Catholic University Law Review

Volume 71
Issue 3 *Summer 2022*

Article 8

6-20-2022

Transparency and Reliance in Antidiscrimination Law

Steven L. Willborn
Univeristy of Nebraska Lincoln College of Law, willborn@unl.edu

TRANSPARENCY AND RELIANCE IN ANTIDISCRIMINATION LAW

Steven L. Willborn[+]

All antidiscrimination laws have two structural features – transparency and reliance – that are important, even central, to their design, but have gone largely unnoticed. On transparency, some laws, like the recent salary-ban laws, attempt to prevent the employer from learning about the disfavored factor on the theory that an employer cannot rely on an unknown factor. Other laws require publication of the disfavored factor, such as salary, on the theory that it is harder to discriminate in the sunlight. Still other laws are somewhere between these two extremes. The Americans with Disabilities Act, for example, limits but does not preclude employer inquiries into disability status. On reliance, most antidiscrimination statutes, like Title VII, ban reliance on disfavored factors. But other statutes do the opposite of banning reliance – they require employers to rely on the factor. For example, a general feature of accommodation statutes is an obligation on employers to rely on the identified factor. Still other laws, like the salary-ban laws, permit but do not require reliance.

This article is the first to explore these important and surprisingly unnoticed and unexplored features of antidiscrimination laws. Viewing antidiscrimination laws through the lens of transparency and reliance presents a new and interesting way to think about current laws and a roadmap for thinking about where future laws should be placed within the transparency-reliance matrix.

[+] Spencer Professor of Law, University of Nebraska College of Law. Thanks to Roger Kirst, Mike Selmi, Sandra Sperino, Charlie Sullivan, and the faculty at the University of Nebraska College of Law for helpful comments and suggestions.

INTRODUCTION

The antidiscrimination laws have two structural features that are important, even central, to their design, but have gone largely unnoticed. Compare, for example, recent salary-ban statutes with Title VII. Many of the salary-ban statutes make it illegal for an employer to ask about past salary, but do not make it illegal to rely on past salary in setting pay if the employer discovers the information without asking.[1] Title VII, on the other hand, does not bar

1. *See, e.g.*, CONN. GEN. STAT. § 31-40z (2021); DEL. CODE ANN. tit. 19, § 709B(b)(2) (2022). It should be noted that while a common feature of the salary-ban laws is that the employer

employers from asking about race or gender, but the statute makes it illegal to rely on either in making an employment decision.[2] This article is the first to explore these important and surprisingly unnoticed and unexplored structural features of antidiscrimination laws.

Both features come in multiple varieties. The first one I am going to call transparency. One antidiscrimination strategy is to prevent the employer from learning about a disfavored factor; the theory is that if the employer does not know about the factor, it cannot rely on it.[3] That is the underlying theory of the salary-ban and ban-the-box laws.[4] They are far to the opaque side of the transparency continuum. But other antidiscrimination efforts are far to the other side of the continuum on the theory that it is harder to discriminate in the sunlight. The Equal Employment Opportunity Commission's (EEOC) effort to gather and publicize salary data is on this side.[5] Still other laws are somewhere between these two extremes. The Americans with Disabilities Act, for example, limits but does not preclude employer inquiries into disability status.[6]

---

cannot ask about salary information, they are quite varied on whether reliance on past salary is permitted. For example, other salary-ban laws prohibit inquiries about salary history, but permit reliance only under certain conditions, most commonly if the applicant volunteers the information. *See, e.g.*, CAL. LAB. CODE § 432.3(h) (West 2022); HAW. REV. STAT. § 378-2.4(b) (2021). Finally, some statutes do not permit inquiries about or reliance on salary history. N.Y. LAB. LAW § 194-a (McKinney 2020); OR. REV. STAT. § 652.220 (2021). For other examples of laws that prohibit inquiries about certain factors, but permit reliance, *see infra* notes 35-37.

2. *See infra* notes 15-16.

3. *See* Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WM. & MARY L. REV. 2097, 2121–22 (2014); Ignacio N. Cofone, *Antidiscrimination Privacy*, 72 SMU L. REV. 139, 148–49 (2019).

4. *See supra* note 1. For a listing of state and local laws restricting employer inquiries about criminal history, *see A Guide to Ban the Box Laws at State and County, and City Levels*, INTELLICORP (Apr. 2021), https://www.intellicorp.net/marketing/IntelliCorp/media/intellicorp/IntelliCorp-BanTheBoxGuide-Version-20-2021-docx.pdf.

5. The EEOC required private employers with 100 or more employees to report pay data for 2017 and 2018 within 12 pay ranges. This was the so-called "Component 2" data collection authorized under the Obama administration and administered, with reluctance, by the Trump administration only after court order. *See* Nat'l Women's L. Ctr. v. Off. Mgmt. & Budget, 358 F. Supp. 3d 66, 90 (D.D.C. 2019). In September 2019, the EEOC announced that it would collect only "Component 1" data (non-compensation demographic data) in the next reporting cycles for calendar years 2019, 2020, and 2021. Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,139 (Sept. 9, 2019). The Securities and Exchange Commission has an analogous initiative that requires public companies to disclose the ratio of the compensation of its chief executive to the median compensation of its employees. The SEC adopted the requirement by rule in 2015. Pay Ratio Disclosure, 80 Fed. Reg. 50104 (Aug. 18, 2015). The rule was required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010). Although on the fringes of "antidiscrimination" law, this is also a law that attempts to address a labor issue (wage disparities) through transparency alone, without a ban on reliance.

6. Americans with Disabilities Act, 42 U.S.C. § 12112(d)(2)(A) [hereinafter ADA]. *See infra* note 50.

The other feature I am going to call reliance. As with transparency, reliance comes in many flavors. The most noted discrimination statutes ban reliance on the disfavored factor. An employer cannot rely on race or gender under Title VII,[7] or age under the Age Discrimination in Employment Act.[8] The precise nature of that reliance is perhaps the most debated feature of these statutes and variation exists even in these "ban" statutes, but that is not my concern here.[9] My focus is on broader differences in reliance between statutes. As mentioned, the salary-ban statutes, somewhat ironically, often do not ban reliance on past salary in setting pay. Instead, they ban transparency.[10] Still other statutes do the opposite of banning reliance—they *require* employers to rely on the factor. For example, a general feature of accommodation statutes is a requirement that employers must rely on the identified factor. When an employer knows an individual has a disability requiring an accommodation, it must attend to the otherwise disfavored factor to try to make it possible for the person to work.[11] This is also true for the increasingly common pregnancy accommodation statutes.[12]

This article identifies and discusses transparency and reliance—two central and important structural features of antidiscrimination law. Transparency and reliance can be used as a lens through which to view virtually every discrimination law; they provide a new window into past and current antidiscrimination efforts, such as race and gender discrimination and the more recent salary-ban statutes, but they also promise new insights into how to deal with emerging issues, such as implicit bias and artificial intelligence.[13] These applications, and others, will be discussed in this article. The focus of the article, however, is not on any particular application of these structural features, but rather on the underlying structure itself, the largely unnoticed and unremarked scaffolding on which antidiscrimination law is built. Detailed application to particular issues will be left to future work.

The article begins in Section I by discussing transparency and reliance in general. As a first cut, transparency and reliance can be viewed as a two-by-two

---

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 [hereinafter Title VII].

8. Age Discrimination in Employment Act, 29 U.S.C. § 623 [hereinafter ADEA]. Both statutes, like most, provide a limited bona fide occupational qualification exception to the prohibition against relying on the disfavored factors. Title VII, 42 U.S.C. § 2000e-2(e); ADEA, 29 U.S.C. § 623(f)(1).

9. *See infra* notes 63–64.

10. *See supra* note 1.

11. ADA, 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation to a known physical or mental limitation).

12. Thirty-one states, including the District of Columbia, have laws requiring at least some employers to reasonably accommodate pregnant workers. *See Reasonable Accommodations for Pregnant Workers: State and Local Laws*, NAT'L P'SHIP FOR WOMEN & FAMILIES (Sept. 2020), https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf.

13. *See infra* notes 133-44.

matrix with transparency high or low and reliance permitted or not.[14] Section I will include a census of antidiscrimination laws, which demonstrates that laws exist in all four quadrants of this transparency/reliance matrix. The section will then discuss more nuanced, non-dichotomous variations of the two features. Section II will then dive deeper into the features to discuss just how sharp the distinctions are between the categories and what factors might explain why a particular law is placed within one quadrant or another. Section III focuses on the decisions of lawmakers about where to place a particular nondiscrimination obligation within the matrix. What are the considerations that would favor transparency versus non-transparency or reliance versus non-reliance? Section IV will then apply these considerations to current antidiscrimination laws to explore how transparency and reliance illuminate and (mostly) explain implicit choices that legislators made about where to place discrimination prohibitions within the transparency/reliance matrix. Finally, Section V will provide a glimpse into the future to illustrate how explicit consideration of transparency and reliance might improve the precision and effectiveness of new contributions to antidiscrimination law.

I. THINKING ABOUT TRANSPARENCY AND RELIANCE

A. Transparency and Reliance—a First Cut

Although neither transparency nor reliance is dichotomous, a good first-cut at the structural features and their relationship is to view them in that way. Figure 1 illustrates the four possible categories when the two factors are treated as dichotomous. Current laws exist that fit into each category.

Reliance	Transparency: High	Transparency: Low
No	1	2
Yes	3	4

14. *See infra* Section I.

Quadrant one—high transparency on factors the employer cannot rely on—is the most common antidiscrimination category. Title VII and the ADEA fit into this category. Neither has limitations on transparency; it is not a violation of either act to ask about the prohibited categories or to find out in other ways.[15] Thus, transparency is high. But both broadly prohibit reliance on the prohibited categories. It is a violation of Title VII to rely on race or gender in making an employment decision;[16] it is a violation of the ADEA to rely on age in making an employment decision.[17] The antiretaliation provisions in antidiscrimination laws (and generally) also fit into this category, maybe even more squarely. The obligation not to retaliate arises only if the employer knows that the employee has participated in a discrimination proceeding or opposed an illegal practice.[18] Thus, the no-reliance obligation can arise *only* if transparency is present.

Quadrant two—low transparency on factors the employer cannot rely on—includes most of the ban-the-box laws,[19] the Genetic Information Non-Discrimination Act,[20] and some applications of the Americans with Disabilities Act.[21] A principal purpose of these laws is to shield from the employer information about criminal history, genetic information, or disability status: asking about any of those things is itself a violation of the act. Most of these laws also contain restrictions on finding out about these factors by other means.[22] These laws also back up this attempt to keep the information from the employer with a prohibition on relying on the factor to make an employment decision if

---

15. As Professor Sullivan points out, at most it would be a violation of Title VII for an employer to ask about a prohibited category (or a related characteristic such as marital plans or plans for children) only if the employer asked only one race or gender and, even if that was the case, it would not be a violation unless an adverse action were taken based on the response. Charles A. Sullivan, *The Unintended Consequences of Putting Family Off-Limits in Job Searches*, JOTWELL (Aug. 16, 2018), https://worklaw.jotwell.com/the-unintended-consequences-of-putting-family-off-limits-in-job-searches. Title VII does not have a provision equivalent to the direct bans on asking in the ADA or the salary-ban or ban-the-box laws. But it should be noted that there is a difference between a formal ban on transparency and a custom of non-transparency that arises out of a ban on reliance. *See infra* Section II. A.

16. 42 U.S.C. § 2000e-2.

17. 29 U.S.C. § 623(a).

18. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-3(a).

19. *See supra* note 4.

20. 42 U.S.C. § 2000ff-1(b) (making it illegal for an employer to "request, require, or purchase" an employee's genetic information).

21. Under the ADA, an employer inquiry about whether an applicant is an individual with a disability is a form of discrimination prohibited by the Act. ADA, 42 U.S.C. § 12112(d)(4). As discussed later, the ADA prohibits reliance on an individual's disability in cases alleging disparate treatment but requires reliance on disability in reasonable accommodation cases. *See infra* notes 122-24.

22. For example, most of the ban-the-box laws also limit background checks, *see supra* note 4, and the ADA limits medical exams in addition to inquiries about disability status. 42 U.S.C. § 12112(d)(1).

non-transparency fails and the employer learns about it. It is usually illegal under these laws to rely on criminal history, genetic information, or (sometimes) disability status to make an employment decision.

Quadrant three—high transparency on factors the employer can rely on—covers most of employment law and a few antidiscrimination laws. Unless prohibited (and most things are not prohibited), an employer can ask anything and can rely on anything in making an employment decision.[23] Juli Briskman was fired for gesturing disrespectfully at a Presidential motorcade.[24] Janet Brunner was fired for volunteering at the AIDS Foundation.[25] James Scroghan was fired for going to law school.[26] Rudy Hillenbrand was fired for discovering that his boss was having an affair.[27] All of these employment decisions were legal. The employer could ask about them and could rely on them in making an employment decision, even if wrong-headed and irrational.[28]

But quadrant three also includes laws that are part of the antidiscrimination effort. Recent efforts by the EEOC,[29] and private groups like Glassdoor,[30] are intended to bring salary data into the sunlight.[31] These initiatives focus on transparency and do not have any direct bans on employer reliance on the data. Indeed, the initiatives are almost the opposite of a ban on use of the information: a primary purpose of the transparency is to encourage reliance on the salaries disclosed. More subtly, accommodation statutes like the Americans with Disabilities Act (ADA) and recent state pregnancy laws may fit into this

---

23. In the United States, this result is a byproduct of employment at will and weak privacy protections. This is not the case everywhere. In Germany, for example, employers are restricted in making inquiries about salary based on general privacy concerns; there, salary-ban statutes would be largely superfluous. *See* Matthew W. Finkin, *Pay Privacy in Comparative Context*, 22 EMP. RTS & EMP. POL'Y J. 355, 368, 378 (2018) ("In Germany, out of concern for employee privacy the employer bears the burden to prove [that a question about salary] is necessary under a strict standard of relatedness to job qualification.").

24. Amanda Holpuch, *Woman Who Gave Trump the Finger Elected in Virginia*, THE GUARDIAN (Nov. 6, 2019, 8:45 AM), https://www.theguardian.com/us-news/2019/nov/06/juli-briskman-trump-middle-finger-wins-office-virginia. She was later elected to the county board of supervisors. *Id.*

25. Brunner v. Al Attar, 786 S.W.2d 784, 784 (Tex. Ct. App. 1990).

26. Scroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977).

27. Hillenbrand v. City of Evansville, 457 N.E.2d 236, 236–37 (Ind. Ct. App. 1983).

28. These results are a function of the ubiquity of the default rule of at-will employment in the United States. *See* RESTATEMENT OF EMP. L. § 2.01 (AM. L. INST. 2015).

29. *See supra* note 5.

30. *See* GLASSDOOR, https://www.glassdoor.com/index.htm (last visited Feb. 4, 2022). Glassdoor is a job-placement website that collects and publicizes salary reports for many job categories and from a wide variety of companies.

31. Ironically, given the salary-ban statutes, a number of academics have argued for almost the opposite legal response: high transparency about pay rather than low transparency. *See, e.g.*, Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. STATE L.J. 951, 952 (2011); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 781 (2014); Gowri Ramachandran, *Pay Transparency*, 116 PENN STATE L. REV. 1043, 1043 (2012).

category. The accommodation obligation arises only when there is transparency, that is, when the employer knows of a disability or pregnancy.[32] When the employer knows, there is almost the opposite of non-reliance: the employer *must* rely on the factor to try to accommodate it.[33] Finally, although maybe on the edge of the "discrimination law" category, the immigration laws require employers to ask about work status and require them to rely on the information. That is, employers must require new employees to complete an I-9 form confirming the employee's authority to work in the United States and requires an employer to rely on the form to permit work to commence or to withdraw the offer of employment.[34]

Quadrant four—low transparency on factors the employer can rely on—includes most of the recent salary-ban laws and many of the ban-the-box laws.[35] The main feature of both these sets of laws is to keep information away from the employer: it is illegal for an employer to ask about prior salary or criminal history.[36] But many of these laws do not bar the employer from relying on the information if they know it. A famous, or maybe infamous, use of this quadrant was the "Don't Ask, Don't Tell" rules initially implemented during the Clinton administration.[37]

In sum, even though transparency and reliance are not often mentioned as central features of antidiscrimination laws, every law makes choices on these two dimensions explicitly or implicitly, and the choices vary. Indeed, the choices are varied enough to have laws fit into each of the four possible categories on the two dimensions.

---

32. *See* ADA, 42 U.S.C. § 12112(b)(5)(A) ("[Employer must make] reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability . . . .") (emphasis added). *See, e.g.*, Kobus v. Coll. of St. Scholastica, Inc., 608 F.3d 1034, 1038 (8th Cir. 2010) (explaining that the employer did not violate the ADA by failing to accommodate absenteeism when employer was unaware that a disability contributed to the absences).

33. *See* ADA, 42 U.S.C. § 12112(b)(5)(A). *See, e.g.*, Holly v. Clairson Indus., 492 F.3d 1247, 1262 (11th Cir. 2007) ("[T]he very purpose of reasonable accommodation laws is to *require* employers to treat disabled individuals differently in some circumstances."). Another example may be laws restricting private agreements not to disclose bad information, such as sexual harassment allegations. These laws increase transparency by barring private agreements to maintain non-transparency; the laws clearly intend to permit and facilitate employer reliance on the information, once disclosed. *See generally*, Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 UNIV. S.F. L. REV. 517, 517–18 (2020) (reporting that at least twelve states have enacted statutes that limit the ability to maintain the confidentiality of sexual harassment allegations).

34. Immigration Reform & Control Act of 1986, 8 U.S.C. § 1324a(b).

35. *See supra* notes 1, 4.

36. Even though these laws restrict speech, they are unlikely to violate the First Amendment. For a good discussion, *see* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL. F. 209 (2020).

37. *See* JODY FEDER, CONG. RSCH. SERV., R40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS (2013).

B. The Transparency Continuum

Although the prior section treated transparency as dichotomous, it is actually a continuum that goes from must disclose to cannot ask, with lots of variation across the entire continuum. The variation includes differences between different types of information and differences in when information must or can be solicited by an employer.

On the "must disclose" side of the continuum, some laws require employers to disclose information. For example, the EEOC requires employers to disclose salary information.[38] Interestingly, the disclosures of individual employers are confidential,[39] so they are clearly intended to assist the agency in enforcing the law (and to deter employers who know the enforcement agency has the information), but not to inform employees about their employer's salary practices.[40] Recently, however, the EEOC released a tool that permits anyone to explore some of the data in aggregate form; employees still will not be able to access their own employer's data, but they will be able to develop comparative data to assist them in evaluating their own treatment.[41] In contrast, a number of other laws require disclosures to be made that are intended to inform employees and the public about their particular employer's labor-related practices, such as the securities laws,[42] the Employee Retirement Income Security Act,[43] and the Fair Labor Standards Act.[44]

Also close to the "must disclose" side of the continuum, employers must ask about, and may require, certain information. For example, they must ask about immigration status and social security numbers. These two differ, however, on the timing of the request. Federal law requires the employer to verify that the worker has an immigration status that permits work,[45] but prohibits making the inquiry until after a job offer is made.[46] For social security numbers, employers

---

38. *See supra* note 5. The SEC has a similar disclosure requirement, although it does not fall as squarely within the category of an antidiscrimination statute. *See supra* note 5.

39. Agency Information Collection Activities, 81 Fed. Reg. 45,479, 45,491–92 (July 14, 2016).

40. *Id.* at 45,491 (noting that the salary data will be used only by EEOC staff for training and to assess charges of discrimination and for aggregated reports).

41. *EEOC Launches New Data Tool to Track Employment Trends*, EEOC (Dec. 2, 2020), https://www.eeoc.gov/newsroom/eeoc-launches-new-data-tool-track-employment-trends.

42. Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,105 (Aug. 18, 2015) (requiring the information to be included in public filings and indicating that the primary purpose is to inform shareholders).

43. Employee Retirement Income Security Act, 29 U.S.C. §§ 1021–25 (requiring disclosure of pension and health care information).

44. 29 C.F.R. § 516.4 (2020) (requiring employers to post notice explaining the requirements of the Fair Labor Standards Act).

45. Immigration Reform & Control Act of 1986, 8 U.S.C. § 1324a(b) (requiring employer to verify eligibility to work).

46. *See Pre-Employment Inquiries and Citizenship*, EEOC, https://www.eeoc.gov/pre-employment-inquiries-and-citizenship (last visited Feb. 4, 2022).

must also ask and, while it is good practice to ask only after a job offer has been made, no restriction exists on asking earlier.[47]

On the "cannot ask" side of the continuum, several laws prohibit an employer from asking or obtaining certain restricted information, but most of them have exceptions tailored to the basic prohibition. The exceptions take one or both of two forms. First, the laws do not apply the prohibition in circumstances where the information is particularly necessary or useful. For example, some of the ban-the-box laws make an exception for fiduciary positions or positions involving public safety.[48] Similarly, the Genetic Information Nondiscrimination Act (GINA) permits an employer to obtain and use genetic information in connection with a wellness program, a request for leave under the Family and Medical Leave Act, or a program to monitor toxic substances in the workplace.[49] The other type of exception is timing. Despite the general prohibition, the laws often permit an inquiry at certain points in time. The ADA, for example, permits inquiries about disability status after an offer of employment has been made, under certain conditions.[50] And GINA, as noted above, permits an inquiry about genetics if relevant to a request under the Family and Medical Leave Act.[51]

Most information falls between these extremes on the transparency continuum: between information that must be disclosed and information that cannot be disclosed. But considerable variation exists in this part of the continuum too. As part of an employment-at-will regime, broadly construed, employers can ask about any information not prohibited and employees can offer any information. It matters not whether the information is relevant to a decision to be made, or completely extraneous, or even frivolous.[52] But despite this general rule, some laws have important effects on transparency. For example, several states do not permit private agreements to keep sexual harassment allegations confidential. The information is not required to be disclosed, but it cannot be kept secret either, even by private agreement.[53] Similarly, laws requiring accommodation effectively require employees to disclose information.

---

47. *See Hiring Employees*, IRS (June 27, 2022), https://www.irs.gov/businesses/small-businesses-self-employed/hiring-employees; *Can Employers Request an Applicant's Social Security Number on an Employment Application?*, SHRM, https://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/socialsecuritynumber.aspx (last visited July 3, 2022).

48. *See* R.I. GEN. LAWS § 28-5-7(7)(ii) (2021); 820 ILL. COMP. STAT. 75/15(b)(2) (2021) (both permitting the question when a fidelity bond is required for the position and a conviction would preclude obtaining one); N.J. STAT. ANN. § 34:6B–16(a) (West 2015); N.Y. CORRECT. LAW § 750(5) (McKinney 2014).

49. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff–1(b).

50. ADA, 42 U.S.C. § 12112(d).

51. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff–1(b)(3).

52. *See* Alison Doyle, *Weird Interview Questions and How to Answer Them*, THE BALANCE CAREERS (May 29, 2021), https://www.thebalancecareers.com/top-weird-interview-questions-2059482 (reporting interview questions such as "Pick a color, red or blue?" and "how many pizzas are ordered every night in the United States?").

53. Kotkin, *supra* note 33, at 519–22.

An employer has an obligation to accommodate a disability or pregnancy only if the employer knows of the condition.[54] Thus, while the employee is not required to disclose the information and, indeed, has a right to keep it secret, a powerful legal incentive exists to tell the employer.

C. The Reliance Continuum

The reliance continuum also has wide variation from must rely to many varieties of cannot rely. As with transparency, most factors fit between these two extremes, but great variety exists throughout the continuum.

On the must-rely side, employers must inquire into and rely on immigration status. This must-rely obligation is one sided. That is, if the worker is not authorized to work in the United States, the employer must rely on that status not to employ the worker.[55] On the other hand, if the worker is authorized to work in the United States, the obligation flips to a form of must not rely. For these workers, employers cannot rely on citizenship or national origin in hiring or firing.[56]

Also on the must-rely side of the continuum, employers must rely on known protected statuses when they are under a duty to accommodate. Employers must accommodate and, thus, must rely on religion under Title VII,[57] disability under the ADA,[58] or, increasingly, pregnancy under state or local laws.[59] An employer that fails to take the status into consideration at all, violates the interactive-process requirement of the accommodation duty,[60] and maybe the accommodation duty itself.[61]

The cannot-rely side of the continuum is populated by all the standard antidiscrimination obligations. The list can be long. My personal favorite is the

---

54. ADA, 42 U.S.C. § 12112(b)(5)(A) ("[Employers must make] reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability.") (emphasis added).

55. Immigration Reform & Control Act of 1986, 8 U.S.C. § 1324a(1)(A).

56. *Id.* at § 1324b(a)(1). Although the general rule is that employers cannot rely on citizenship in hiring and firing for employees authorized to work in the United States, employers can rely on citizenship to break a tie between equally qualified candidates. *Id.* at § 1324b(a)(4).

57. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j).

58. ADA, 42 U.S.C. § 12112(b)(4).

59. *See Pregnancy Accommodations in the States*, NAT'L WOMEN'S L. CTR., at 1 (July 2017), https://nwlc.org/wp-content/uploads/2016/09/Pregnancy-Accommodations-in-the-States-July-2017.pdf (reporting that twenty-one states and the District of Columbia have laws requiring accommodation of pregnancy).

60. 29 C.F.R. §1630.2(o)(3) (2022) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process . . . .").

61. It is probably the case that the interactive-process duty is violated only if a reasonable accommodation might have been discovered through the process; if no reasonable accommodation was possible, a bare violation of the process duty is probably not an independent violation of the ADA. *See* Stern v. St. Anthony's Health Ctr., 788 F.3d 276, 293–94 (7th Cir. 2015); McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 101 (2d Cir. 2009).

Madison, Wisconsin, nondiscrimination ordinance. In Madison, an employer making an employment decision cannot rely on:

> sex, race, religion, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record, conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partnership status, receipt of assistance, unemployment, or status as a victim of domestic abuse, sexual assault, or stalking . . . .[62]

The precise nature of the cannot-rely ban is variable and one of the most debated issues in discrimination law. Sometimes, but not always, the ban includes non-intentional disparate impacts, as well as intentional discrimination.[63] Sometimes it requires but-for causation, but at other times not.[64] These are important distinctions, but they are not the focus of this article. For the purposes of this article, these distinctions are relatively minor variations that all fall well within the cannot-rely category.

But as with transparency, most factors an employer might rely on fall between the two extremes of must rely and cannot rely. Again, the United States is mostly an employment-at-will regime, so employers can rely on any factor not prohibited in making an employment decision, even immaterial and silly ones. But, of course, the cannot-rely factors cast a shadow over this otherwise sunny pasture (or a few rays of sunlight on this cloudy day?). Most significantly, the disparate impact doctrine can convert neutral factors into prohibited ones. Part of the paradox of disparate impact is that it does this conversion. The doctrine requires the analysis to begin with a neutral, non-banned factor but, when the overlap with a banned factor is too great, neither the neutral factor nor the banned

---

62. MADISON, WIS., CODE OF ORDINANCES, § 39.03(1) (2022), https://library.municode.com/wi/madison/codes/code_of_ordinances; *see also* § 39.03(2)(mm). For employment discrimination, the ordinance generally follows Title VII's low transparency/no reliance model. *Id.* at § 39.03(8)(a), (b) (tracking the language of Title VII of The Civil Rights Act of 1964, § 703(a)(1)–(2)). However, the ordinance does contain a number of adjustments for particular protected statuses. *See infra* note 132.

63. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 425–426, 436 (1971) (holding that the disparate impact of employment tests that cannot predict job performance are a violation under Title VII); Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (holding that recovery for disparate impact claims are authorized under the ADEA); *but see, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390–91 (2002) (concluding that disparate impact claims are not available under 42 U.S.C. § 1981); Washington v. Davis, 426 U.S. 229, 233, 238–39, 246 (1976) (holding that disparate impact claims are not available under 42 U.S.C. § 1981).

64. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (holding but-for causation is required under an ADEA disparate-treatment claim); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (holding but-for causation is required for retaliation cases under Title VII); *but see* Title VII, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (stating that but-for causation is not required for race, color, religion, sex and national origin, as proof that the status was a motivating factor is sufficient); Uniform Services Employment & Reemployment Rights Act, 38 U.S.C. § 4311(c) (same for discrimination on the basis of service in the uniformed services).

factor can be used (absent business necessity). The conversion takes place on a sliding scale—some overlap is acceptable, but not too much—and the neutral factor might be banned even if the employer did not know about the overlap and did not intend at all to use it nefariously.[65]

II. THINKING ABOUT THE CATEGORIES

Even though reliance and transparency are quite variable, it is useful to think about them as distinct categories. Thinking about the four quadrants produced by distinct categories can tell us something about discrimination law that we don't see otherwise.

A. Formal Categories and Practical Realities

Formally, quadrants one and four are quite distinct. Quadrant one (high transparency on factors that an employer cannot rely on) stands in sharp contrast to quadrant four (no transparency on factors that an employer can rely on). Title VII is different than the salary-history bans. But the two may be more similar than appears at first glance. Indeed, despite these formal differences, in practice the two may begin to resemble each other.

Consider quadrant one. First, Title VII has no prohibition against asking about any of the prohibited categories, for example about gender or gender-related issues, such as pregnancy or childcare.[66] When Congress wants to have a prohibition on transparency, it knows how to do that as it did in the ADA and GINA.[67] It did not do that in Title VII. An employer may even ask only female applicants, and not males, about gender and gender-related issues, so long as the employer does not rely on them in making an employment decision. An

65. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (explaining that an adverse employer intention is not required to prove disparate impact discrimination). A discussion of application of the transparency/reliance matrix to disparate impact is outside the scope of this paper. The relationship between the two is far from clear in large part because the underlying theory of disparate impact has always been obscure. *See, e.g.*, JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 105–06 (1972); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1298–99 (1987); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1358 (2017); Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 800–01 (1985).

66. *See Questions and Answers About the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues*, EEOC (June 25, 2015), https://www.eeoc.gov/laws/guidance/questions-and-answers-about-eeocs-enforcement-guidance-pregnancy-discrimination- and ("Title VII does not prohibit employers from asking applicants or employees about gender-related characteristics such as pregnancy . . . .").

67. 42 U.S.C. § 12112(d)(2); 42 U.S.C. § 2000ff-1(b).

employer needs to take an adverse employment action to violate Title VII.[68] Merely asking is not a cognizable adverse action.

But the conventional wisdom is that employers cannot ask about these things. We have all heard this in training sessions from human resources offices.[69] So why is this? One reason is that merely asking increases the risk of a discrimination lawsuit. Why ask if you're not going to use it? Doesn't asking imply that you're going to use it? Distrust of agents is another explanation. Nuanced rules are difficult to convey and enforce, and "you can ask but don't rely on the answer" is a nuanced rule. A cleaner rule—don't ask—is easier to convey to an employer's hiring agents, and easier to enforce internally.[70]

But for our purposes, note that a widespread practice like this effectively converts a law that formally falls into quadrant one into a quadrant two law, that is, from a high transparency/cannot rely law into a low transparency/cannot rely law. Although still not formally a quadrant two law, it effectively becomes one.

In a similar move, quadrant four laws may move in the direction of quadrant one. Certainly, the theory and goal of quadrant four laws is that the covered factor will not be relied on. The theory is that, if the employer does not know of the factor because non-transparency is effective, then the employer cannot rely on it. Consequently, if completely successful, a quadrant four law also moves into quadrant one: transparency is forbidden, therefore reliance is blocked.

B. Why Quadrant Four?

Why is there ever a viable legislative choice between quadrant two and four? If the factor is disfavored, why not prohibit both transparency and reliance? Why prohibit only transparency? The answer highlights the underlying assumptions of the two quadrants.

Quadrants one and two are based on the idea that the factors are always invidious and, correspondingly, always irrelevant to employment decisions. This is a case where the exception proves the rule. Laws in these quadrants

---

68. *See, e.g.*, AuBuchon v. Geithner, 743 F.3d 638, 645 (8th Cir. 2014) (holding that there was no Title VII violation when the plaintiff only suffered petty slights or minor annoyances); Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 569, 571 (2d Cir. 2011) (finding that there was no adverse action from required factfinding sessions, threats of termination, and switch from day to night shift). *See generally* Esperanza N. Sanchez, *Analytical Nightmare: The Materially Adverse Action Requirement in Disparate Treatment Cases*, 67 CATH. U. L. REV. 575, 578 (2018).

69. For examples of such advice, *see, e.g.*, *Illegal Interview Questions and Female Applicants*, FINDLAW (Dec. 10, 2018), https://employment.findlaw.com/hiring-process/illegal-interview-questions-and-female-applicants.html; *How to Ask Legal Interview Questions*, MONSTER, https://hiring.monster.com/employer-resources/recruiting-strategies/interviewing-candidates/legal-job-interview-questions.

70. Of course, there are good reasons to ask that are lost when employers have a flat ban on asking about these topics. For example, if an employer's relative advantage in the labor market is good public schools and childcare, failing to ask about children makes it more difficult to present these advantages to candidates.

almost always have a narrow exception—the bona fide occupational qualification exception ("BFOQ")—to permit the factor to be used, but only in the narrowest of circumstances.[71] For example, on paper (but not in practice), Title VII permits all of the factors, except race, to be used if the occupation requires it. When in the labor market for sperm donors or wet nurses, employers can discriminate against women and men, respectively. But Title VII's BFOQ exception does not apply to race.[72] By its terms, Title VII views race as always invidious, always irrelevant.

But even race is not *always* completely irrelevant. It seems (and is) legitimate for a police captain to rely on race to select someone to infiltrate a White supremacist gang.[73] Nor does it seem problematic for the director of a realistic biopic of Martin Luther King Jr. to rely on race to select the central figure.[74] Similarly, employers may be permitted, or even required, to take race into account to correct for past discrimination or long-standing racial disparities.[75] This tells us that the invidious/irrelevant presumption in the language of Title VII is to be taken seriously but not literally. The seeming (but not) absolute bar may serve an expressive function even more than a strictly positive one.[76]

Quadrant four is based on a different underlying assumption: that the factor is usually irrelevant and produces problematic social outcomes (such as fewer job opportunities for women or individuals with disabilities), but it is not *always* invidious and, thus correspondingly, it is sometimes relevant to employment decisions. Indeed, for the ADA, the assumption is that at some points in the employment process, the factor is central to employment decisions and *must* be relied on to facilitate fair employment outcomes. Similarly, for past-salary information, the limits on transparency are intended to limit the adverse effect on women who, because of gender-related pay disparities, are disproportionately

---

71. *See, e.g.*, Title VII, 42 U.S.C. § 2000e-2(e); ADEA, 29 U.S.C. § 623(f)(1).

72. Title VII, 42 U.S.C. § 2000e-2(e) (providing an exception for bona fide occupational qualifications only for religion, sex, and national origin).

73. *Broadway's "Hamilton" Teaches Lessons to Employers*, FISHER PHILLIPS (Apr. 8, 2016), https://www.fisherphillips.com/resources-newsletters-article-broadways-hamilton-teaches-lessons-to-employers-1 (noting that Title VII does not prohibit using race to set up sting operation for a White supremacist gang).

74. The musical *Hamilton* provides a recent example. The casting call for the musical specifically sought "non-white men and women" for lead roles. Although never litigated, the practice was widely viewed as acceptable as a bona fide occupational qualification since one of the central messages of the musical depended on non-white actors. *See* Nicole Ligon, *Who Tells Your Story: The Legality of and Shift in Racial Preferences Within Casting Preferences*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 135, 135 (2019).

75. *See* Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 445 (1986); United States v. Paradise, 480 U.S. 149, 154 (1987) (permitting court-ordered remedies requiring employers to grant racial preferences to correct for past discrimination); United Steelworkers of America v. Weber, 442 U.S. 193, 197 (1979); Johnson v. Transp. Agency, 480 U.S. 616, 629 (1987) (permitting voluntary race-conscious affirmative action programs to correct for past, long-standing discrimination).

76. *See supra* notes 92-93 and accompanying text.

likely to present lower comparative salary information. But the salary-ban laws do not want to prohibit the minority of women with higher-than-offered salaries from bargaining for higher pay with that information. They want that information to be transparent and to permit employers to rely on it.

In sum, the assumptions underlying skepticism about use of the factors explain why a legislature might choose a quadrant four approach rather than a quadrant one or two approach. If the assumption is that the factor is generally problematic, but nevertheless sometimes relevant and legitimate (more often than would be permitted by a stringent bona fide occupational qualification exception), it might choose quadrant four instead of quadrant one or two.

C. Why Quadrant One?

The discussion above raises the converse question: If it is (almost) always improper to rely on the invidious factor, then why permit the employer to ask about it? Why not prohibit transparency as well as reliance? Why place a prohibition into quadrant one when quadrant two (no reliance and low transparency) would do an even more thorough job?

Ironically, this question may have an answer analogous to the "why quadrant four" question but focused on the other party to the negotiation. For quadrant four, reliance is permitted because, although the information presents problems, it can also be used positively in the antidiscrimination effort. We want to permit employers to rely on salary history when women have higher salaries so that the reliance might help address (rather than detract from) the problem of unequal wages. We want employers to rely on disability status when accommodations permit the individual to perform job duties.

For quadrant one, the idea is also that the information is useful, but to the other party to the negotiation, that is, to the prospective employee. Although an employer cannot rely on gender or gender-related topics such as pregnancy and childcare in making an employment decision, discussion of them may help the employment matching process. By discussing childcare options or a generous leave policy, employers can openly signal that they provide a work environment conducive to women and it can help women sort into jobs that better meet their preferences. A barrier on frank discussion of these topics would interfere with the sorting process to the detriment of both employers and workers. Thus again, while an employer cannot rely on these factors, transparency permits communication on them; it improves the efficiency of the labor market, of the matching process.

Note that this permitted transparency helps "good" employers and hurts "bad" employers, while non-transparency would do the reverse. Good employers want to be able to inquire freely into the preferences of employees on gender-related matters so that they can signal their "goodness." Bad employers would rather avoid the issues. In this way, transparency also provides some incentive to invest in and provide a work environment attentive to these kinds of issues. If employers could not talk about the work environment, good employers would

not be able to reap the full benefits of their investments in good leave programs, good child-care options, and the like.

D. Why Quadrant Three?

Quadrant three—high transparency on factors an employer can rely on—includes most things an employer might rely on in making an employment decision. But the interesting question for this paper is why would this choice ever be used as part of the antidiscrimination effort? Why would it apply to factors that employers are generally discouraged from using, such as salary, disability, or pregnancy?

The key factor here is that, even though the factor can be used improperly, it also has proper uses. An employer who wants to attract an employee needs to know if its offer is too low; similarly, an employee who wants to work for that employer wants to give the employer an opportunity to beat her current salary. For disability or pregnancy, the obligation of an employer to accommodate can be meaningful only if the employer knows about the disability or pregnancy. Interestingly, in contexts like these, transparency itself may be a positive good; people tend to look more favorably on transparent processes than on opaque ones.[77]

When a factor, such as salary or disability, can be used properly or improperly, a ban on its use would ban proper as well as improper uses. More particularly to transparency, if a factor can be used properly, a ban on asking about it is likely to be ineffective or even counter-productive. When employers and employees both have incentives to disclose the information, they will often find ways to discover or disclose the information indirectly, even if they are prohibited from discussing it directly.[78] As a result, factors may fall into this category when the information can be used legitimately and illegitimately, and the legitimate uses make it reasonable to permit the employer to discover and use the information in many situations.

E. Problems with Non-Transparency

Non-transparency as a nondiscrimination strategy has two big problems. First, true non-transparency is often difficult and, second, even if possible, hiding a factor may perversely activate unconscious biases.

Sometimes non-transparency is possible and sometimes it is not. This factor––the possibility of non-transparency—is an important one differentiating

77. *See* BRIAN CHRISTIAN, THE ALIGNMENT PROBLEM: MACHINE LEARNING AND HUMAN VALUES 319 (2020) (finding people place greater trust in transparent computer models even when the models are wrong and ought not to be trusted).

78. *See infra* notes 79-82 and accompanying text. Professor Cofone provides an insightful discussion of this issue noting that legal limits on access to information an employer views as relevant to an employment decision may be avoided by asking about the subject indirectly (thus, increasing the time and cost of the hiring process) or by using proxies for the information (which can be done efficiently by algorithm). Cofone, *supra* note 3, at 174-75.

between laws that do and do not require it. Past salary and criminal convictions, for example, are not evident *a priori* to employers. On the other hand, race and gender are usually evident even if employers are forbidden from asking about them.[79] Disability falls in between; some disabilities are obvious, others hidden. More abstractly, the effectiveness of transparency depends on the unavailability of proxies. If proxies are available, to be effective, the rule would also have to ban proxies. But because modern technology is very adept at finding proxies, producing effective non-transparency is increasingly difficult.[80] In the extreme case, if non-transparency is impossible (the factor is readily observable), then a non-transparency rule is futile. In that case, if a problem with the factor is to be addressed, it must be addressed in another way, for example, by prohibiting reliance on it.

But even if non-transparency seems possible, it may be difficult to enforce. Consider the situation in which employers cannot ask about a factor, say salary, but they can rely on it if they know about it, for example, if the employee volunteers the information.

Consider this analogy. Each of one hundred sellers of apples (employees selling labor) has a box containing one to one hundred apples; each apple is worth one dollar. The sellers know how many apples they have in their box and the purchaser (employer) knows the seller knows, but the purchaser cannot ask a seller how many apples are in a box. What would a seller with 100 apples in her box do in this situation? She knows the purchaser won't offer her $100 without disclosure because the odds are that she doesn't have 100 apples in her box. So, she discloses. Now there are only boxes with one to ninety-nine apples. What does the seller with ninety-nine apples do? Then the seller with ninety-eight apples, with ninety-seven apples, and so forth. This is unraveling. In theory, at the end of the day all the sellers will disclose their private information. In the employment context, even if all the sellers (of labor) do not disclose, the employer can and probably will make inferences about those that do not. A "can't ask" rule is likely to be ineffective unless there is also a rule against voluntary disclosure.[81]

This unraveling story illustrates one reason non-transparency is difficult even for non-evident factors. On salary, for example, if an employer offers an initial salary, the employer would expect a prospective employee to voluntarily disclose current salary if it is more than the offer. This expectation means that,

---

79. Obviously, employers can take steps to withhold this information from decision-makers, for example, by not including it on the application form, prohibiting photographs, etc. *Cf.* Timothy Williams, *To Avoid Bias, Prosecutors Try Hiding a Suspect's Race When Filing Charges*, N.Y. TIMES June 12, 2019, at A15. But that strategy is only possible at some stages of employment (for example, it is difficult to implement for decisions about current employees) and it depends on the unavailability of proxies. *See infra* note 80 and accompanying text.

80. *See* Cofone, *supra* note 3, at 151.

81. This example is adapted from DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 89–95 (1994).

if an employer cannot ask about current salary, it has an incentive to low-ball the initial salary to encourage voluntary disclosure of current salary. Given this structure, it is possible that a law limiting employer inquiries about salaries may cause more low-ball initial offers and, consequently, result in lower salaries than a more open system where salary expectations are discussed freely and openly.[82]

A stronger non-transparency rule may also produce perverse outcomes. Consider a non-transparency rule that is coupled with a no-reliance rule: the employer cannot ask and cannot rely on the factor. Recent studies indicate that this may result in worse outcomes for the intended beneficiaries of the rules because it may activate adverse reactions. For example, it may be that the absence of information activates unconscious biases.

In a leading study, Professors Agan and Starr examined callback rates before and after enactment of ban-the-box laws. Before the ban-the-box laws, White applicants received twenty-three percent more callbacks than Black applicants with similar resumes. And, as expected, employers who asked about criminal records were very significantly more likely to callback applicants who did not have criminal records (sixty-three percent more likely), a form of discrimination that the no-transparency obligation of the ban-the-box laws eliminated. But the overall effect of the ban-the-box laws' non-transparency was to *increase* the disadvantage of Black applicants. Before ban-the-box when employers asked about criminal records, White applicants received seven percent more callbacks than similar Black applicants; after ban-the-box White applicants received forty-five percent more callbacks than similar Black applicants from those employers.[83] In essence, the studies find that the benefits of a ban-the-box law for Blacks *with* convictions are outweighed by the disadvantages for Blacks

82. *See* Jeff Meli & James C. Spindler, *Salary History Bans & Gender Discrimination*, PUB. L. & LEGAL THEORY RSCH. PAPER SERIES NO. E587, 6 (2019) (finding that bans on salary history information inhibit information about worker productivity and, consequently, adversely affect high performing women thus aggravating the wage gap); *but see* James Bessen et al., *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, B. U. PUB. L. & LEGAL THEORY PAPER NO. 20-19, 26–29 (2020) (finding that salary history bans increase wages by five percent on average, with higher increases for women and African-Americans); Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence From a Field Experiment*, NBER WORKING PAPER NO. 26627, 31–32 (2020) (finding from an experiment that workers benefited from salary-ban laws); Benjamin Hansen & Drew McNichols, *Information & the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban*, NBER WORKING PAPER NO. 27054 (2020) (finding that California's salary-ban statute reduced the gender wage gap by one percent).

83. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECONOMICS 191, 195 (2018); *see also* Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden*, 38 J. LAB. ECON. 321, 352 (2020) (finding ban-the-box laws decrease the probability of employment for young, low-skilled Black men by 5.1 percent); *but see* Dallan F. Flake, *Do Ban-the-Box Laws Really Work*?, 104 IOWA L. REV. 1079, 1079–180 (2019) (reporting on an empirical study which found that a ban-the-box law increased callbacks for all races, with the biggest increase for Black applicants).

without convictions. When the latter are prohibited from declaring that they are conviction-free, a form of statistical discrimination, stereotyping bias, mistakenly scars them.

This possibility is not restricted to African-Americans, ban-the-box, or stereotyping. Professors Hirsch and Shinall have found that the hiring prospects of female applicants decline when they conceal personal information about their personal and family situation. The professors attribute this result to another form of behavioral heuristic: ambiguity aversion. Individuals tend to prefer known risks to unknown ones; disclosure of personal and family information reduces uncertainty and, as a result, improves the prospects for candidates who disclose the information.[84] Thus, as with the ban-the-box studies, this result indicates that non-transparency requirements or customs that prevent disclosure of unfavorable information may perversely result in worse outcomes than if the information were made available.[85]

In sum, non-transparency laws face two types of practical problems. First, if they prohibit employers from asking about a factor but permit them to rely on it, enforcing the non-transparency is difficult. Some kinds of factors, such as race and gender, may be generally known even without asking. Moreover, even for factors that are not as obvious, a form of unraveling may occur that incentivizes disclosure, perhaps more disclosure than would occur without the limitation on asking.[86] Second, if the non-transparency laws prohibit both asking about and relying on the factor, the limitation may activate unconscious biases that produce worse outcomes for the intended beneficiaries.

III. DECIDING ON THE PROPER QUADRANT: THE CONSIDERATIONS

Transparency and reliance are already features of American antidiscrimination law. Indeed, they have to be; they are a part of the basic structure of antidiscrimination law. But decisions about where to place a particular prohibition in the transparency/reliance matrix are not uniform; laws currently exist that fall into each possible quadrant of transparency and reliance.[87] This means that decisions about placement are being made, but they have been made implicitly without a framework for thinking about the proper quadrant.

---

84. Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 86–87 (2016).

85. Interestingly, Professor Strahilevitz argues from this that information such as criminal record histories should not be restricted. Making the information available to employers may reduce the incidence of statistical discrimination. Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 363–64 (2008).

86. A law that bans employers from asking about a factor, such as salary, signals to employees that the information might be important to employers. As a result, employees might be *more* likely to disclose the information voluntarily. Ironically, a ban like this would be most effective if employers knew about it, but employees did not. *See* BAIRD, *supra* note 81, at 92.

87. *See supra* Part I.A.

It would be better if decisions about transparency and reliance were made explicitly and for good reasons. What kinds of considerations would lead to the right placement in the matrix? In this section, I will describe the kinds of considerations that ought to guide placement into a particular quadrant.

A. The Possibility of Non-Transparency

One variable is whether the low transparency half of the equation is even possible, or possible enough to be a viable option. Non-transparency seems mostly unattainable for some factors and some decisions. Race and gender, for example, are difficult to shield effectively. Even without interviews, inferences about these factors can be made from names and activities; the resume studies indicate that these kinds of inferences *are* made.[88] And even if non-transparency can be achieved when some employment decisions are made, it may not be possible at other times for other decisions. For example, with modern technology, steps can be taken to shield race and gender at the hiring stage, even with interviews. But similar shielding seems futile when decisions like pay raises and promotions are made by supervisors about current employees.

On the other hand, low transparency seems quite possible for other factors. Criminal history, for example, is not apparent absent employer inquiry or investigation, and need not be apparent at any stage of employment.[89]

B. The Possibility of Non-Reliance

In some circumstances, non-reliance may be as difficult to enforce as non-transparency. A feature of implicit bias, for example, is conscious unawareness of the phenomenon resulting in the discrimination; if the discriminator is conscious of bias, it is no longer implicit. Viewed in this way, to require non-reliance on implicit bias presents a non sequitur; actors are being asked not to rely on a factor of which they are unaware. While not presenting the seeming impossibility of requiring non-reliance on implicit bias, other disfavored factors may be difficult to define with the precision necessary to permit enforcement. For example, actors may be aware of microaggressions, but identifying them

88. Both of these factors have become less dichotomized and more fractionalized in recent years. Thus, this factor depends on the perception of transparency at the time of legislative enactment, rather than transparency in some objective sense. *See infra* notes 111-12 and accompanying text (discussing Title VII).

89. Many of the ban-the-box laws prohibit both employer inquiries about criminal history, but also background checks and other employer attempts to obtain the information. *See A Guide to Ban the Box Laws at State County and City Levels. An Overview of Laws that May Impact Private Employers*, INTELLICORP, (Apr. 2021), https://www.intellicorp.net/marketing/IntelliCorp/media/intellicorp/IntelliCorp-BanTheBoxGuide-Version-20-2021-docx.pdf.

with sufficient precision to ban reliance, impose penalties, and determine damages may be quite difficult.[90]

C. Legitimate Uses

Some factors have legitimate uses, even required uses. For others, the legitimate uses are rare to non-existent. When accommodation of a factor is required as is the case under the ADA and many state pregnancy statutes, the employer must know about the factor to trigger the accommodation duty and must rely on it to satisfy the duty. Even if reliance on the factor is not required, some factors have well-accepted legitimate uses. It is well-accepted, for example, that prospective employees should be able to disclose past salaries that are higher than an employer's offer, and that employers should be permitted to rely on the past salary. On the other hand, one of the assumptions of the factors covered by Title VII (except religion) is that employers rarely, if ever, have legitimate reasons for relying on them. This is most apparent for race, which lacks even a statutory basis for a bona fide use.[91] But the BFOQ exception, even when it applies, is intentionally narrow, in part to emphasize the limited usefulness of the prohibited factors.

Non-transparency and non-reliance do not make sense for factors with required uses. The required use signals as strongly as possible that there are legitimate uses for the factors. Beyond that, a rough sliding scale exists: disclosure and reliance become more acceptable (and can even be required) as the legitimate uses for a factor increase.

D. Expressive Function

Not all law is coercive. Sometimes the law is intended to express social norms.[92] The no-reliance half of the matrix is coercive. But the other half may or may not be coercive. The accommodation mandates that are in the can-rely half are coercive; employers not only can-rely, they must rely on the factors. On the other hand, the salary-ban acts in the can-rely half are not coercive;

---

90. The most-cited definition of microaggression is "brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group." D.W. Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 273 (2007). Placing microaggression on the no-reliance side of the quadrant would be difficult because of problems identifying offending statements with sufficient precision, then attempting to prove the statements caused an adverse outcome (since, by definition, they are "micro"), and, even if both identification and causation were possible, to quantify the damages from a violation.

91. Title VII, 42 U.S.C. § 2000e-2(e).

92. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

employers cannot inquire about past salary, but they can rely if they become aware by other means.

In the context of our matrix, the expressive function can be more or less powerful. Forbidding reliance and transparency (quadrant two) would express the most disapproval of a factor. On the other end of the continuum, permitting reliance and high transparency (quadrant three) would signal that use of the factor is acceptable. But there may be a function for a middle ground on expressive function. In particular, permitting reliance but reducing (or even requiring) transparency may signal disapproval of the factor in situations where forbidding reliance may be difficult or impossible.[93]

E. Adaptation

Expected adaptation is another factor relevant to determining the appropriate quadrant. As noted above, a quadrant one statute (forbidding reliance but permitting transparency) may, in practice, turn into a quadrant two statute if employers react by instructing agents not to ask about the prohibited factor.[94] Similarly, a quadrant four statute (permitting reliance but limiting transparency), if effective, may practically become a quadrant one statute if it effectively prevents employers from learning about the factor.[95]

Although relevant, predicting adaptations is difficult. There is evidence, for example, that the salary-ban statutes have caused employers to post salaries with job advertisements more frequently.[96] The effect of this on the goals of the salary-ban statutes is ambiguous. It could mean employers are initially offering lower salaries than earlier and, if accepted, the practice could result in lower job-change salaries.[97] Or it could be that posting salaries is an indication that employers have accepted that the salary-ban statute removes most of the benefits of wage bargaining and, with it, the incentive to keep the initial wage offer secret.[98] But even though adaptations and their effects may be difficult to predict, the effectiveness of a statute in any quadrant will depend some on the adaptive reactions of employers and workers.

F. Intended Audience

A major difference between the must-disclose and the cannot-disclose laws is the intended audience. The intended audience of must-disclose laws, such as the

93. *See infra* notes 135-38.

94. *See supra* notes 66-70

95. *See supra* Part II.A, at 14.

96. *See* Bessen, et al., *supra* note 82.

97. *See supra* note 82 and accompanying text.

98. *See* Bessen, et al., *supra* note 82, at 29 (finding evidence that this is the reason for increased posting of salaries, which resulted in wage increases, especially for women and minority groups).

harassment-settlement laws,[99] and the salary-disclosure laws of the EEOC,[100] is the public. The idea is that disclosure of this information will protect workers from potential harassment and improve the efficiency of the wage-setting process. Perhaps the disclosures will even aid enforcement efforts by informing employees of past harassment and wage disparities. On the other hand, the main audience of the cannot-disclose laws is usually the employer. The idea is that the information is irrelevant to employment decisions, while use of it adversely impacts protected groups.

G. Timing

Timing is one way of dealing with the disjunction between transparency and reliance. The ADA and salary-ban statutes limit transparency at one point in time (before an offer of employment is made), but then permit transparency and reliance later.[101] Timing like this can permit a more fine-tuned calibration of the relationship between transparency and reliance.

But timing has limitations. As a general matter, employment discrimination laws apply to the full range of employment decisions, not only those that occur at the hiring stage. Transparency limitations are likely to be less effective, or even completely ineffective, for employment decisions made about current employees. Employers have more ready access to information about current employees; it is harder to erect information shields.

H. History

Related to expressive function, another consideration is the historical use of the factor. Of course, since all these laws impose limitations, the history must indicate worries about use in the past. But some histories are worse than others and, thus, may call for stronger prohibitions.

History solved one of the problems early discrimination theorists worried about. For example, Owen Fiss in his seminal piece on the theory of fair employment laws justified them on the basis of lack of individual control and unrelatedness to productivity. But if those are the reasons, Fiss asked, why should the use of race and gender be banned, but not eye color, which also fits both criteria? Fiss's answer to this problem was historical use of the factor—the widespread and unfair use of race and gender over time.[102]

Similarly, then, history may justify stronger measures within the reliance/transparency matrix or point to less stringency. For example, race and gender discrimination, with longer histories and which were deeply entrenched in labor markets, may require a strong prohibition on reliance. On the other hand, salary and criminal history have a less direct relationship to the identified

99. *See supra* note 53.

100. *See supra* note 5.

101. ADA, 42 U.S.C. § 12112(d;); *see infra* note 127 and accompanying text.

102. *See* Fiss, *supra* note 65, at 242 n.11.

problem (that is, they are related, but not precisely targeted to gender and race discrimination) and a more mixed record of inappropriate use.[103] Thus, they may call for a lesser prohibition within the matrix.

IV. RE-THINKING THE PAST: APPLYING THE TRANSPARENCY/RELIANCE MATRIX RETROACTIVELY

Lawmakers have always made decisions about transparency and reliance. They are fundamental features of every antidiscrimination law. But the decisions have been made implicitly, without direct consideration of the reasons for placement within a particular quadrant of the matrix. This section compares where antidiscrimination prohibitions have historically been placed in the matrix, almost by happenstance, with where they would have been placed if the matrix had been considered explicitly. Sometimes the placement makes sense; sometimes less so.

A. Title VII: The Basic Approach

Title VII is the place to begin because it was the first major federal antidiscrimination law and because it is the model for most of the state and local laws. Most of those laws follow the Title VII model on transparency and reliance and expand the substantive scope of the law simply by adding protected categories to Title VII's basic list.[104] For example, the Madison, Wisconsin, ordinance cited earlier prohibits discrimination on the Title VII factors, but then adds nineteen other factors.[105] This means that most state and local antidiscrimination laws (and, hence, most antidiscrimination laws) fall into the same quadrant as Title VII: quadrant one (no reliance and high transparency).

So, the first question to ask is whether quadrant one was the right placement in the matrix for Title VII, or at least a justifiable placement. Title VII was enacted mostly in response to a long history of extreme and explicit discrimination against Blacks. Other types of discrimination were also prohibited, of course, but the main impetus was discrimination against Blacks. On the reliance side of the matrix, this history called for a strong expressive statement against discrimination. As a result, both of these factors—history and expressive function—pointed to placement of the act into one of the no-reliance boxes of the matrix.

---

103. I do not mean to imply here that salary and criminal history have not been used in problematic ways in the past, but rather simply that, compared to race and gender, they have more appropriate uses.

104. They often also expand the procedural scope, for example, by increasing the number of employers subject to the nondiscrimination requirements.

105. MADISON, WIS., CODE OF ORDINANCES, § 39.03(2)(mm) (2022), https://library.municode.com/wi/madison/codes/code_of_ordinances.

Title VII also envisioned few legitimate uses for the prohibited factors. The BFOQ exception was extremely narrow, especially for race.[106] And the application of the prohibition was broad; it applied not only at hiring, but across the entire spectrum of employment decisions. These two factors—few legitimate uses and broad application—also point to placement in one of the no-reliance boxes.

Non-reliance was also indicated because discrimination under Title VII was defined in ways that were conducive to effective enforcement, or at least that is how the courts interpreted the Act. Both major branches of discrimination relied on a form of intention, either intentional use of a prohibited factor directly,[107] or intentional use of a neutral factor that had an adverse impact on a protected group.[108] Even when Title VII was extended to cover harassment, harassment was defined in a way attentive to enforcement, for example, by requiring an adverse effect on a tangible aspect of employment or, if not that, severe or pervasive harassment.[109] Title VII did not present either the reliance non sequitur of implicit bias or the precision difficulties of microaggression.[110]

Finally, the intended audience of Title VII also points to placement in one of the no-reliance boxes. The primary intended audience of Title VII is employers; it is directed to regulating their conduct. Given that, it makes sense that the Act takes the form of prohibiting reliance on the disfavored factors.

On transparency, at the time Title VII was enacted the possibility of non-transparency was probably thought to be limited. Even though "passing" was known at the time,[111] it was not thought to be widespread and current appreciation of the variation of race and, especially, of gender was unheard of at the time.[112] Even today, the name/resume studies indicate that non-transparency

---

106. Title VII, 42 U.S.C. § 2000e-2(e).

107. The two major sub-branches of intentional employment discrimination are individual disparate treatment discrimination, *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and systemic disparate treatment discrimination. *See* Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

108. The leading case on disparate impact discrimination is Griggs v. Duke Power Co., 401 U.S. 424 (1971).

109. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–54 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 786–92 (1998).

110. *See supra* note 90 and accompanying text & *infra* note 133 and accompanying text.

111. *See* ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014).

112. For example, the 1960 census included nine race, ethnicity, and origin categories, while the 2020 census contained twenty categories, and for Whites and Blacks asks for additional narrative explanation (such as German, Irish, Nigerian, or Somali). The census permitted Americans to choose more than one racial category only since 2000. *See What Census Calls Us*, PEW RSCH. CTR. (Feb. 6, 2020), https://www.pewresearch.org/interactives/what-census-calls-us. The modern conception of sex and gender that rejects a simple bipolar model and instead recognizes many variations is generally dated from the late 1960s and early 1970s. For a good history, *see* Kristina M. Zosuis et al., *Gender Development Research in Sex Roles: Historical Trends & Future*

is difficult.[113] The possibility-of-non-transparency factor, then, points to placement in one of the high-transparency boxes of the matrix.

Similarly, the adaptation and timing factors point to placement in one of the high transparency boxes. On adaptation, even with low transparency, employers could make adaptations to frustrate low transparency. Many of the adaptations were tried, such as photos on applications. Others, such as names on applications and record-keeping for EEOC reporting, did not even require much "adaptation." On timing, Title VII provided a modest non-transparency rule that indirectly emphasizes the general transparency rule. Title VII explicitly prohibited race- and sex-segregated help-wanted advertisements.[114] Thus, a modest form of non-transparency was provided only at an early stage of the hiring process when it might be effective. No similar non-transparency rule was provided for any other stage of the employment process.

Thus, if Congress had thought about the transparency/reliance matrix when it enacted Title VII (which it did not), it probably would have placed the act in quadrant one—no-reliance and high transparency—which is where it was placed, albeit based only on implicit reasoning.

B. Title VII: The Special Case of Religion

As originally enacted, religion was not treated differently than any of the other prohibited factors: race, color, national origin, and sex.[115] Thus, by default, it was placed in quadrant one (no reliance, high transparency) alongside the other factors. But it soon became apparent that there were problems on the reliance side of that placement.

Directions, 64 SEX ROLES 826 (2011). For a good overview of current gender categories, *see* Shelby Hanssen, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 ORE. L. REV. 283 (2017).

113. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily & Greg More Employable than Lakisha & Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991 (2004).

114. Title VII, § 704(b), 42 U.S.C. §§ 2000e-3(b). Although the language of the statute was clear and race-segregated help-wanted advertisements disappeared quickly, an extended debate ensued about the legality of sex-segregated advertisements. In 1965, the EEOC issued its first interpretive guidance on the issue which permitted sex-segregated advertisements under certain conditions. By 1968, however, the EEOC reversed itself, interpreting the provision to prohibit employers from using sex-segregated advertisements. Nicholas Pedriana & Amanda Abraham, *Now You See Them, Now You Don't: The Legal Field and Newspaper Desegregation of Sex-Segregated Help Wanted Ads 1965-75*, 31 LAW & SOC. INQUIRY 905, 913–14 (2006). Later, in 1973, the Supreme Court found analogous state and local restrictions that applied directly to newspapers to be consistent with the First Amendment. Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 391 (1973).

115. Title VII, 42 U.S.C. § 2000e-2. Congress exempted religious organizations from the ban on religious discrimination. *Id.* § 2000e. As a result, that narrow category of employers would fit into quadrant three (high transparency, may rely). This section discusses religious discrimination as applied to the much broader category of employers not covered by the exemption.

Soon after the Act's effective date in 1965, the question arose whether it would be impermissible religious discrimination for an employer to discharge or refuse to hire a person who refused for religious reasons to work during the employer's normal work week.[116] In 1966, the EEOC issued a guideline saying that, for religion, the non-discrimination language of Title VII meant that employers were required "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business."[117] The next year, the EEOC revised the language of its guideline to state the accommodation requirement in almost its modern form: employers must "make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[118]

In 1971, the United States Supreme Court considered *Dewey v. Reynolds Metals Co.*, a case in which a lower court had relied on the EEOC's guidelines to hold that it was permissible for an employer to discharge an employee for refusing to work on Sundays for religious reasons when the employer had provided the employee with the option of finding his own replacement.[119] Uncertainties about how to apply the EEOC's reasonable-accommodation standard were very apparent when the Supreme Court was equally divided in the case (with one Justice recusing himself). Consequently, the Court affirmed the lower court decision without issuing an opinion.

Reasonable accommodation first entered American statutory law in 1972 when Congress tried to provide clarity after *Dewey* by amending Title VII to add a definition of "religion":[120]

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[121]

This was a significant change on the reliance side of the transparency/reliance matrix. It recognized that, unlike the other Title VII factors for which there were very few legitimate uses, there were sometimes legitimate reasons for an

116. This history is recited in the seminal Supreme Court case on religious discrimination under Title VII. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 66 (1977).

117. 29 C.F.R. § 1605.1 (1967).

118. 29 C.F.R. § 1605.1 (1968).

119. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), *aff'g* 429 F.2d 324 (6th Cir. 1970).

120. "This amendment is intended . . . to resolve by legislation . . . that which the courts apparently have not resolved. I think it is needed . . . because court decisions have clouded the matter with some uncertainty . . . ." 118 Cong. Rec. 705–06 (1972) (remarks of Sen. Randolph). Sen. Randolph concluded his remarks by placing the Court of Appeals decision in *Dewey* into the Congressional Record. *Id.* at 706.

121. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103.

employer to rely on religion in making an employment decision. As a result, instead of the (almost) always cannot-rely requirement of Title VII as originally enacted, this change meant that religion was sometimes in the cannot-rely quadrant one (for straight-up cases of disparate treatment religious discrimination), but more commonly was in the must-rely quadrant three (for cases when accommodation was required). Complete placement in the no-reliance quadrant is not possible when reliance is sometimes required. On the other hand, when a worker's religious beliefs or practices do not require an accommodation, a no-reliance rule makes sense.

Title VII, however, was not revised to change the transparency requirement. As a result, religion remained, and still remains, on the high-transparency side of the matrix. No restrictions exist on employer questions or inquiries about religion. If Congress had been thinking about transparency, they may have made a change on that side of the matrix, too. I have some confidence in saying this because, as I detail below, they did make such a change in the other major federal law requiring accommodation: the Americans with Disabilities Act.

C. The Americans with Disabilities Act: Changing Transparency

Like Title VII, the ADA was enacted in response to a long history of disadvantage suffered by workers in the labor market, in this case by individuals with disabilities. This long history called for a law to express disapproval of those labor market outcomes, even if some of the reasons for those outcomes were understandable. That is, in contrast to the original Title VII, it was recognized that there were legitimate uses for the disfavored factor that might lead to labor market disadvantages—the factor could be relied on if accommodation was difficult or imposed undue hardship. Indeed, the factor *must* be relied on if accommodation was necessary to permit the individual to perform the essential functions of the job.

This combination, as with religion under Title VII,[122] pointed to a nuanced position on the reliance side of the matrix. Complete placement in the no-

122. The evolution of the accommodation requirement for disability is similar to its evolution for religion. The history begins with enactment of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701 *et seq*.), which prohibited discrimination on the basis of "handicap" (as the phraseology was then): "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* at § 504.

In 1977, after some delay, the Department of Health, Education and Welfare (later renamed the Department of Health and Human Services), the main federal enforcement agency for the Rehabilitation Act, issued regulations to provide guidance about what non-discrimination in this context meant and, as with religious discrimination, the conclusion was that non-discrimination meant primarily a duty to accommodate: "[Under the Rehabilitation Act, covered entities must] make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the [entity] can demonstrate that the

reliance quadrant is not possible when reliance is sometimes required. On the other hand, when the worker is fully qualified without accommodation, a no-reliance rule makes sense.

On the transparency side, the ADA recognized that it is not always readily apparent that a worker is a person with a disability. Some disabilities are "hidden."[123] This meant that non-transparency was possible in at least a substantial subset of cases involving individuals with disabilities. In general, the possibility of non-transparency was most achievable at the application stage; after employment, it was less likely that non-transparency could be maintained.

Finally, on adaptation, the ADA was an act in which adaptation was a positive and required feature of the act. When employers learned of a disability, they had an affirmative duty to adapt to, to accommodate, the disability. Thus, again, the possibility of positive adaptation meant that transparency subtlety was required. No transparency would mean that the expected, and indeed required, adaptation could not occur.

Thus, if Congress had thought about the transparency/reliance matrix when enacting the ADA (which it did not), it probably would have enacted a nuanced position on both reliance and transparency. On reliance, it probably would have prohibited reliance when the disability was irrelevant to the position, but required reliance when accommodation was required. On transparency, Congress probably would have limited transparency at certain times early in the employment process when non-transparency was possible, but permitted transparency later when reliance obligations came into place. And this is about where the ADA came out. It is (mostly) a quadrant two law (no reliance and

---

accommodation would impose an undue hardship on the operation of its program or activity." 42 Fed. Reg. 22,676, 22,680 (May 4, 1977) (codified at 45 C.F.R. § 84.12(a) (1977).

Years later, this conception of non-discrimination for individuals with a disability was incorporated into the Americans with Disabilities Act (ADA), which had much broader applicability. The statutory language was very similar to the administrative regulation under the Rehabilitation Act:

> [T]he term "discriminate" . . . includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business[.] 42 U.S.C. § 12112(b)(5)(A).

Interestingly, however, the non-discrimination language of the Rehabilitation Act itself remains substantively unchanged, as does the regulation implementing it. Thus, for both religion and disability, development of the concept of reasonable accommodation began with a broad statement that discrimination on that basis was illegal, which was interpreted by an administrative agency to impose an accommodation requirement, which was later incorporated into statutory language.

123. *See* J.H. Verkerke, *Is the ADA Efficient*, 50 UCLA L. REV. 903, 934–36 (2003); Peter David Blanck & Millie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 369 (1997) (noting that the majority of disability claims filed with the EEOC were for hidden disabilities).

low transparency) except when it is a quadrant three law (must rely when there is transparency).[124]

D. The Salary-Ban Laws

The salary-ban laws have been enacted mainly in response to long-standing pay disparities between men and women and to a lesser extent between Whites and racial minorities. Importantly, however, the laws are an indirect attack on those disparities, rather than a direct attack. Laws already exist to prohibit salary disparities that can be proven to be directly attributable to discrimination.[125] Instead of doing that, these laws attempt to limit the opportunity to perpetuate the disparities by limiting a category of information on which they might be based. As a result, the history of improper use of salary, the disfavored factor, is not as direct as the history of discrimination against Blacks and others addressed by Title VII or individuals with disabilities addressed by the ADA.[126] Similarly, the expressive function of the laws is less direct. The expressive statement is not directly against pay discrimination against women and racial minorities, but against the use of one factor that may be contributing to those disparities. These factors point to a reliance standard that is weaker than that of Title VII or the ADA.

The salary-ban laws also recognize that legitimate uses exist for past-salary information. Women and racial minorities with higher-than-offered salaries should be able to present past-salary information to negotiate for higher salaries. Again, this points to a may-rely standard rather than a no-reliance standard.

On transparency, salary history is non-obvious and, thus, poses the possibility of non-transparency. The possibility of non-transparency is enhanced as the laws are directed at only one point in the employment process: the hiring stage. Thus, if non-transparency is required only for that time, it may be both possible and effective to limit improper use. Adaptation is a worry about non-transparency even at the hiring stage. As noted above, in response to a salary-ban law, employers may post expected salaries more often and the incentive would be to post lower-than-expected salaries to incentivize applicant self-disclosure. There is some evidence that this has occurred.[127] Interestingly, although the salary-ban laws opt for limited transparency, this type of possible adaptation may mean that high transparency would be a better option than low

---

124. "[E]mployers must treat individuals with disabilities equally if they are qualified and their disabilities do not require accommodation, . . . [but] employers are required to treat such individuals differently if reasonable accommodations are necessary to ensure equal employment opportunities and benefits." CHARLES M. SULLIVAN & MICHAEL J. ZIMMER, CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION 442 (9th ed. 2017).

125. *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d); Title VII, 42 U.S.C. § 2000e-2.

126. *See supra* Section III.H.

127. Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 992–93 (2011).

transparency. That is, maybe as several academics have argued, quadrant four would be a better home for this class of statute than quadrant three.[128]

Thus, again, if jurisdictions considered the transparency/reliance matrix in enacting salary-ban laws and the choice was made to be non-transparent, one would expect to see the non-transparency requirement only during the crucial period when the problematic use of salary occurs (that is, during hiring) with permission to rely on past salary if it is disclosed legitimately outside of the non-transparency requirement. That is, one might expect the laws to fit into quadrant four—low transparency on a factor that the employer may rely on. Many of the salary-ban laws fit into that quadrant.[129] On the other hand, it could be that the opposite choice should be made on transparency; instead of salary "ban" acts, perhaps they should be salary "disclosure" acts.

****

In sum, applying the criteria discussed in Section III retroactively, the placements of antidiscrimination protections into the matrix generally make sense even though the decisions at the time were made implicitly rather than explicitly. Alternatively, playing the tune backwards, it could be that given current antidiscrimination statutes, the criteria in Section III make sense. Sometimes, the arrow of causation can be uncertain. At the same time, however, explicit consideration of the matrix may have changed at least one of the placements at the time and now (religion). Regardless of the direction of the arrow of causation, thinking about transparency and reliance helps us to understand, analyze, and, perhaps, as in the case of religion, improve antidiscrimination efforts.

V. A GLIMPSE AT THE FUTURE: THINKING EXPLICITLY ABOUT TRANSPARENCY AND RELIANCE

In addition to helping us think about past decisions, and maybe improving upon them, thinking explicitly about transparency and reliance may help us address new and emerging issues. This section hints at the promise of thinking of new antidiscrimination initiatives through the lens provided by transparency and reliance. The section will not provide a detailed analysis of each area—a detailed analysis would justify an article on each—but it will demonstrate the potential value of explicit consideration of these two factors.

Consider first a common approach of state and local laws to expand the reach of antidiscrimination laws: to use the Title VII framework, but simply add to the list of prohibited factors. The Madison, Wisconsin, antidiscrimination ordinance, mentioned earlier is an example of this.[130] It prohibits employer reliance on the Title VII factors, plus nineteen others. By default, this approach

128. *See* Bessen, et al., *supra* note 82, at 28.

129. *See supra* note 1 and accompanying text.

130. *See supra* note 62.

places all of those factors into Title VII's high-transparency/no-reliance quadrant. But attending explicitly to transparency and reliance would indicate that at least some of the factors might benefit from placement into the low-transparency/no-reliance quadrant instead. Limiting inquiries about family or student status or whether someone has been a victim of domestic abuse or sexual assault may contribute to minimizing improper reliance on those factors. As a result, placement of those factors into the no-transparency/no-reliance quadrant might make more sense. Similarly, some of the factors, such as religion and handicap/disability, almost certainly should be placed in one of the must-rely quadrants, at least for some claims.[131] Although the ordinance partially attends to this,[132] the ordinance could be both clearer and more appropriately targeted if explicit attention were paid to the transparency/reliance matrix for each prohibition considered separately instead of, as is common practice illustrated by the Madison ordinance, lumping all the prohibitions together into the same, default Title VII quadrant.

The transparency/reliance lens may also provide new avenues for addressing emerging discrimination issues. For example, consider implicit bias. Addressing implicit bias has proven to be challenging under the high transparency/no reliance framework of Title VII. First, it has been exceedingly difficult to prove reliance under traditional notions of reliance since, by assumption, the bias is implicit, that is, non-conscious.[133] If it is conscious, it is not *implicit* bias anymore. Second, despite that, because of the possibility of liability for implicit bias, employers resist the idea that it plays any role in their decision-making.[134]

---

131. *See supra* notes 115-24 and accompanying text (describing when religion and disability would be placed in the no-reliance versus the must-rely quadrant).

132. MADISON, WIS., CODE OF ORDINANCES, *§ 39.03(8)(h) (2022), https://library.municode.com/wi/madison/codes/code_of_ordinances* (incorporating accommodation duty for religion); *id.* at 39.03(i) (making various exceptions).

133. For articles expressing skepticism that Title VII recognizes claims of implicit-bias discrimination, *see* Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1131–32 (1999); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 42–43 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 503–04 (2010); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1056–58 (2006). *But see* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1035 (2006); Christopher Cerullo, *Everyone's A Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 128 (2013).

134. For examples of employers denying the presence and relevance of implicit bias, with varying results, *see* Martin v. F.E. Moran, Inc., 2018 U.S. Dist. LEXIS 54179, at *67–70 (N.D. Ill. Mar. 30, 2018) (finding that plaintiff failed to tie expert testimony on implicit bias to individual circumstances in the case); Jones v. Nat'l Council of YMCA Ass'ns, 34 F. Supp. 3d 896, 898–901 (N.D. Ill. 2014) (rejecting expert testimony on implicit bias); Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 776–78 (E.D. Wis. 2010) (finding implicit bias).

A better approach to implicit bias might be to take it out of the Title VII's no-reliance quadrants and place it instead in the high-transparency/may-rely quadrant. If that were done, employers might be encouraged to explore the effects of implicit bias in their decision-making without fear of liability if they isolated its effects. Indeed, it might even be preferable to enhance the high-transparency requirement. Employers might not only be *permitted* to inquire about implicit bias, but *required* to do so.[135] A statute might provide that they are liable if they *fail* to explore the possibility of implicit bias in their workplaces, provide anti-bias training to their employees, and establish structures in the workplace to identify, minimize, and eliminate it.[136] This framework might also apply to other emerging areas, such as microaggressions,[137] or even accent discrimination.[138]

Finally, the transparency/reliance lens may help us to think about how to address the new challenges posed by the use of artificial intelligence (AI) in making employment decisions. In the process, in a forward-to-the-past move, thinking of AI through this lens may help us think about perennial issues in the law of employment discrimination.[139] On new challenges, employment discrimination restrictions on the use of AI are placed by default into Title VII's high-transparency/no-reliance quadrant. But problems exist on both sides of this divide. On the transparency side, AI programs can be incredibly opaque to normal human surveillance while, on the no-reliance side, even if an AI program is instructed not to rely on a prohibited factor, such as gender, it may be incredibly clever (and opaque) in finding proxies.[140] At a deeper, forward-to-the-past level, thinking about AI through this lens may tell us something about

---

135. Although they obviously do not rely on the transparency/reliance matrix, Professors Jolls and Sunstein suggest an analogous approach to implicit bias. They suggest that instead of banning implicit bias directly, the law could be used to encourage or enable employers to take steps to reduce implicit bias. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 988–90 (2006). That is what is suggested here through the lens of transparency and reliance: no ban, but high, mandatory transparency with an obligation to take steps to address and minimize implicit bias.

136. The obvious analogy here is to sexual harassment where employers are provided a defense to hostile-environment harassment claims if they take proactive steps to address and minimize the harassment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998). Through the transparency/reliance lens, this framework permits hostile environment harassment to occur without liability (in essence, permitting reliance) if the employer takes steps to implement high transparency directed to addressing and minimizing such harassment.

137. *See* Sue et al., *supra* note 90.

138. *See* KATHERINE D. KINZLER, HOW YOU SAY IT: WHY YOU TALK THE WAY YOU DO – AND WHAT IT SAYS ABOUT YOU 145–48 (2020) (arguing that accent discrimination should be a protected category under civil rights laws).

139. With apologies to Back to the Future. *See* BACK TO THE FUTURE (Universal Pictures 1985).

140. For good discussions of these issues, *see* Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L. REV. 803 (2020); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

both disparate treatment and disparate impact discrimination. On disparate treatment, the lens indicates that any psychological gloss on intent in antidiscrimination law should finally be rejected; AI programs do not have human intent, but their decisions should be illegal nonetheless if they result in disparate treatment of a protected group.[141] On disparate impact, AI is problematic in that it may be difficult to isolate the effect of any particular factor in a complex program. But this problem can serve to highlight a better approach to causation in disparate impact law. The problem of separating the effect of multiple factors is only a problem if separating effects is a requirement of the doctrine. But from the very earliest case,[142] a more blindered approach to causation has been used. That is, the task in proving a prima facie case is not to separate the effect of a factor from other factors, but to compare the effect of a factor "blindly" without consideration of any other factor.[143] If this proper view of causation is applied, AI may enhance the use of disparate impact rather than complicate and frustrate it. The blindered data should be readily available within the program even in situations where disaggregating the effects of many factors is difficult or impossible.[144]

This glimpse at the future has been, by necessity, more atmospheric than detailed. Each of these topics—state and local antidiscrimination laws, implicit bias, and AI—and, for that matter, several others, merit their own article and careful consideration. The task here is merely to indicate that use of the transparency/reliance lens may be useful in thinking about these future challenges.

VI. CONCLUSION

In structuring antidiscrimination laws, legislatures work with a large number of variables. Legislators consider most of the variables explicitly. They determine which employers are covered, what characteristics to protect, the methods of proof, the procedures to be followed, and the available remedies. These are all important decisions that have an important effect on the effectiveness of the antidiscrimination effort.

This article is about two variables that are present in every antidiscrimination law, but which have until now not been considered explicitly. The laws regulate

---

141. For a good discussion, *see* Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 404–10 (2018).

142. *See* Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 352–54 (1996) (explaining the use of blindered causation in *Griggs v. Duke Power Co.*).

143. *See id.* at 364–77.

144. The transparency/reliance lens will be less useful in addressing the business-necessity prong of disparate impact analysis as applied to AI outcomes: is a mere correlation between criterion and job performance sufficient to make out a business-necessity defense, or is something more required? For discussions, *see* Sullivan, *supra* note 141, at 415–28; Steven L. Willborn, *Righting the World: Sullivan on Disparate Impact*, 50 SETON HALL L. REV. 1495, 1505–08 (2020).

transparency by sometimes limiting employer access to information about the protected characteristic, while at other times requiring broad access to the information. In addition, the laws regulate reliance usually by prohibiting reliance on the protected characteristic, while at other times permitting or even requiring reliance.

The main thesis of this article is that the antidiscrimination effort could be improved by explicit consideration of these two variables. Explicit consideration would facilitate a more careful tailoring of transparency and reliance to the goals of the particular antidiscrimination effort. As noted above, explicit consideration may improve the efficacy of current antidiscrimination efforts, such as those relating to salary-ban statutes. But perhaps even more importantly it may enhance efforts to expand the antidiscrimination effort into new areas, such as microaggression or accent discrimination, or to deal with emerging problems, such as AI decision-making.

Even more basically, however, transparency and reliance have always been and always will be central features of antidiscrimination laws. Until now, they have been largely hidden and addressed only implicitly. Nothing would be lost by thinking about them explicitly, and it is possible that much could be gained.