a cure.[51] Over time, it became clear to members of the disability rights movement that meaningful social and legal progress would not be made without

47. *See* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 943 (2012).

48. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 13 (2009).

49. *See id.* at 18; Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 185–87 (2008); Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER 266, 268 (Lennard J. Davis ed., 3d ed. 2010); Travis, *supra* note 47, at 943.

50. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–53 (1999) (describing the societal effects of the medical model).

51. *See* Alemzadeh, *supra* note 34, at 22 (explaining that the medical model "places disabled individuals in a unique power dialectic with the medical community, where presenting certain symptoms is essential to attain the diagnosis that legitimizes the individual's claim to disability entitlements"); Areheart, *supra* note 49, at 186 (explaining how the medical model frames social responses "either as rehabilitation efforts to enable the individual to overcome the effects of the disability, or medical efforts to find a cure"); Travis, *supra* note 47, at 975–76 (describing how the medical model of disability "abdicat[es] . . . control to medical professionals").

first dismantling the medical model of disability and shifting the causal focus of employment inequality to the workplace structures, practices, and norms that rendered various physical and mental characteristics limiting in their effects.

B. Gender and the "Women Don't Ask" Narrative

An internal causal attribution for the source of inequality similarly has entrenched itself in debates about the gender wage gap. In the gender context, the internal causal attribution resides within the women don't ask narrative. Like the medical model of disability that locates the cause of inequality within impaired individuals themselves, the pervasive women don't ask narrative locates the causal source of the gender pay gap within women, who purportedly lack the ability or the will to negotiate effectively for wage parity. By implicitly blaming women for their own income inequality—and linking the source to an internal deficiency that is assumed to be even more within the victim's control than most physical or mental impairments—this narrative has been extraordinarily effective at deflecting employers' responsibility for gender wage inequality.[52] As with the medical model of disability, the internal causal theory for the gender wage gap implicitly bestows power upon "experts"—in this context, social psychologists and negotiation skills trainers—who become necessary to help identify and fix women's deficiencies.

The internal causal narrative is deeply ingrained in public rhetoric, as women in the workforce are inundated with messaging about the role that their own behavioral failings play in their unequal pay and career advancement. Women are told to "lean in," to "pushback," to "stand up," to "take charge," to be a "go-getter," to take a "place at the table," and to just "ask for it."[53] This narrative gained widespread prominence with the 2003 book by Linda Babcock and Sara Laschever titled *Women Don't Ask: Negotiation and the Gender Divide*.[54] The book was reprinted in 2007 under the title, *Women Don't Ask: The High Cost of Avoiding Negotiation—and Positive Strategies for Change*.[55] Using interviews and other data from psychology, sociology, and economics, the authors revealed women's lower propensity relative to men to initiate negotiations

52. *See* Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 GEO. J. GENDER & L. 1, 9 (2009) ("The more society blames women for their own reluctance to negotiate, the less culpable employers appear for paying women less than their male counterparts."); Porter, *supra* note 25, at 447, 458–60 (analyzing how women are blamed for the gender wage gap by characterizing women's lower pay as a "[c]hoice" and an "unwillingness to negotiate on their own behalf" (internal quotation marks omitted)).

53. These phrases all come from popular book titles. *See infra* notes 54–70.

54. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (Princeton U. Press) (2003) [hereinafter BABCOCK & LASCHEVER, WOMEN DON'T ASK I].

55. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE (Random House Publ'g Grp. 2007) [hereinafter BABCOCK & LASCHEVER, WOMEN DON'T ASK II].

on their own behalf.[56] A year after the reprinted version was published, the same authors wrote a follow-up book titled, *Ask for It: How Women Can Use the Power of Negotiation to Get What They Really Want.*[57] This follow-up book claims to provide "the action plan that women all over the country requested."[58] According to the book's description on Amazon, this book "teaches [women] how to ask effectively, in ways that feel comfortable to you as a woman."[59]

Although *Women Don't Ask* provided a catchy phrase for encapsulating the internal causal attribution for the gender wage gap, it was by no means an isolated work. Another example with a similar (albeit less catchy) title showed up on the bookstands just after Babcock and Laschever's first book: *Why Women Earn Less: How to Make What You're* Really *Worth.*[60] Women who read the book's description on Amazon will likely agree that "[u]nder-earning is an insidious problem," but they may be surprised to learn that it is a problem "with psychological roots that run deep."[61] But the book's description also provides ready (if demeaning) reassurance, along with an expert plan for women to cure their ills:

> Luckily, there's help. This book is a practical, step-by-step guide for under-earning women who are ready to turn their lives around. It demystifies the process of under-earning, explores its underlying psychological and emotional issues, and offers practical advice and strategies to help overcome it. *Why Women Earn Less* explains how you can be better paid for the work you do. It maps out, on a practical level, how to overcome the bad habits that contribute to earning less than you deserve. As you do so, you will find yourself not only benefiting from an improved bottom line, but also enjoying a renewed sense of optimism and personal satisfaction.[62]

On the heels of *Women Don't Ask* followed a wealth of other self-help books, all from "experts" who purport to have diagnosed the internal causes for women's unequal pay and who provide treatment plans for

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56. *See* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 1–4, 17–129.

57. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE THE POWER OF NEGOTIATION TO GET WHAT THEY REALLY WANT (2008) [hereinafter BABCOCK & LASCHEVER, ASK FOR IT].

58. *See Ask for It: How Women Can Use Negotiation to Get What They Really Want*, AMAZON, http://www.amazon.com/Ask-For-It-Negotiation-Really-ebook/dp/B0013TTLBQ (last visited Apr. 5, 2014) (describing BABCOCK & LASCHEVER, ASK FOR IT, *supra* note 57).

59. *Id.*

60. MIKELANN R. VALTERRA, WHY WOMEN EARN LESS: HOW TO MAKE WHAT YOU'RE *REALLY* WORTH (2004).

61. *Why Women Earn Less: How to Make What You're Really Worth*, AMAZON, http://www.amazon.com/gp/product/B004SPD94C/ref=s9_wish_co_d99_g351_i1 (last visited Apr. 5, 2014) (describing VALTERRA, *supra* note 60).

62. *Id.*

women to narrow the gap.[63] In *Nice Girls Don't Get the Corner Office: 101 Unconscious Mistakes Women Make that Sabotage Their Careers*, women can learn how to fix the "girlish behaviors" that "[s]abotage [t]heir [c]areers."[64] In *Pushback: How Smart Women Ask—and Stand Up—for What They Want*, a leadership consultant provides women with the "self-advocacy" tools to get "what is rightlfully yours."[65] The authors of *Hardball for Women* show women "how to break patterns of behavior that have put them at a disadvantage in the business world of men."[66] And for women who still remain uncured, there are many other expert treatments to try, such as *See Jane Lead: 99 Ways for Women to Take Charge at Work*,[67] and *Her Place at the Table: A Woman's Guide to Negotiating Five Key Challenges to Leadership Success*.[68] For women who care both about the gender wage gap and about their appearance, there is even a guide for addressing deficits in both arenas simultaneously: *The Go-Getter Girl's Guide: Get What You Want in Work and Life (and Look Great While You're at It)*.[69]

This internal causal narrative reached even loftier heights and greater perceived legitimacy when Facebook's Chief Operating Officer, Sheryl Sandberg, began promoting her new book, *Lean In: Women, Work, and the Will to Lead*.[70] Now women's personal deficits have a packaged sound bite to go with them—the failure to lean in. In two sentences in the

63. *See* Elzer, *supra* note 52, at 3 (describing the emergence of books and websites over the past decade that "teach[] women to be better negotiators," and arguing that they depend upon an "underlying premise . . . that women are not as good at negotiating as men are").

64. *Nice Girls Don't Get the Corner Office: 101 Unconscious Mistakes Women Make that Sabotage Their Careers*, AMAZON, http://www.amazon.com/Nice-Girls-Dont-Corner-Office/dp/0446693316/ref=pd_sim_b_2 (last visited Apr. 5, 2014) (describing LOIS P. FRANKEL, NICE GIRLS DON'T GET THE CORNER OFFICE: 101 UNCONSCIOUS MISTAKES WOMEN MAKE THAT SABOTAGE THEIR CAREERS (2010)).

65. *Pushback: How Smart Women Ask—and Stand Up—for What They Want*, AMAZON, http://www.amazon.com/Pushback-Smart-Women-Ask-Up/dp/1118104900/ref=pd_sim_b_13/ (last visited Apr. 5, 2014) (describing SELENA REZVANI, PUSHBACK: HOW SMART WOMEN ASK—AND STAND UP—FOR WHAT THEY WANT (2012)).

66. *Hardball for Women*, AMAZON, http://www.amazon.com/Hardball-Women-Revised-Pat-Heim/dp/0452286417/ref=pd_sim_b_7 (last visited Apr. 5, 2014) (describing PAT HEIM & SUSAN K. GOLANT, HARDBALL FOR WOMEN (rev'd ed. 2005)).

67. LOIS P. FRANKEL, SEE JANE LEAD: 99 WAYS FOR WOMEN TO TAKE CHARGE AT WORK (2009).

68. DEBORAH M. KOLB, JUDITH WILLIAMS & CAROL FROHLINGER, HER PLACE AT THE TABLE: A WOMAN'S GUIDE TO NEGOTIATING FIVE KEY CHALLENGES TO LEADERSHIP SUCCESS (2010); *see also* DEBORAH M. KOLB & JUDITH WILLIAMS, THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS (2000); LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING: HOW TO CONVINCE, COLLABORATE, AND CREATE YOUR WAY TO AGREEMENT (2002). A second edition of the Millers' book was published in 2010 sporting a book cover telling women to "never be taken advantage of again." *See* LEE E. MILLER & JESSICA MILLER, A WOMAN'S GUIDE TO SUCCESSFUL NEGOTIATING (2d ed. 2010) (cover photo *available at* http://www.amazon.com/Womans-Successful-Negotiating-Second-Edition/dp/0071746501).

69. DEBRA SHIGLEY, THE GO-GETTER GIRL'S GUIDE: GET WHAT YOU WANT IN WORK AND LIFE (AND LOOK GREAT WHILE YOU'RE AT IT) (2009).

70. SHERYL SANDBERG WITH NELL SCOVELL, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

book's introduction, Sandberg acknowledges criticisms about the internal causal narrative upon which her advice is built: "I know some believe that by focusing on what women can change themselves—pressing them to lean in—it seems like I am letting our institutions off the hook," she notes, "[o]r even worse, they accuse me of blaming the victim."[71] But rather than engaging those critiques, she brushes them aside, saying "I have heard these criticisms in the past and I know that I will hear them . . . in the future."[72] "The time is long overdue," she proceeds undaunted, "to encourage more women to dream the possible dream."[73] The dream is "possible," according to Sandberg—despite the fact that the gender wage gap still exists fifty years after the enactment of Title VII—because women themselves are a cause of their own workplace inequality and therefore should be able to implement a cure. "We move closer to the larger goal of true equality," she proclaims, "with each woman who leans in."[74]

To Sandberg's credit, she is one of the few self-designated experts advising women on negotiation skills to acknowledge the flawed assumption that women will narrow the gender pay gap simply by negotiating to the same degree and in the same manner as men. "[W]e need to recognize that women often have good cause to be reluctant to advocate for their own interests," Sandberg wisely cautions, "because doing so can easily backfire."[75] "For men," she explains, "there is truly no harm in asking," because society expects men to advocate on their own behalf.[76] "But since women are expected to be concerned with others," Sandberg explains, "when they advocate for themselves or point to their own value, both men and women react unfavorably."[77] Sandberg is correct. Research reveals that evaluators resist working with a woman colleague if they know she has negotiated for higher pay because the mere act of self-advocacy violates female gender norms, which results in the woman being perceived as too demanding and less likeable.[78]

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71. *Id.* at 10–11.
72. *Id.* at 11.
73. *Id.*
74. *Id.*
75. *Id.* at 45. This statement is well supported by social science research. *See infra* notes 136–40.
76. SANDBERG, *supra* note 70, at 45.
77. *Id.*
78. *See* Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 84–95 (2007) (describing findings from a series of empirical studies); Hannah Riley Bowles & Linda Babcock, When Doesn't It Hurt Her to Ask? Framing and Justification Reduce the Social Risks of Initiating Compensation Negotiations 2 (Dec. 14, 2008) (unpublished conference paper), *available at* http://ssrn.com/abstract=1316162 (noting that "[i]n multiple studies, researchers have found evaluators to be significantly less inclined to work with a woman who attempts to negotiate for higher compensation as compared to one who does not"); Hannah Riley Bowles & Kathleen L. McGinn, *Untapped Potential in the Study of Negotiation and Gender Inequality in Organizations*, 2 ACAD. MGMT. ANNALS 99, 109 (2008) (summarizing research finding that "participants were significantly

But despite being aware of this research, Sandberg focuses her proposals neither on the employment decision makers (her peers) who act on these gender stereotypes, nor on the situational constraints in workplace negotiations that systematically disadvantage women. Instead she focuses on women themselves. Sandberg advises women to adopt a "communal approach" to their negotiations, which she analogizes to "cross[ing] a minefield backward in high heels."[79] She instructs women to "provide a legitimate explanation for the negotiation," to "invok[e] common interests, emphasiz[e] larger goals, and [to] approach[] the negotiation as solving a problem as opposed to taking a critical stance."[80] For this to be effective, Sandberg advises, women must "combine niceness with insistence" and be sure to "smil[e] frequently," while "expressing appreciation and concern."[81]

When a woman executive as successful as Sheryl Sandberg—who has access to such a powerful platform upon which to engage the public about issues of gender inequality in pay and career advancement—nevertheless uses that platform to advise women to "smil[e] frequently,"[82] it demonstrates the depths to which the internal causal narrative has been absorbed and accepted in our society. This is not to say that Sandberg is providing erroneous advice. In fact, it is well-founded in the psychological literature.[83] But the fact that researchers have been able to identify and document the situational constraints and the invidious gender stereotypes that affect employment decision makers' reactions to women in the workplace renders even less defensible the continued unwillingness to confront the institutional discrimination that underlies the gender wage gap.[84]

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less inclined to work with a woman who had attempted to negotiate as compared to one who had stayed mum, and male participants consistently penalized women more than men for attempting to negotiate"); *see also* Ramachandran, *supra* note 4, at 1060 (explaining that "even when [women] do stand up for themselves, they may be penalized for it").

79. SANDBERG, *supra* note 70, at 47–48.

80. *Id.*

81. *Id.* at 48.

82. *Id.*

83. *See* Hannah Riley Bowles & Linda Babcock, *How Can Women Escape the Compensation Negotiation Dilemma? Relational Accounts Are One Answer*, 37 PSYCHOL. WOMEN Q. 80, 91 (2012) [hereinafter Bowles & Babcock, *How Can Women Escape*] (concluding from two empirical studies "that female negotiators can reduce social resistance to their self-advocacy and improve their negotiation outcomes if they legitimize their requests in a manner that also communicates their concern for organizational relationships"); Bowles & Babcock, When Doesn't It Hurt Her to Ask?, *supra* note 78 (manuscript at 1) (finding in a series of empirical studies that women may reduce the social risks of initiating negotiations for higher pay by "using a communal frame to communicate concern for relationships" or "justifying the request with external validation," such as an external job offer).

84. If Sandberg had framed her advice differently, the immediate value that it may provide to women who are poised near the top of professional careers (and who therefore cannot wait for structural or legal reforms) might have outweighed the downside of publicly reinforcing the internal causal narrative of women's workplace inequality. Rather than suggesting that her book is a new "feminist manifesto," *see* SANDBERG, *supra* note 70, at 9, she could have explicitly recognized the necessary role that employers play in sustaining women's inequality and the illegitimacy of placing

While the pervasiveness of the internal causal narrative in our society is pernicious enough on its own, even more disappointing is the way in which Title VII has invited this narrative into legal doctrine. In doing so, Title VII reinforces rather than disrupts this powerful source of pay inequality. Title VII prohibits covered employers from discriminating on the basis of sex, race, color, religion or national origin in hiring, firing, compensation, or other "terms, conditions, or privileges of employment."[85] However, § 703(h) of Title VII—known as "the Bennett Amendment"—carves out an exception that applies *only* to claims of compensation discrimination and *only* to the protected status of sex, thereby providing less legal protection *only* for sex-based discrimination in pay.[86]

The Bennett Amendment states that "[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the [Equal Pay Act]."[87] The Equal Pay Act (EPA), enacted prior to Title VII, prohibits employers that are covered under the Fair Labor Standards Act from paying women less than men for "equal work" on jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions."[88] The EPA contains four exceptions for pay differentials that are based on: (1) "a seniority system"; (2) "a merit system"; (3) "a system which measures earnings by quantity or quality of production"; or (4) "any other factor other than sex."[89] The Bennett Amendment incorporates these four defenses to gender-based compensation discrimination claims from the EPA into Title VII, which means that an employer will not violate Title VII by discriminating against women in their pay if the

causal responsibility on women, but then described her advice as an interim step that might provide some immediate assistance for those women in privileged situations that enable them to "lean in," while continuing to pursue the more important and longer-term task of changing the organizational norms that disadvantage women. For a similar book that successfully achieves this constructive balance, see JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW (2014).

85. 42 U.S.C. § 2000e-2(a)(1) (2012).

86. *Id.* § 2000e-2(h). Congress also grants differential protection levels against intentional discrimination by not subjecting race and color to the bona fide occupational qualification defense to disparate treatment claims, *see id.* § 2000e-2(e)(1), and by granting a modest accommodation right for religion, *see id.* § 2000e(j).

87. *Id.* § 2000e-2(h). The legislative history of the Bennett Amendment is very limited. *See* Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 HARV. WOMEN'S L.J. 127, 160 & n.140, 161 (1991) (summarizing the Bennett Amendment's legislative history). The protected status of sex was not added to Title VII until two days before the House vote, and it was not until the House version was on the Senate floor for final consideration that Senator Bennett offered his Amendment as a concern arose over possible inconsistencies between Title VII and the EPA. *See* County of Wash. v. Gunther, 452 U.S. 161, 171–73 (1981); 110 CONG. REC. 13310, 13647 (1964) (statement of Sen. Bennett).

88. 29 U.S.C. § 206(d)(1) (2012).

89. *Id.*

pay differences are based on seniority, merit, or production systems, or on "any other factor other than sex."[90]

Sex-based compensation discrimination claims are still cognizable under Title VII, which theoretically remains broader than the EPA because it does not limit antidiscrimination protection only to situations in which lower paid women are performing substantially similar work as higher paid men.[91] But the "any other factor other than sex" defense has dramatically undercut the efficacy of Title VII's protection against sex-based pay discrimination by opening the door to internal causal narratives that shield the gender pay gap from legal review. This is particularly true in the context of disparate impact claims, which otherwise would have the most potential for redressing employer pay practices that base compensation in full or in part on individual employee negotiations.[92]

A Title VII disparate impact claim requires proof that a facially neutral particular employment practice causes women to experience substantially different outcomes than men.[93] The employer must then defend the practice by demonstrating that it is "job related" and "consistent with business necessity."[94] If the employer meets that burden, the plaintiff may still succeed by showing that a less discriminatory alternative employment practice exists that serves the employer's business needs.[95] If a plaintiff succeeds in a disparate impact case, the plaintiff may receive back pay but is not entitled to compensatory or punitive damages, or to a jury trial.[96] The power of a disparate impact claim is that it enables a court to enjoin the illegal employment practice.[97] In a pay equity case, a court could force an employer to eliminate the challenged wage-setting

90. *See Gunther*, 452 U.S. at 167–80; *see also* Charles B. Craver, *If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and Title VII*, 102 MICH. L. REV. 1104, 1118–22 (2004) (describing how the Bennett Amendment affects Title VII claims); Porter, *Synergistic Solutions*, *supra* note 40, at 830–31 (same).

91. *See* Craver, *supra* note 90, at 1118; *see also* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 180 (2011) (noting that unlike the EPA, "Title VII extends to pay discrimination involving dissimilar jobs").

92. *See* Perry, *supra* note 87, at 159 (describing how "the Bennett Amendment has proven to be a barrier to many sex-based wage discrimination cases that rely on the disparate impact doctrine of Title VII").

93. *See* 42 U.S.C. § 2000e-2(k) (2012).

94. *See id.* § 2000e-2(k)(1)(A)(i).

95. *See id.* § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

96. *See id.* § 1981(b).

97. *See id.* § 2002e-2(k)(1)(A)(i); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that "[i]f an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited"); *see also* Travis, *supra* note 21, at 373–74 (describing the remedy for a disparate impact claim); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1238 (2003) (explaining that "[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody").

practice and require the employer to set up an alternative method for establishing employees' pay.[98]

Unfortunately, courts have been very willing to allow employers to use the factor other than sex defense as a way to sidestep disparate impact law by shifting causal attention away from the employer's role in wage setting and onto other causal sources.[99] The Bennett Amendment's incorporation of the factor other than sex defense allows the law to ignore one of the necessary causes, i.e., the employer, in what is really a multiple-necessary-cause scenario. Employers have used this strategy effectively with external causal narratives that invoke a variety of market-related excuses for gender pay disparities, as well as with internal causal narratives that invoke women's own "choices" as the cause of their own pay inequality.[100]

As the women don't ask narrative gained prominence socially, employers also have seized upon this specific version of an internal causal narrative to continue shielding themselves from legal liability for sex-based pay discrimination claims. Many courts have rejected gender pay equity claims by accepting an employer's argument that women's failure to negotiate as successfully as men supports the factor other than sex defense.[101] Even the EEOC has bought into this causal narrative, as illustrated in its compliance manual that lists examples of gender wage disparities that it would not consider to be violations of the EPA.[102] One listed example is when an employer gave "the same opening offer" to both a male and female employee, but the female employee "ended up with a lower starting salary" because she "did not bargain as assertively as the male."[103] Not only does the term "assertively" itself reflect gender stereotypes, but the EEOC also ignores social science research demonstrating that a woman who negotiates in the same manner as a man is likely to be penalized for her efforts, both by obtaining less favorable

98. *See* Chamallas, *supra* note 20, at 581, 611 (describing a disparate impact remedy in the pay equity context).

99. *See* Travis, *supra* note 21, at 348 (explaining how employers "falsely dichotomiz[e]" the causes of women's workplace inequality and use causes outside the workplace to skirt the application of Title VII law); Travis, *supra* note 8, at 54 (observing that "courts often implicitly decide whether to view the employee or the employer as the 'cause' of the employment event at issue").

100. *See* Travis, *supra* note 21, at 348–49 (compiling case law allowing employers to use a "market," "choice," or "lack of interest" defense to Title VII disparate impact claims (internal quotation marks omitted)).

101. Elzer, *supra* note 52, at 10–21 (summarizing case law and finding that, "[a]lmost without exception, courts hold that salary negotiation is a valid 'factor other than sex' that justifies an employer paying a man more than a woman who performs substantially equal work"); *see* Rabin-Margalioth, *supra* note 24, at 807–23 (analyzing employers' legal success in justifying gender pay differentials on the basis of "market forces," including "individual pay demands" and "bargaining effectiveness"); Ramachandran, *supra* note 4, at 1047 (explaining how courts are "reluctant to hold employers liable for discrimination that results, in part, from . . . the socialization of women . . . to negotiate less aggressively").

102. *See* EEOC Compl. Man. (EEOC) No. 915.003 § 10 ex. 42 (Dec. 5, 2000), *available at* http:// www.eeoc.gov/policy/docs/compensation.html.

103. *Id.*

results in the wage negotiation and by suffering residual dislike by other workers who then perceive her as overly aggressive.[104]

While most of these claims have been formally styled as alleged EPA violations,[105] the Bennett Amendment incorporates this causal barrier into Title VII. Even though an employer's selection of a pay-setting practice that relies upon individual employee negotiation is, by definition, another necessary cause of the gender pay disparity, the Bennett Amendment effectively allows that practice to avoid scrutiny by blocking the claim before getting to the business necessity defense, which would require an employer to justify its practice.[106] This risk of undercutting Title VII's ability to address facially neutral but discriminatory pay practices through a broad application of the factor other than sex defense has been compounded by Supreme Court dicta suggesting that the Bennett Amendment may bar the use of the disparate impact theory altogether in the context of sex-based pay equity claims.[107] This dicta suggests that the legal gap is even wider between the protection that is provided for women's pay disparities and all other forms of status-based employment discrimination.

The women don't ask narrative has become so accepted that even legislators who have recognized the inadequacy of our existing legal tools for combatting the gender pay gap are willing to reinforce it and lend it credibility. The internal causal attribution has found its way into

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104. *See supra* note 78 and *infra* notes 136–40.

105. *See* Porter & Vartanian, *supra* note 91, at 174–75, 178–79 (summarizing cases in which employers successfully defended EPA claims by using the excuse that "the male has negotiated for more pay").

106. *See* Rabin-Margalioth, *supra* note 24, at 812 & n.24 (analyzing how employers have successfully argued under existing law "that there is no legal obligation to offer individual workers more than their initial pay demands, even if implementation of a wage scheme based on employee wage demands ultimately disadvantages women").

107. In *Smith v. City of Jackson*, the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. 544 U.S. 228, 232 (2005) (plurality opinion). In reaching that holding, the Court stated that "if Congress intended to prohibit all disparate-impact claims, it certainly could have done so," and it then used the EPA as an example. *Id.* at 239 n.11. "For instance, in the Equal Pay Act," noted the Court, "Congress barred recovery if a pay differential was based 'on any other factor'—reasonable or unreasonable—'other than sex.'" *Id.* (quoting 29 U.S.C. § 206(d)(1) (2012)). Many commentators have read this dicta as a potential bar on disparate impact claims for sex-based pay equity under Title VII, which incorporates the "any other factor other than sex" defense from the EPA. *See, e.g.*, William E. Doyle Jr., *Implications of* Smith v. City of Jackson *on Equal Pay Act Claims and Sex-Based Pay Discrimination Claims under Title VII*, 21 LAB. LAW. 183, 183–85, 188–90 (2005) (arguing that the "implication" from the *Smith* dicta "is that the disparate impact theory is ruled out as a basis for sex-based pay discrimination claims under Title VII"); Porter, *Synergistic Solutions*, *supra* note 40, at 831 (explaining that Supreme Court dicta has made it "unclear" whether disparate impact claims for sex-based wage discrimination are cognizable); Rabin-Margalioth, *supra* note 24, at 828 (describing the dicta in *Smith* as "a strong suggestion . . . that the EPA's fourth affirmative defense effectively rules out disparate impact" claims under Title VII). *But see* Perry, *supra* note 87, at 158–74 (arguing that courts have incorrectly interpreted the Bennett Amendment to constrain Title VII disparate impact claims); Mark B. Seidenfeld, Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083, 1088–95 (1982) (arguing that the Bennett Amendment should not preclude Title VII disparate impact claims for sex-based wage discrimination).

the text of one of the most progressive pieces of proposed legislation that is backed by some of the most progressive women in Congress: the Paycheck Fairness Act (PFA).[108] The PFA's goal is "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex."[109] The bill recognizes the importance of eliminating the gender pay gap not only to "reduc[e] the number of working women earning unfairly low wages," but also to enhance "women's retirement security," to "reduc[e] the dependence on public assistance," and to "promot[e] stable families by enabling all family members to earn a fair rate of pay."[110] To achieve these goals, the bill seeks to expand the EPA's impact by narrowing the factor other than sex defense to apply only to "a bona fide factor other than sex, such as education, training, or experience."[111] The PFA also would require an employer to demonstrate that the factor is job-related and consistent with business necessity, and it would give employees the opportunity to demonstrate "that an alternative employment practice exists that would serve the same business purpose without producing such differential."[112]

If the bill stopped there, it could indeed go a significant distance toward restoring disparate impact claims in the context of gender-based compensation.[113] But the PFA includes an additional provision that implicitly endorses and entrenches the internal causal narrative that the bill is designed to dismantle. Section 5 of the PFA is titled, "Negotiation Skills Training for Girls and Women."[114] This section would authorize the Secretary of Labor, in consultation with the Secretary of Education, to establish a competitive grant program for selected public agencies, private nonprofits, and community-based organizations to "carry out an effective negotiation skills training program that empowers girls and women."[115] According to the Act, funded programs would "help girls and women strengthen their negotiation skills to allow the girls and women

108. Paycheck Fairness Act, S. 84, 113th Cong. (2013), *available at* http://www.govtrack.us/congress/bills/113/s84. A version of The Paycheck Fairness Act was first introduced by then-Senator Hillary Clinton and Representative Rosa DeLauro in 2005. *See* Paycheck Fairness Act, S. 841, 109th Cong. (2005). The most recent version was sponsored by Senator Barbara Mikulski, along with cosponsors Senators Barbara Boxer and Dianne Feinstein, among other prominent women democrats. *See* Paycheck Fairness Act, S. 84.

109. Paycheck Fairness Act, S. 84.

110. *Id.* § 2(3)(B), (4)(C)(ii)–(iii).

111. *Id.* § 3(a)(2) (internal quotation marks omitted).

112. *Id.* § 3(a)(3). The Paycheck Fairness Act would also prohibit employers from retaliating against employees for discussing wages with co-workers, *id.* § 3(b), would increase penalties, including compensatory and punitive damage awards, *id.* § 3(c), and would allow class actions, *id.* § 3(c)(4).

113. *See* Elzer, *supra* note 52, at 30–33 (analyzing the potential effect of the Paycheck Fairness Act on claims targeting negotiation); *see also* Porter & Vartanian, *supra* note 91, at 195–202 (analyzing how the PFA would affect EPA cases in which an employer invokes a market excuse to justify a gender pay disparity).

114. Paycheck Fairness Act, S. 84 § 5.

115. *Id.* § 5(a).

to obtain higher salaries and rates of compensation that are equal to those paid to similarly situated male employees."[116]

While empowering girls and women is certainly a laudable goal and one that is difficult to criticize in the abstract, this particular form of "empowerment" rests on the assumptions that women's negotiation skills are deficient, that experts can treat the deficiency, and that women themselves are responsible for moving their wages to an "equal" level with similarly situated men. Moreover, the PFA's validation of the relevance of gender-based negotiation skills may enable employers to successfully invoke differences in negotiation outcomes as a "bona fide factor other than sex,"[117] which would undermine the PFA's attempt to narrow that broad-based defense in the first place.[118]

The PFA highlights how little progress the women's rights movement has made in resisting the internal causal attribution that places responsibility for the gender pay gap within women themselves. The disability rights movement, in contrast, has made tremendous strides in dismantling the internal causal attribution narrative that historically prevented its members from holding employers responsible for the workplace inequality faced by individuals with disabilities. That success was achieved by replacing the medical model of disability with the social model of disability, which shifted the causal focus from individuals onto employers—a shift that is also needed in the context of the gender pay gap.

II. LEARNING FROM THE DISABILITY RIGHTS MOVEMENT: USING THE SOCIAL MODEL TO SHIFT CAUSAL ATTRIBUTIONS TO EMPLOYERS

The social model of disability provides a theory that might help overcome the common barrier that women who experience wage inequality share with individuals with disabilities. This model recognizes the socially constructed nature of a marginalized and therefore limiting

116. *Id.* § 5(a)(5).

117. *Id.* § 3(a)(2) (internal quotation mark omitted).

118. *But see* Elzer, *supra* note 52, at 33 (suggesting that the presence of the negotiation funding provision would improve plaintiffs' chances for success in an EPA claim challenging unequal pay resulting from individual negotiations because "courts would be more likely to account for [gender differences in negotiation] if a statute authorized government-funded negotiation training programs designed for the express purpose of teaching women and girls how to obtain higher salaries"). The PFA also includes a brief provision stating that the EEOC "shall provide training to . . . affected individuals and entities on matters involving discrimination in the payment of wages," Paycheck Fairness Act, S. 84 § 4, and a longer provision on "Research, Education, and Outreach," which would require the Secretary of Labor to "conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women," *id.* § 6. While these provisions are on the right track in attempting to combat the institutional sources of the gender wage gap, neither provision contains details about what such training, studies, and information would contain, nor does it identify any of the known sources of the gender wage disparity, including employers' stereotypic reliance upon and reactions to individual employee negotiations. It leaves open the possibility that employers will simply be educated about women's own deficient negotiation skills as a source of the gender pay gap.

status, and it uses that recognition as a tool to shift causal attributions both in society and in the law.

A. The Social Model of Disability

Members of the disability civil rights movement recognized that reducing stigma and achieving meaningful antidiscrimination protection would first require combatting the internal causal attribution that was entrenched in the medical model of disability.[119] The movement therefore unified around a central goal of reconceptualizing disability not as an inherently limiting individual trait but rather as a social construct created by the interaction between mental or physical characteristics and contingent aspects of our environment that impose restrictions.[120]

Under the social model, the term "impairment" is used solely to describe a mental or physical condition, which is not inherently limiting independent from the context and environment in which it interacts.[121] A "disability," in contrast, refers not to an internal attribute, but instead to the limitations that are socially "imposed on top of one's impairment."[122] The social model is thus best understood not as a normative stance or policy prescription, but rather as a causal attribution theory.[123] It provides a theoretical basis for shifting from an internal to an external causal attribution to explain the source of inequality for individuals with impairments.[124] The crowning achievement of the social model of disability was to shift causal responsibility for workplace inequality away from individuals' physical and mental impairments and onto the "architectural, social, and economic environment" that renders those impairments limiting.[125]

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119. *See* Travis, *supra* note 47, at 943; *see also* BAGENSTOS, *supra* note 48, at 13 (describing "the endorsement of a social rather than a medical model of disability" as "the one position that approaches consensus within the movement").

120. *See* Travis, *supra* note 47, at 943; *see also* BAGENSTOS, *supra* note 48, at 18 (describing the social model of disability); Crossley, *supra* note 50, at 653–55 (explaining that "the social model of disability sees disadvantages as flowing from social systems and structures"); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 100 (2000) (describing the social model's understanding that "actual limitations that flow from an individual's physical or mental impairment often result from the manner in which society itself is structured"); Shakespeare, *supra* note 49, at 268 (explaining that the social model views disability as "a relationship between people with impairment and a disabling society").

121. *See* Shakespeare, *supra* note 49, at 268; Travis, *supra* note 47, at 944; Shelley Tremain, *On the Government of Disability*, 27 SOC. THEORY & PRAC. 617, 620 (2001).

122. Tremain, *supra* note 121, at 620; Travis, *supra* note 47, at 944 (describing the social model's distinction between impairment and disability).

123. *See* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251, 1255 (2007); *see also* Travis, *supra* note 47, at 944 (describing the social model as a causal theory).

124. *See* Samaha, *supra* note 123, at 1255; Travis, *supra* note 47, at 944.

125. Samaha, *supra* note 123, at 1255; Travis, *supra* note 47, at 944 (internal quotation marks omitted).

The social model not only unified very diverse members of the disability rights movement, but it also provided the foundation for legal and policy change. The most significant result was congressional enactment of the ADA's reasonable accommodation mandate.[126] The accommodation mandate recognizes that both an individual's impairment and aspects of the workplace are multiple necessary causes of an individual's inability to perform essential job tasks. The accommodation mandate therefore obligates employers to make reasonable modifications to workplace practices, policies, structures, and norms in order to reduce the functional effects of impairments that otherwise are not inherently limiting. By rendering legally irrelevant the particular diagnosis, the specific source, or the potential treatments for an individual's impairment, the ADA also shifted power away from medical experts.[127]

The social model of disability has not achieved all of the goals of the disability rights movement, nor is it without shortcomings.[128] But it has achieved far more progress than the women's rights movement has achieved in delegitimizing the internal causal narrative for the gender pay gap and resting power away from negotiation "experts" who are being increasingly empowered to diagnose and cure women's deficiencies.

Social model theorists did not undertake this momentous shift all on their own. To the contrary, early social modelists actually borrowed from and leveraged certain aspects of feminist legal theory—in particular, theories about the socially constructed nature of gender—in order to develop and ground the social model of disability.[129] As Professor Carlos Ball has explained, it was feminist theory that led disability rights advocates "to grapple with the social contexts that often determine whether particular physical or mental impairments translate into disabilities."[130]

126. *See* 42 U.S.C. § 12112(b)(5) (2012).

127. *See* Strassburger, *supra* note 38, at 364 (explaining that "[i]n the social model of disability, doctors are no longer the center of the story"); Travis, *supra* note 47, at 975–76 (describing one goal of the social model of disability as trying to delegitimize "the medical model's abdication of control to medical professionals"). This shift was strengthened in the Americans with Disabilities Act Amendments Act of 2008, which clarified that one's disability status is assessed in an unmitigated state, rendering irrelevant the potential medical treatments that are available to ameliorate an impairment. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (2012)).

128. *See, e.g.*, Areheart, *supra* note 49, at 192–225 (explaining the ways in which "the medical model remains firmly entrenched" in social and legal context, despite the movement's focus on the social model of disability); Travis, *supra* note 47, at 975–76 (explaining that one shortcoming of the social model of disability is that it left the definition of impairment in the hands of medical professionals, "which is precisely what the social model of disability had intended to undermine by replacing the medical model").

129. *See, e.g.*, Alemzadeh, *supra* note 34, at 22 (describing the work by early social model theorist Susan Wendell); *see also* Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 141–42 (2005) (explaining how disability discrimination law is built upon "the feminist position on difference and equality," and arguing that "[w]hat disability discrimination law demands is something much closer to the understanding of equality held by feminist theory, one sensitive and attuned to issues of difference").

130. Ball, *supra* note 129, at 134–35.

Such borrowing, however, has generally occurred in the direction of disability rights advocates seeking to align with gender theory, rather than the reverse.[131] At this important juncture fifty years after the enactment of Title VII, it is time for women's advocates to claim the social model as a tool with untapped potential for combatting the gender pay gap.[132]

B. A Social Model of the Gender Pay Gap

The women don't ask narrative is analogous to the medical model of disability in that it focuses on perceived deficiencies within the individuals who are experiencing workplace inequality, and it therefore looks to experts to provide a treatment or cure. In the disability context, the medical model viewed impairments as deficits and sought help from medical professionals, while in the gender context, the women don't ask narrative views women's approach to negotiation as a deficit and seeks help from psychologists and negotiation experts. Applying a social model to the gender pay gap would make explicit the fact that gender pay disparities are actually the result of the interaction between the way in which women negotiate and the environment in which that negotiation occurs. A social model would recognize that the use of an employment practice that sets wages based in whole or in part on individual bargaining without pay transparency is what renders "disabling" any unique aspects of women's negotiation style.

One critical result of the social model of disability was to reveal that physical and mental impairments are merely differences that are not inherently limiting outside of the context in which they interact. Applying a social model to the gender pay gap would similarly provide a way to push women's negotiation differences from the normative realm into the merely descriptive. A social model reveals that any unique aspects of women's approach to negotiation are not necessarily deficits outside of an environment that renders them limiting in obtaining equal pay. In other words, a social model prevents observers from ignoring context. It recognizes when a multiple-necessary-cause scenario exists, and it forces attention onto the situational cause that is otherwise overshadowed by the personal. Specifically, it focuses attention onto the aspects of an employer's compensation system that are necessary to produce the gender pay

131. *See* Alemzadeh, *supra* note 34, at 30 (observing that the recent move to characterize pregnancy as a disability has been launched by disability scholars, "rather than from an advocate focusing primarily on pregnancy rights"). A notable exception is scholars who have used the ADA's accommodation mandate to provide comparators for supporting broader accommodation rights under the Pregnancy Discrimination Act. *See, e.g.*, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27–38 (1995); Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1004–11, 1018–35 (2013).

132. *Cf.* Strassburger, *supra* note 38, at 338–39 (arguing that "transgender, transsexual, and otherwise gender-variant or genderqueer activists can benefit from gender identity protections informed by the social model of disability" because the social model provides "a stronger long-term theoretical construct" than those offered by sex discrimination law (footnote omitted)).

gap. In doing so, the social model would shift power away from "experts" who, under the current internal causal narrative, are needed to diagnose and treat women's negotiation deficiencies, which is a process that itself carries economic and psychological costs.[133]

Just as the social model of disability does not deny that physical and mental impairments exist, a social model of the gender pay gap does not need to reject the existence of general differences in the ways that women as a group and men as a group approach wage negotiations on their own behalf. The authors of *Women Don't Ask* persuasively demonstrate, for example, that women negotiate their starting salaries and ask for raises less frequently than men,[134] and a body of research supports that conclusion.[135] The social model merely reveals that those differences are only deficits because of the employment practices that render them so—in other words, the differences may be socially real but legally irrelevant.

The empirical research on the gender pay gap not only supports the social model's notion that limitations are produced by the interaction between internal differences and the social environment in which the different individuals are engaged, but it also reveals that this interaction is neither random nor neutral. To the contrary, this interaction is highly dependent upon gender stereotypes and bias.[136] The research demonstrates, for example, that employers react more negatively to and take tougher positions against women who attempt to negotiate their wages than employers do for men who engage in the same type of self-advocacy.[137] In addition, evaluators—both men and women—tend to

133. *Cf. id.* at 364 (arguing that the disability rights movement's shift "from a medical model of disability to a social model" can benefit other marginalized groups, like members of the trans community, to "avoid the economic and psychological costs" of using medical diagnoses "to secure protections").

134. *See* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 1–4, 17–129.

135. *See* Bowles & McGinn, *supra* note 78, at 105–06 (summarizing research findings "suggest[ing] that male managers and professionals negotiate higher starting pay than their female peers"); Elzer, *supra* note 52, at 3–9, 34 (summarizing the social science research on gender differences in negotiation approaches and results, and concluding "that gender differences in negotiation are real"); Porter & Vartanian, *supra* note 91, at 184–92 (summarizing research documenting women's differential propensity to negotiate for higher compensation than men); Rabin-Margalioth, *supra* note 24, at 814–18 (summarizing research demonstrating that women as a group assess the economic value of their work lower than men do when pay-rate information is unavailable, and that there are "systemic differences in the way women and men approach and handle wage negotiation"); Ramachandran, *supra* note 4, at 1059–60 (summarizing research on the differential negotiation patterns of women and men and how that contributes to the gender pay gap). *See generally* Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299 (1999) (describing differences in women's and men's negotiation styles).

136. *See* Porter & Vartanian, *supra* note 91, at 164 (explaining that "when women do negotiate, gender schemas can and do influence the way employers react").

137. *See* Bowles & McGinn, *supra* note 78, at 108–09 (summarizing studies finding that women will achieve less successful pay negotiation results than men when they "take a stereotypically masculine approach and advocate assertively for their self-interest"); *see also* BABCOCK & LASCHEVER, WOMEN DON'T ASK I, *supra* note 54, at 87 (explaining that "an assertive woman, no matter how well she presents her arguments in a negotiation, risks decreasing her likeability and therefore her ability to influence the other side"); Elzer, *supra* note 52, at 2, 6–8 (summarizing research demonstrating that "employers may react more negatively to women who *do* attempt to

further penalize women for attempting to negotiate for higher pay by deeming them less likeable and overly aggressive, and therefore being less willing to work with them in the future.[138] Women's tendency not to negotiate for higher wages is thus a "rational decision" that correctly takes into account the fact that society "punish[es] women for being aggressive."[139] Gender differences in negotiation cannot meaningfully be extricated from social context—"namely that men and women 'face different social incentives' when deciding whether to initiate negotiation."[140] In other words, internal differences in women's and men's approaches to negotiation are caused in part by external realities of the workplace.

Social scientists have recognized the implications that this research has for crafting solutions and legal reforms. Because the research demonstrates that the differences in women's negotiation tendencies and results are contingent upon the gender-biased environment in which the negotiation takes place, social scientists have argued that we "should shift the discussion of prescriptive implications away from fixing the women to addressing the social conditions that motivate these gender differences."[141] The social model used in the disability context would provide a theoretical framework to help scaffold those views as advocates try to combat the causal narrative not just socially but doctrinally as well.

While the disability rights movement ultimately leveraged the social model of disability into the reasonable accommodation mandate in disability discrimination law, the women's rights movement has significant room to progress without yet needing to go that far. Applying the social model to the gender wage gap could provide the basis for the more modest step of jettisoning the Bennett Amendment and resuscitating the dis-

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negotiate than they do to similarly-situated men"); Porter & Vartanian, *supra* note 91, at 184–95 (summarizing research showing that employers "react less favorably to" and "take a much tougher stance against female employees who negotiate on their own behalf").

138. *See supra* notes 135–37; *see also* Elzer, *supra* note 52, at 7–9 (summarizing research showing that "employers sometimes react more negatively toward women who negotiate than they do towards male negotiators"); Porter & Vartanian, *supra* note 91, at 194 (concluding that "[s]elf-promotion is so important for negotiating on one's own behalf and yet women are penalized for such self-promotion").

139. Elzer, *supra* note 52, at 9.

140. *Id.* at 8–9 (quoting Bowles, Babcock & Lai, *supra* note 78, at 100); *see also* Bowles & Babcock, *How Can Women Escape*, *supra* note 83, at 80–81 (summarizing research showing "that women have good reason to be more reticent than men about negotiating for higher compensation because women pay a higher social cost than men for doing so"). *See generally* Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 PSYCHOL. WOMEN Q. 65 (2001) (describing the social and psychological costs that women pay for self-advocacy).

141. Bowles, Babcock & Lai, *supra* note 78, at 100; *see also* Iris Bohnet & Hannah Riley Bowles, *Special Section: Gender in Negotiation: Introduction*, 24 NEGOTIATION J. 389, 390 (2008) (explaining that "what recent research has shown is that gender effects on negotiation are contingent on situational factors"); Elzer, *supra* note 52, at 9 (arguing that the "shift in focus from internal motivations to external factors" to explain why women negotiate less successfully makes it harder for employers to "escape liability by claiming that their male employees are better negotiators").

parate impact doctrine in the context of sex-based wage discrimination claims.[142]

The social model is entirely consistent with conventional disparate impact doctrine. Disparate impact law always deals with situations involving a facially neutral employment practice, which interacts with some real difference that distinguishes the members of a protected group from others, thereby producing disproportionate results. *All* disparate impact claims involve multiple necessary causes—one cause being the employer's practice and another being something that differentiates the protected class members from others.[143] An employer's neutral practice could not disparately impact a particular group if the members of that group did not differ from the members of another group in some meaningful way.[144] Yet disparate impact doctrine does not care whether those distinguishing characteristics are "physical, social, or cultural in nature."[145] In fact, disparate impact doctrine deems those distinguishing characteristics irrelevant in assessing an employer's liability.[146] Disparate impact doctrine "treats the employer's criterion as *the* cause of a disparity," even though it is only one of the necessary factors for producing the outcome.[147] The defining feature of disparate impact doctrine—what makes this model "a distinct and powerful feature on the antidiscrimination landscape"—is its refusal to ignore the employer's causal role just because there is some feature about the members of a protected group that is also necessary to produce the disparate results.[148] Professors Ramona Paetzold and Steven Willborn describe this defining feature of disparate impact theory as "causation with blinders."[149]

This multi-causal reality has not created a stumbling block for courts in disparate impact claims based on statuses other than sex and in contexts other than compensation.[150] The Supreme Court's decision in

142. *See* Chamallas, *supra* note 20, at 581, 600, 606 (urging the need "to revive disparate impact theory for use in pay equity disputes"); Perry, *supra* note 87, at 137 (arguing that "[t]he judiciary's refusal to enforce pay equity as mandated by Title VII's disparate impact theory must be challenged"); Rabin-Margalioth, *supra* note 24, at 818 (arguing that an employer's use of individual negotiations to set salaries adversely affects women and should support a disparate impact claim).

143. *See* Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 353 (1996) ("[E]very disparate impact case depends on an adverse impact that is created jointly by social factors and the employer's employment practice."); Travis, *supra* note 21, at 349–50 (noting the multi-causal nature of all disparate impact claims).

144. *See* Travis, *supra* note 21, at 349–50.

145. *See id.*

146. *See* Paetzold & Willborn, *supra* note 143, at 354 (explaining that disparate impact doctrine "ignore[s] causes external to the employer that contribute to the impact," which means that "employers may be held legally responsible for impacts that are 'caused' in substantial part by factors external to the employers").

147. *Id.* at 353–54, 364 (emphasis added).

148. *See id.* at 364.

149. *Id.* at 353–54, 364.

150. *See* Travis, *supra* note 21, at 350.

Griggs v. Duke Power Co.,[151] in which the Court first recognized the disparate impact theory under Title VII, is a prototypic example.[152] In *Griggs*, the Court used the disparate impact doctrine to invalidate an employer's facially neutral practice of requiring applicants to have a high school diploma, which at the time excluded African-American applicants at a higher rate than white applicants.[153] The fact that the disproportionate results resulted both from the employer's hiring practice and from the social reality that a lower percentage of African-Americans than whites received high school diplomas did not prevent the Court from invalidating the hiring practice under the disparate impact doctrine.[154] The employer was not permitted to point to African-Americans' lesser success in completing high school as a way to shield itself from liability for its neutral hiring practice, which it could not lawfully retain unless it could demonstrate that it was job-related and consistent with business necessity.[155]

Yet that is precisely what the Bennett Amendment permits employers to do in the context of gender pay equity claims. By incorporating the EPA's factor other than sex defense into Title VII, the Bennett Amendment reverses the typical causation blinders in a disparate impact claim involving sex-based pay disparities. The factor other than sex defense not only allows contributing factors that reside outside the employer to become legally relevant, but it treats those factors as *the* cause of the gender wage inequity. The Bennett Amendment permits employers to point to women's lesser success in negotiation as a way to shield the employer from liability for its facially neutral hiring practice that bases compensation on individual negotiation without pay transparency, thereby allowing the employer's wage-setting practice to avoid scrutiny for business necessity because the case never gets to the defense stage.[156] There is no

151. 401 U.S. 424 (1971).

152. *Id.* at 431; *see* Paetzold & Willborn, *supra* note 143, at 352–53 (using *Griggs* to illustrate "the multiple causation present in all disparate impact cases"); Travis, *supra* note 21, at 350 (analyzing the multiple necessary causes in the *Griggs* case).

153. 401 U.S. at 436.

154. *Id.*; *see* Paetzold & Willborn, *supra* note 143, at 352–53 (explaining that the disparate impact in *Griggs* was "caused" both by "the social conditions that resulted in a lower proportion of blacks than whites with high school diplomas" and the employer's use of a high school diploma requirement to make hiring decisions (internal quotation marks omitted)); Travis, *supra* note 21, at 350 (describing the multiple causes of the disparate impact in *Griggs*).

155. *See* Paetzold & Willborn, *supra* note 143, at 393 (explaining that evidence of "causative factors" that have their source within the employees who are experiencing disproportionately negative employment outcomes are irrelevant in a disparate impact case).

156. *Cf.* Perry, *supra* note 87, at 128, 131, 136–37 (arguing that disparate impact doctrine should require courts to examine the business justification of any type of "pay-setting practice[]" that is "consequentially preferential to men"). Even if an employer could overcome the business necessity hurdle, women could still win a disparate impact claim by demonstrating a less discriminatory alternative pay-setting practice. Social science research could aid that endeavor by suggesting specific situational changes that reduce the potential effects of gender on negotiation outcomes. *See, e.g.*, Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951, 952–58, 962 (2005). One example is to decrease situational and structural ambiguity, which means specifying

legitimate reason to treat disparate impact claims differently in the context of sex-based compensation practices.[157] But the internal causal narrative of women's own responsibility for the gender wage gap—our failure to lean in, to speak up, and to just ask—is so pervasive and entrenched that it has rendered the employer's pay-setting practice invisible. Applying the social model of disability to the gender wage gap renders visible the multiple necessary causes of gender pay disparities and focuses attention on the employer's causal role.

The social model thus supports elimination of the Bennett Amendment from Title VII (or at least elimination of the factor other than sex defense from the four defenses that the Amendment currently incorporates). While this proposal is similar to the PFA and to other scholars' proposals for interpreting or applying the EPA's factor other than sex defense more narrowly,[158] eliminating the Bennett Amendment from Title VII would go further toward leveling the playing field for Title VII claims, and it would do so by directly addressing the source of the problem.

The PFA only amends the EPA, and it does so by narrowing but not eliminating the factor other than sex defense. The PFA would amend the EPA to allow the factor other than sex defense to apply only to "a bona fide factor other than sex, such as education, training, or experience."[159] The PFA then tracks the steps in a conventional Title VII disparate impact claim, by requiring an employer to demonstrate that the factor is job-related and consistent with business necessity, and allowing employees to demonstrate "that an alternative employment practice exists that

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more clearly "how parties are supposed to interact with one another," and making explicit the "economic structure of the negotiation," such as letting parties know "the limits of the bargaining range and appropriate standards for agreement." *Id.* (describing the results of two empirical studies). Based on that research, women could argue that a less discriminatory alternative pay-setting practice would structure wage negotiations to decrease situational and structural ambiguity in how the interaction should proceed and in the economic parameters of the bargaining range. *See id.*

157. *See* Perry, *supra* note 87, at 184 (arguing that "applying standard Title VII disparate impact doctrine to any claim of sex-based wage discrimination should result in analysis which is indistinguishable from that done in other disparate impact claims").

158. *See, e.g.*, Craver, *supra* note 90, at 1114–17 (interpreting the factor other than sex defense narrowly to conclude that "[i]f an employer were to succumb to male bargaining entreaties with respect to jobs that are substantially equal to those of women who do not ask about the possibility of more advantageous employment terms, the women would have claims under the EPA"); Elzer, *supra* note 52, at 2–3, 9, 21 (arguing that salary negotiation should not be deemed a valid factor other than sex in an EPA claim because "gender differences in negotiation arise out of unequal bargaining power"); Porter & Vartanian, *supra* note 91, at 165–66, 195–203 (proposing to adopt the PFA's amendment for limiting the "'any other factor other than sex'" defense, but to jettison the uncapped damage provision to make the bill more politically viable (internal quotation marks omitted)). The proposal for amending the EPA that is most analogous to this Article's proposal for amending Title VII is Professor Rabin-Margalioth's suggestion for changing the EPA so that mere proof that "a female employee is compensated at a lower rate than a comparable male employee for the same work" would "trigger[] the obligation to inquire whether this can be justified." *See* Rabin-Margalioth, *supra* note 24, at 808–09.

159. Paycheck Fairness Act, S. 84, 113th Cong. § 3(a)(2) (2013) (internal quotation marks omitted).

would serve the same business purpose without producing such differential."[160] Although this appears to be quite similar to a full revival of the disparate impact doctrine, it continues to violate the defining feature of disparate impact theory: the legal irrelevance of causal factors outside of the employer. Although the PFA narrows the non-employer causes that may be invoked to shield the employer from legal liability by ignoring the necessary causal role that is also played by the employer's neutral pay practice, that shield nonetheless remains. By leaving the Bennett Amendment intact—which would then incorporate the narrower factor other than sex defense into Title VII—the PFA would still allow room for employers to avoid the causation blinders that are the defining feature of the disparate impact doctrine in all other areas of Title VII law.

By focusing on the Bennett Amendment and reviving the disparate impact doctrine, leveraging the social model of disability may help the women's rights movement make headway on the gender pay gap without having to take on the special treatment stigma that attaches to an accommodation right. The social model merely provides the theoretical basis for delegitimizing the internal causal narrative of the gender pay gap, thereby revealing the illegitimacy of the Bennett Amendment's "second class treatment" of sex-based compensation discrimination claims.[161] Using the social model toward this end is thus consistent with an equal treatment and formal equality approach. Its objective is to bring Title VII's protection for sex-based compensation discrimination up to the same level as the protection that Title VII provides for all other statuses in all other types of employment discrimination claims.[162]

CONCLUSION

Causal narratives are enormously influential in directing not only our social assessments of responsibility but also our legal assessments of discrimination liability. The women don't ask narrative has been particularly powerful. This narrative holds women themselves responsible for the gender wage gap, and it buttresses a legal regime that allows employers to avoid liability for pay-setting practices that are built upon gender stereotypes and that entrench gender pay inequality. Although the social

160. *Id.* § 3(a)(3)(B).

161. *See* Perry, *supra* note 87, at 184 (describing Title VII's "unique and second class treatment" for gender-based pay equity claims).

162. *See id.* at 158 (noting that "[t]he Bennett Amendment, by its terms, singles out sex-based wage discrimination for different treatment under Title VII" (footnotes omitted)); *see also* Rabin-Margalioth, *supra* note 24, at 828 n.104 (arguing that reading the Bennett Amendment to rule out disparate impact claims under Title VII "would lead to an implausible situation where two similar claims of Title VII compensation discrimination, one claiming race or national origin base[d] discrimination and the other claiming sex based discrimination, would not be offered the same scope of protection"). The heightened protection for race and color in disparate treatment claims would still exist in Title VII's exemption of those statuses from the bona fide occupational qualification defense, *see* 42 U.S.C. § 2000e-2(e)(1), as would the modest accommodation right for religion, *see id.* § 2000e-2(e)(2).

science research itself reveals this reality by demonstrating the role that gender stereotypes play in creating and sustaining women's differential negotiation approaches and results, the women don't ask causal narrative is so pervasive that it needs a theoretical framework to help shift the internal causal attribution upon which the narrative rests. The social model is a causal attribution theory that achieved a similar objective for disability rights, by replacing the internal causal attribution of the medical model of disability with an external causal attribution that focused instead on the employment practices that render various characteristics disabling. As a causal attribution theory, the social model provides a useful tool for the women's rights movement, which needs a way to make salient the role that employers' wage-setting practices play in sustaining the gender pay gap.

Challenging the legal relevance of the women don't ask narrative in Title VII law is an important step, but it is likely only one of many steps that will be needed to eventually bridge the gender pay gap. Placing sex-based disparate impact compensation claims on par with all other types of disparate impact claims is a critical start, but there are many ways in which courts have undermined the transformative potential of the disparate impact doctrine more generally, which will also need attention. These general issues include, among others, courts' unwillingness to characterize deeply entrenched employment norms and organizational structures as "particular employment practices" that are subject to disparate impact review.[163] They also include courts' unwillingness to engage in deep scrutiny under the business necessity defense.[164] It is also hard to imagine the gender pay gap ever disappearing without a major shift toward pay transparency.[165] But none of these proposed reforms will likely move forward if we continue to allow the women don't ask causal narrative to dominate the gender wage debate. It is time for the women's rights movement to lean *out* by shifting our causal narrative away from women and onto the workplace practices that render women's negotiation less lucrative than men's.

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163. *See* Chamallas, *supra* note 20, at 609 (noting the problem of characterizing complex pay-setting systems as particular employment practices for purposes of a disparate impact challenge); Porter, *Synergistic Solutions*, *supra* note 40, at 806–20 (proposing EEOC guidance that would "redefine 'employment practice' to include workplace norms that often go unnoticed"); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 36–46, 77–91 (2005) (analyzing case law to reveal how courts treat default organizational structures as non-practices, thereby shielding them from a disparate impact challenge).

164. *See* Porter, *Synergistic Solutions*, *supra* note 40, at 806–21 (proposing EEOC guidance to "requir[e] a more searching business necessity inquiry"); Travis, *supra* note 21, at 360–68 (analyzing case law indicating that "courts increasingly have deferred to employers' business decisions" and urging a higher bar for the business necessity defense).

165. *See generally* Ramachandran, *supra* note 4, at 1046 (arguing for pay transparency—i.e., "the ability for employees to find out what other employees in their workplace make"—as a way to help address the gender pay gap).

CHAPTER INTRODUCTION: SEXUAL ORIENTATION

SUSANNAH W. POLLVOGT[†]

What is the relationship between discrimination based on sex and discrimination based on sexual orientation? To what extent have sexual minorities been able to rely on Title VII's antidiscrimination protections? To what extent *should* they be able to? These and other questions were addressed by the participants in the Sexual Orientation panel at the *Revisiting Sex* Symposium.

Professor Jessica Clarke launched the discussion with an incisive inquiry into how courts determine sexual orientation for purposes of Title VII. "But wait," you might say. "If Title VII doesn't protect sexual orientation, why would courts be looking into this issue in the first place?" The answer proceeds in several steps. In connection with protecting against sexual discrimination in the workplace, Title VII protects against workplace sexual harassment. Workplace sexual harassment, in turn, is considered discriminatory based on one of three theories: that it uses sex identity to facilitate domination (using sexuality as power); that it enforces stereotypes (generally, of women as sex objects); or that it represents the harasser taking the victim's sex into account. As Professor Clarke pointed out, none of these three theories require the harasser to have a particular, genuinely held sexual orientation. A straight man can use his sexuality to dominate another man; a gay man harassing a woman could be enforcing stereotypes; a gay woman harassing a man could be taking her victim's sex into account.

And yet, despite the irrelevance of sexual orientation to the theories of sexual-harassment-as-sex-discrimination, a number of courts have determined that sexual harassment only "counts" if the harasser's sexual orientation places him in a position to genuinely desire the victim. As Professor Clarke persuasively argues, this is problematic on at least two levels. First, it misunderstands sexual harassment as an expression of genuine sexual desire as opposed to an exercise of power. Second, the method by which courts attempt to assess the "true" sexual orientation of the harasser is flawed.

Specifically, the courts that Professor Clarke examined tended to place a great deal of weight on the harasser's self-identification as heterosexual. Thus, even where a male harasser made repeated, overtly sexual advances to a male colleague, the fact that the harasser was married with

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children verified his heterosexual identity and negated any harassment claim.

Professor Zachary Kramer touched on similar themes, drawing distinctions between "old discrimination" (which tended to be formal and based on one's membership in a particular social group) and "new discrimination" (which may be informal and based on one's individual gender or sexual identity). Title VII, Kramer asserts, deals well with with old discrimination but is ill-equipped to deal with new discrimination. This is in part because we have come to see gender and sexual identity as much more complicated, making the dynamics of discrimination more complicated as well. Courts perceive these as "hard cases."

Professor Kramer proposed the model of religious discrimination as an alternative framework for thinking about the dynamics of discrimination. There are several aspects of the way that we conceptualize religious discrimination that make it a useful tool for understanding new discrimination on the basis of other traits. First, this body of law acknowledges that one can be discriminated against both on the basis of status (e.g., because you are Jewish) and on the basis of conduct (e.g., because you observe the Sabbath). Second, it allows the individual wide discretion in defining her religious beliefs and practices. Third, it can protect individuals regardless of whether they are identified with a larger group or are the only one to subscribe to their particular belief system. Thus, it is a vigorous and flexible approach to protecting individual identity.

Professor Erin Buzuvis explored a practical litigation strategy for addressing discrimination on the basis of sexual orientation despite the fact that it is not a protected trait under Title VII. Specifically, Buzuvis discussed the dynamics of retaliation claims under Title VII. If, for example, a gay employee is harassed on the basis of his sexual orientation, that underlying ("predicate") discrimination is not addressed by Title VII. But, if the employee complains about the harassment to a supervisor, and is then subjected to adverse employment action for lodging the complaint, the employee may have a claim based on retaliation under the Act. The retaliation protection extends not only to reporting of valid discrimination claims but also to colorable (but ultimately invalid) discrimination claims—in the interest of not stifling whistleblowers acting in good faith.

The crux of these arguments is whether the employee had a good faith and "reasonable belief" that the underlying discrimination was actionable—even if that belief was not true as a matter of law. There are two possible scenarios here: that the employee believed that sexual orientation was protected under Title VII, or that what is characterized as harassment on the basis of sexual orientation is actually a form of sex discrimination—in particular, being targeted because of one's failure to conform to sex roles or stereotypes.

In conclusion, Professor Buzuvis explored the fascinating notion that the legal concept of reasonable belief could be influenced by social practice. That is, the more that gays and lesbians are protected from discrimination in other arenas, the more viable an individual employee's reasonable belief that harassment on the basis of sexual orientation was actionable under Title VII.

The overall theme of our discussion was that claims of sexual orientation discrimination brought under Title VII are pushing our thinking about the relationship between sex and sexual orientation, how courts understand sex and sexual identity, and the ways in which academics and advocates can influence the emerging law in this field.

A REASONABLE BELIEF: IN SUPPORT OF LGBT PLAINTIFFS' TITLE VII RETALIATION CLAIMS

ERIN E. BUZUVIS[†]

ABSTRACT

When an LGBT employee is punished for complaining about discrimination in the workplace, he or she has two potential causes of action under Title VII: first, a challenge to the underlying discrimination, and second, a challenge to the resulting retaliation. The first claim is vulnerable to dismissal under courts' narrow interpretation of Title VII's prohibition of discrimination "because of sex" as applied to LGBT plaintiffs. But such an outcome need not determine the fate of the second claim. Faithful application of retaliation law's "reasonable belief" standard, which protects a plaintiff from reprisal so long as she reasonably believed that she was complaining about unlawful discrimination, should allow LGBT plaintiffs to successfully challenge the reprisal, even if the court determines that the underlying discrimination was not "because of sex." This Article provides several arguments in support of such reasonable belief, in order to strengthen both the law's protection from retaliation in general as well as the challenges of obtaining relief for workplace discrimination against LGBT individuals.

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INTRODUCTION

Despite the prevalence of discrimination against lesbian, gay, bisexual, and transgender (LGBT) employees in the workplace,[1] Title VII does not expressly prohibit employment discrimination on the basis of sexual orientation or transgender status. For this reason, until such time as Congress changes the law, an LGBT employee who suffers discrimination on the job must formulate his or her claim as one of sex discrimination in order to gain relief under federal law. Fortunately, this has been possible in many cases. Courts have found Title VII's prohibition against sex discrimination to apply where plaintiffs were targeted for their gender nonconformity[2] or change of sex,[3] and where the plaintiff was harassed in a sexual manner.[4] At the same time, LGBT plaintiffs frequently run up against the limits of these approaches, such as when courts narrowly interpret the plaintiff's evidence of gender nonconformity[5] or adhere to restrictive precedents that foreclose expansive definitions of sex discrimination.[6] As such, sex discrimination claims are a second-best solution for LGBT plaintiffs—an insufficient work-around to the problem created by Title VII's omission of sexual orientation and gender identity as protected characteristics.

With a toolbox limited to second-best solutions, it is useful to have as many as possible from which to choose. To that end, this Article seeks to make a modest contribution to the toolbox by generating support for

1. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012).

2. EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 472 (5th Cir. 2013) (en banc); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).

3. Schroer v. Billington, 424 F. Supp. 2d 203, 210–11 (D.D.C. 2006).

4. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1065 (9th Cir. 2002); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002).

5. *E.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (rejecting gay plaintiff's sex discrimination claim because he "failed to allege that he did not conform to traditional gender stereotypes in any observable way at work").

6. *E.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).

another work-around: retaliation claims. Many times, particularly in harassment cases, an LGBT employee who suffers discrimination on the job also endures reprisals for having reported it. These reprisals ought to qualify for protection under Title VII's anti-retaliation provision, even in cases where the underlying discrimination does not appear to the court to be an instance of actionable sex discrimination. With few exceptions,[7] however, courts often summarily dismiss attendant retaliation claims with no further analysis other than to note that the underlying discrimination was not itself a violation of law.[8] This approach flies in the face of Supreme Court precedent, which has interpreted Title VII's anti-retaliation provision to potentially apply in cases where the plaintiff reasonably believes that the complained-of discrimination violates the statute.[9]

There are many reasons why LGBT employees could reasonably believe that discrimination about which they complain violates Title VII. First, though an erroneous belief, it is widely assumed that a federal ban on sexual orientation discrimination already exists.[10] This collective assumption likely derives from an increasing number of state-level protections against discrimination and the well-known political and legislative victories in the marriage-equality movement. Second, even if a court rejects that it is reasonable to believe that federal law prohibits discrimination on the basis of sexual orientation, that court should still be willing to consider that an LGBT employee reasonably believed that the complained-of discrimination was actionable sex discrimination. The reasonableness of this belief is underscored by the fact that federal courts no longer categorically deny sex discrimination claims by LGBT plaintiffs. Most circuit courts of appeal have either decided sex discrimination claims in favor of an LGBT plaintiff,[11] or at least addressed the possibil-

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7. *E.g.*, Dawson v. Entek Int'l, 630 F.3d 928, 936–37 (9th Cir. 2011); McCarthy v. R.J. Reynolds Tobacco Co., No. CIV. 2:09–2495 WBS DAD, 2011 WL 4006634, at *4 (E.D. Cal. Sept. 8, 2011). In *McCarthy* the court stated:

> There cannot be any doubt that the plaintiffs in this case were reasonable in believing that Title VII prohibited defendant from terminating their coworker based on his sexual orientation. Not only has there been a growing gay rights movement in this country, the courts have also recognized sexual orientation as a status that merits heightened protection.

McCarthy, 2011 WL 4006634, at *4 (citation omitted).

8. *E.g.*, Larson v. United Air Lines, 482 F. App'x 344, 351 (10th Cir. 2012); Gilbert v. Country Music Ass'n, 432 F. App'x 516, 520 (6th Cir. 2011); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1060 (7th Cir. 2003); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000).

9. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

10. A survey by the Center for American Progress found that "9 of out [sic] 10 voters erroneously think that a federal law is already in place protecting gay and transgender people from workplace discrimination." Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AM. PROGRESS, June 2, 2011, http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/.

11. *E.g.*, EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 457 (5th Cir. 2013) (en banc); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 293 (3d Cir. 2009); Smith v. City of Salem, 378 F.3d 566,

ity of doing so in cases where the plaintiff properly alleged and supported a claim based on gender nonconformity.[12] Moreover, interpretations of Title VII—whether by the courts or, most recently, the Equal Employment Opportunity Commission (EEOC)[13]—are increasingly recognizing the inextricable convergence of sex, sexual orientation, and gender identity.[14] Even if the judge in a plaintiff's case does not think, for example, that "faggot" is a gender-based slur,[15] it is hardly unreasonable for the plaintiff to believe that it is. In laying out support for an LGBT plaintiff's reasonable belief in the illegality of the underlying discrimination, this Article hopes to strengthen the potential for retaliation claims to be successful in general, and in particular for those plaintiffs who would otherwise be without recourse under Title VII.

Part I of this Article will first explain briefly why, despite courts' expanding interpretations of sex discrimination, Title VII's prohibition on sex discrimination remains a limited remedy for workplace discrimination against LGBT employees. Part II examines Title VII's anti-retaliation provision and the reasonable belief doctrine and provides examples of retaliation cases predicated on anti-LGBT discrimination. Finally, Part III provides support for LGBT plaintiffs' reasonable belief that underlying discrimination is unlawful.

I. SEX DISCRIMINATION CLAIMS AS SECOND-BEST SOLUTIONS FOR LGBT PLAINTIFFS

Notwithstanding their vulnerability to bias and harassment on the job, Title VII only offers limited protection to LGBT employees. As this Part will describe, early judicial interpretations of Title VII foreclosed interpretations that would have extended the statute's prohibition on sex discrimination to also include discrimination based on homosexuality or transgender status per se. The Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*[16] has provided relief to some LGBT plaintiffs, but only in cases where discrimination based on gender nonconformity, read narrowly, is also present. Notwithstanding the more robust view of sex discrimination that is emerging from the EEOC, the courts generally

578 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 877–78 (9th Cir. 2001); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).

12. *E.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 224 (2d Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 265 (1st Cir. 1999).

13. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

14. Henderson v. Labor Finders of Va., Inc., No. 3:12cv600, 2013 WL 1352158, at *4 (E.D. Va. Apr. 2, 2013) ("Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." (quoting Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)) (internal quotation mark omitted)); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms.").

15. *E.g.*, Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1060, 1067–68 (7th Cir. 2003).

16. 490 U.S. 228 (1989) (plurality opinion).

have yet to embrace this view. Title VII's ban on sex discrimination thus remains a second-best solution to employers' discrimination against LGBT employees.

A. Early Courts Foreclose Broad Interpretations of Sex Discrimination

Title VII of the Civil Rights Act of 1964, the federal employment discrimination statute, prohibits an employer from refusing to hire, firing, or otherwise discriminating against any individual "because of such individual's race, color, religion, sex, or national origin."[17] It does not expressly enumerate sexual orientation or gender identity as protected characteristics, and some early judicial decisions under Title VII interpreted this omission to exclude LGBT plaintiffs from the protections of the statute. For example, in 1979, the Ninth Circuit Court of Appeals, deciding *DeSantis v. Pacific Telegraph & Telephone Co.*,[18] rejected several arguments that sought to position sexual orientation discrimination as a subset of sex discrimination, including the argument that discrimination against a male employee who chooses male sexual partners is sex discrimination in that it treats him differently from a female employee who also chooses a male sexual partner, as well as the argument that sexual orientation discrimination relies on stereotypes about hegemonic masculinity.[19] The court reasoned that any argument that renders all sexual orientation discrimination to fall within the ambit of sex discrimination would have constituted impermissible "bootstrap[ping]" by defying Congress's intentional exclusion of sexual orientation as a protected characteristic under Title VII.[20] Five years later, the Seventh Circuit's decision in *Ulane v. Eastern Airlines*[21] created a similar categorical exclusion for transgender plaintiffs. In that case, the court dismissed a case against an airline that fired a pilot after discovering that she had had sex reassignment surgery. The court rejected Ulane's argument that the discrimination she endured was "because of . . . sex," either as discrimination against Ulane because of her female sex or because of her change of sex.[22] Both arguments would have required the court to interpret sex to mean something other than biological sex—an interpretation the court believed was foreclosed by congressional intent.

B. Price Waterhouse *Offers Some Relief to LGBT Plaintiffs*

The Supreme Court's later decision in *Price Waterhouse v. Hopkins* rejected a narrow reading of sex discrimination and provided new ammunition for LGBT plaintiffs to challenge discrimination in the workplace. In that case, the plaintiff, Ann Hopkins, had been passed over for

17. 42 U.S.C. § 2000e-2(a)(2) (2012).
18. 608 F.2d 327 (9th Cir. 1979).
19. *Id.* at 330.
20. *Id.* (internal quotation marks omitted).
21. 742 F.2d 1081 (7th Cir. 1984).
22. *Id.* at 1084, 1087.

promotion in her accounting firm because the partners thought she was too aggressive for a woman.[23] The Court viewed this as impermissible sex discrimination because the employer's practice of rewarding aggressiveness in men while objecting to aggressive women placed Hopkins in an "intolerable and impermissible catch 22."[24] With this conclusion, the Court suggested an expanded definition of sex that includes not just whether someone is male or female, but also how one presents one's gender.[25]

Lower courts have come to read *Price Waterhouse* for the proposition that Title VII prohibits employers from discriminating against employees who do not conform to stereotyped notions of masculinity and femininity. In *Nichols v. Azteca Restaurant Enterprises*,[26] the Ninth Circuit recognized that its earlier holding in *DeSantis* was at least partially abrogated by *Price Waterhouse* when it held an employer liable for harassment that targeted a male employee because of his gender nonconformity.[27] Though the plaintiff in that case was not identified as gay, the nature of the harassment he endured suggested that his co-workers perceived him to be so; they called him "she" and other "vulgar name[s] . . . cast in female terms[,]" taunted him for effeminate mannerisms, and teased him for not sleeping with a female co-worker.[28] Like the Ninth Circuit, most courts have similarly held that Title VII prohibits anti-gay harassment that demonstrably targets the plaintiff's gender nonconformity.[29]

Price Waterhouse also created a potential Title VII remedy for transgender employees who endure discrimination on the job. In *Smith v. City of Salem*,[30] for example, the Sixth Circuit Court of Appeals agreed that an employer's adverse treatment of a transgender employee who had begun to express his female gender identity on the job was prohibited by Title VII because it targeted the plaintiff for failing to conform to stereotypes consonant with the sex (male) they perceived the plaintiff to be.[31] In so holding, the court acknowledged that earlier precedent such as

23. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plurality opinion).
24. *Id.* at 251.
25. *Id.*
26. 256 F.3d 864 (9th Cir. 2001).
27. *Id.* at 874–75.
28. *Id.* at 874 (internal quotation marks omitted).
29. *E.g.*, EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 449 (5th Cir. 2013) (en banc); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 293 (3d Cir. 2009); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261–62 (1st Cir. 1999); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999); Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).
30. 378 F.3d 566 (6th Cir. 2004).
31. *Id.* at 574–75.

Ulane had been eviscerated by the Court's decision in *Price Waterhouse*.[32] Other courts have ruled similarly.[33]

C. *Narrow Interpretations of* Price Waterhouse *Foreclose Relief to Many LGBT Plaintiffs*

Despite broadening the scope of actionable sex discrimination, the sex-stereotyping argument created by *Price Waterhouse* offers only limited protection to LGBT plaintiffs. Most significantly for gay and lesbian plaintiffs, courts apply *Price Waterhouse* only to gender-nonconforming behavior or appearance that is visible on the job.[34] A remnant of the anti-bootstrapping rationale, this limitation precludes gay and lesbian plaintiffs from arguing that homosexuality per se is a departure from sex stereotypes that is protected from discrimination.[35] This limitation ensures that only gay and lesbian plaintiffs who are visibly gender-nonconforming—a gay male with effeminate mannerisms, or a lesbian with masculine ones—can potentially allege an actionable claim of sex discrimination.

Gay and lesbian plaintiffs also have difficulty proving that the discrimination they experienced was based on sex. Some courts view anti-gay bias as an alternative to gender-based motivation for harassment, and do not see them as overlapping or related. In these courts, evidence of anti-gay animus—plaintiff was called a faggot, for example—reflects a singular homophobic motive for harassment that forecloses the possibility that the plaintiff's gender was also a target.[36] With few exceptions,[37]

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32. *Id.* at 573.

33. Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005); Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 656 (S.D. Tex. 2008) (examining action brought by transsexual male-to-female (MTF) plaintiff whose job offer was revoked after she came to the interview presenting as a woman); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 9, 2001); *see also* Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (holding that discrimination against a transgender plaintiff is sex discrimination for purposes of applying heightened scrutiny under the Equal Protection Clause, noting that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes").

34. Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) (rejecting plaintiff's argument that "his supposed sexual practices, [where] he behaved more like a woman" could qualify as actionable sex-stereotyping under *Price Waterhouse*); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (finding plaintiff's evidence was insufficient to show that she was discriminated against for her gender nonconforming appearance, rather than her sexual orientation).

35. *Dawson*, 398 F.3d at 218. The court stated:

> When utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII."

Id. (citation omitted) (quoting Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).

36. Kay v. Independence Blue Cross, 142 F. App'x 48, 50–51 (3d Cir. 2005) (interpreting plaintiff's harassment as being related to his sexual orientation rather than gender, where plaintiff was called a "faggot" and other slurs, but was also told "[a] real man in the corporate world would

courts have generally not embraced the view that anti-gay harassment is the means by which some workplace environments police gender norms.[38]

The limits of *Price Waterhouse* are made more significant when viewed in the context of courts' reluctance, since *Oncale v. Sundowner Offshore Services, Inc.*,[39] to find that the sexual nature of harassment satisfies the requirement that harassment be motivated by the victim's sex. In *Oncale*, the Court rejected the idea that same-sex harassment was categorically excluded from protection under Title VII, in contradiction to some lower courts that had so held.[40] However, the Court went on to emphasize that a plaintiff still needs to demonstrate that harassment was motivated by sex, such as by offering evidence that (1) the harasser is homosexual, and therefore motivated by sexual desire; (2) the harasser is generally hostile to the presence of the plaintiff's sex in the workplace; or (3) the harasser in a mixed-sex workplace singles out one sex for harassing treatment.[41] Notably, the Court did not suggest that the highly sexualized nature of harassment could also satisfy this burden; if it had, the Court would not have had to remand Oncale's case on this question, since his allegations—that co-workers restrained him while one placed his penis on Oncale's neck and arm, that they threatened to rape him, and that they forcibly pushed a bar of soap into his anus while he was show-

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not come to work with an earring in his ear. But I guess you will never be a 'real man'!!!!!!" (internal quotation marks omitted)); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (holding that plaintiff repeatedly called "faggot" and other gay slurs did not allege gender nonconformity claim under *Price Waterhouse*); *see* Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000); EEOC v. Family Dollar Stores, Inc., No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *17 (N.D. Ga. Aug. 28, 2008); Mowery v. Escambia Cnty. Utils. Auth., No. 3:04CV382-RS-EMT, 2006 WL 327965, at *7 (N.D. Fla. 2006) ("Being forty years old, owning a home and truck, living alone, and not discussing one's sexual partners are not feminine gender traits. These characteristics may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender."); *see also* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 312, 314 (2011) (criticizing this approach and arguing that unprotected traits like sexual orientation should be neutral for purposes of a sex discrimination claim).

37. *E.g.*, Henderson v. Labor Finders of Va., Inc., No. 3:12cv600, 2013 WL 1352158, at *1–2, *7 (E.D. Va. Apr. 2, 2013); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

38. 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, 633 (1992) ("Homophobia is both a symptom and a primary weapon of gender discrimination; any serious attempt to attain gender equality must aim to remove it."); Kramer, *supra* note 36, at 313; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776–77 (1998); Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 118, 142 (2002).

39. 523 U.S. 75 (1998).

40. Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451–52 (5th Cir. 1994), *abrogated by Oncale*, 523 U.S. at 75, 77; *see also* Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 692–93 (1998) (describing the legal landscape for same-sex harassment prior to *Oncale*).

41. *See Oncale*, 523 U.S. at 80–81.

ering—clearly would have qualified.[42] With one notable exception,[43] the courts have generally been reluctant to conclude after *Oncale* that the sexualized nature of harassing conduct can support a claim that same-sex harassment is motivated by the victim's sex—an unfortunate limitation for gay employees who are particularly vulnerable to same-sex harassment. For example, in *Vickers v. Fairfield Medical Center*,[44] the Sixth Circuit Court of Appeals denied that the plaintiff, a gay man, had endured harassment because of sex where the harassment, while sexual in nature, did not reflect the harasser's sexual desire, general hostility towards men, or differential treatment towards men.[45] While courts generally do allow gay plaintiffs to use gender nonconformity as the basis for arguing that harassment targets them because of sex, cases like *Vickers* show that the limitations of this doctrine often leave gay plaintiffs without any remedy at all.[46]

Price Waterhouse is also a limited remedy for discrimination against transgender employees in that courts may potentially apply it only to situations like in *Smith*, where the employee begins to transition on the job and is targeted for discrimination for dressing or behaving in ways that belie the employee's natal sex. As with homosexuality, most courts are unwilling to consider being transgender per se as gender nonconformity. While many cases of discrimination against a transgender employee will also involve discrimination for failing to appear and behave in accordance with natal sex stereotypes, and thus be actionable, some cases will fall outside of this zone of overlap. Discrimination that targets a transgender employee whose transgender identity is discovered (or disclosed) but who does not (or not yet) appear as their affirmed sex at work may not be prohibited under *Price Waterhouse*.[47] And even in

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42. *Id.* at 82; *Oncale*, 83 F.3d. at 118–19.

43. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066–68 (9th Cir. 2002) (en banc) (concluding that plaintiff's allegations of "physical conduct of a sexual nature" state a cause of action for sexual harassment under Title VII (internal quotation marks omitted)); *see also* Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. & SEXUALITY 61, 68 (2011) (pointing out the unique nature of the *Rene* decision).

44. 453 F.3d 757 (6th Cir. 2006).

45. *Id.* at 765.

46. *Id.* at 763; McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543 (8th Cir. 2003); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001); Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 261–62 (4th Cir. 2001); *see also* Reeves & Decker, *supra* note 43, at 68–69; Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 337–39 (2011) (pointing out that heterosexual men have an easier time prevailing on same-sex harassment claims than queer men).

47. Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006). The court stated:

> A transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions. Such a claim is not stated here, where the complaint alleges that Schroer's non-selection was the direct result of her disclosure of her gender dysphoria and of her intention to

cases where a transgender employee is dressing or behaving in a manner that belies stereotypes of his or her natal sex, courts may not agree that this was the employer's motivation for discrimination.[48] For instance, the plaintiff in *Etsitty v. Utah Transit Authority*[49] was a transgender bus driver who, while on the job, had begun the process of transitioning from male to female.[50] She sued the transit authority, which fired her when she did not agree to refrain from using women's bathrooms along her route.[51] On appeal, the Tenth Circuit Court of Appeals rejected her argument that using a women's bathroom on the job was gender nonconforming behavior that was protected from discrimination under *Price Waterhouse*.[52] As such, the employer could rely on its concern about bathroom usage as a legitimate, nondiscriminatory reason in satisfaction of its burden under *McDonnell Douglas Corp. v. Green*.[53]

Even in cases where the gender nonconformity theory could potentially apply, it is not always the plaintiff's desired approach, since it can be undermining to a transgender plaintiff's gender identity to have to seek relief as a nonconforming member of their natal, rather than affirmed, sex.[54] It also validates gender stereotypes as such, since describ-

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begin presenting herself as a woman, or her display of photographs of herself in feminine attire, or both.

Id. (citation omitted). The court went on to deny the employer's motion to dismiss anyway, and later concluded after trial that the plaintiff had presented evidence of discrimination based on gender nonconformity. Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *see also* Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *2 (E.D. La. 2002) (employer terminated transgender employee after learning the employee identified as transgender and cross-dressed outside of work); Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 441 (2012).

48. Mary Kristen Kelly, Note, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219, 230 (2010) (citing Myers v. Cuyahoga Cnty., 182 Fed. App'x 510, 520 (6th Cir. 2006)) (describing a case in which a transgender plaintiff's harassment claim was dismissed "because the only evidence she was able to show was that her supervisor referred to her as a 'he/she,' which," while offensive, did not constitute evidence of the harasser's animus towards her gender nonconformity).

49. 502 F.3d 1215 (10th Cir. 2007).

50. *Id.* at 1218–19.

51. *Id.* at 1219.

52. *Id.* at 1224.

53. *Id. McDonnell Douglas* allows a plaintiff to satisfy the requirement of proving discriminatory intent based on circumstantial, rather than direct, evidence of such motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973). A plaintiff who satisfies the elements of a prima facie case shifts the burden to the defendant to demonstrate a nondiscriminatory reason for adverse employment action, which the plaintiff may rebut with evidence that the nondiscriminatory reason is pretext for discrimination. *Id.* In *Etsitty*, the court assumed without deciding that the plaintiff had met her burden to satisfy the prima facie case. 502 F.3d at 1224. After accepting the transit authority's rationale as legitimate and nondiscriminatory, the court then determined that Etsitty had not proffered evidence sufficient to show that the bathroom usage rationale was pretext for discrimination based on sex/gender nonconformity. *Id.* at 1227.

54. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 666 (2009) ("Our difficulty with the *Smith* case is that the court reduces Smith's transgender identity to little more than a fashion choice to wear women's clothing."); Kelly, *supra* note 48, at 230; Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on* Schroer v. Billington, 45 HARV. C.R.-C.L. L. REV. 205, 205 (2010) (quoting Diane Schroer as saying, "I haven't gone through all this only to have a

ing a person's behavior or appearance as gender nonconforming implies there is a "correct" gender for whatever behavior or appearance is at issue.[55] This might not feel right to some transgender plaintiffs, particularly if their gender identity is outside the gender binary altogether.

D. Emerging Alternatives to Price Waterhouse

Because of these limitations, it is promising that alternative interpretations of Title VII's application to transgender plaintiffs have begun to emerge. In 2008, a district court judge in Washington, D.C. interpreted the statute's ban on sex discrimination to include discrimination on the basis of one's transsexuality. In that case, *Schroer v. Billington*,[56] the Library of Congress revoked a job offer it had made to "David" Schroer (later Diane) when she disclosed her transgender status and intent to start work as a woman.[57] In the lawsuit that followed, the judge ruled in her favor on two alternative grounds. First, the court applied *Price Waterhouse* to find that the discrimination against Schroer was discrimination because of sex, relying on evidence that the hiring supervisor was uncomfortable with the fact that someone she had come to know as a man would be wearing a dress and presenting as a woman in contravention of stereotyped masculinity.[58] Then the court went on to hold that even in the absence of sex stereotyping, the employer had violated Title VII because refusing to hire someone who changes their sex targets that person because of sex.[59] It is therefore sex discrimination in the same sense that refusing to hire someone because they have converted from one religion to another is discrimination on the basis of religion.[60] The reasoning in this opinion extends a broader range of protection to transgender plaintiffs than *Price Waterhouse* would alone because it is available to

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court vindicate my rights as a gender non-conforming man" (internal quotation marks omitted)); Storrow, *supra* note 38, at 149–50.

55. Devi Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC'Y 245, 252, 263 (2013); *cf.* Judith Butler, *Appearances Aside*, 88 CALIF. L. REV. 55, 62 (2000) ("Antidiscrimination law participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate—and entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate.").

56. 577 F. Supp. 2d 293 (D.D.C. 2008).

57. *Id.* at 295–99.

58. *Id.* at 305. The judge in this case had, in an earlier decision, acknowledged the potential limitations of framing the discrimination in Schroer's case as that of gender nonconformity:

> Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that "Diane" is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex.

Schroer v. Billington, 424 F. Supp. 2d 203, 210–11 (D.D.C. 2006). The court went on to deny the Library's motion to dismiss anyway. *Id.* at 213.

59. *Schroer*, 577 F. Supp. 2d at 307–08.

60. *Id.* at 306.

transgender plaintiffs even in the absence of evidence that the employer's motivation for discrimination was the plaintiff's gender nonconformity rather than her transsexuality per se.[61]

While *Schroer*'s "change of sex" rationale has yet to be cited by other federal courts, the EEOC incorporated its rationale into a decision that broadly construed the agency's jurisdiction to investigate claims of sex discrimination filed by transgender employees. In *Macy v. Holder*,[62] the EEOC determined that a transgender applicant who was rejected for a job with a federal agency had successfully alleged a complaint of sex discrimination.[63] The EEOC employed a broad reading of *Price Waterhouse* to conclude that gender nonconformity includes not only visibly transitioning on the job, as in *Smith*, but even simply identifying as transgender.[64] Moreover, the EEOC held that transgender plaintiffs were not limited to alleging claims of sex discrimination based only on the gender nonconformity approach.[65] An employer who discriminates because an employee changes sex or identifies as transgender has "relied on [the employee's] gender in making its decision," which is prohibited under Title VII.[66]

The EEOC's decision employs a broad definition of sex discrimination—broader than any courts have used to date. While it is likely to be influential on the courts, the extent of this influence remains to be seen. Many courts will likely defer to it as a well-reasoned interpretation of Title VII. However, *Macy*'s status as an adjudicatory decision that is technically only binding on the federal sector does not necessarily require courts to extend deference in cases involving private employers.[67] As a result, courts could still reject it on grounds that it conflicts with earlier precedent from the *Ulane* line of cases that foreclose Title VII protection from discrimination because of one's transgender status.

II. TITLE VII'S ANTI-RETALIATION PROVISION AND LGBT PLAINTIFFS' REASONABLE BELIEFS

As the previous Part makes clear, Title VII offers LGBT plaintiffs limited means to redress direct instances of employment discrimination. As this Part will show, LGBT plaintiffs have also had limited success pursuing retaliation claims in cases where the predicate discrimination

61. *See generally* Lee, *supra* note 47.
62. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).
63. *Id.* at *1.
64. *Id.* at *7–8.
65. *Id.* at *10.
66. *Id.* (alteration in original) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (internal quotation mark omitted)).
67. Cody Perkins, Comment, *Sex and Sexual Orientation: Title VII After* Macy v. Holder, 65 ADMIN. L. REV. 427, 437 (2013) ("Similarly, EEOC adjudicatory decisions are granted some judicial deference, and although they are not binding on anyone outside the federal sector, they are often treated as indications of what will constitute 'good practice' in the future.").

was not itself unlawful. As explained in this Part, courts have taken an increasingly narrow view of conduct that is protected under Title VII's prohibition against retaliation. Notwithstanding critiques of this problematic approach, it has been employed in cases involving gay plaintiffs. Yet, the fact that some courts have read the law to offer broader protection against gay and other LGBT plaintiffs suggests and lays the groundwork for a more promising alternative approach.

A. Title VII's Anti-Retaliation Provision

Protection against retaliation is essential to the enforcement of anti-discrimination laws.[68] Without it, whistleblowers would be reluctant to report and seek remedies to redress discrimination.[69] Accordingly, Congress included express statutory language in Title VII that prohibits employers from retaliating against employees who complain, whether formally or informally, about discrimination made unlawful by the statute.[70] However, courts have long held that a plaintiff may prevail under Title VII's anti-retaliation provision even if the conduct complained of (i.e., the predicate discrimination) is not actually unlawful.[71] As Professor Brake explains, "[p]rotection from retaliation would mean little if it were otherwise."[72] Most employees do not have specific knowledge about discrimination law, and even those who do would be hard pressed to predict how judges and juries would apply that law in a specific case.[73] If protection from retaliation was contingent on the employee guessing right in the face of such uncertainty, many would avoid the risky act of whistleblowing.[74]

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68. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180 (2005) (interpreting Title IX's implied right of action to include retaliation claims, even though such protections are not expressly contained in the statute); *see also* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 377–78 (2010).

69. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–26 (2005).

70. 42 U.S.C. § 2000e-3(a) (2012) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

The two clauses defining protected conduct under this provision are generally known as the opposition clause and the participation clause, respectively. *See, e.g.*, DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 165, 168 (8th ed. 2010).

71. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1004–06 (5th Cir. 1969); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (extending this rationale to the opposition clause as well by reasoning that EEOC enforcement "would be severely chilled" if Title VII's protection against retaliation under the participation clause only applied to meritorious EEOC complaints).

72. Brake, *supra* note 69, at 76.

73. *Id.* at 76–77.

74. *Id.* at 77; Pizer et al., *supra* note 1, at 734 ("LGBT employees are often reluctant to pursue claims for fear of retaliation or of 'outing' themselves further in their workplace.").

B. The Reasonable Belief Standard

When an employee complains of discrimination in the context of a formal EEOC proceeding, the employee is generally protected from retaliation as long as the underlying complaint is not false or malicious.[75] However, in informal contexts, such as an internal complaint to the employer, an employee's protection is more narrow, extending only to situations where the employee has a good faith, reasonable belief that the predicate discrimination is unlawful.[76] Early courts applied this standard to broaden, not narrow, the range of conduct protected from retaliation. Compared to the possible alternative of requiring plaintiffs to prove that the underlying discrimination was unlawful,[77] the "reasonable belief" standard allowed for robust protection against retaliation while still ensuring employers' freedom to address "malicious accusations and frivolous claims."[78] Increasingly, however, courts are raising the bar on what constitutes a reasonable belief and using that requirement as grounds to deny plaintiffs' retaliation claims.[79]

For example, in *Clark County School District v. Breeden*,[80] the Supreme Court denied a plaintiff's retaliation claim after noting that "no one could reasonably believe that the [alleged predicate discrimination] violated Title VII."[81] In that case, an employee alleged that she was transferred as punishment for complaining internally about sexual harassment arising from a one-time, situation-appropriate exchange in which a supervisor repeated another person's sexual comment in the plaintiff's presence.[82] Because sexual harassment must be "severe or

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75. *Pettway*, 411 F.2d at 1007. *But see* Lawrence D. Rosenthal, *Reading Too Much Into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After* Clark County School District v. Breeden, 83 WASH. L. REV. 345, 357 (2008) (describing several cases that have, post-*Breeden*, imposed a "reasonable belief" requirement for retaliation cases under the participation clause as well (internal quotation marks omitted)).

76. *See, e.g.*, Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982). The court stated:

> The mistake must, of course, be a sincere one; and presumably it must be reasonable . . . for it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.

Id.

77. Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1471 (2007).

78. *Id.* at 1472 (quoting Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1020 (D.C. Cir. 1981)).

79. Moberly, *supra* note 68, at 448.

80. 532 U.S. 268 (2001) (per curiam).

81. *Id.* at 270.

82. *Id.* at 269. Specifically, the plaintiff complained about an exchange that occurred when she, her supervisor, and "another male employee" were meeting to review reports about four individuals who had applied for a job with the school district. *Id.* The report on one of the applicants recounted that he had:

> [O]nce commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." . . . [T]he [plaintiff's] supervisor read the comment aloud, [and then]

pervasive" in order to be actionable, the Court refused to recognize that the plaintiff's complaint about a seemingly minor incident warranted protection from retaliation.[83]

Other cases since *Breeden* have also denied protection from retaliation to plaintiffs who complained about harassment that they could not have reasonably believed was severe or pervasive, including in cases where the predicate harassment was arguably more serious than what Breeden herself had challenged.[84] Retaliation plaintiffs have been thwarted by other mistakes of law regarding the predicate discrimination as well.[85]

C. Critiques of the Narrowing of Reasonable Belief

Critics have argued that *Breeden*'s narrow reading of the reasonable belief standard threatens to undermine the enforcement-enhancing purpose of Title VII's anti-retaliation provision.[86] Professor Rosenthal argues that it "forces employees to essentially become employment law experts before deciding whether to report behavior they believe is unlawful."[87] Professor Brake takes this point further, arguing that—especially as to mistakes about whether harassment is pervasive—"[t]he problem is not simply that most people lack the legal expertise to ascertain where that line begins and ends, but that the uncertainties of litigation prevent such a determination from being made in advance."[88] In other legal contexts, courts do not require a "reasonable person" to have expertise she or he does not have reason to possess,[89] and such requirements in retaliation

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stated, "I don't know what that means." The other employee then said, "Well, I'll tell you later," and both men chuckled.

Id. (citations omitted).

83. *Id.* at 270–71 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998)).

84. Jordan v. Alt. Res. Corp., 458 F.3d 332, 336, 342–43 (4th Cir. 2006) (black plaintiff suffered reprisals and was ultimately fired for reporting an employee who said, in the wake of the capture of the D.C. sniper, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them" (internal quotation marks omitted)); George v. Leavitt, 407 F.3d 405, 408 (D.C. Cir. 2005) (black female plaintiff from Trinidad alleged she was punished after reporting insulting and demeaning statements of her co-workers: "On different occasions, she was told by three separate employees to 'go back to Trinidad' . . . . On these and other occasions, her co-workers shouted at her, told her that she should never have been hired, and told her to 'shut up.'").

85. Outside of the employment context, an appellate court held that a plaintiff was not protected from retaliation because he had complained about employer practices that had a disparate impact based on race, a cause of action that had earlier been foreclosed by the Supreme Court's interpretation of Title VI's implied private right of action. Peters v. Jenney, 327 F.3d 307, 310, 315 (4th Cir. 2003).

86. Brake, *supra* note 69, at 81–83; Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1130 (2007).

87. Rosenthal, *supra* note 86, at 1131; *see also* Gorod, *supra* note 77, at 1492–93.

88. Brake, *supra* note 69, at 89.

89. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 290 cmt. f (1965) ("If the actor has special knowledge, he is required to utilize it, but he is not required to possess such knowledge, unless he holds himself out as possessing it or undertakes a course of conduct which a reasonable man would recognize as requiring it."); Gorod, *supra* note 77, at 1495 n.114 (contrasting the narrowing view of

cases evoke harsh consequences on a complaining employee who gets it wrong. If she complains too soon, before the harassment has become pervasive, then she is vulnerable to retaliation for which she cannot turn to Title VII for redress. If she complains too late, once the harassment has become pervasive, she must not only endure additional harassment,[90] but she may also be unable to prevail on the other elements of an eventual harassment claim, for two reasons. For one, her employer can argue that her failure to complain suggests that the harassment was not "unwelcome," one of the required elements for actionable harassment.[91] The employer can also argue that the employee's failure to complain sooner was unreasonable, which gives rise to an employer's affirmative defense against vicarious liability for harassment committed by a supervisor.[92] Narrow interpretations of reasonable belief threaten employers' interests as well. When employees are deterred from complaining about problems in the workplace, employers lack the information they require to stop small problems from becoming big ones that deplete employee productivity and morale. Fearing retaliation, employees who would have otherwise complained internally may also choose instead to file formal EEOC complaints, which are costlier and more time-consuming to defend.[93]

For these reasons, some have argued that the courts should abandon the requirement that the plaintiff's belief be objectively reasonable, leaving in place only the requirement of a good faith belief.[94] Employers would still be able to take adverse action against an employee who has filed malicious or frivolous claims and, in the rest of cases, can protect themselves against retaliation claims by refraining from taking punitive action against a good faith complainant. This approach, while sensible, may be unfeasible given the widespread adoption of the reasonable belief standard in the wake of the Supreme Court's endorsement in *Breeden*.[95] Plaintiffs may have better outcomes by making stronger arguments about the reasonableness of their beliefs. In this spirit, other critics advocate for pushing the boundaries of what ought to constitute a reasonable belief for the purposes of demarking conduct protected from retaliation. Professor Brake proposes that courts shift the vantage point of reasonableness from that of someone with knowledge of the law to that of an ordinary em-

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a reasonable mistake in retaliation law to the much more generous view of reasonable mistake that applies to defendants claiming qualified immunity).

90. Jordan v. Alt. Res. Corp., 458 F.3d 332, 355 (4th Cir. 2006) (King, J., dissenting) (pointing out this "Catch-22").

91. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (internal quotation marks omitted).

92. Gorod, *supra* note 77, at 1489; Rosenthal, *supra* note 86, at 1159–60. An employer may avoid liability for a supervisor's harassment if (1) the employer has taken reasonable care to prevent and correct harassment, and (2) it was unreasonable for employee not to avail herself of employer's prevention/correction opportunities. *E.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

93. Gorod, *supra* note 77, at 1507–08; Rosenthal, *supra* note 86, at 1164–65.

94. Gorod, *supra* note 77, at 1500; Rosenthal, *supra* note 86, at 1149.

95. Rosenthal, *supra* note 86, at 1135, 1138 (describing how *Breeden* motivated some courts to adopt an objective test).

ployee.[96] She also suggests that courts could set limits on the reasonable belief standard by asking "whether the plaintiff can make a reasoned case that the practices opposed interfere with the goals and objectives of discrimination law."[97] Another commentator suggests reforming how the reasonable belief standard applies to cases of predicate harassment in particular by accepting that an employee reasonably believes that an isolated incident of harassment is unlawful if the incident, when repeated, would constitute a Title VII violation.[98] As explained in Part III, cases involving retaliation against LGBT plaintiffs who have complained of harassment are particularly useful for advancing robust and persuasive arguments for broadening the reasonable belief doctrine along the lines these commentators have proposed. In addition to helping LGBT plaintiffs find relief under a law that does not provide direct protection, a focus on these cases could lead the push back on this encroaching doctrine.

D. Judicial Decisions Ignoring Gay Plaintiffs' Reasonable Belief

Recently, LGBT plaintiffs have been among those whose retaliation claims have been victims of the narrowing reasonable belief doctrine. For example, in *Larson v. United Air Lines*,[99] a gay customer service manager alleged that he was furloughed by the airline in retaliation for complaining about anonymous letters that he perceived to be disparaging him because of his sexual orientation.[100] Affirming the lower court's dismissal of this claim, the Tenth Circuit Court of Appeals rejected the argument that Larson's complaint amounted to protected conduct.[101] Without citing *Breeden* or mentioning the reasonable belief standard, the court required retaliation plaintiffs to demonstrate their "opposition to a practice made an unlawful employment practice by Title VII."[102] Since Title VII does not prohibit discrimination on the basis of sexual orientation, the court reasoned, Larson's conduct was not protected from retaliation under Title VII.[103]

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96. Brake, *supra* note 69, at 103.

97. *Id.* Similarly, another recommendation is to maintain the objective standard but to evaluate the reasonableness of the plaintiff's belief based on the "totality of circumstances"—including among other factors whether the courts and other authorities are unanimous about whether particular conduct violates Title VII. Matthew W. Green, Jr., *What's So Reasonable about Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 799–800 (2014).

98. Gorod, *supra* note 77, at 1497–98.

99. 482 F. App'x 344 (10th Cir. 2012).

100. *Id.* at 345–46.

101. *Id.* at 350.

102. *Id.* at 351 (quoting Petersen v. Utah Dep't of Corr., 301 F.3d 1182, 1188 (10th Cir. 2002)) (internal quotation mark omitted).

103. *Id.* The court also rejected the argument that the predicate was discriminatory, since the first anonymous letter was severely dealt with by the airline (leaving Larson no discrimination to complain about), and the second letter did not specifically reference Larson or expressly evince hostility towards his sexual orientation. *Id.* Additionally, the court determined that Larson had not demonstrated a causal connection between his complaints about the letters and his eventual furlough, since those who had taken his complaint were not involved in the furlough decision. *Id.*

Similarly, in *Gilbert v. Country Music Association*,[104] the Sixth Circuit Court of Appeals affirmed the dismissal of an openly gay union member's claim that his union withheld referrals because he complained that a fellow union member had "called him a 'faggot' and threatened to stab him."[105] First, the court determined that the predicate harassment was not actionable sexual harassment.[106] Though the court recognized that Title VII protects against harassment motivated by the victim's failure to conform to gender stereotypes, the victim's same-sex orientation does not itself qualify as nonconforming behavior.[107] Rather, the plaintiff must be targeted for gender nonconformity in his "'behavior observed at work or affecting his job performance,' such as his 'appearance or mannerisms on the job,'"[108] which the plaintiff in this case did not allege.[109] Then, having concluded that the predicate harassment was motivated by sexual orientation rather than sex, the court dispensed Gilbert's retaliation claim in a single sentence.[110] Giving no consideration to whether he could have reasonably believed that the harassment was actionable, the court dismissed the retaliation claim for the simple reason that Gilbert had opposed conduct that was not itself prohibited by Title VII.[111]

The Seventh Circuit Court of Appeals has also rejected a gay plaintiff's retaliation claim. In *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*,[112] the plaintiff alleged that he was terminated from his job as a nurse because he complained about a supervising doctor's harassing comments.[113] After a trial, the lower court granted summary judgment in favor of the hospital, which Hamner appealed.[114] The Seventh Circuit analyzed lengthy excerpts of Hamner's trial testimony about the nature of the internal grievance he had filed.[115] Despite Hamner's testimony that he believed the doctor's conduct—which included mocking him by lisping and making limp wrists—was harassment because of sex, the court read the trial transcript to support the lower court's conclusion that the doctor's "homophobia" motivated Hamner's complaint.[116] Yet even though the court concluded that this predicate harassment was not actionable under Title VII, the court went on to consider whether, for pur-

104. 432 Fed. App'x 516 (6th Cir. 2011).
105. *Id.* at 518, 521.
106. *Id.* at 519.
107. *Id.* at 519–20.
108. *Id.* at 519 (quoting Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006)).
109. *Id.* at 520 (rejecting the plaintiff's allegation that "homosexual males did not conform to [the harasser's] male stereotypes" as an insufficient "formulaic recitation" of the gender nonconformity element (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted)).
110. *Id.*
111. *Id.*
112. 224 F.3d 701 (7th Cir. 2000).
113. *Id.* at 703.
114. *Id.*
115. *Id.*
116. *Id.* at 706 (internal quotation marks omitted).

poses of his retaliation claim, Hamner reasonably believed otherwise.[117] To this end, the court required that to be reasonable, the plaintiff's complaint must at least fall into a category of discrimination that is covered by Title VII, and Hamner's complaint, having been construed to be about sexual orientation rather than sex, did not qualify.[118]

While these three cases reach the same result, the depth of the courts' respective analyses range in their complexity. The Tenth Circuit denied the gay plaintiff's retaliation claim simply because Title VII does not cover sexual orientation.[119] The Sixth Circuit at least considered the possibility that the gay plaintiff might have suffered discrimination on the basis of sex, but then rejected the retaliation claim without bothering to distinguish the plaintiff's reasonable belief from the court's conclusion that he did not.[120] Finally, the Seventh Circuit did distinguish between actionable harassment and harassment a plaintiff reasonably could have believed was so, but nevertheless rejected the idea that a plaintiff could reasonably believe that harassment motivated by sexual orientation is prohibited.[121] Interestingly, the Seventh Circuit's decision in *Hamner* is the only one of the three decisions to predate *Breeden*, yet it is the only one to actually consider the reasonableness of the plaintiff's belief in the illegality of the underlying harassment. Yet, the court's analysis of that standard is arguably flawed, for two reasons. First, the court's reasonable belief analysis was limited to whether Hamner reasonably believed sexual orientation discrimination was illegal;[122] it did not consider whether Hamner could have reasonably believed that the sexual orientation discrimination he endured was actually, or also, discrimination because of sex—an omission made more blameworthy by the fact that the doctor's teasing included imitating the voice and gestures of stereotyped effeminate men.[123] The second flaw of the *Hamner* decision is that, when read together with *Breeden*, it leaves nothing left of reasonable belief and effectively requires the plaintiff to prove the illegality of the predicate discrimination.[124] In *Breeden*, the Court detected an unreasonable belief based on the insufficient *degree* of harassment rather than its *type*.[125] If

117. *Id.* at 706–07.
118. *Id.* at 707.
119. Larson v. United Air Lines, 482 F. App'x 344, 351 (10th Cir. 2011).
120. Gilbert v. Country Music Ass'n., 432 Fed. App'x 516, 519–20 (6th Cir. 2011).
121. *Hamner*, 224 F.3d at 706–07.
122. *Id.*
123. *Id.*
124. The Seventh Circuit's analysis of reasonable belief has not changed since *Breeden*, as more recent decisions have relied on *Hamner* for the principle that "[t]he objective reasonableness of the belief is not assessed by examining whether the conduct was persistent or severe enough to be unlawful, but merely whether it falls into the category of conduct prohibited by the statute." Magyar v. Saint Joseph Reg'l Med. Ctr., 544 F.3d 766, 771 (7th Cir. 2008); *see also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066 (7th Cir. 2003) (rejecting retaliation claim of a heterosexual male plaintiff who complained about same-sex harassment that the court determined was not actionable).
125. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270–71 (2001).

mistakes of type are also excluded from reasonable belief, as the Seventh Circuit appears to hold, there is hardly anything left for a harassed employee to be reasonably mistaken about—a result that *Breeden* itself forecloses.

E. Judicial Decisions Affirming Gay Plaintiffs' Reasonable Belief

Two courts have found in favor of gay plaintiffs seeking to advance retaliation claims based on predicate discrimination that turned out not to be unlawful under Title VII. In *Dawson v. Entek International*,[126] the plaintiff appealed the lower court's dismissal of both his hostile-environment sexual harassment claim and his claim that the employer terminated him in retaliation for reporting the harassment.[127] The Ninth Circuit Court of Appeals agreed that the plaintiff had not alleged actionable sexual harassment because "Dawson presented no evidence that he failed to conform to a gender stereotype" and even testified himself that he "does not exhibit effeminate traits."[128] Nevertheless, the court reversed the lower court's dismissal of his retaliation claim.[129] Without expressly addressing the reasonable belief standard, the court concluded simply that "Dawson engaged in protected activity when he visited [a person] in human resources to discuss his treatment and file a complaint. This was a complaint to human resources staff based directly on sexual orientation discrimination."[130] Though the analysis is sparse, the court seemed to have considered the plaintiff's belief that Title VII prohibits sexual orientation discrimination to be a reasonable one.

In a later decision applying *Dawson*, a federal district court in California suggests as much. In that case, *McCarthy v. R.J. Reynolds Tobacco Co.*,[131] two employees prevailed at trial on a claim that their employer took adverse action against them after they complained about sexual harassment as well as the harassment of their gay co-worker.[132] The employer challenged the jury instruction, which defined activity protected from retaliation as "complaining to the defendant . . . based on the plaintiff's reasonable belief that her employer was engaged in unlawful conduct, which includes subjecting an employee to a sexually hostile work environment or discriminating against an employee on account of race, age, sex, or *sexual orientation*."[133] Relying on the Ninth Circuit's decision in *Dawson*, the court affirmed that the jury was properly instructed to consider complaints about sexual orientation to be protected activity

126. 630 F.3d 928 (9th Cir. 2011).
127. *Id.* at 932.
128. *Id.* at 937.
129. *Id.*
130. *Id.* at 936.
131. No. CIV. 2:09–2495 WBS DAD, 2011 WL 4006634 (E.D. Cal. Sept. 8, 2011).
132. *Id.* at *1.
133. *Id.* at *3.

for purposes of Title VII's anti-retaliation provision.[134] In so doing, the court supplied some of the missing analysis that would have made the *Dawson* decision more clear. In particular, the court raised and applied the reasonable belief standard:

> There cannot be any doubt that the plaintiffs in this case were reasonable in believing that Title VII prohibited defendant from terminating their coworker based on his sexual orientation. Not only has there been a growing gay rights movement in this country, the courts have also recognized sexual orientation as a status that merits heightened protection. Accordingly, based on the Ninth Circuit's holding in *Dawson* and because plaintiffs were reasonable in believing that Title VII prohibited defendant from discriminating based on sexual orientation, the court's inclusion of "sexual orientation" in Instruction No. 11 was a correct statement of the law and does not merit a new trial.[135]

In support of the second sentence quoted above, the court cited judicial decisions ruling in favor of same-sex marriage and narrowing the Defense of Marriage Act, law review articles arguing for expansive definitions of sexual harassment under Title VII that would include sexual orientation discrimination, provisions of California law that prohibit discrimination on the basis of sexual orientation, and federal regulatory policy construing the Civil Service Reform Act of 1978 to include discrimination on the basis of sexual orientation.[136] This decision is a promising example of how courts could construe reasonable belief, and it will serve as a foundation for some of the arguments provided in the next Part.

In addition to these two cases affirming that complaining about anti-LGBT harassment is protected conduct, there have also been decisions where the courts assumed *arguendo* that was the case. While not as useful to LGBT plaintiffs as *Dawson* or *McCarthy*, these decisions are at least worth noting for the mere fact that even outside of the Ninth Circuit, some courts, unlike those in *Larson* and *Gilbert*, refrain from casually restricting the scope of protected conduct to exclude discrimination reported by LGBT plaintiffs. In one such case, a federal district court in New York cited the reasonable belief standard as the basis for its assumption that a lesbian plaintiff's complaints were protected from retaliation under Title VII, even where the court had already determined that the predicate harassment was itself not actionable.[137] The court preferred

134. *Id.* at *3–4.
135. *Id.* at *4 (footnote omitted).
136. *Id.* at *4 n.5.
137. Jantz v. Emblem Health, No. 10 Civ. 6076(PKC), 2012 WL 370297, at *13 n.9 (S.D.N.Y. Feb. 6, 2012). Though the plaintiff alleged that she was targeted for harassment because of her

instead to grant summary judgment on other grounds, namely, that she had not proffered sufficient evidence of a causal connection between the protected activity and her eventual termination.[138] Similarly, a federal court in Alabama assumed for argument's sake that a transgender plaintiff's complaint about sex discrimination amounted to protected conduct,[139] even though the sex discrimination claim itself had been dismissed for lack of sufficient evidence from which to construe bias.[140] Here, too, the retaliation claim failed on other grounds.[141]

III. TOWARDS A MORE ROBUST ANALYSIS OF LGBT PLAINTIFFS' REASONABLE BELIEFS

Discrimination against LGBT employees is a pervasive problem that advocates should challenge by all available means. Political efforts aimed at persuading Congress to pass a federal law that prohibits employment discrimination on the basis of sexual orientation and gender identity[142] will, when successful, largely close the gap that leaves LGBT Americans vulnerable to discrimination under federal law.[143] In the

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failure to conform to gender stereotypes in her attraction to and relationship with a female partner, the court construed this as sexual orientation discrimination not actionable under Title VII. *Id.* at *7.

138. *Id.* at *7.

139. Parris v. Keystone Foods, LLC, 959 F. Supp. 2d 1291, 1301 (N.D. Ala. 2013); *see also* Sturchio v. Ridge, No. CV-03-0025-RHW, 2005 WL 1502899, at *10 (E.D. Wash. 2005) ("It is undisputed that the Plaintiff [who complained about sex discrimination related to her gender transition] engaged in protected activity.").

140. *Parris*, 959 F. Supp. 2d at 1301.

141. *Id.* at 1312.

142. The latest version of the perennially-proposed Employment Non-Discrimination Act (ENDA) would do exactly that. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(a) (2013), which states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity.

Id.

143. "Largely" refers to the strong possibility that Congress would pass a version of ENDA that exempts religious organizations, or possibly even secular employers with a religious objection, from having to comply. Indeed, the recent version of ENDA passed by the Senate contained an exemption for religious organizations, though an amendment that would have expanded the exemption to include objecting secular employers failed to pass. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6; Ramsey Cox, *Senate Passes ENDA Amendment Designed to Protect Churches*, THE HILL (Nov. 6, 2013, 12:15 PM), http://thehill.com/blogs/floor-action/senate/189434-senate-adopts-amendment-to-enda-aimed-at-protecting-churches. In contrast, Title VII only permits such employers to discriminate against non-ministerial employees on the basis of religion, not on the basis of other protected characteristics (the ministerial exemption, in contrast, applies to discrimination on the basis of religion and other protected characteristics). 42 U.S.C. § 2000e-1(a) (2012) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (recognizing religious institution's exemption from antidiscrimination laws in the hiring of those it deems to be ministers). Should any version of a religious exemption be included in the version of ENDA that ultimately becomes law, Title VII would remain the only federal law potentially available to LGBT non-ministerial employees to challenge discrimination by religious employers who are exempt from ENDA.

meantime, of course, advocates can also employ a litigation strategy that seeks to incrementally expand courts' interpretation of sex discrimination covered by Title VII. At the same time, advocates should not ignore opportunities to also push back on the courts' narrowing protection against retaliation for LGBT employees who reasonably believe that discrimination they have suffered is unlawful.[144] By pushing equally hard on retaliation claims, advocates increase a client's chances of obtaining some relief. Additionally, the success of such efforts would strengthen the law's protection against retaliation, which in turn could motivate LGBT employees to speak up about discrimination on the job. Such whistleblowing is the crucial precursor to litigation that continues to push for robust interpretations of sex discrimination under Title VII. It can also yield examples useful in the political arena to persuade Congress and those with influence that the Employment Non-Discrimination Act (ENDA) is necessary. In other words, it is worth pushing hard on retaliation claims, not only for the individual litigant's sake, but in the interest of supporting the efforts to challenge anti-LGBT discrimination on all respective fronts. The remainder of this Part will explore arguments that could be useful to this end.

A. Employees Might Reasonably Believe That Discrimination Based on Sexual Orientation and Gender Identity Is Already Prohibited by Federal Law

When LGBT employees report that they have been the victim of unlawful harassment, they may be doing so on the basis of a mistaken, yet reasonable, belief that federal law bans discrimination based on sexual orientation and gender identity. Indeed, surveys show that such protections are not only favored by a majority of Americans, but they are also widely assumed to already exist.[145] As the federal district court noted in *McCarthy*, this belief seems reasonable when viewed against the backdrop of LGBT (particularly lesbian and gay) victories in the courts and in

144. *Cf.* Kiley v. Am. Soc'y for Prevention of Cruelty to Animals, 296 Fed. App'x 107, 108 (2d Cir. 2008) (plaintiff who lost on sexual orientation and sex stereotyping claim did not even appeal dismissal of his retaliation claim); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 761 n.1 (6th Cir. 2006) (Vickers "fail[ed] to make any argument regarding his Title VII retaliation claim," so therefore it was waived).

145. A survey by the Center for American Progress found that "9 of out [sic] 10 voters erroneously think that a federal law is already in place protecting gay and transgender people from workplace discrimination." Krehely, supra note 10; *see also* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 210–11 (2012). In her article Schwartz states:

> [A] 2007 poll found that only one-third of American adults were aware that federal law . . . does not provide protection for employees on the basis of sexual orientation. At the same time, public opinion polls suggest that Americans do not find the idea of protection against employment discrimination based on sexual orientation particularly controversial. A 2008 Gallup poll found that support for homosexuals having equal rights in job opportunities has jumped from fifty-six percent in 1977 to eighty-nine percent.

Id. (footnotes omitted).

the political arena.[146] Marriage equality is arguably a more controversial prospect than employment nondiscrimination, so the fact that same-sex marriage is now legal in a majority of states (thirty-six as of this writing)[147]—as well as recognized for purposes of federal law[148]—could realistically contribute to the public perception that equality in the workplace is at least as secure. In the context of employment, LGBT rights are also on the rise. Twenty-one states and the District of Columbia ban employment discrimination on the basis of either sexual orientation or gender identity, as do more than two hundred cities and counties.[149] Additionally, in 2011 Congress repealed the most notorious example of pervasive employment discrimination against gays and lesbians—the military's Don't Ask Don't Tell policy.[150] The widespread erroneous belief in federal protection against harassment of gay workers could even partially derive from the Supreme Court's decision in *Oncale*,[151] which did not involve a gay plaintiff but was widely reported as a gay-rights victory.[152] At the same time, news of courtroom victories for LGBT plaintiffs such as Diane Schroer does not necessarily emphasize the nuances of the judge's sex discrimination rationale,[153] which could also lead the general public to erroneously believe the law protects gay, lesbian, bisexual, and transgender individuals by virtue of their status as such.[154]

As the district court decision in *McCarthy* shows, it is possible for courts to accept that a whistleblower reasonably believes that federal law prohibits status-based discrimination against LGBT workers based on these examples of momentum in the gay-rights movement, both in the employment context and in general. Polling data about the public's mistaken belief that such laws already exists makes this argument even stronger.[155] Its weakness, however, is that it requires courts to accept what I will call a "categorical mistake" (believing a certain category of discrimination is prohibited when it is not) as a reasonable belief, which

146. McCarthy v. R.J. Reynolds Tobacco Co., No. CIV. 2:09–2495 WBS DAD, 2011 WL 4006634, at *4 n.5 (E.D. Cal. Sept. 8, 2011).

147. *See Same Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx (last updated Jan. 19, 2015).

148. *See* United States v. Windsor, 133 S. Ct. 2675, 2691–93 (2013).

149. Pizer et al., *supra* note 1, at 755, 757.

150. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111–321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

151. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); *see supra* Part I.C.

152. *E.g.*, Joan Biskupic, *Same-Sex Harassment Is a No-No, Says Court; Landmark Ruling Covers Situations with Both Gay and Non-Gay Participants*, MOBILE REG., Mar. 5, 1998, at 1A; Richard Carelli, *Same-Sex Harassing Is Illegal: Employer, Gay-Rights Groups Praise Supreme Court Ruling*, ST. PAUL PIONEER PRESS, Mar. 5, 1998, at 1A; David Jackson, *Court Ruling on Same-Sex Harassment Also Victory for Gay, Lesbian Workers*, DALL. MORNING NEWS, Mar. 5, 1998.

153. Jesse J. Holland, *Judge Rules Transgender Discrimination Is Illegal*, STAR-LEDGER (Newark), Sept. 20, 2008, at 16; *Former Army Commander Wins Transgender Lawsuit*, TIMES UNION (Albany), Sept. 20, 2008, at 5.

154. Gorod, *supra* note 77, at 1494 ("Moreover, employees' understandings of what constitutes harassment will be shaped in large part by media accounts.").

155. *See supra* note 145.

some courts have already refused to do.[156] This tendency, however, demonstrably undermines Title VII enforcement. For the reasonable belief doctrine to mean anything at all, it has to allow whistleblowers to make some kinds of mistakes about the legal status of predicate discrimination. Especially where courts also insist on rejecting reasonable mistakes about the pervasiveness that harassment must reach to be actionable, rejecting reasonable categorical mistakes leaves effectively nothing left for an employee to be reasonably mistaken about. This result would eviscerate a doctrine that is both longstanding and that enjoys the apparent endorsement of the Supreme Court,[157] and ought to be challenged as such.

B. Employees Might Reasonably Believe That Anti-LGBT Discrimination Is Also Prohibited Sex Discrimination

When LGBT plaintiffs report harassment or other discrimination that turns out not to be unlawful, they could also reasonably be mistaken in believing that they were complaining about actionable sex discrimination. This is because when targeted for discrimination, sex, gender, and sexual orientation are often, and reasonably, conflated. Sex is widely understood to refer to one's anatomical status as male or female.[158] Gender is the socially-prescribed roles associated with sex, i.e., attributes that are masculine or feminine.[159] Sexual orientation is an individual's sexual or romantic attraction to either members of the same, other, or both sexes.[160] To say that sex and gender are conflated in our culture is to say that society generally expects one's anatomical sex to forecast much about an individual's behavior, personality, appearance, interests, and qualities. Sexual orientation is also conflated with both sex and gender. Society expects those of the male sex to be sexually attracted to those of the female sex; heterosexuality is part of what it is to be masculine.[161] If society conflates sex, gender, and sexual orientation, then one could reasonable perceive that the mindset of a discriminating employer likely follows suit.

To put this more concretely, imagine a hypothetical gay employee. He complains to his employer about co-workers who harass him verbally and physically, regularly calling him a faggot. Whether or not this complaint is protected from retaliation depends on whether he reasonably believes the harassment to be motivated by gender nonconformity. Of course, the co-workers' use of the word "faggot" implies animus towards

156. *See supra* note 85 and Part II.D.

157. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

158. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 164 (1996).

159. *Id.*

160. *Id.*

161. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196.

his sexual orientation, which the courts do not see as synonymous with gender.[162] But the employee may still reasonably perceive that his masculinity is ultimately, or simultaneously, the target. Because he does not date and sleep with women, his masculinity does not measure up to his co-workers' expectations about the male sex. To him, this situation may be as much about gender as harassment mocking him for effeminate mannerisms. Because it is only courts' esoteric concerns about "bootstrapping" that keep them from reading *Price Waterhouse* to prohibit the "faggot" situation as well as the harassment based on his effeminate mannerisms, they should forgive the average employee who has not read the case law for not intuiting this distinction.

1. Reasonableness Supported by Social Science Research

Social science research validates the reasonableness of viewing anti-gay harassment as a means of policing gender. Sociologist Michael Kimmel, for example, describes homophobia as a "central organizing principle of our cultural definition of manhood."[163] In our patriarchal society, men ascribe power to themselves by calling out other men's gender nonconformity—an act that reaffirms their own compliance with "hegemonic" masculinity, the version of masculinity that is most powerful in society.[164] Hegemonic masculinity requires the "relentless repudiation of the feminine," including, perhaps especially, the "feminine" sexual practice of having or desiring sex with men.[165] Anti-gay harassment, then, is a tool for generating and assigning male privilege.[166]

Researchers have confirmed that heterosexual men's negative attitudes about homosexuality derive from its perceived threat to their masculinity, rather than aversion to homosexual orientation per se.[167] The connection between masculinity and homonegativity can also be seen in research documenting heterosexual men's (but not heterosexual wom-

162. *See supra* note 36.

163. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, *in* THEORIZING MASCULINITIES 119, 131 (Harry Brod & Michael Kaufman eds., 1994).

164. *See id.* at 124–25, 131.

165. *Id.* at 125.

166. *Id.* at 131–32; *see also* MICHAEL A. MESSNER, TAKING THE FIELD: WOMEN, MEN, AND SPORTS 67–68 (2002); C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL 52–83 (2007).

167. Michelle Davies, *Correlates of Negative Attitudes Toward Gay Men: Sexism, Male Role Norms, and Male Sexuality*, 41 J. SEX RES. 259, 259 (2004); Scott W. Keiller, *Masculine Norms as Correlates of Heterosexual Men's Attitudes Toward Gay Men and Lesbian Women*, 11 PSYCHOL. MEN & MASCULINITY 38, 48 (2010).

en's) less favorable view of gay men than lesbians,[168] and the disparaging of effeminate gay men within the gay-male community.[169]

2. Reasonableness Supported by Dicta of a Federal District Court

In addition to scientific authority, legal authority also sometimes recognizes the inherent interrelation of sexual orientation, gender, and sex—further marking as "reasonable" an employee's impression of anti-gay harassment being motivated by gender. In *Centola v. Potter*,[170] a federal district court in Massachusetts held in favor of a gay-male employee whose co-workers used anti-gay slurs and teased him about being gay.[171] Though holding that the plaintiff had provided sufficient evidence that he was targeted for gender-nonconforming appearance and behavior, the court went on to say:

> The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.[172]

To be sure, the dicta quoted here, over ten years old, still represents an extreme minority view among the federal courts, which generally do not view homosexuality as a gender nonconformity for purposes of applying Title VII.[173] But the fact that it has not convinced the majority of courts to recognize anti-gay harassment as sex discrimination does not foreclose its value in retaliation cases by serving as a testament to the reasonableness of that belief.[174]

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168. Gregory M. Herek, *Sexual Prejudice and Gender: Do Heterosexuals' Attitudes Toward Lesbians and Gay Men Differ?*, 56 J. SOC. ISSUES 251, 255 (2000).

169. Francisco J. Sánchez & Eric Vilain, *"Straight-Acting Gays": The Relationship Between Masculine Consciousness, Anti-Effeminacy, and Negative Gay Identity*, 41 ARCHIVES SEXUAL BEHAV. 111, 112 (2012).

170. 183 F. Supp. 2d 403 (D. Mass. 2002).

171. *Id.* at 407.

172. *Id.* at 410 (footnote omitted). It is also worth noting that the *Centola* court also went on to consider the plaintiff's retaliation claim and, in that context, persuasively dispensed with the employer's argument that the employee had not engaged in protected conduct because he did not call it sexual harassment when he reported it. *Id.* at 412. It was enough to the court that the plaintiff "presented to his employers . . . events that, viewed in the light most favorable to him, constituted discrimination against him on the basis of his sex due to sexual stereotyping." *Id.*

173. Though, it was cited recently by a federal district court in Virginia, which rejected a defendant's motion to dismiss a Title VII case involving anti-gay harassment. Henderson v. Labor Finders of Va., Inc., No. 3:12cv600, 2013 WL 1352158, at *4 (E.D. Va. Apr. 2, 2013) (citing *Centola*, 183 F. Supp. 2d at 408–09).

174. *See* Gorod, *supra* note 77, at 1495–96 ("If the courts cannot agree, how are the individual citizens supposed to know?").

3. Reasonableness Supported by the Emerging Position of the EEOC

In further support of the reasonableness of an employee's belief that Title VII prohibits anti-LGBT discrimination, the EEOC has signaled that it, too, shares this belief. For one thing, the EEOC's interpretation of sex discrimination in *Macy* should not only support the reasonableness of any transgender plaintiff's belief that discrimination is actionable, it is also broad enough to permit the conclusion that homosexuality, too, is protected from discrimination under Title VII. For one thing, the EEOC endorsed a broad reading of *Price Waterhouse* that "gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms."[175] The EEOC did not say "only those gender-based expectations or norms related to how the employee behaves or appears in the workplace."[176] Additionally, the EEOC broadly read *Price Waterhouse*'s admonition that "an employer may not take gender into account in making an employment decision" to provide another reason, in addition to sex stereotyping, why transgender discrimination is actionable sex discrimination.[177] An employer who discriminates against a gay or lesbian employee is taking gender into account in an equally broad way, in that the employer is considering the gender of the employee relative to the gender of the person to whom he or she is sexually attracted.[178]

The EEOC spells this connection out more expressly in two separate, nonbinding decisions from 2011. In one, a gay employee filed a complaint against his employer, the Postal Service, to challenge harassment by his co-workers that stemmed from the public announcement of his wedding to another man.[179] The agency concluded that the employee stated a claim of plausible sex discrimination because he essentially argued that the harassment was motivated "by [the harassing co-worker's] attitudes about stereotypical gender roles in marriage."[180] In the other case, the EEOC determined that a lesbian employee, chided by her manager about her presumed sexual practices, had stated an actionable claim for sexual harassment, having "alleged that [the manager's] comment

175. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

176. Of course, as discussed in the text at notes 34–35, *supra*, this position conflicts with that of courts like the Sixth Circuit, which has expressly limited gender nonconformity protected from discrimination under Title IX to that which is observable at work. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006).

177. *Macy*, 2012 WL 1435995, at *7 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989)) (internal quotation marks omitted).

178. Perkins, *supra* note 67, at 440–41.

179. Veretto v. Donahoe, No. 0120110873, 2011 WL 2663401, at *1 (E.E.O.C. July 1, 2011).

180. *Id.* at *3.

was motivated by his attitudes about stereotypical gender roles in relationships."[181]

The EEOC position may eventually influence the courts to view sexual orientation discrimination as a form of sex discrimination. Meanwhile, however, it should also be cited in support of LGBT plaintiffs' reasonable belief in the interconnected nature of discrimination targeting sex, gender, and sexual orientation for purposes of sustaining a retaliation claim.

CONCLUSION

Until Congress enumerates sexual orientation and gender identity as characteristics protected from employment discrimination, LGBT workers who experience status-based discrimination on the job must allege sex discrimination in order to gain relief under federal law. This approach is inherently limited by courts' insistence that sex discrimination should not subsume all discrimination on the basis of sexual orientation or gender identity. As advocates continue to push back against this restrictive approach, they should also make vigorous arguments in support of employees' attendant retaliation claims. Though courts do not always apply it faithfully, the reasonable belief doctrine ensures that retaliation plaintiffs' success does not turn on whether they were technically correct that the predicate discrimination was unlawful. Given, then, that retaliation plaintiffs are allowed to be reasonably mistaken, mistakes about the legal status of discrimination against LGBT employees are good candidates for the label "reasonable." Aside from reasonably believing that sexual orientation and transgender status are protected in their own right, the interrelatedness of sex, gender, and sexual orientation support a reasonable belief that the challenged discrimination is sufficiently gender-related to warrant protection. Because there are so many arguments in support of a reasonable mistake about the legal status of anti-LGBT discrimination, these cases make an excellent vehicle to remind courts of the proper application of reasonable belief doctrine. When these arguments succeed, the retaliation doctrine will afford LGBT plaintiffs the protection they need to more aggressively report discrimination when it occurs. These reports, in turn, will help generate the case law necessary to push back on the limited definition of sex discrimination and support the political efforts to pass statutory protections for sexual orientation and gender identity discrimination.

181. Castello v. Donahoe, No. 0120111795, 2011 WL 6960810, at *2 (E.E.O.C. Dec. 20, 2011).

CHAPTER INTRODUCTION: CAREGIVING 2014

RACHEL ARNOW-RICHMAN[†]

Intransigent. Intractable. Entrenched. Ineradicable. These are some of the adjectives that feminist scholars have used to describe the persistent problem of achieving work/family balance for caregivers. Why such strong language? Since Title VII's enactment in 1964, we have seen additional legislative action in this area, including congressional passage of the Pregnancy Discrimination Act in 1978[1] and the Family and Medical Leave Act in 1990,[2] as well as various state statutes, several of which provide greater protection than federal law. We have also seen the development of novel litigation strategies, such as the theory of family responsibilities discrimination[3] and discriminatory failure to accommodate,[4] which have been embraced by the Equal Employment Opportunity Commission (EEOC)[5] and enjoyed some success in court. And yet, the inability to achieve work/family balance remains a significant bar to realizing substantive gender equality today, in 2014, much as it has for decades. Why?

The scholars participating at the "Caregiving 2014" Panel at the *Revisiting Sex* Symposium posed this question and wrestled with its implications. Professor Michael Selmi launched the discussion with a retrospective, citing the minimal progress we have made in job segregation, pay equity, and division of household labor. Professor Selmi suggested that a reason for this may be the absence of a common goal. As a society we remain deeply ambivalent about caregiver participation in the workforce, particularly with regard to working mothers. What, then, should equality for caregivers look like? Absent agreement on this question, the only consensus point within the work-/family debate is the desire to protect caregivers' individual choices and insulate them from penalty. Pro-

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1. 42 U.S.C. § 2000e(k) (2012).
2. 29 U.S.C. § 2601 (2012).
3. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008).
4. *See* Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1105 (2010).
5. *See* TITLE VII/EPA/ADEA DIV., OFFICE OF LEGAL COUNSEL, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *in* 2 EEOC COMPLIANCE MANUAL § 615 (2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf.

fessor Selmi is skeptical that such a broad principle can serve as a guiding framework for meaningful reform.

Professor Nicole Porter suggested that the problem lies in the structure of work itself and our unwillingness to interrogate existing workplace norms. Drawing on case law under the Americans with Disabilities Act (ADA),[6] Professor Porter demonstrated how courts defer to employers' judgment about the way work time is organized. Managerial choices such as the use of rotating shifts, the preference for full-time workers, and the strict enforcement of attendance and leave policies are treated as essential functions of the job from which employers may not be compelled to deviate. In the face of these entrenched expectations, there is little hope that new legislation or legal strategies aimed at enhancing caregiver protection will be successful in court. Rather, progress in the work/family arena depends first and foremost on dismantling workplace norms. Strategies that attack these norms directly—such as mandating paid time off, incenting work-spreading through wage and hour reform, and requiring audits and disclosure of flexible work practices—are a first step.

Professor Kyle Velte's contribution focused on employer retaliation against second-time parents, or "second child bias" (SCB). In cases of SCB, mothers report no discrimination in the workplace after the birth of their first child, but experience marginalization, loss of work, negative performance evaluations, and other adverse consequences after the birth of a second child. Professor Velte theorized a basis for SCB—the belief that a mother fulfills her "right" to combine market work and parenting when she has a single child—and speculated that employers' instinct to suppress stereotype diminishes after a mother has a second. Naming SCB and framing cases around the theory can serve an expressive function as well as a strategic one, according to Professor Velte. Such claims advance a stereotype theory of family responsibility discrimination (FRD) and can potentially steer the law away from reliance on comparator evidence, a requirement that has been a death knell for many FRD plaintiffs.

Professor Laura Kessler closed the panel on a hopeful note, highlighting the numerous incremental but collectively significant steps in the development of gender discrimination law since Title VII's enactment. She reminded us that the law's role in effecting social change is often invisible to those who experience its benefits and urged caution in discounting the possibility of a continued role for antidiscrimination law in effecting greater gender equality. Rather than turning to universalist reforms, Professor Kessler suggested that scholars and advocates incorporate the anti-essentialist critique of the discrimination framework in reforming discrimination law itself. We might start by breaking down doc-

6. 42 U.S.C. § 12101 (2012).

trinal walls—both within Title VII and across antidiscrimination statutes—that currently impede plaintiffs in obtaining relief for intersectional harms like caregiver discrimination.

In this way, the panel both acknowledged Title VII's limitations and celebrated its successes. It questioned the viability of further reform while reaffirming the importance of Title VII to the project of securing full equality for working women. Pessimism is the academic's luxury; the challenge lies in finding pathways for progress using the legal tools that we have and those we can hope to secure. In introducing the panel at the Symposium, I jested that we should call our program "Title VII: Fifty and Looks It." Reality, however, is far more complicated. Beauty is in the eye of the beholder.

CAREGIVER CONUNDRUM REDUX: THE ENTRENCHMENT OF STRUCTURAL NORMS

NICOLE BUONOCORE PORTER[†]

ABSTRACT

Scholars and feminists (and feminist scholars) have been debating ways to ameliorate the work-family conflict for several decades. For some of us writing in this area, it seems as if the debate is endless and ineradicable. Unfortunately, this Article does not end the debate with some brilliant solution. Instead, I attempt to explain why the "caregiver conundrum" is so unwieldy and unyielding. The reason, I argue, is because of the entrenchment of structural norms in the workplace. By structural norms, I am referring to employers' rules and practices regarding hours, shifts, schedules, attendance, leaves of absence, etc.—basically, when and where the work is performed. In this Article, I argue that employers are very reluctant to make modifications to the structural norms of their workplace and courts are loath to force them to do so. Because many individuals with disabilities ask for modifications to the structural norms pursuant to the Americans with Disabilities Act, I use this body of law to demonstrate the entrenchment of these norms. And because these norms are so entrenched, I explain how proposed solutions, both litigation- and legislation-focused, will ultimately fail. Instead of the many solutions that have been proposed thus far, the only way to truly solve the caregiver conundrum is to dismantle the entrenchment of the structural norms.

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† Professor of Law, University of Toledo College of Law. I would like to thank Professors Rachel Arnow-Richman, Nantiya Ruan, and Catherine Smith, as well as the Denver Law Review planning committee for inviting me to join this symposium.

INTRODUCTION

The debate regarding how to ameliorate work-family conflict (also known as caregiver discrimination, the "maternal wall,"[1] "family responsibilities discrimination,"[2] or my term, the "caregiver conundrum"[3]) has been raging for several decades, since at least the debate leading up to the passage of the Pregnancy Discrimination Act (PDA) in 1978.[4] Although not as old as the old-fashioned kind of sex discrimination (simply excluding women from workplaces),[5] the debate over eliminating caregiver discrimination is arguably more prevalent than discussion and debate about other types of sex discrimination under Title VII of the Civil Rights Act of 1964.[6]

Although (or maybe because) I have written several articles in this area,[7] I struggled with what more I, or anyone else, could say regarding this intractable problem. Always reform-oriented, I set out to determine

1. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 69–70 (2000).

2. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

3. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 356 (2010) [hereinafter Porter, *Why Care?*].

4. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012).

5. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 260 (2013) ("Initially, women . . . attacked the most obvious forms of discrimination at work such as sex-based job classifications or harassment"). Family responsibilities discrimination is often referred to as a second-generation discrimination theory. *Id.*

6. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 4 (2010) (stating that work-family conflict is a media obsession); Williams & Bornstein, *supra* note 2, at 172 (stating that there has been a 400% increase in family responsibilities cases filed in the last ten years as compared to the prior ten-year period).

7. Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW. U. L. REV. 1 (2011) [hereinafter Porter, *Embracing Caregiving*]; Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55 (2006); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777 (2010) [hereinafter Porter, *Synergistic Solutions*]; Porter, *Why Care?*, *supra* note 3.

whether I have missed or should revisit some compelling solution. I came up empty-handed. As I reflected on *why* I was so pessimistic—why I believed every solution would fail—I realized that the inevitable failure of each solution had one thing in common: The entrenchment of structural norms in the workplace.[8]

This Article will proceed in three parts. Part I will briefly describe the caregiver conundrum and how it manifests itself in the lives of working men and women. Part II will provide a summary of the various solutions that have been proposed over the years, along with the accompanying criticism of those proposals. Part III will discuss the entrenchment of the structural norms of the workplace, using jurisprudence under the Americans with Disabilities Act (ADA)[9] to demonstrate the bias against modifications to the structural norms. This Part will also explain why, in light of the entrenchment of these practices, many of the proposed reforms would be unsuccessful. Finally, this Part will briefly discuss the only type of reform that might be successful in ending the caregiver conundrum—attacking the structural norms directly.[10]

I. THE CAREGIVER CONUNDRUM

What is the caregiver conundrum? This is the term I use to describe caregiver discrimination or family responsibilities discrimination, as it is often called. I use the word "conundrum" to reflect the puzzle that is inherent in solving this problem. I define the term broadly to include all of the workplace norms, rules, and practices that make it difficult for working caregivers to successfully balance work and family.[11]

My focus has always been on what I refer to as "real"[12] workers—those who do not consistently meet their employers' expectations regarding the hours and schedules worked because of their caregiving responsibilities.[13] As other scholars have also noted, long hours and inflexible workplaces make it difficult for many caregivers to successfully balance work and family.[14] Of course, I also recognize that caregivers (both men and women) who *are* ideal workers still suffer from discrimination based on stereotypes that assume that caregivers are not competent or commit-

8. For an excellent discussion of the entrenchment of structural norms in the workplace, see CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE (2010).

9. 42 U.S.C. §§ 12101–12213 (2006).

10. *See also* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5 (2005).

11. Porter, *Synergistic Solutions*, *supra* note 7, at 777.

12. Porter, *Why Care?*, *supra* note 3, at 357.

13. For a detailed description of the difficulties of caregiving, see Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 380 (2001).

14. *See, e.g.*, Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 307 (2004).

ted. However, Title VII's sex discrimination provision adequately covers this type of discrimination through use of the stereotyping theory.[15]

The caregiver conundrum affects both women and men.[16] Because women still perform eighty percent of the child-care duties,[17] it is difficult for them to successfully balance work and family.[18] As stated by Michelle Travis, most workplaces are designed around the "full-time face-time norm" of long hours, unlimited overtime, and uninterrupted careers.[19] Thus, women's caregiving obligations affect their pay[20] and their opportunities for promotion.[21] Many women try to balance work and family by finding family-friendly workplace alternatives, although most of these workplaces lead to the marginalization of women's careers.[22]

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15. *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (discussing some successful cases brought by caregivers who are discriminated against on the job); Williams & Bornstein, *supra* note 2, at 174–81 (discussing the stereotyping cases).

16. Kaminer, *supra* note 14, at 317–18 (discussing the harm to men of the ideal worker model). Interestingly, one study found that 90% of Americans favor tax incentives for employers to help them provide flexible workplaces. *Id.* at 311.

17. Williams & Bornstein, *supra* note 2, at 174. Of course, statistics vary, although only slightly. Travis states that American women perform two-thirds of housework and eighty percent of all child-care. Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 299 (2003). Keith Cunningham-Parmeter states that women do eighty percent of the child-care and seventy percent of the household work. Cunningham-Parmeter, *supra* note 5, at 255.

18. *See, e.g.*, Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 22 (2009) (stating that 59% of caregivers have had difficulty balancing work and family and 57% of that number have had to take time off for caregiving).

19. Travis, *supra* note 10, at 10 (internal quotation marks omitted). Travis also argues that this norm has become not just descriptive of most workplaces but also normative—this is how good workplaces are designed. *Id.* A good example of this norm of hard work becoming entrenched is this quote from a senior manager reacting to a junior manager who reported a survey showing that employees wanted a more balanced work life:

> Don't *ever* bring up "balance" again! . . . Everyone in this company has to work hard. *We* work hard. *They* have to work hard. That's the way it is. Just because a few women are concerned about balance doesn't mean we change the rules. If they choose this career, they're going to have to pay for it in hours, like the rest of us.

Id. at 19.

20. Cunningham-Parmeter, *supra* note 5, at 255 (stating that mothers earn 60% of the wages of fathers); Suk, *supra* note 6, at 59 (stating that there is a larger pay gap between men and women in the United States than in other countries where women have better paid maternity benefits).

21. Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. REV. 447, 460–61 (2013); *see also* Kaminer, *supra* note 14, at 313 (stating that mothers make career sacrifices to satisfy their caregiving responsibilities and caregiving affects their pay); Kessler, *supra* note 13, at 385–86 (stating that women are more likely to work in part-time or "mommy-track[ed]" jobs).

22. For instance, Michelle Travis discusses how telecommuting, which is frequently lauded as a family-friendly workplace benefit, often ends up hurting women because employers use telecommuting to pay women less or move them to independent contractor status, which takes away their benefits. Travis, *supra* note 17, at 296–302. Telecommuting also does not ease women's burden at home, as they often end up doing more homework when telecommuting. *Id.* at 312–14. Meanwhile, men who telecommute do less work at home and more market work. *Id.* at 313–14.

Scholars have emphasized the importance and self-fulfillment of working.[23] Some women, however, end up opting out of the workplace completely because of the difficulty in balancing work and family. When women opt out of the workplace, the negative effect is not limited to women and their families, but it also affects employers and society as companies lose valuable employees and diverse leadership.[24] Even more, allowing women to combine caregiving and work benefits children.[25]

Men also suffer from the caregiver conundrum, although differently from women.[26] According to Keith Cunningham-Parmeter, one of the new voices in the literature discussing men as caregivers, masculinities theory requires three negative performances of working men: non-nurturance, non-dependence, and non-expression.[27] This means they must avoid care work; establish themselves as breadwinners;[28] and remain silent regarding work-family conflicts.[29] Men are often discouraged from taking leave by their employers.[30] Even when they try to get involved in caregiving work, women often act as gatekeepers, supervising men in their care of the house and children, which can make men less willing to want to be caregivers.[31] Cunningham-Parmeter states that fathers in dual-earner couples are more likely to report work-life conflict than mothers.[32] And when their work and family conflict, men are more likely to silently accept workplace discipline rather than violate the "male code" by talking about their caregiving obligations.[33] Although

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23. *See, e.g.*, Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's* The Autonomy Myth, 93 CALIF. L. REV. 1285, 1306–07 (2005); Kaminer, *supra* note 14, at 314–16 (discussing the mental and economic benefits to women working); Kessler, *supra* note 13, at 381–84 (discussing the benefits of wage work for women and stating that women need to work to achieve economic stability); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1916–18 (2000).

24. Katelyn Brack, Note, *American Work-Life Balance: Overcoming Family Responsibilities Discrimination in the Workplace*, 65 RUTGERS L. REV. 543, 545 (2013); Kaminer, *supra* note 14, at 322–23 (discussing the harm employers face from failing to provide flexible workplaces).

25. Maxine Eichner argues that allowing parents to successfully combine caregiving and work assures that children's needs are met but not fetishized. She points to the tendency of late for parents to feel like they must spend every minute with their children, leading kids "to fall victim to the 'over-appreciated child' syndrome," in which kids have difficulty functioning without constant attention. Eichner, *supra* note 23, at 1308–09; *see also* Kaminer, *supra* note 14, at 316–17.

26. Many scholars have written about men and caregiver discrimination. *See, e.g.*, Cunningham-Parmeter, *supra* note 5; Martin H. Malin, *Fathers & Parental Leave*, 72 TEX. L. REV. 1047 (1994); Martin H. Malin, *Fathers & Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25 (1998); Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men & Responsibility*, 4 U. ST. THOMAS L.J. 573 (2007).

27. Cunningham-Parmeter, *supra* note 5, at 275.

28. Cunningham-Parmeter discusses how difficult it is for men to actually meet this breadwinner goal. *Id.* at 279–80. Society expects men to be able to support their families but the family wage is just a myth. *Id.* at 279, 281. Despite working more hours than other countries (men work 47 hours per week on average and women work 35 hours per week), it is still difficult for men to be the primary breadwinners. *Id.*

29. *Id.* at 275.

30. *Id.* at 290; *see also* Kessler, *supra* note 13, at 420–21 (discussing the fact that men suffer from hostility when they seek parental leave).

31. Cunningham-Parmeter, *supra* note 5, at 277–78.

32. *Id.* at 283.

33. *Id.* at 284.

Cunningham-Parmeter recognizes that women experience caregiver bias at work more than men, those men who do engage in caregiving experience severe consequences.[34]

Most scholars (although certainly not all)[35] believe that our current laws are ill-equipped to ameliorate the caregiver conundrum.[36] No federal statute specifically protects caregivers, although some states and localities do.[37] As many have argued, Title VII's sex discrimination provision, the PDA, and the Family and Medical Leave Act (FMLA)[38] provide only limited protection to workers who experience the caregiver conundrum.[39] Certainly, other than some limited access to leave under the FMLA, caregivers are not entitled to workplace accommodations for their caregiving.[40]

For some, it might be necessary for me to respond to the question: Why should anyone care that women, and sometimes men, make decisions regarding having children, caregiving, or both that affect their success and options in the workplace? Although several articles could be written about this very topic,[41] I will address it here only briefly. Scholars have argued that society has a responsibility to help make the combination of working and caregiving possible, in part because everyone benefits from caregiving work.[42] Although scholars disagree regarding whether there is societal value to actually having children, most agree

34. *Id.* at 292–93. And when employers engage in discrimination against male caregivers, courts are less likely to see it as discriminatory. *Id.* at 296. Part of the reason for this is because the masculine norms tend to be invisible. *Id.* "Cloaked in a veneer of ordinariness, masculinity silently establishes social positions by convincing people that the dominant male form is the way things ought to be." *Id.* Courts are more willing to see discrimination against mothers as actionable because the stereotypes of either women as mothers but incompetent workers or competent workers but incompetent mothers are easy to see as discriminatory. *Id.* at 297–98.

35. *See infra* Part III.A.

36. Susan Bisom-Rapp, *Gauging Employer Reactions to the First Maternal Wall Suits: Commentary on Keynote Speaker Joan Williams's "Beyond the Glass Ceiling,"* 26 T. JEFFERSON L. REV. 27, 27 (2003) (stating that many law professors who wish to help men and women balance work and family are discouraged by the existing state of the law); Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80; Travis, *supra* note 10, at 5–6 (discussing the laws' inability to restructure the organizational structures of the workplace).

37. Locke, *supra* note 18, at 24–25, 29 (pointing to Alaska and Washington D.C. and 60 localities).

38. 29 U.S.C. §§ 2601–2654 (2012).

39. Kaminer, *supra* note 14, at 307 (stating that Title VII and the FMLA have failed to adequately protect working caregivers); Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80; *see also* Kessler, *supra* note 13, at 429.

40. Kessler, *supra* note 13, at 429; Porter, *Synergistic Solutions*, *supra* note 7, at 790–95; Porter, *Why Care?*, *supra* note 3, at 370–80.

41. I have addressed this very issue before. *See* Porter, *Why Care?*, *supra* note 3.

42. *See, e.g.*, Eichner, *supra* note 23, at 1309; Martha Albertson Fineman, *Contract & Care*, 76 CHI.-KENT L. REV. 1403, 1420 (2001); Kessler, *supra* note 12, at 445–47, 449 (discussing the debate regarding the autonomy over caregiving decisions, the autonomy myth, and the harm that comes from the autonomy myth); Porter, *Why Care?*, *supra* note 3, at 384–90; Williams & Segal, *supra* note 15, at 87–89.

that once that decision is made, taking good care of children is a responsibility, and one that benefits others.[43]

II. PLETHORA OF PROPOSED SOLUTIONS

Broadly speaking, scholars have proposed solutions that fall into three general categories: litigation-based solutions, legislation-based solutions, and solutions aimed at changing gender norms.[44] Many solutions encompass more than one category. As an example, scholars propose using legislation to help change gender norms. The most common example of this strategy is a proposed statute that would incentivize men to take more leave to care for children (either newborn babies or children who are ill or disabled), encouraging them to be more involved in their children's lives.[45] This Part will discuss the three types of proposals along with the most often-cited criticisms of each.

A. Litigation-Focused Solutions

The strongest proponent of using litigation as a solution to eradicating family responsibilities discrimination is Joan Williams. Williams's main argument (some might call it a mantra) is: "Designing workplace objectives around an ideal worker who has a man's body and men's traditional immunity from family caregiving discriminates against women. Eliminating that ideal is not 'accommodation'; it is the minimum requirement for gender equality."[46] Thus, she argues in favor of using a "discrimination model, linked with the business case" in order to eliminate family responsibilities discrimination.[47] Much of her scholarship focuses on addressing negative cases (and responding to those scholars who cite to negative cases), explaining why they were not litigated

43. Eichner, *supra* note 23, at 1303; Kaminer, *supra* note 14, at 319–22 (arguing that children should be viewed as a public good); Porter, *Why Care?*, *supra* note 3, at 388–90.

44. Others might choose to add in a fourth solution: getting the state to support caregiving directly. *See generally* Eichner, *supra* note 22. Maxine Eichner disagrees with Martha Fineman's proposals to have the state directly subsidize care work. Instead, she argues that the state should support caregiving in a way that would allow individuals to combine caregiving and market work. *Id.* at 1287. She argues that the state should support caregiving because it is a societal obligation to protect the most vulnerable. *Id.* She, for the most part, agrees with Fineman's focus on the fact that people are not autonomous—dependency is inevitable, and once that view is accepted, the minimalist approach of the state and employers doing nothing becomes indefensible. *Id.* at 1291–92. Eichner, however, argues in favor of getting employers to make changes rather than the state providing direct subsidies in part because if the state directly subsidizes caregiving, this will only help caregivers in the short run—those caregivers will ultimately suffer from having dropped out of the workforce. *Id.* at 1306. On the other side of the debate, Mary Anne Case argues that children should not be considered a public good. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1775, 1782 (2001). She also states that not all parents are good parents so not all parents deserve a subsidy. *Id.* at 1778.

45. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 297 (2007).

46. Williams & Segal, *supra* note 15, at 106.

47. *Id.* at 79 (internal quotation mark omitted). The idea behind using the "business case" is to point out to employers and courts that there are financial benefits to having family-friendly workplaces; thus, it is irrational for an employer to refuse to give employees family-friendly benefits. *Id.*

properly or did not have good facts.[48] For instance, she argues that the plaintiff in one case was not sympathetic because she would not work overtime after her baby was born.[49] Williams explains that another case failed because the plaintiff, whose termination was a product of her morning sickness, brought her claim under the PDA.[50] Williams points out that the PDA does not require employers to give more leeway to pregnant employees than it gives to other employees.[51]

Williams and her co-authors also discuss several positive cases, in which plaintiffs successfully sued under a disparate treatment theory. On my reading, almost all of the cases cited by Williams deal with plaintiffs being mistreated in the workplace because of employers' stereotypical assumptions regarding working mothers.[52] There were only two cases cited by Williams and her co-authors that did not involve ideal workers. The first case, *Walsh v. National Computer Systems, Inc.*,[53] involved a plaintiff who had to miss a significant amount of work because of her son's illnesses.[54] The plaintiff's boss threw a phone book at her when she informed him her son had an ear infection and demanded she find a new doctor.[55] In the second case, *Snodgrass v. Brown*,[56] a plaintiff was terminated due to too many absences.[57] Because the absences were caused by the employer's last-minute scheduling changes, and the plaintiff's subsequent inability to find childcare, she was able to survive summary judgment on her claim.[58] Other than these two cases, however, the other cases mentioned by Williams and her co-authors involve "ideal workers," employees who were assumed (erroneously) would not meet their employers' expectations because of their caregiving responsibilities.[59]

Scholars also argue that disparate impact cases can have some success.[60] Scholars point to three frequently cited cases: *Roberts v. U.S.*

48. Williams & Bornstein, *supra* note 2, at 182–85; Williams & Segal, *supra* note 15, at 102–10.

49. Williams & Segal, *supra* note 14, at 103–05 (discussing Chi v. Age Group, Ltd., No. 94 CIV. 5253 (AGS), 1996 WL 627580, at *1 (S.D.N.Y. Oct. 29, 1996)).

50. *Id.* at 105–06 (discussing Troupe v. May Dept. Stores, Inc., 20 F.3d 734 (7th Cir. 1994)).

51. *Id.*

52. *Id.* at 106–07.

53. No. 00-CV-82, slip op. at 2 (D. Minn. Aug. 27, 2002)).

54. *Id.* at 128 (citing *Nat'l Computer Sys.*, No. 00-CV-82, at 2).

55. *Id.* (citing oral comments by Jim Kaster, plaintiff Shirleen Walsh's attorney, at the New Glass Ceiling Conference, Washington College of Law, Washington, D.C. (Jan. 24, 2003) (transcript available from AM. U. J. OF GENDER SOC. POL'Y & L.)).

56. No. 89-1171-K, 1990 WL 198431 (D. Kan. Nov. 26, 1990).

57. *Id.* at *14.

58. *Id.* at *17.

59. *See* Williams & Segal, *supra* note 15, at 124–30.

60. Kessler, *supra* note 13, at 412; Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 581 (2002); Travis, *supra* note 17, at 288–89 (arguing that there is untapped potential in the disparate impact theory for eliminating workplace structures that discriminate against working caregivers); Williams & Bornstein, *supra* note 2, at 182–83; Williams & Segal, *supra* note 15, at 134.

Postmaster General,[61] in which a plaintiff successfully challenged a sick leave policy that could not be used for the illness of a family member;[62] *Abraham v. Graphic Arts International Union*,[63] in which a pregnant plaintiff successfully challenged a ten-day leave limit;[64] and *EEOC v. Warshawsky & Company*,[65] where a plaintiff successfully challenged a sick leave policy that did not allow leaves of absence until the employee had been working for a year.[66] In responding to the employer's business necessity defense, Williams argues that litigants can point to the business case that family-friendly policies actually save money by decreasing attrition.[67]

Michelle Travis is one of the main proponents of using the disparate impact theory to restructure workplace norms. She states that disparate impact theory has "great potential for addressing aspects of women's inequality that stem from workplace organizational norms that create, retrench, or magnify women's disproportionate conflicts between work and family."[68] Although Travis recognizes that many courts are not giving the disparate impact theory the transformative potential it could have,[69] some courts correctly recognize that the organizational structures of employers are "particular employment practices" subject to challenge under the disparate impact theory.[70] One benefit of disparate impact theory, according to Travis, is that the risk of special treatment stigma is less if the obligation to restructure workplace norms is based on the successful use of the disparate impact theory.[71] Travis notes that an accommodation mandate would only require an employer to make a change in schedule, hours, attendance, or overtime requirements for one particular employee who requested the accommodation, while the disparate impact theory would require the employer to eliminate the practice completely.[72]

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61. 947 F. Supp. 282 (E.D. Tex. 1996).

62. *Id.* at 287–89; Travis, *supra* note 17, at 357–58.

63. 660 F.2d 811 (D.C. Cir. 1981).

64. *Id.* at 819; Travis, *supra* note 17, at 356–57 (stating that this case was a positive case in which the court was willing to look beyond the act/omission distinction).

65. 768 F. Supp. 647 (N.D. Ill. 1991).

66. *Id.* at 647; Williams & Segal, *supra* note 15, at 135.

67. Williams & Segal, *supra* note 15, at 88–89 (stating that it costs $200,000–$500,000 to replace an attorney, and even replacing lower level employees is expensive—$1,000 to replace a convenience store clerk and $2,100 to replace a hotel industry employee); *see also* Travis, *supra* note 17, at 373. Of course, other scholars note the problems with the business necessity defense. *See, e.g.*, Smith, *supra* note 60, at 597. One problem is that courts frequently give too much weight to the short-term costs of family-friendly policies and workplaces, ignoring the long-term cost savings. Travis, *supra* note 17, at 363. *But see id.* at 362–63 (arguing that there is at least one case where, in dicta, the court held that courts should consider long-term benefits when looking at the business necessity defense).

68. Travis, *supra* note 10, at 37.

69. *Id.* at 39–46.

70. *Id.* at 39, 84–88 (discussing the positive disparate impact cases).

71. Travis, *supra* note 17, at 328–29.

72. *See id.* at 329–30; Travis, *supra* note 10, at 38.

Once the practice is eliminated, men and women—caregivers and non-caregivers—will all benefit.[73]

Williams acknowledges that litigation by itself cannot eliminate family responsibilities discrimination. Instead, a few successful cases can lead to social change.[74] She discusses law's expressive function and the influence of "rights talk," which allows women to stop blaming themselves for not being able to adequately balance work and family.[75] Furthermore, successful cases can positively influence key decision-makers, such as human resources personnel, in-house lawyers, and even some conservatives who believe in family values.[76] As Williams argues, the threat of litigation produces more social change than actual litigation, because employers often go beyond what the law requires.[77] As Williams summarizes: "The cases that are litigated will always be a small percentage of the potential cases—and they will tend to be the most egregious ones. Ultimately, the power of 'rights talk' stems less from the cases won than from the cases that never have to be fought."[78] The hope is that the threat of litigation and the business case for offering family-friendly benefits will motivate employers, who will therefore offer more effective family-responsive benefits.[79]

Of course, many scholars argue that litigation under our current legal regime is insufficient to make much of a dent in the caregiver conundrum, especially for those caregivers who are "real" workers—those whose caregiving obligations affect their ability to consistently meet their employers' workplace requirements such as strict schedules, long hours, mandatory overtime, face time requirements, stringent attendance policies, etc.[80] Williams is a little inconsistent here. At one point, she specifically states, "The first thing one needs in an employment discrim-

73. Travis, *supra* note 17, at 330; *see* Travis, *supra* note 10, at 89 (discussing the "benefits that flexible work arrangements can have on recruiting, retention, absenteeism, and productivity"). However, there are other scholars who point out that there are few plaintiffs who have achieved success using a disparate impact theory. *See, e.g.*, Smith, *supra* note 60, at 582.

74. *See* Williams & Segal, *supra* note 15, at 161 (stating that a couple of good cases can influence courts and attorneys); Bisom-Rapp, *supra* note 36, at 29.

75. Williams & Segal, *supra* note 15, at 113–14.

76. *Id.* at 120–22 (discussing "new institutionalism," which states that legal mandates can lead human resources personnel to go further than necessary in order to avoid liability).

77. Williams & Bornstein, *supra* note 2, at 186; Bisom-Rapp, *supra* note 36, at 30–31 (stating that employers, counseled by human resources management and in-house counsel, will develop compliance programs to eradicate discrimination to shield employers from liability).

78. Williams & Segal, *supra* note 15, at 121–22.

79. *Id.* at 161.

80. Porter, *Why Care?*, *supra* note 3, at 357–58 (describing "real" workers). Julie Suk also argues that litigation brought under an anti-stereotyping theory does not work for "real" women because any time caregiving detracts from work, the law allows the caregiver to be treated the same as if fantasy baseball detracts from one's work obligations. Suk, *supra* note 6, at 56. *See also* Kaminer, *supra* note 14, at 328 (stating that Title VII cannot be effective because it is limited to equal treatment and therefore cannot protect working caregivers who are not meeting the ideal worker norm); Kessler, *supra* note 13, at 407 (stating that Title VII only helps ideal workers but most women with children cannot succeed under this standard); Travis, *supra* note 10, at 7 (stating that scholars have moved away from anti-discrimination law for remedying caregiver discrimination).

ination suit is a 'good' plaintiff, i.e., someone who has done her job well . . . ."[81] After this statement, she devotes one paragraph to discussing how to litigate claims for those who do not conform to the ideal worker norm[82] and concludes by stating, "[I]t is clear that Title VII can be used to protect the rights of mothers who do not fit neatly into the ideal-worker category."[83] She refers to the lack of choices in the workplace as discrimination, but her discussion of the successful cases mostly involves ideal workers.[84]

Furthermore, even when successful, litigation is viewed as being too slow, too piecemeal,[85] too expensive, and too unpleasant for plaintiffs.[86] Travis argues that, although litigation helps in cases where employers stereotype women as not competent once they become mothers,[87] it is hard to allege intentional discrimination when complaining about the lack of family-friendly policies.[88]

B. Legislation-Focused Solutions

Proposals calling for additional legislation fall into two general categories: proposals for additional anti-discrimination protection based on one's status as a caregiver and proposals for affirmative mandates. Affirmative mandates include proposed amendments to the FMLA or proposals for an accommodation mandate similar to the accommodation mandate for religious practices under Title VII or the reasonable accommodation provision under the ADA.[89]

1. Adding Caregiver Status as a Protected Class

As discussed above, no federal law directly protects caregivers against discrimination. Only a couple of jurisdictions provide such pro-

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81. Williams & Segal, *supra* note 15, at 107.

82. *Id.* at 107–08 (stating that women who are not ideal workers can litigate these claims if they can prove that the employer treated them poorly after they requested or used flexible work arrangements that the employer does allow).

83. *Id.* at 108. She also states that she hopes that the influence of ideal worker cases will help the real worker cases. *Id.*

84. Specifically, she states that if plaintiffs have failed to perform important requirements of the job, their cases will likely fail. *Id.* at 141. *See also* Locke, *supra* note 18, at 31–32 (pointing out that the EEOC guidelines on caregiver discrimination make clear that only ideal workers are protected); Kaminer, *supra* note 14, at 329–30 (arguing that, despite Williams's statements to the contrary, most of the cases she cites involve ideal workers).

85. Brack, *supra* note 24, at 559.

86. Even those scholars who generally argue in favor of litigation recognize that litigation is not ideal. For instance, Michelle Travis recognizes that lawsuits are not the ideal mechanism for change in part because they are costly. Travis, *supra* note 17, at 320. She also argues that litigating using a sex discrimination theory under Title VII runs the risk of characterizing work-family balance as a women's issue, which risks further entrenching stereotypes of women as caregivers. *Id.*

87. *Id.* at 335–36.

88. *Id.* at 337; *see also* Porter, *Synergistic Solutions*, *supra* note 7, at 790–91; Porter, *Why Care?*, *supra* note 3, at 372.

89. Scholars also argue in favor of paid leave mandates and subsidized day care. *See, e.g.*, Porter, *Synergistic Solutions*, *supra* note 7, at 857; Eichner, *supra* note 23, at 1317.

tection: Alaska and Washington, D.C.[90] Scholars have discussed adding a protected classification to Title VII;[91] earlier proposals referred to "parental status" or "familial status," but more recent proposals are broader, referring to "caregiver status."[92]

Although Peggie Smith ultimately argued against adding parental status as a protected classification under Title VII, she was probably the earliest and most prominent scholar to discuss such a proposal in detail.[93] She discusses a statute proposed by President Clinton, entitled Ending Discrimination Against Parents Act (EDPA),[94] which would have prohibited discrimination against parents "based on the assumption that they cannot satisfy the requirements of a particular position."[95] Although Smith recognizes the benefits of such a law,[96] she argues that it only would cover ideal workers[97] and that the cause of most work-life conflict is the structural limitations of the workplace.[98] Many parents are real workers with real conflicts who cannot always meet the hour and attendance requirements of the workplace.[99] Smith states: "To effect purposeful change on behalf of individuals with parental obligations, workplace practices must be restructured to value parenting as a social good that requires affirmative support."[100]

Smith further argues:

> Although a parental-status-based[101] approach to discrimination stands to promote a gender-neutral understanding of child care, and in the process, to advance the interests of all workers with parental obliga-

90. ALASKA STAT. § 18.80.220(a)(1) (2013); D.C. Code § 2-1402.11(a)(1) (2013); *see also* Brack, *supra* note 24, at 554; Locke, *supra* note 17, at 29, 34–35 (mentioning that sixty localities also prohibit discrimination based on parental or familial status or caregiver status, including New York City).

91. Brack, *supra* note 24, at 562 (stating that family responsibilities discrimination should be recognized under federal law and that the obvious solution would be to amend Title VII to include discrimination based on all types of caregiving).

92. *See, e.g.*, Stephanie J. Eifler, *Choosing Not to Choose: A Legislative Solution for Working Adults Who Wish to Be Successful Employees and Successful Caregivers*, 60 DRAKE L. REV. 1205, 1226–28 (2012) (proposing adding caregiver status as a protected class and defining it broadly to include providing care for a variety of family members, including grandparents or grandchildren, in-laws, and siblings).

93. Smith, *supra* note 60.

94. S. 1907, 106th Cong. (1st Sess. 1999).

95. Smith, *supra* note 60, at 587.

96. Namely that it would help with the absence of male comparators; would help with intersectional claims, and would help with disparate impact claims which often fail because there are too few male caregivers to prove the requisite statistics. *Id.* at 589–90, 593–94.

97. *Id.* at 598.

98. *Id.* at 594–95 (stating that structural barriers cause more of the problems with work-life balance than stereotypes).

99. *Id.* at 595.

100. *Id.*

101. Scholars used to refer to "parenting" when discussing caregiving or work-life balance. Most scholars now are increasingly recognizing that caring for sick, disabled, or elderly spouses, partners, parents, and other adult family members also contributes to work-family conflict. *See* Williams & Bornstein, *supra* note 2, at 171.

> tions, such an approach remains wedded to a limited conception of equality, requiring only that employment decisions not reflect differences based on parenthood. Consequently, anti-discrimination legislation is satisfied so long as both women and men with parenting obligations are equally ill-treated.[102]

Smith also argues that protecting parents is not necessary because there is not much evidence that parents suffer from discrimination based on erroneous assumptions about their commitment to work.[103] To the extent they do, Smith believes that parents (specifically mothers) can bring cases under Title VII using a stereotyping theory.[104]

Since Smith's work, other scholars have revisited the issue of protecting parental status or caregiver status.[105] These scholars have argued that changes since Smith's article make protecting caregiver status more feasible and defensible.[106] The changes to which they refer are better research indicating that caregivers suffer from bias based on stereotypes and the U.S. Equal Employment Opportunity Commission's (EEOC) guidance regarding family responsibilities discrimination.[107] Even though Smith did not think that stereotypes were being used against mothers, the evidence now suggests otherwise.[108]

Scholars also argue that relying on sex discrimination under Title VII is problematic because it perpetuates the stereotype that caregiving is women's work.[109] Furthermore, stereotypes about mothers' competence and commitment also undermine the progress of laws allowing for accommodations for caregiving.[110]

Many of the authors proposing an anti-discrimination provision based on parenting or caregiver status recognize that anti-discrimination provisions are not enough without an accommodation mandate.[111] One

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102. Smith, *supra* note 60, at 572–73 (footnote omitted). The last sentence of the quoted passage is confusing. If a statute prohibited discrimination based on parental status, it would most certainly violate the law to treat both men and women with parenting obligations badly. An employer would be required to treat parents in the same way as they treat non-parents. Perhaps what Smith means in this passage is that an employer would not be required to *accommodate* parenting obligations. Thus, an employer could penalize both mothers and fathers if they do not meet the attendance requirements because of their parenting obligations. But an employer could not, under a provision prohibiting parental status discrimination, decide not to promote mothers or fathers because of a belief that their caregiving obligations will get in the way of their work.

103. *Id.* at 573.

104. *Id.* at 575.

105. *See, e.g.*, Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463 (2008).

106. *Id.* at 1465.

107. *Id.*

108. *Id.* at 1472–73.

109. *Id.* at 1468.

110. *Id.* at 1472–73. They also argue that if you prohibit parental status discrimination, this will make the law more supportive of workplace accommodations. *Id.* at 1480.

111. *See, e.g.*, Eifler, *supra* note 92, at 1221; Farrell & Guertin, *supra* note 105, at 1465–66, 1479 (stating that there is a strong case for family responsibilities legislation working in tandem with

commentator argues that an anti-discrimination mandate protecting parents is not sufficient because employers can continue to ignore caregiving and treat parents and non-parents alike.[112] I discuss the proposals for accommodation mandates next.

2. Accommodation Mandate and Other Affirmative Mandate Solutions

Over the years, scholars have proposed various affirmative mandate solutions either as a supplement to anti-discrimination provisions or as stand-alone provisions. The most prominent among these are proposals to expand the right to leaves of absence;[113] proposals for a process law;[114] proposals for daycare care or other subsidies to help working caregivers;[115] and proposals for an accommodation mandate, the latter of these I turn to now.

One of the earliest proponents[116] of an accommodation mandate was Peggie Smith. Smith argues in favor of using the religious accommodation mandate under Title VII rather than the reasonable accommodation provision under the ADA.[117] She argues that the religious accommodation mandate is superior to the disability accommodation mandate because religious accommodations are about keeping employees in the workplace,[118] and because religious accommodations involve deferring to

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accommodation laws); Locke, *supra* note 18, at 19; Elizabeth Roush, Note, *(Re)Entering the Workforce: An Historical Perspective on Family Responsibilities Discrimination and the Shortcomings of Law to Remedy It*, 31 WASH. U. J.L. & POL'Y 221, 248–52 (2009) (stating that an anti-discrimination provision is not enough without an accommodation mandate).

112. Locke, *supra* note 18, at 33.

113. *See, e.g.*, Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 329–31 (2014) [hereinafter Porter, *FMLA*]; Porter, *Synergistic Solutions*, *supra* note 7, at 836–40 (discussing other scholars' proposals for subsidized paid leave).

114. *See, e.g.*, Rachel Arnow-Richman, *Public Law & Private Process: Toward an Incentivized Organizational Justice Model of Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 27; Porter, *Synergistic Solutions*, *supra* note 7, at 804–06.

115. *See, e.g.*, Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561 (2005); Debbie Kaminer, *The Child Care Crisis & the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495, 513 (2007); Porter, *Synergistic Solutions*, *supra* note 7, at 840–44.

116. Certainly other scholars have argued in favor of forcing employers to accommodate caregiving without going into specifics regarding what such an accommodation mandate might look like. *See, e.g.*, Eichner, *supra* note 23, at 1292 (stating that caregiving is so important that it should be accommodated even if it means adding costs to employers).

117. Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445–46 (2001); *see also* Kaminer, *supra* note 14, at 333 (advocating for an accommodation mandate for caregiving patterned after the religious accommodation mandate under Title VII); Kessler, *supra* note 13, at 457–58 (stating that a religious accommodation mandate is superior to an accommodation mandate under the ADA because religion and caregiving have some aspect of choice rather than being purely biological, such as most disabilities).

118. Smith, *supra* note 117, at 1464–65. Smith contrasts the ADA, which she argues is more about bringing people into the workplace rather than keeping them there. *Id.* Although getting individuals with disabilities employed was a major goal of the ADA, most ADA cases involve issues surrounding keeping individuals with disabilities employed. *Id.* at 1464.

employee choice when values conflict with work.[119] Smith's proposal involves requiring employers to accommodate employees when those employees have a compelling parental obligation that conflicts with a work requirement.[120] Smith uses unemployment compensation cases to help define a "compelling parental obligation."[121] If an employee quits or is terminated because of an unavoidable caregiving schedule conflict, courts will still allow the employee to collect unemployment. These obligations are compelling because they would cause a reasonable person to quit their job.[122] Once an employee has met this obligation, the employer can attempt to prove undue hardship. Smith advocates for an intermediate standard between the highly deferential *de minimis* standard used in religious accommodation cases and the difficult-to-prove undue hardship standard under the ADA.[123]

Other scholars have advocated for an accommodation mandate similar to the one contained in the ADA, or a model that combines aspects of the ADA model with features of the religious accommodation model under Title VII.[124] Finally, some scholars have argued for a universal accommodation mandate.[125] The argument in support of a universal accommodation mandate is that the stigma associated with getting special treatment in the workplace will dissipate if everyone is entitled to

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119. *Id.* at 1464; *see also* Kaminer, *supra* note 14, at 334 (stating that the religious accommodation mandate makes sense because just as workplaces are built around those who are Christians, they are also built around those without caregiving responsibilities).

120. Smith, *supra* note 117, at 1465–66; *see also* Kaminer, *supra* note 14, at 340 (suggesting that employees must prove that they have a bona fide caregiving responsibility that conflicts with the workplace rules or norms).

121. Smith, *supra* note 117, at 1471–72

122. *Id.* at 1445. For instance, most employees would risk termination rather than leaving a young child home alone. But most employees would not risk termination to attend a field trip or a softball game. *Id.* at 1471. Smith would also require the employee to show a good faith attempt to resolve the conflict. *Id.* at 1472–73. Kaminer also argues in favor of a religious accommodation mandate, in part because many of the possible accommodations for religion are similar to the accommodations caregivers might need, such as schedule or shift changes. Kaminer, *supra* note 14, at 336–37.

123. Smith, *supra* note 117, at 1483.

124. *See, e.g.*, Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 634–35 (2004); Kaminer, *supra* note 14, at 333–358 (advocating for an accommodation mandate similar to the religious accommodation mandate but suggesting the more stringent undue hardship analysis under the ADA). Another commentator argues in favor of the adoption of a federal statute similar to a proposed New York City bill that would protect against discrimination based on caregiving status (defined broadly) and require that employers provide reasonable accommodations to caregivers unless the accommodation would cause an undue hardship, which is defined similar to the factors used in the ADA. Locke, *supra* note 18, at 34–36.

125. *See, e.g.*, Case, *supra* note 44, at 1768 (stating that if everyone was entitled to flexibility benefits, this would reduce the stigma parents suffer from getting special treatment); Nicole B. Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1135–38 (2014) [hereinafter Porter, *Mutual Marginalization*] (discussing but ultimately rejecting a universal accommodation mandate as being impractical); Michael Stein, Anita Silvers, Bradley A. Areheart & Leslie P. Francis, *Accommodating Every Body*, 82 U. CHI. L. REV. 689 (2014) (advocating for a universal accommodation mandate).

the special treatment (which, of course, means that the treatment is not special at all).[126]

There have been many critics of the accommodation model,[127] most prominently Joan Williams, who states: "You can't solve an institutional problem with an individual accommodation."[128] Williams argues that a religious accommodation model will fail because of a narrow interpretation of the accommodation mandate under Title VII's religious accommodation provisions.[129] She also argues that the ADA has been read very narrowly.[130] Williams states that because there are an infinite variety of disabilities, an individual accommodation is the best we can do for those with disabilities, but

> [i]n the work-family arena, there is not a dazzling array but a dyad. The question is whether workplaces will continue to be designed around the bodies and life patterns of men, with "accommodations" offered to women, or whether workplace norms will be redesigned to take into account the reproductive biology and social roles of women and family caregivers, as well.[131]

Thus, we do not need accommodations, according to Williams—we only need equality.[132]

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126. *See* sources cited *supra* note 124.

127. *See, e.g.*, Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX J. WOMEN & L. 345, 362–67 (2003); Befort, *supra* note 124, at 618, 624. There are also scholars who are skeptical about the success of an ADA-like accommodation model because the ADA itself has experienced a backlash in the courts. *See* Porter, *Synergistic Solutions*, *supra* note 7, at 802–03 & nn.165–68.

128. Williams & Segal, *supra* note 15, at 82 (quoting ANNE WEISBERG, CATALYST, WOMEN IN LAW: MAKING THE CASE 18 (2011)).

129. *Id.* at 84. Although the one thing that Williams does not acknowledge or explore is that it is commonly believed that the reason that courts narrowly construed the accommodation mandate under the religious accommodation provisions was because of First Amendment concerns, which are not present in the caregiving context. Mary Anne Case also discusses the narrow construction given to the religious accommodation mandate under Title VII. Case, *supra* note 44, at 1769.

130. Williams & Segal, *supra* note 15, at 84. This was true at the time Williams published this piece, in 2003. But the ADA was amended in 2008 and dramatically increased the coverage of the statute. Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 541 n.74 (2013) [hereinafter Porter, Martin*izing*].

131. Williams & Segal, *supra* note 15, at 84–85. I have always found this statement by Williams frustrating. The ways in which caregivers balance work and family are highly variable and highly individual depending on a variety of factors, including the job, the age and health of the children, the marital status and presence or absence of other family members, and the daycare/school situation. Some caregivers need more lenient attendance policies to account for things like sick children and routine doctor's appointments; some need flexible schedules; some need a straight shift rather than a rotating shift; and, if you include pregnant women, some may need many of the same physical modifications of the job that individuals with disabilities need; *see also* Kaminer, *supra* note 14, at 337 (arguing that caregiving needs vary greatly).

132. Williams & Segal, *supra* note 15, at 85. Other authors argue that the problem with an accommodation mandate is that it assumes all women need accommodations when many do not and thus it perpetuates the idea that women are in need of special treatment. Farrell & Guertin, *supra* note 105, at 1478.

Michelle Travis also argues that litigation is better than an accommodation mandate, because special legislation to benefit caregivers runs the risk of essentializing women and makes it too easy to accept gender norms of women as caregivers.[133] Although she recognizes the benefit to an accommodation mandate,[134] she argues that the problem with it is that most people do not see an accommodation as a form of equal opportunity; instead, they see it as a form of affirmative action.[135] If employers were forced to accommodate caregivers, this would likely cause resentment by other employees, and might cause employers to be more reluctant to hire and promote women—who are most often the caregivers.[136]

C. Changing Gender Norms

Many scholars argue that for women to be equal, either men must assume equal caregiving responsibility or institutions must be adjusted to accommodate caregiving.[137] In recent years, several scholars have argued that it is not only employers that cause the problem working caregivers face.[138] According to these scholars, the problem lies with the division of labor between men and women at home.[139] In other words, women are only disadvantaged in the workplace because they are stuck doing the vast majority of caregiving in the home.[140] If men picked up some of the workload at home, women would be able to be more successful employees.[141] A few scholars believe it is unfair to ask employers or the state to

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133. Travis, *supra* note 17, at 322–23.

134. *Id.* at 324–25 ("In theory, a gender-neutral caregiving accommodation duty has the potential to ameliorate the work/family conflicts felt disproportionately by women, without essentializing either women's or men's roles with regard to paid or unpaid work.").

135. *Id.* at 326 (pointing to the fact that the ADA is less effective because it is seen as a social welfare statute rather than an anti-discrimination statute).

136. *Id.* at 327; Bisom-Rapp, *supra* note 36, at 28; Case, *supra* note 44, at 1761 (stating that if we force employers to provide additional benefits to women with children, they will simply hire fewer women); *see also* Porter, *Mutual Marginalization*, *supra* note 125. Mary Anne Case also discusses the potential backlash if caregivers are given special benefits because employers often make other employees pick up the slack without paying them any more. Case, *supra* note 44, at 1757.

137. Eichner, *supra* note 23, at 1289.

138. Case, *supra* note 44, at 1754–56 (questioning whether employers should be responsible for ameliorating work-family conflict); Selmi, *supra* note 26, at 577.

139. Case, *supra* note 44, at 1756 (stating that resistance from men who do not want to do their fair share of the work at home is part of the problem and the reason why women have trouble balancing work and family); Eichner, *supra* note 23, at 1295 (stating that many scholars believe that getting men to do more would change things for women and would eliminate the leisure gap between men and women).

140. Cunningham-Parmeter, *supra* note 5, at 255 ("Women will not attain full equality at work until men do more at home."); *see* Case, *supra* note 44, at 1785–86 (stating that fathers should be forced to kick in before everyone else is asked and that fathers should not be free-riding—men's resistance to doing more work at home is not a good reason to put the burden on employers).

141. Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 433 (2004) ("Indeed, the assumed result of work/family balance is that it would help achieve equality: families would be treated equally, caregivers would be supported equally, and children and family members would receive necessary and important care equally.").

assist caregivers when men are not being asked to do their fair share.[142] The rationale of these scholars is that when employers give more benefits to caregivers, either leaves of absence or flexible work schedules, employers will often make other employees pick up the slack, and often those employees are childless women.[143]

Of course, stating that men should do more at home does not and cannot automatically lead to men doing more at home.[144] It is difficult to regulate how much childcare and housework men do.[145] Thus, scholars have proposed legislation aimed at shifting the gender norms. For instance, several scholars have proposed incentivizing men to take leave so that they can help more at home.[146] It is also hoped that, if men spend more time on leave caring for children, employers will stop believing that women cost more to employ because of more frequent leaves of absence.[147]

By almost all accounts, this has proven to be an unsuccessful strategy. Swedish law uses this strategy by reserving some leave only for men. Yet men often do not take the full amount of leave to which they are

142. Case, *supra* note 44, at 1756 (arguing that we should not shift the burden to employers, when men are to blame); Dowd, *supra* note 141, at 442 (stating that many agree that men should play an equal or at least a stronger part in children's lives); Eichner, *supra* note 23, at 1296 (pointing to Mary Anne Case as an example of a scholar who argues in favor of getting men to do more and against requiring employers to accommodate caregiving). Eichner points to some scholars, Mary Anne Case and Katherine Franke, who argue that feminists should stop assuming that motherhood is natural for all women and should be promoting alternative paths for women. Eichner, *supra* note 23, at 1297. These feminists argue that we should stop seeing procreation as a biological imperative and instead see it as a cultural preference. *Id.* at 1298. I agree with some of their argument but once someone has made a decision to have children, caring for them well is community enhancing. *But see id.*; Porter, *Why Care?*, *supra* note 3, at 389. Moreover, I agree with Eichner that if the goal is to dissuade women from having children, the likely result is "dismal failure: if having women bear large costs in terms of economic and social inequality would deter them from having children, humanity would already be threatened with extinction." Eichner, *supra* note 22, at 1299.

143. Case, *supra* note 44, at 1757–58.

144. *See, e.g.*, Cunningham-Parmeter, *supra* note 5, at 254 (stating that the goal of getting men to do more work at home has not been realized); Travis, *supra* note 17, at 312.

145. Eichner, *supra* note 23, at 1296 (stating that proposals to get men to do more work at home fail on a practical level); Cunningham-Parmeter, *supra* note 5, at 256 (stating that men "tal[k] the talk" regarding wanting to spend more time caregiving but do not actually do more work); Case, *supra* note 44, at 1761 (stating that men do not take more leave not because of feared stigma but because they can get women to do it). Case also argues that when men do help out at home, they tend to do just the fun tasks rather than the menial tasks. *Id.* at 1761–62. *But see* Cunningham-Parmeter, *supra* note 5, at 283–84 (describing the stigma men face when they take on caregiving roles).

146. Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace*, 9 U. PA. J. LAB. & EMP. L. 293, 296 (2007); Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 434 (2012); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 61 (2004); Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 271 (2003); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 410–11 (1999); Michelle A. Travis, *The Future of Work-Family Policy: Is "Choice" the Right Choice? Review of Women and Employment: Changing Lives and New Challenges*, 13 EMP. RTS. & EMP. POL'Y J. 385, 419 (2009).

147. *See* Suk, *supra* note 6 (stating that Sweden has attempted this approach).

entitled.[148] There are a couple of possible explanations for this result. First and primarily, men and women are socialized to believe that caregiving is women's work. Thus, taking any significant time off work when a new baby is born or when a child is sick feels like a gender norm violation for many men. Men also might believe (again, because of the way they have been socialized) that they are not competent at caring for children, especially babies.[149] Finally, lessons from masculinities theory teach us that men suffer workplace penalties when they engage in gender non-conforming behavior such as caring for their children.[150]

Moreover, some scholars believe that even if men did more work at home, this would not necessarily make things better, because we still live in a society that structures work around employees without any dependency obligations.[151] In other words, even if men did more work at home, as long as employers continue to devalue caregiving work, those who perform it will still suffer in the workplace.[152] There is also an argument to be made that focusing on changing gender norms in the home ignores all of the single mothers running households, many of whom are minorities.[153]

III. THE ENTRENCHMENT OF STRUCTURAL NORMS

In this Part, I will argue that all of the above-proposed solutions have been and will continue to be unsuccessful because of the entrenchment of employers' structural norms. I will use ADA jurisprudence to demonstrate that employers are reluctant to give employees with disabilities modifications to the structural norms of the workplace, even though those employers are often willing to accommodate employees with disabilities in other ways. I then argue that, because of this entrenchment, many of the proposals for ending the caregiver conundrum will fail. Finally, I propose that the only way to alleviate the problem is to attack the entrenchment of structural norms directly.

148. *Id.* at 64. Even if men take leave immediately after the baby is born, when the leave is incentivized, this does not lead these men to continue to do more caregiving as the child ages. *Id.* at 63–65. Although Suk states that the Sweden approach to incentivize men into taking more leave has not been successful at eradicating gender norms, Sweden does have higher rates of female labor participation and a smaller pay gap between men and women. *Id.* at 63.

149. In my opinion, it is easy to feel insecure about parenting newborn babies, especially if the baby is the parents' first.

150. *See generally* Cunningham-Parmeter, *supra* note 5.

151. Eichner, *supra* note 23, at 1296.

152. *Id.* at 1296–97. However, I question whether it would be possible for employers to penalize all employees with children if both men and women took on equal caregiving responsibilities.

153. Kessler, *supra* note 13, at 421.

A. The ADA's Example of the Entrenchment of Structural Norms

This subpart will provide a summary of cases under the ADA that illuminate the entrenchment of the structural norms of the workplace.[154] The ADA requires employers to provide reasonable accommodations to individuals with disabilities as long as those accommodations would allow the employee to perform the essential functions of the job.[155] Even though the ADA contemplates employers providing variations from the regular hour and shift norms of the workplace,[156] many employers refuse to do so, and many courts affirm employers' refusal by granting those employers' motions for summary judgment.[157] Most courts do this by stating that the structural norms of the workplace (the when and where the work is performed) are essential job functions.[158] Once a job function is deemed essential, an employer does not have to provide a reasonable accommodation that would allow the elimination of that job function.[159]

One structural norm, rotating shifts, is frequently litigated. Employees with various disabilities sometimes request a waiver from the requirement of working rotating shifts, arguing that a straight shift is required for managing the disability. For instance, in *Bogner v. Wackenhut Corp.*,[160] the plaintiff, who had epilepsy and suffered from occasional seizures, asked to work only the day shift, as his doctor advised that it would limit the recurrence of his seizures.[161] The court held that rotating shifts were an essential function of the job, and therefore it was unreasonable to allow the plaintiff to avoid working rotating shifts as an accommodation.[162]

Similarly, in *Kallail v. Alliant Energy Corporate Services*,[163] the plaintiff, whose job required rotating shifts, had Type I diabetes and related complications.[164] Because of the difficulties associated with managing her diabetes, the doctor advised, and the plaintiff requested, to work a

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154. *See also* ALBISTON, *supra* note 8, at 9 ("Despite th[e] accommodation mandate, . . . ADA claimants have had little success obtaining changes to the schedule of work to allow for absences because of illness or medical treatment, even though schedule adjustments are far less expensive than changes to physical structures.").

155. *See generally* Travis, *supra* note 10, at 22 (discussing the reasonable accommodation mandate under the ADA and the importance of defining the essential job functions).

156. 42 U.S.C. § 12112(b)(5)(A) (2012) (defining discrimination to include not making reasonable accommodations to the known disabilities of employees); *id.* § 12111(9) (defining reasonable accommodations to include "part-time or modified work schedules").

157. Travis, *supra* note 10, at 47–49 (stating that courts are ignoring the reasonable accommodation mandate of the ADA when they define the structural norms of the workplace to be "essential job functions" and therefore immune to challenge); *see also id.* at 21 (stating that employers have been and will likely continue to be resistant to voluntarily restructuring the workplace despite affirmative mandates to the contrary).

158. *Id.* at 23–24.

159. *Id.* at 22–23.

160. No. 05-CV-6171, 2008 WL 84590 (W.D.N.Y. Jan. 7, 2008).

161. *Id.* at *1.

162. *Id.* at *6.

163. 691 F.3d 925 (8th Cir. 2012).

164. *Id.* at 927–28.

straight day shift.[165] The court accepted the employer's argument that working rotating shifts was an essential function of the job, thereby denying the plaintiff a remedy.[166]

In *Dicksey v. New Hanover County Sheriff's Department*,[167] the plaintiff was a deputy sheriff and detention officer who suffered from a seizure disorder.[168] When he was transferred to a job that worked rotating shifts, his doctor advised that he would be better able to control his seizure disorder if he worked a straight shift.[169] The day after the plaintiff requested a straight shift as an accommodation for his disability, he was terminated.[170] The court held that the employer should not have to reallocate essential functions of the job (working a rotating shift) or create a new position (a straight day-shift position).[171]

Finally, in *Rehrs v. Iams Co.*,[172] the plaintiff, who suffered from Type I diabetes, began having trouble managing his diabetes when his company implemented a rotating-shift schedule for all warehouse technicians.[173] He suffered a heart attack and went on leave.[174] When he was ready to return to work, his doctor submitted a letter requesting that the plaintiff be placed on a fixed day-shift schedule because his diabetes had become difficult to control.[175] He was allowed to work this schedule until the employer learned that this would be a permanent schedule change, at which point he was put on short-term disability leave.[176] The court found that the rotating shift was an essential function of the job and that allowing the plaintiff to work a straight day shift would have placed a "heavier or unfavorable burden on other technicians."[177] I was unable to find a case where the court required the employer to allow a disabled plaintiff to obtain a waiver from a rotating shift requirement.[178]

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165. *Id.* at 928.
166. *Id.* at 931, 933.
167. 522 F. Supp. 2d 742 (E.D.N.C. 2007).
168. *Id.* at 744–45.
169. *Id.* at 745.
170. *Id.*
171. *Id.* at 748–49.
172. 486 F.3d 353 (8th Cir. 2007).
173. *Id.* at 354–55. For the first two years of his employment, he worked a fixed schedule from 4 p.m. to midnight. It was only after January of 2000 when Proctor & Gamble acquired Iams that it began the rotating shift schedule, which consisted of two daily twelve-hour shifts. *Id.* at 354.
174. *Id.* at 355.
175. *Id.* at 355.
176. *Id.* Interestingly, shortly after this time, Proctor & Gamble outsourced the operation of the Aurora facility to Excel, which operates the facility using a straight-shift schedule. *Id.*
177. *Id.* at 357.
178. For other cases on this issue and other structural norm issues, see Nicole B. Porter, *The New ADA Backlash*, 82 TENN. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399724##.

In addition, some employees with disabilities ask for accommodations regarding the number of hours required.[179] For instance, in *Meinen v. Godfrey Brake Service & Supply, Inc.*,[180] after the plaintiff was hospitalized and subsequently diagnosed with multiple sclerosis,[181] the company created two part-time positions to cover the department where the plaintiff worked and retained a position for the plaintiff when he could return to work.[182] When the plaintiff returned to work, he could not work more than four hours per day.[183] The employer eventually terminated the plaintiff.[184] The court held that creation of a part-time position is not a reasonable accommodation.[185]

The court in *White v. Standard Insurance Co.*,[186] held that full-time employment is an essential function of the job, and therefore the plaintiff, whose back pain limited her ability to work to four hours per day or less, was not qualified.[187] The court relied on the employer's evidence that it had never employed someone in the plaintiff's position on a part-time basis and that the employer's written job description stated that the position was full time.[188]

Working at home is another frequently requested accommodation for individuals with disabilities and one that working caregivers might also need. In the disability field, the majority rule is that working from home is not a reasonable accommodation.[189] As stated in the well-known case of *Vande Zande v. Wisconsin Department of Administration*[190]:

> Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not re-

179. Of course, variation from the working hours is also a modification that working caregivers would need. For a discussion of ADA cases involving hours worked, see Travis, *supra* note 10, at 24–28.

180. No. CIV. 10–5077–JLV, 2012 WL 1038676 (D.S.D. Mar. 26, 2012), *report and recommendation adopted in part, rejected in part by* Meinen v. Godfrey Brake Service & Supply, Inc., No. CIV. 10–5077–JLV, 2012 WL 4364669 (D.S.D. Sept. 24, 2012).

181. *Id.* at *1.

182. *Id.* at *2.

183. *Id.* at *7.

184. *Id.* at *3.

185. *Id.* at *10. I find it interesting (and somewhat infuriating) that even though the ADA lists "part-time or modified work schedules" as possible reasonable accommodations, courts easily ignore this by stating that the accommodation requested is not a modification to the current position, allowing the employee to reduce his hours, but rather is the creation of an entirely new part-time position.

186. 529 F. App'x 547 (6th Cir. 2013).

187. *Id.* at 549–50.

188. *Id.* at 550.

189. Porter, Martin*izing*, *supra* note 130, at 549–51 (gathering cases regarding working from home); *see also* Travis, *supra* note 10, at 29–31 (stating that most courts are following the rule in *Vande Zande* that working from home is not a reasonable accommodation).

190. 44 F.3d 538 (7th Cir. 1995).

> quired to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.[191]

Attendance policies and leaves of absence policies are also considered structural norms of the workplace. In several cases, excessive absences have meant that an employee is not qualified to perform the essential functions of the job, and courts have often held that requests for leaves of absence are unreasonable accommodations.[192]

Courts have held that a business does not have "to endure erratic, unreliable attendance by its employees," even when that conduct is due to an alleged disability.[193] In *Brown v. Honda of America*,[194] the defendant alleged that the plaintiff's "inability to reliably attend work render[ed] her unable to perform the essential functions of her job" in the employer's factory.[195] Similarly, in *Lewis v. New York City Police Department*,[196] the court found that the plaintiff's regular absences, missing a total of 207 days of work in seventeen months, established that she was not a qualified individual.[197]

In another attendance case, *Basden v. Professional Transportation, Inc.*,[198] the Seventh Circuit held that the plaintiff was not qualified when she violated the employer's very strict attendance policy, which only allowed eight absences in a year and did not differentiate between absences for medical and other reasons.[199] Because the plaintiff had been employed for less than one year, she was not entitled to FMLA leave.[200] The court held that because "[a]n employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance," her inability to come to work regularly meant that she was not able to perform the essential functions of the job and was therefore not a qualified individual.[201] The court held that even a thirty-day leave of absence to allow her to get diagnosed and

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191. *Id.* at 544.

192. *See, e.g.*, Robert v. Board of Cnty. Comm'rs of Brown Cnty., 691 F.3d 1211, 1218–19 (10th Cir. 2012); Zimmerman v. Gruma Corp., No. 3:11–CV–01990–L, 2013 WL 3154118, at *13, *15 (N.D. Tex. June 21, 2013); Fuentes v. Krypton Solutions, LLC, No. 4:11cv581, 2013 WL 1391113, at *4 (E.D. Tex. Apr. 4, 2013) (stating that excessive absences makes him unqualified and that an indefinite leave of absence is not a reasonable accommodation); EEOC v. Ford Motor Co., No. 11–13742, 2012 WL 3945540, at *5 (E.D. Mich. Sept. 10, 2012) (holding that plaintiff is not qualified because of excessive absences and working from home is not a reasonable accommodation).

193. *Brown v. Honda of Am.*, No. 2:10–cv–459, 2012 WL 4061795, at *5 (S.D. Ohio Sept. 14, 2012).

194. *Id.*

195. *Id.* at *4.

196. 908 F. Supp. 2d 313 (E.D.N.Y. 2012).

197. *Id.* at 328.

198. 714 F.3d 1034 (7th Cir. 2013).

199. *Id.* at 1036–37.

200. *Id.* at 1039.

201. *Id.* at 1037.

begin treatment for multiple sclerosis was an unreasonable accommodation.[202]

These cases are just a small sample of the cases that demonstrate how difficult it is for individuals with disabilities to obtain modifications to the structural norms of the workplace.[203] Because these structural norms are so intractable, I next argue that this entrenchment will lead to the failure of many of the proposals to solve the caregiver conundrum.

B. The Effect of the Entrenchment of Structural Norms on Proposals to End the Caregiver Conundrum

1. The Failure of Litigation-Focused Proposals

It is easy to see why the entrenchment of structural norms leads to the futility of sex discrimination claims brought under a disparate treatment theory.[204] Disparate treatment theory works well in stereotyping cases where the plaintiff is performing as an ideal worker but the employer erroneously believes that the plaintiff lacks commitment or competence.[205] But in many cases, where the plaintiff is a real worker rather than an ideal worker, employers can successfully use the entrenchment of structural norms to defeat disparate treatment claims.[206] Because disparate treatment theory only requires that an employer treat employees the same when they are similarly situated, if a caregiver cannot meet a stringent attendance policy or cannot work overtime as the job requires (as just a couple of examples of entrenched structural norms), she is not going to be seen as similarly situated to her male counterparts.[207]

Although many scholars (including myself) have argued that disparate impact theory has the potential to dismantle the structural norms of the workplace,[208] others have expressed skepticism about disparate

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202. *Id.* at 1038–39; *see also* Travis, *supra* note 10, at 34–36 (discussing cases where regular attendance is held to be an essential job function and therefore reasonable accommodations are not required).

203. For a fascinating discussion of the history behind our country's time norms, see generally ALBISTON, *supra* note 8. *But see* Travis, *supra* note 10, at 68–73 (discussing ADA cases where the courts correctly hold that the structural norms are not essential functions and require employers to defend their structural norms using an undue hardship analysis).

204. *See, e.g.*, Bisom-Rapp, *supra* note 36, at 28 (stating that workplace norms are "too entrenched to be dislodged through litigation").

205. *See generally* Williams & Bornstein, *supra* note 2; Williams & Segal, *supra* note 15.

206. Porter, *Why Care?*, *supra* note 3, at 372; Smith, *supra* note 55, at 598. Even Williams, who is in favor of litigation-focused solutions, recognizes that employees who are not performing up to snuff—i.e., not ideal workers—are not good candidates for family responsibilities discrimination (FRD) litigation. Williams & Segal, *supra* note 15, at 107.

207. Suk, *supra* note 6, at 57 (stating that family responsibilities discrimination only works under a sameness theory); Kaminer, *supra* note 14, at 328; Porter, *Synergistic Solutions*, *supra* note 7, at 791; Porter, *Why Care?*, *supra* note 3, at 370–71.

208. Porter, *Synergistic Solutions*, *supra* note 7, at 806–07; Travis, *supra* note 17, at 341 (stating that disparate impact is well-suited to address inequality because employers have to eliminate the offending practice if it is found to cause a disparate impact); Travis, *supra* note 10, at 77–78.

impact's promise.[209] The primary problem[210] is the employer's business necessity defense.[211] Even when a plaintiff can prove that a practice has a statistically greater disadvantage for women than men because of women's caregiving roles, the employer has the opportunity to prove that the practice is job-related and consistent with business necessity.[212] Assume that a single mother is fired because she cannot work rotating shifts due to her caregiving responsibilities. Even if she can demonstrate that the rotating shift requirement has a disproportionate effect on women over men,[213] the employer will then be given the opportunity to defend the practice. As we saw in the discussion above regarding cases under the ADA, courts have consistently held that rotating shifts are an essential function of the job, and therefore employers are not required to provide reasonable accommodations that would eliminate an essential function.[214] There is no reason to think that plaintiffs would fare any better under a business necessity analysis. If courts hold that rotating shifts are an essential function of the job, they are just as likely to hold that rotating shifts are job-related and consistent with business necessity.[215]

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209. Smith, *supra* note 117, at 1458; Smith, *supra* note 60, at 582–85 (discussing the problems with disparate impact theory).

210. To be clear, there are certainly other problems with using disparate impact theory to challenge workplace practices that make it difficult for caregivers to successfully balance work and family. Travis discusses many of the primary problems. The first is the difficulty in demonstrating that a "particular employment practice" caused the disparate impact. Travis, *supra* note 17, at 348. Employers often try to defend disparate impact claims by arguing that certain decisions are not "practices" or are too complex and multi-faceted to be a "particular employment practice." *Id.* at 342–43 (internal quotation marks omitted); Kaminer, *supra* note 14, at 330. As stated by Laura Kessler, "[w]hile there are many identifiable, affirmative employer practices and policies that serve to disadvantage women in the workplace, they are so entrenched, so accepted as the norm, that they are virtually invisible." Kessler, *supra* note 13, at 413. Travis also notes the difficulty in proving the requisite statistics if the court requires a comparison to male employees. Travis, *supra* note 17, at 346; *see also* Kaminer, *supra* note 14, at 331; Smith, *supra* note 60, at 582–83. Travis also notes that some courts make it difficult for plaintiffs to prove causation, because they often blame the disparate impact on choices made by women. Travis, *supra* note 17, at 349. Travis responds that as long as women can prove that they do more care work, that should be the end of the inquiry, even if the reason they do more care work is based on gender norms in their families. *Id.* at 350. She makes an interesting and apt comparison to *Griggs v. Dukes Power Co.*, where the plaintiffs only had to prove that fewer black employees had high school diplomas than white employees. *Id.* (discussing 401 U.S. 424 (1971)). Another problem with disparate impact cases is that sometimes courts use the act/omission distinction, claiming that the lack of a leave policy, for example, cannot be a particular employment practice that causes a disparate impact. *Id.* at 355; *see also* Dormeyer v. Comerica Bank–Illinois, 223 F.3d 579, 583–84 (7th Cir. 2000) (holding that the lack of a leave policy cannot be the basis of a disparate impact claim).

211. *See, e.g.*, Travis, *supra* note 17, at 362–63 (stating that courts give too much weight to short-term cost savings); Kessler, *supra* note 13, at 416–17. *But see* Williams & Segal, *supra* note 15, at 79 (stating that the business case for family-friendly benefits helps challenge the employer's business necessity defense); Kaminer, *supra* note 14, at 331–32.

212. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

213. She would also have to demonstrate that the rotating shift is a "particular employment practice," rather than just part of the job, which, as described in the note above is difficult to do. *See supra* note 210.

214. *See supra* Part III.A.

215. *See* Travis, *supra* note 10, at 36–38 (stating that the disparate impact analysis is analogous with the essential job function analysis under the ADA). Other scholars agree that disparate impact is unlikely to be successful. For instance, Susan Bisom-Rapp is skeptical that litigation can change the

I am compelled to respond to statements made by Joan Williams, who is arguably the strongest proponent of using litigation to induce social change. Williams criticizes those who argue that Title VII is an empty remedy. Williams questions whether scholars are being useful when they suggest more expansive reform, such as some of the solutions discussed above.[216] She states: "While scholarship and free inquiry should flourish, having feminists devote their energies to the excavation of case law that will be used to defeat women's claims in court seems an odd role for feminist jurisprudence."[217] I have two responses to this statement. First, it is not odd for feminists to debate and disagree about the best way to achieve equality, justice, or whatever goal feminists might have. This debate has been ongoing for years. The debate surrounding the *Cal-Fed* case[218] is a perfect example. Feminists vehemently and very publicly disagreed about whether a California statute, requiring employers to give women pregnancy leave without requiring equal leave for other illnesses or injuries, was preempted by the Pregnancy Discrimination Act.[219]

Second, and more importantly, I find such a statement by Williams to be akin to saying that scholars must agree with her or not discuss the subject at all. While some scholars do advocate for litigation as a way to ameliorate work-family conflict,[220] certainly plenty of prominent scholars believe that there is more than one way to solve the problem.[221] And

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structural norms of the workplace that make it difficult for caregivers to balance work and family. She argues that employers feel the pull from the status quo in favor of management prerogative. Bisom-Rapp, *supra* note 36, at 30–31. She also states that employers do not see themselves as biased and therefore "want the freedom to manage operations as they see fit." *Id.* at 31. Peggie Smith also argues that it is difficult to get courts to depart from the norm of "comprehensive commitment." Smith, *supra* note 60, at 598.

216. *See supra* Part II.B.

217. Williams & Segal, *supra* note 15, at 112.

218. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

219. *See generally* Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 133–40 (2009). The debate was between so-called "special treatment" feminists, who argued that in order for women to be treated equally in the workplace, they needed to be afforded "special treatment," including paid leave benefits when they had a baby. *Id.* "Equal treatment" feminists were worried that if women are given "special treatment" in the workplace, this would perpetuate stereotypes of women as the weaker sex in need of special benefits in the workplace and will make employers more reluctant to hire them. *Id.*

220. *See, e.g.*, Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO J. ON POVERTY L. & POL'Y 1, 4 (2012); Travis, *supra* note 10, at 7–8; Travis, *supra* note 17, at 288–89.

221. *See, e.g.*, Arnow-Richman, *supra* note 114, at 27 (arguing that we should find ways of incentivizing employers to provide family-friendly workplaces); Bisom-Rapp, *supra* note 36, at 27 (stating that law professors who wish to help men and women balance work and family are discouraged by the existing state of the law); Schultz, *supra* note 23, at 1885 (arguing for measures like a reduced workweek in addition to litigation-focused solutions); Selmi, *supra* note 26, at 577 (arguing that men, as opposed to employers, should be more responsible for ameliorating work-family conflict); Suk, *supra* note 6, at 12–17 (expressing skepticism of the ability of Title VII to end caregiver discrimination); *see also* Bisom-Rapp, *supra* note 36, at 28 (stating that workplace norms are "too entrenched to be dislodged through litigation" and that Joan Williams is one of the few scholars that takes a positive stance towards litigation). Even Michelle Travis, who argues in favor of litigation,

frankly, there is only so much that can be said regarding using litigation to eliminate family responsibilities discrimination. When Williams questions whether feminists are being helpful when they advocate for reform besides litigation, she is, in my opinion, stifling the discussion, which might be stifling new voices, especially junior scholars who might be reluctant to disagree with her.

2. The Failure of Legislative Solutions

a. Protecting Caregiver Status

As discussed above, one possible solution that has been debated for many years is either amending Title VII or enacting another statute to protect caregivers from discrimination based on their caregiver status.[222] However, the entrenchment of structural norms will limit the success of this type of legislation. As stated above, disparate treatment claims will only work in cases where the employer is either intentionally discriminating based on parental or caregiver status (a relatively rare occurrence) or the employer is making stereotypical decisions about the commitment or competence of caregivers (a much more likely occurrence).[223] But in order to actually help those caregivers who have difficulty meeting the hours and attendance requirements of the employer because of the their caregiving responsibilities, employees would need to bring a disparate impact claim, arguing that the employer's practice (either long hours, strict attendance, rotating schedules, etc.) had a disproportionate effect on caregivers over non-caregivers. Of course, proving the statistical disparity might not be that difficult, but just as it would be difficult to challenge the employer's business necessity defense in a sex discrimination disparate impact claim, it would also be difficult challenging the employer's business necessity defense in a caregiver discrimination disparate impact claim.[224] In fact, the defense would be identical. And just as employers have succeeded in proving that the structural norms of the workplace are essential functions of the job in ADA claims, they will likely succeed in proving that the structural norms of the workplace are job-related and consistent with business necessity.

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recognizes that anti-discrimination law is not the entire answer to ameliorating work-family conflict. Travis, *supra* note 10, at 7–8 (stating that there is not one answer to such a multi-faceted problem); Travis, *supra* note 17, at 319.

222. *See supra* Part II.B.1. These proposals used to refer specifically to "parental status" discrimination or "family status" discrimination. *See* Smith, *supra* note 117. But more recent proposals recognize the need for a more inclusive statute that would protect all kinds of caregivers, including those who are caring for sick, disabled, or elderly adult family members, such as spouses, partners, parents, or other relatives. *See, e.g.*, Locke *supra* note 18, at 19–20.

223. *See supra* Part II.B.1.

224. Smith, *supra* note 60, at 596–97.

b. Accommodation Mandate and Other Affirmative-Mandate Statutes

Because of the difficulty surrounding litigation under either a sex discrimination or a caregiver discrimination theory, many scholars have proposed various solutions involving affirmative mandates rather than anti-discrimination provisions.[225] Although there is some utility in increased access to leaves of absence under the FMLA[226] and national or subsidized daycare, most scholars[227] agree that in order to accommodate the various needs of most caregivers, an individualized accommodation mandate is necessary.[228]

It would seem that an individual accommodation mandate could have the most promise for ending the caregiver conundrum. However, even assuming there was some chance that such a provision could become law (which most scholars agree is very doubtful), the entrenchment of structural norms would doom an accommodation mandate in much the same way that the entrenchment of structural norms has doomed the accommodation mandate of the ADA as applied to structural norms cases.[229] As the cases above demonstrate, courts are very reluctant to require employers to provide reasonable accommodations to disabled employees when those accommodations involve variations of or waivers from the structural norms of the workplace.[230] Courts are reluctant to require employers to provide waivers from rotating shifts, reluctant to require employers to provide leaves of absence or waivers of attendance policies, and reluctant to require employers to allow employees to work from home or have part-time work schedules.[231] There is no reason to think an accommodation mandate for caregivers would fare any better than the accommodation mandate for individuals with disabilities. In fact, there is

225. *See supra* Part II.B.2.

226. Increased access to FMLA can mean several things: It can mean increasing the number of employees entitled to FMLA leave; expanding the reasons for which employees can take leaves of absence; expanding the definition of "family" in the FMLA—expanding the group of individuals for whom an employee can rightfully take leave to care for; increasing the amount of leave to which employees are entitled; and providing for some wage-replacement during leaves of absence. Porter, *FMLA*, *supra* note 113, at 16–17. *See also* Smith, *supra* note 60, at 616–17 (arguing that a positive FMLA-type mandate is better than an anti-discrimination provision protecting parental status).

227. Of course, as stated above, Joan Williams believes that accommodation mandates are not needed in the caregiving context because caregivers do not need individual solutions. Williams & Segal, *supra* note 15, at 84–85. As I mentioned above, see *supra* note 131, I disagree that all caregivers need the same thing in the workplace. Some caregivers require better access to leaves of absence; some need flexible starting and ending times; some need reduced-hour or part-time work schedules; some need more lenient attendance policies so that they can tend to sick children or cover for sick baby-sitters; some need a waiver from rotating or evening shifts; some need waivers from overtime or travel requirements; and some simply need occasional time off of work to take loved ones to doctors' appointments or to attend mandatory school meetings.

228. *See supra* Part II.B.2.

229. In prior work, I demonstrated that employers are more willing to provide accommodations for the physical functions of the job than accommodations regarding the structural norms of the job. Porter, *supra* note 178.

230. *See supra* Part III.A.

231. *See supra* Part III.A.

some reason to believe that employers might be more reluctant to provide accommodations to caregivers because the number of caregivers is likely to exceed the number of individuals with disabilities in the workplace.[232] Thus, the entrenchment of structural norms in the workplace will likely doom an accommodation mandate for caregivers.

3. Even if Men and Women Performed Equal Work in the Home . . .

In addition to my skepticism about the likelihood of changing gender norms, even if men were to take on more caregiving tasks—perhaps by providing better protections for men who are discriminated against for taking on those tasks—there remains the problem of the entrenchment of structural norms. Even if parents divide responsibilities equally, parenting well will still take more time than the ideal worker norm allows. It is true that there will be fewer career penalties if two parties divide the sick kid days, doctors' appointments, etc. evenly, but unless the parents have extremely healthy children, reliable nannies and back up daycare for when the nanny is sick, or both, there will be times that one of the parents will need to leave work early, not work overtime, or not go on a business trip, not to mention taking leaves of absence when a new child arrives. As long as employers continue to insist on the ideal worker norm, getting men to do more caregiving will not completely solve the caregiver conundrum.

C. Attacking the Structural Norms Directly

As I have argued above, because the entrenchment of structural norms means the failure of most proposed solutions, it seems to me the only other option is to attack the structural norms directly—to dismantle them.[233] I make this argument with full knowledge that it has no possible chance of succeeding, although some employers have successfully accomplished this. First of all, let me be clear about what I mean. Many scholars have discussed using litigation or an accommodation mandate to break down employers' structural norms.[234] I have already discussed why

232. *See* Porter, *Mutual Marginalization*, *supra* note 125, at 41 (making this argument although pointing out that with the expanded definition of disability under the ADA, the number of individuals with disabilities is likely to increase dramatically). Although, as argued by some, not all women with caregiving responsibilities need accommodations and the problem with an accommodation mandate is that it assumes all women do need accommodations, thereby perpetuating stereotypes. Farrell & Guertin, *supra* note 105, at 1478.

233. *See* ALBISTON, *supra* note 8, at 240 ("[R]ights strategies that target institutional arrangements directly not only seem to produce better outcomes, but also avoid reifying gender and disability [arrangements that support inequality in the workplace]"); Smith, *supra* note 60, at 595 ("To effect purposeful change on behalf of individuals with parental obligations, workplace practices must be restructured to value parenting as a social good that requires affirmative support."); Travis, *supra* note 10, at 5.

234. *See supra* Parts II.A & B.

I do not believe litigation or accommodation mandates are sufficient.[235] Thus, I am now referring to attacking those norms directly. Because of space constraints, I cannot discuss each of the ideas below in detail, and frankly, I am skeptical about any of them working. But, trying to look outside the box, I will suggest some possibilities.

One solution discussed by scholars is a reduced-hour workweek.[236] If the standard workweek were thirty-two hours instead of forty hours, this would go a long way towards ameliorating work-family conflict. In conjunction with this, we would need an increase in overtime pay (perhaps double time rather than time and a half) and would need to completely eliminate or drastically decrease the number of employees who are exempt from overtime under the Fair Labor Standards Act (FLSA), and therefore not entitled to overtime pay. This would force employers to hire more employees to even out the workload among those employees, rather than require some employees (usually the non-caregivers) to pick up the slack (often without extra pay)[237] of the caregivers.

An even more drastic measure would require employers to provide a very generous paid leave benefit package to all employees, and those employees would be forced to take the leave, or they would lose their pay during those weeks. Imagine that every employee is entitled to and forced to take four weeks of leave per year (for any reason). This would go far towards eliminating the stigma of those who ask for leave.

Finally, perhaps at the most draconian level, a system could be established where every employer has to certify that they either offer a certain amount of flexibility, such as offering flexible start and end times, occasional telecommuting options, reduced-hours options, etc., or that they can prove that the nature of the job precludes such flexibility.[238] I recognize that none of these are viable solutions. Outside the law, we should be encouraging employers to understand that efficiency and equality demand that they should seek to dismantle their structural norms without being forced to do so.[239]

CONCLUSION

Despite the efforts of many, the caregiver conundrum remains very difficult to solve. Men and women who have caregiving responsibilities

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235. *Supra* Parts III.B.1 & 2; *see also* Smith, *supra* note 60, at 598 (stating that it is difficult to get courts to depart from an employer norm of comprehensive commitment).

236. *See, e.g.*, Schultz, *supra* note 23, at 1955–56.

237. Case, *supra* note 44, at 1757–58.

238. A less draconian version of this would be to offer tax incentives for such family-friendly benefits. *See* Porter, *Synergistic Solutions*, *supra* note 7, at 821–22.

239. *See, e.g.*, Smith, *supra* note 60, at 617–18 (stating that we should make efforts to restructure the workplace); Williams & Segal, *supra* note 15, at 79 (discussing the business case for family friendly benefits). As stated by Maxine Eichner, work and caregiving are not incompatible if we change the way employers operate. Eichner, *supra* note 23, at 1308.

still find balancing work and family difficult and this affects their job prospects, pay, promotional opportunities, and their sanity.[240] Although scholars have spent many years debating various solutions, including litigating under our current laws, enacting new laws, and changing gender norms at home and in the workplace, these solutions have been unsuccessful. In this Article, I have identified the reason so many proposed solutions have failed and will continue to fail—the entrenchment of structural norms. Employers are very reluctant to change the practices of the workplace that most contribute to the caregiver conundrum: long hours; mandatory overtime; rotating shifts, inflexible shifts; stringent attendance policies; and inadequate leave policies. As demonstrated through the jurisprudence under the ADA, courts rarely force employers to modify their structural norms. Thus, I argued that the entrenchment of the structural norms is what will doom any possible solutions to the caregiver conundrum. The only answer to this puzzle is to dismantle the structural norms directly. I recognize how difficult it would be to force employers to modify their structural norms, so there remains much work to be done to convince employers that efficiency and equality dictate that they should voluntarily dismantle their structural norms.[241]

240. I use "sanity" tongue in cheek. I do not mean to suggest that all or even most working caregivers are actually insane.

241. This is one place where the work of scholars like Joan Williams is very helpful. She has done a very good job of highlighting the "business case" for family friendly workplaces. *See, e.g.*, Williams & Segal, *supra* note 15, at 79, 81–82.