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ACCOMMODATING THE FEMALE BODY: A DISABILITY PARADIGM OF SEX DISCRIMINATION

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This Article presents a novel approach for understanding sex discrimination in the workplace by integrating three distinct areas of scholarship: disability studies, employment law, and architectural design. Borrowing from disabilities studies, I argue that the built environment serves as a situs of sex discrimination. In the first Part, I explain how the concept of disability has progressed from a problem located within the body of an individual with a disability to the failings of the built environment in which that person functions. Using this paradigm, in the next Part, I reframe workplaces constructed for male workers as instruments of sex discrimination. I then explain how built environments intended for the male body constitute disparate impact under Title VII. In the final Part, I present the architectural school of universal design, which has been a source of crucial innovation in the area of disability rights, as a means for both de-abling and de-sexing the workplace.

INTRODUCTION

The male ideal worker has structured our work environments.[1] His interests have determined our most coveted occupations, his traditional family role has determined our wages, his availability has determined our work hours, and most im-

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1. Joan Williams defines the "ideal worker" as a worker "who works full time and overtime and takes little or no time off for childbearing or child rearing." JOAN WILLIAMS, UNBENDING GENDER, WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000). For a discussion of the ideal worker norm, see *infra* notes 24–36 and accompanying text.

portant to this Article, his body has determined our work environment.[2] This Article proposes that the built environment can become a source of discrimination against women when spaces are constructed with the male body in mind. In its examination of the shortcomings of the current state of the law, this Article integrates three separate and distinct areas of scholarship: disability studies; Title VII sex discrimination; and lastly, architectural innovation in the form of universal design as a possible solution to this dilemma. By employing disability theory, disparate impact claims can challenge the sex discrimination that results when environments are built for men, the remedy for which is not the shifting of requirements but the alteration of the environment itself, in a word: accommodation.

Part I introduces the concept of the environment as an agent of discrimination. As this Article focuses on a particular sphere of traditionally male space, the workplace, Part II examines the historical construction of work as a masculine endeavor and demonstrates how certain work environments have been constructed specifically for a male ideal worker. Part III explains Title VII disparate impact claims. In the case of people with disabilities, architects have developed a theory called "universal design," geared toward eliminating the discriminatory aspects of built environments.[3] Part IV concludes by exploring this creative and forward-thinking school of design, illustrating how employers might remove architectural and structural barriers that have a disparate impact on women in the workplace.

I. BORROWING BUILT-ENVIRONMENT DISCRIMINATION FROM DISABILITY STUDIES

This Part examines disability scholarship as a heuristic lens for understanding the "built environment"[4] as an agent of discrimination. According to this thinking, it is not the indi-

2. *See* Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 311–15, 317–18 (1999).

3. *See infra* Part IV.

4. Laura Rovner defines the "built environment" as "not only . . . physical buildings and structures which have, for example, been built without ramps or doorways wide enough to accommodate wheelchairs, but also . . . the rules, policies, and practices that define our societal institutions in ways that do not consider the range of human functioning." Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1044 n.11 (2004).

vidual with the disability who poses the proverbial problem, but rather the inherent biases and assumptions of any number of urban planners, architects, and interior designers. This notion can be expanded beyond disability discrimination to encompass sex discrimination when environments have been built for the male body.

Definitions of disability, like our understandings of other identity groups, have shifted over time.[5] Four models have existed for understanding disability: moral, medical/rehabilitation, sociopolitical, and civil rights/minority. Originally, disability was conceived of in moral terms: physical impairments were equated with moral deficiencies or sin and understood as outward expressions of internal shortcomings.[6] As the so-called moral model of disability subsided, it was gradually replaced with the medical or rehabilitation model. This new framework constructed disability as something to be cured or treated, a defect or sickness addressable through medical science.[7] Although people with disabilities no longer bore the perceived stigma of immorality or fault, the new conceptualizations still located the "problem" of disability in the *person* with the disability.[8] However, "if disability is essentially biological, then the social disadvantages and exclusion that accompany the disability can be explained as natural and not ascribable to any social cause."[9] As disability is a function of biology and not society, "the disabled individual has no claim of right to social remediation, and any benefits or assistance that society chooses to bestow on persons with disabilities can be viewed as a charitable response of 'doing special things.' "[10] As long as disability was understood as a personal shortcoming, people with disabilities lacked the necessary tools for social reform.

Eventually, the sociopolitical model replaced the medical model, redefining the problem of disability as "a product of [the] interaction between health status and the demands of one's physical and social environment."[11] Under this new

5. *See generally* Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL'Y 352 (2000).

6. *Id.* at 353.

7. *Id.* at 353–55.

8. Rovner, *supra* note 4, at 1044 (quoting Kaplan, *supra* note 5, at 352).

9. *Id.* at 1049 (quoting Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 651–52 (1999)).

10. *Id.* (quoting Crossley, *supra* note 9, at 651–52).

11. Richard Scotch, *Understanding Disability Policy*, 22 POL'Y STUD. J. 170,

paradigm, the meaning of disability shifted from the medical defects of individual people to the shortcomings of constructed space.[12] A disability was no longer located in the body of the individual but "in the interface between the individual and her environment."[13] The sociopolitical model of disability regarded varying abilities as normal, not deviant, thereby rejecting the idea that people with disabilities are somehow "defective."[14] In short, the barriers encountered by people with disabilities were not a result of their physical impairments, but rather a function of the built environment.[15]

Once the built environment was identified as an instrument of exclusion, it could be understood as a discriminatory force. Viewing the exclusion of people with disabilities as intolerable discrimination is the heart of the civil rights, or minority, model.[16] This model takes the sociopolitical model a step further, re-construing the difficulties faced by people with disabilities as societal failures to ensure that people of all levels of ability can participate fully in social life.[17] According to the minority model, people with disabilities are a minority group that has been denied civil rights and equal access.[18]

Under the minority model, eliminating structural barriers is necessary to give people with disabilities equal rights. Consequently, traditional antidiscrimination strategies, rooted in principles of equal treatment, often prove insufficient: treating people with disabilities in the same fashion as their able-bodied counter-parts frequently results in their exclusion rather than their inclusion.[19] As a result, the Americans with Disabilities

172 (1994).

12. Rovner, *supra* note 4, at 1051 ("A central feature of this movement was the reframing of disability from a medical defect residing in the individual, to a recognition that the major problems associated with disability could be attributed to the external environment.").

13. *Id.* at 1044.

14. Kaplan, *supra* note 5, at 355.

15. *Id.* at 357. "Handicap is therefore a function of the relationship between disabled persons and their environment. It occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens." *Id.* at 356 (quoting UNITED NATIONS, DECADE OF DISABLED PERSONS 1983–1992: WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS 3 (1997)).

16. Rovner, *supra* note 4, at 1056.

17. *Id.*

18. RHODA OLKIN, WHAT PSYCHOTHERAPISTS SHOULD KNOW ABOUT DISABILITY 26 (1999).

19. Rovner, *supra* note 4, at 1057–58.

Act ("ADA") requires employers, government agents, and public entities to make "reasonable accommodations" for people with disabilities when those institutions violated rules of fair access.[20] Congress defined a "reasonable accommodation" as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[21] The reasonable accommodation provisions in the ADA represent a movement away from a medical construction of disability to a sociopolitical, or even a civil rights, perspective.[22] As will be demonstrated later in this Article, the concept of accommodation as a remedy is essential when alleging that sex discrimination resulted from the built environment.

Sex discrimination law could benefit from a similar leap from the medical model to the sociopolitical or civil rights model. Courts have previously employed what can be understood as a "medical model" of sex discrimination, blaming the exclusion of female bodies from environments built for male bodies on the veritable femaleness of the bodies themselves.[23] This Article calls for the institutionalization of a sociopolitical and civil rights model of understanding built-environment discrimination against women. The discriminatory effects of environments built for male bodies must be relocated to the environments themselves. Once we do this, we can stop blaming women for failing to function adequately in traditionally male spaces and begin to examine how to make those spaces accessible for the average man, the average woman, and everyone else in between. A new form of disparate impact claim and a new kind of remedy can help achieve these goals.

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20. *See* 42 U.S.C. §§ 12101–12300 (2000).

21. 42 U.S.C. § 12111(9) (2000) (defining reasonable accommodation).

22. Bradley Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 191–92 (2008).

23. *See infra* notes 74–78 and accompanying text.

II. THE PRESUMPTION OF THE MALE BODY AND THE MALE IDEAL WORKER

In her article *Space, Place, and Gender*, Doreen Massey observes that "spaces and places, and our senses of them (and such related things as our degrees of mobility) are gendered through and through."[24] Part III turns to the issue of built-environment discrimination on the basis of sex, arguing that environments constructed for male bodies discriminate against women on the basis of sex. Requirements demanding conformance to the average male body seem, on their face, deceptively sex neutral, creating an analog with the medical model of disability. Thus, this Part expands disability theory by arguing that built environments may not only be inherently ableist—that is favoring the non-disabled—but inherently sexist and thereby subject to challenge under Title VII.

Work is a particularly rich area of inquiry, given both the physical and social mores surrounding paid labor. Jobs frequently are not merely jobs: they are often gendered.[25] In her article *Life's Work*, Vicki Schultz argues that women are characterized as inauthentic workers because of the presumption that they "are first and foremost committed to domesticity—as wives, mothers, daughters, sisters, general nurturers, and providers of care and cleanup."[26] Because women have been historically regarded as caregivers and not wage laborers, work has often been designed with traditionally masculine workers in mind.[27] Joan Williams calls this phenomenon the "ideal worker norm."[28] The ideal worker can devote all of his time to work because he has a wife at home to take care of the house and family.[29] Williams argues that, as a result of the ideal worker norm, workers are expected to conform to masculine norms in a number of ways, including in their demeanor,[30] in their availability,[31] and in their physique.[32] According to Wil-

24. Doreen Massey, *Space, Place, and Gender*, *in* GENDER, SPACE, ARCHITECTURE 128, 129 (Jane Rendell et al. eds., 2000).

25. *Id.* at 130.

26. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892 (2000).

27. *See infra* notes 29–33 and accompanying text.

28. Williams, *supra* note 2, at 311–15.

29. WILLIAMS, *supra* note 1, at 1.

30. *Id.* at 312 (traditionally masculine characteristics such as aggression and competitiveness are considered valuable by employers).

31. *Id.* at 311–12 (men typically rely upon women for maintaining their households and raising their families and therefore can spend more hours in the

liams, the male ideal worker norm and the gendered nature of work can best be understood "by beginning with the situation in which equipment is designed around men's *bodies*. Equipment used in traditionally male jobs is typically designed to specifications that fit most men but few women."[33] Thus, work environments have been built to accommodate the average *man* and not the average *person*. Many occupations historically held by men require male physical traits because the machinery necessary for these jobs was constructed around the male body.[34] Women, who tend to be smaller than men, may be unable to use this equipment as safely or efficiently and may thereby be treated as incapable of performing these jobs.[35] As a result, equipment specifications based on the biomechanical and ergonomic data of a previously exclusively male labor force compound women's problems in entering and performing traditionally male jobs.[36]

For example, Rachel Weber takes on the design of both military and commercial plane cockpits in her article *Manufacturing Gender in Commercial and Military Cockpit Design*.[37] She explains that historically the military has used guidelines crafted for the male body when designing cockpits.[38] Cockpits were made using 95th and 5th male dimension percentiles—only 10 percent of the male population will be unable to use a particular design feature.[39] Yet, a cockpit built to the specifications of the 5th to the 95th percentile of men only accommodates women from the 65th to the 95th percentile.[40] Weber notes that although commercial airlines may depend on a different pool of pilots than their military counterpart, commercial aviation relies on the same anthropometric data as the

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workplace).

32. *Id.* at 317–18 (machines required for various types of manual labor were designed with the male body in mind).

33. *Id.* at 317 (emphasis added).

34. Maxine Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1403 (1988).

35. *Id.*

36. Ellen Shapiro, Note, *Remedies for Sex-Discriminatory Health and Safety Conditions in Male-Dominated Industrial Jobs*, 10 GOLDEN GATE U. L. REV. 1087, 1091 (1980).

37. Rachel Weber, *Manufacturing Gender in Commercial and Military Cockpit Design*, 22 SCI., TECH., & HUM. VALUES 235 (1997).

38. *Id.* at 238.

39. *Id.*

40. *Id.* at 239.

military.[41] She concludes that "[b]ecause both commercial and defense aircraft have been built for use by male pilots, the physical differences between men and women serve as very tangible rationales for gender-based exclusion."[42]

Similarly, women may have difficulty using or be unable to use work tables and machinery that were created for men. Ellen Shapiro, in her article *Remedies for Sex-Discriminatory Health and Safety Conditions in Male-Dominated Industrial Jobs*, notes that "the optimal average height for work tables for males has been determined to be forty-two inches, which is about three inches below the elbow; but this would be too high for the average woman."[43] Drill presses illustrate the problems women experience when using machinery designed for men:

> Operation of [drill presses] involves the use of an on-off switch located at the top of the apparatus and gear levers located at the side. Safety considerations dictate turning off the press between uses, so that the operator can position the metal on the table without risk of accidental activation of the drill. Thus, each hole drilled in the metal requires both use of the on-off switch and rotation of the lateral gear levers. The position of these controls is such that a female of average height must stretch over her head to reach the switch and must reach forward and above shoulder level to draw the levers forward in a semi-circular motion. Repeated operation of this kind of press, while perhaps somewhat fatiguing to male operators can require excessive stretching and reaching actions when performed by females of average size.[44]

Because of the difficulty experienced by people falling outside of the gamut of the average male body, employers may adopt sex-neutral policies, such as height and weight requirements, to ensure that everyone hired may safely and effectively function at work. However, these seemingly neutral requirements literally build sex discrimination into the work environment. While feminists have recognized the existence of discriminatory built environments, grounding these observations in disability rights rhetoric gives a deeper meaning to these arguments, as well as an established legal and theoretical

41. *Id.* at 240.
42. *Id.* at 241.
43. Shapiro, *supra* note 36, at 1091.
44. *Id.* at 1088–89 n.10.

framework for constructing claims.

In sum, the male ideal worker norm has led to work environments built exclusively for the male body. Although women have gained increasing access to the labor market, in her piece, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, Maxine Eichner maintains that

> job descriptions and structures that have been adapted to male incumbents continue to bar women from those sectors of the labor market from which they were once historically excluded by intentional discrimination. . . . These employment standards assume men to be the norm and relegate women who diverge from this norm to second class status in the labor market.[45]

Thus, similar to the medical model of disability, women's exclusion from traditionally male jobs does not result from structural barriers generated by environments built only for men. Rather, it is the individual woman's shortcomings in height, weight, and strength that make her unable to use the worktable and operate the drill press, thereby excluding her from employment. The sociopolitical and minority models of disability, however, suggest a different result. Using these frameworks, job requirements that employ the male body as the ideal standard can be re-conceptualized as a form of impermissible discrimination generated by the built environment.

III. INTRODUCING THE DISPARATE IMPACT FRAMEWORK

Concepts from disability law provide useful ways for thinking about women's exclusion from traditionally male jobs. This Part explores the practical legal application of these theories by demonstrating how Title VII disparate impact claims might challenge not only the facially neutral job requirements, but the environment that advantages the average male body over the average female body.

Title VII of the Civil Rights Act of 1964 prohibits employer discrimination on the basis of race, religion, national origin, and sex.[46] The law prohibits overt discrimination, such as

45. Eichner, *supra* note 34, at 1398–99.
46. 42 U.S.C. § 2000-e (2000).

white-only or male-only hiring policies,[47] yet Title VII also extends to facially neutral practices that create the de facto exclusion of protected classes.[48] There are two distinct strains of facially neutral Title VII challenges: disparate treatment and disparate impact. While both are derived from the same statutory provision, disparate treatment and disparate impact claims each have their own procedure, burdens of proof, and accepted defenses.

Disparate treatment claims allow plaintiffs to challenge facially neutral policies that intentionally discriminate against a protected group.[49] In constructing a prima facie case, plaintiffs must demonstrate intent to discriminate, either by providing evidence that discrimination was an underlying motive of the adverse employment action[50] or by showing a severe enough pattern and practice of discrimination for the court to infer discriminatory intent.[51] If the plaintiff successfully meets this initial burden, the employer may respond with a showing that the challenged action or policy served a legitimate, nondiscriminatory business purpose.[52] If a permissible reason is adequately shown, the plaintiff can then rebut by arguing that the articulated purpose served as a mere pretext for discrimination.[53] The invidious intent of an employer is a necessary condition for the success of such claims.[54]

Conversely, disparate impact challenges do not have a mental state requirement.[55] In this type of case, the plaintiff must first establish a prima facie case of discrimination by establishing that the challenged practice has an adverse impact on a protected group.[56] Statistics demonstrating that a neutral policy disproportionately affects group members are considered a sufficient evidentiary basis.[57] After the plaintiff meets this

47. *Id.*
48. *See infra* note 60 and accompanying text.
49. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
50. Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977).
51. *Id.* at 336.
52. *McDonnell Douglas*, 411 U.S. at 802.
53. *Id.* at 804.
54. *See supra* notes 50–51 and accompanying text.
55. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
56. *See, e.g., id.*
57. *See* Christine Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 ALB. L. REV. 633, 635 (2003) ("The importance of statistics in disparate impact cases is readily accepted. As a result, these statistics could easily become the requisite evidence for proving discrimina-

burden of proof, the burden shifts to the employer who can escape liability by proving that the requirement under attack constitutes a "business necessity," a higher standard than the "legitimate business purpose" defense for disparate treatment.[58] If the employer can sufficiently demonstrate that the discriminatory measure is necessary for business, the plaintiff may still prevail if she can prove less restrictive alternatives exist for achieving the necessary business goal.[59]

Women may be able to use Title VII disparate impact doctrine to challenge policies predicated on the preference for male instead of female bodies. According to the Supreme Court in the Title VII case *Griggs v. Duke Power*, which set the precedent for the validity of disparate impact claims, employers may not offer

> equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. . . . [Congress] has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. . . proscrib[ing] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.[60]

De facto exclusion, resulting from facially neutral policies, renders the assurance of equal opportunity meaningless. Under *Griggs*, exclusion without a discriminatory intent is exclusion nonetheless.

Cases dealing with physical requirements and their disparate impact on women, as well as on other protected groups, have arisen for a number of workers: automobile manufacturers,[61] fire fighters,[62] police officers,[63] truckers,[64] and pi-

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tion claims.").

58. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 668 (1989) (Stevens, J., dissenting) ("Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirmative defense of business necessity.").

59. *Id.* at 660–61.

60. *Griggs*, 401 U.S. at 431.

61. *See* Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Ky. 1973).

62. *See* Davis v. Los Angeles, 566 F.2d 1334 (9th Cir. 1977).

63. *See* United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976); Hardy v. Stumpf, 112 Cal. Rptr. 739 (Ct. App. 1974).

64. *See* United States v. Lee Way Motor Freight, Inc., No. CIV-72-445, 1973 WL 278 (W.D. Okla. Dec. 27, 1973).

lots.[65] Additionally, scholars have argued that male built environments may give rise to actionable Title VII claims. For example, in her article, *Remedies for Sex-Discriminatory Health and Safety Conditions in the Male-Dominated Workplace*, Ellen Shapiro argues that maintaining equipment designed for the average male body instead of the average human body violates both Title VII and the Occupational Safety and Health Act of 1970.[66]

In the infamous case, *Boyd v. Ozark Airlines*,[67] the Eighth Circuit invalidated a minimum height requirement for prospective pilots. Rose Mary Boyd, an unsuccessful applicant to the pilot training program, challenged the 5'7" minimum height requirement as discriminatory on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.[68] The trial court found that Boyd had, through statistical evidence, established a prima facie case of disparate impact sex discrimination.[69] Yet, as the Supreme Court asserted in *Griggs*, "[t]he touchstone [in these cases] is business necessity," and herein lies the problem.[70] The Eight Circuit upheld the finding of the trial court that Ozark had

> amply met its burden of establishing that a height requirement is a business necessity. The evidence showed that pilots must have free and unfettered use of all instruments within the cockpit and still have the ability to meet the design eye reference point. In view of the cockpit design, over which defendant has little control, a height requirement must be established. The cockpit can only accommodate a range of heights. Defendant has chosen to draw the line at 5'7". The evidence established, however, that a requirement of 5'5", which would lessen the disparate impact upon women, would be sufficient to insure the requisite mobility and vision. Accordingly, the Court will order defendant to lower its height requirement to 5'5".[71]

Thus, the court ruled that while a 5'7" minimum height re-

65. *See* Boyd v. Ozark Air Lines, Inc., 568 F.2d 50 (8th Cir. 1977).
66. *See* Shapiro, *supra* note 36.
67. *Boyd*, 568 F.2d 50.
68. *Id.* at 52.
69. *Id.*
70. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
71. *Boyd*, 568 F.2d at 52–53 (quoting Boyd v. Ozark Air Lines, Inc., 419 F. Supp. 1061, 1064 (E.D. Mo. 1976)).

quirement had a disparate impact on women, a minimum requirement of 5'5" was justifiable under the business necessity doctrine, thereby vindicating the foundation of Boyd's argument but leaving her, standing at under five feet two inches tall, excluded.[72] *Boyd* demonstrates the problem inherent in designing the industrial workplace for the average man and not the average person.[73] Many women applying for traditionally male occupations may find themselves unable to operate equipment at all, or not without the risk of serious physical strain.[74] Sadly, courts have more often than not assumed that this preference for male bodies reflects inevitable realities about the workplace and have upheld requirements that have a disparate impact on women with very little rigorous judicial scrutiny.[75] The business necessity defense is at the root of this deficiency. Eichner explains:

> In investigating the necessity of employment practices that exclude women, however, courts typically seek to determine only that selection practices effectively screen in an unbiased manner for the qualities and structures deemed necessary for the job by the employer. They fail to recognize that the employer's conceptions of necessary job qualities and job structures may themselves contain entrenched discriminatory biases.[76]

Not surprisingly, in *Boyd*, the court found that the plaintiff "was rejected solely because of her height," never questioning why pilots needed to be tall in the first the place.[77] The answer is, more likely than not, that the cockpit was designed and constructed to be used by a man. Discriminatory policies, such as height requirements, may not reflect actual job functions, but rather stem from the masculine structure of the built work environment. While they may be "perceived as necessary for op-

72. *Id.* at 53.

73. This Article is specific to American law and American aircrafts. Other countries in which the average height (of both men and women) varies might build planes with different proportions in order to suit their bodies. As an aside, national origin/ethnicity claims have been brought when height and weight requirements have a disparate impact on certain covered groups, like people of Hispanic descent.

74. *See supra* Part III.

75. Eichner, *supra* note 34, at 1410.

76. *Id.* at 1409–10.

77. *Boyd*, 568 F.2d at 53.

timal job performance, often they are unconnected to the actual needs of the job itself."[78] This is where disability theory comes into play. We must understand Boyd's inability to fly a plane not as a result of her height but as a result of a sexist built environment. The very physical structure of the plane discriminates against her. If we relocate the problem to the environment itself, a 5'5" minimum requirement feels as unsatisfactory as a 5'7" one.

A disability law framework provides a means to reconceptualize women's exclusion from traditionally male jobs. Such a paradigm would allow plaintiffs like Rose Mary Boyd to bring Title VII disparate impact challenges against job requirements born of discriminatory built environments. The proper remedy in such cases is, like in the realm of disability discrimination, reasonable accommodation.

IV. CREATIVE SOLUTIONS—UNIVERSAL DESIGN AS THE PROPER REMEDY

As the built environment has been identified as the situs of discrimination, it must also be the location of the remedy. In her book *Redesigning the American Dream*, architect and feminist scholar Dolores Hayden states that "[g]ender stereotypes must be eliminated from architecture, urban design, and graphic design in public space."[79] Unlike the disability rights movement, the women's movement has typically fought for equal treatment of men and women. Yet, as *Boyd* demonstrates, an equal-treatment standard may ignore or fail to address certain forms of sex discrimination. As in the disability context, simply giving women "access" to traditionally male occupations by eliminating overt discrimination falls short of ensuring them equality in a meaningful sense.[80] Changing the built environment to ensure equal access does not constitute

78. Eichner, *supra* note 34, at 1401.

79. DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: GENDER, HOUSING, AND FAMILY LIFE 228 (rev. ed. 2002).

80. Shapiro, *supra* note 36, at 1088 ("Merely gaining access to traditionally all-male jobs does not guarantee women equality with men in the workplace. Because men have predominated in the workforce of heavy industry, applicable design standards have created equipment suited to the *average male* rather than the *average person*." (emphasis added)); Williams, *supra* note 2, at 318 ("Giving women 'equal' opportunity to live up to standards designed around men does not offer women true equality. Rather, it is a way of perpetuating discrimination against women and calling it equality.").

special treatment for women, but rather it constitutes the proper remedy for discrimination resulting from the male ideal worker norm. Reasonable accommodation is not just for people with disabilities suing under the ADA: women could also propose this remedy for Title VII disparate impact claims.[81]

The ADA's reasonable accommodation requirement reflects, first, that societal structures and institutions have not been constructed with people with disabilities in mind and, second, that changes to the environment in the form of accommodation are often necessary to provide disabled people with meaningful access.[82] While some scholars have attempted to differentiate the ADA reasonable accommodation provision from other antidiscrimination laws by drawing a distinction between negative action (removing barriers) and positive action (requiring accommodation),[83] others have argued that they are related inextricably: "the restructuring of job requirements or the dismantling of physical barriers can be seen as 'special accommodation' only if one conceives of the original way in which the job is structured as natural, and any modifications as something beyond dismantling employment discrimination."[84]

Not surprisingly, legal academics have argued that Title VII disparate impact doctrine itself includes implicit accommodation requirements.[85] Although Title VII has no explicit accommodation remedy, in her piece *Antidiscrimination and Accommodation*, Christine Jolls demonstrates how, unlike the more rigid parameters of Equal Protection claims, Title VII disparate impact claims can include inherent accommodationalist aspects.[86] Jolls explains that "[d]isparate impact liability,

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81. Accommodation as a remedy in the Title VII context could be modeled after the ADA. Thus, employers would not be obligated to provide an accommodation that would result in an "undue hardship." The ADA defines undue hardship as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A) (2000).

82. Rovner, *supra* note 4, at 1044.

83. *See, e.g.*, Samuel Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003).

84. Jennifer Lav, Note, *Conceptualizations of Disability and the Constitutionality of Remedial Schemes Under the Americans with Disabilities Act*, 34 COLUM. HUM. RTS. L. REV. 197, 226 (2002).

85. *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

86. *Id.* at 647 ("While both the Equal Protection Clause and Title VII apply to discrimination on the basis of sex, such discrimination is defined more expansively under Title VII than under the Constitution. Discrimination on the basis of sex includes discrimination on the basis of pregnancy under Title VII, but not un-

like the ADA's 'reasonable accommodations' provision, challenges the way in which the job is defined or structured in addition to the way in which candidates are selected for positions."[87] She argues that "traits covered by Title VII require—and in some cases in fact receive—accommodation through the operation of disparate impact liability."[88] Yet, while judges have arguably ordered forms of accommodation as remedies in Title VII,[89] those remedies have not included alterations to the physical environment. Moreover, unlike the ADA, Title VII does not include an express accommodation provision with regard to sex discrimination.[90] Title VII does, however, give judges broad discretion in fashioning relief:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.[91]

Altering the discriminatory workspace would be an appropriate affirmative action in the context of a disparate impact, built-environment claim.[92] Thus, although they would be taking an unconventional approach, courts could order defendants to institute work spaces created according to universal design principles as a remedy.[93]

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der the Equal Protection Clause.").

87. *Id.* at 669.

88. *Id.* at 668–69.

89. *See id.* at 653–65.

90. Title VII does, however, include a reasonable accommodation provision with respect to religion. 42 U.S.C. § 2000e(j) (2000).

91. 42 U.S.C. § 2000e-5(g)(1) (2000).

92. Courts have explained that, despite the "intentionally engaged" language of § 2000e-5(g)(1), "[t]he full range of equitable remedies are available in disparate impact cases as well." *In re* Employment Discrimination v. Alabama, 198 F.3d 1305, 1316 n.13 (11th Cir. 1999).

93. In order not to impose excessive financial liability on the defendants, courts could order that when equipment is replaced or space is renovated the defendants comply with universal design principles. Although such a strategy would not assist an immediate plaintiff, it would allow further progress in light of

Universal design includes four key tenets: support, adaptability, accessibility, and an orientation toward safety.[94] This architectural school grew out of the disability rights movement as an effort to create nondiscriminatory structural environments, providing everyone with equal access.[95] *Universal Design: Creative Solutions for ADA Compliance*, which provides architects and architecture students with interesting ideas for building environments useable by all people, explains that "[u]niversal design, also known as *lifespan design*, seeks to create environments and products that are usable by children, young adults, and the elderly. They can be used by people with 'normal' abilities and those with disabilities, including temporary ones."[96] Likewise, universal design principles will result in environments and products equally usable for women as well as men. Work environments designed according to these principles will eliminate the structural barriers that have led to the exclusion of both women and people with disabilities.

To demonstrate how universal design would operate, we can return to the *Boyd* case. Rose Mary Boyd was too short to operate the plane safely and efficiently.[97] Her height made her incapable of reaching all of the controls or seeing over the plane's dash.[98] If the cockpit had been built using universal design, it might have included an adjustable chair to allow her to see over the dashboard and pedal-free controls that do not necessitate her feet touching the floor. Additionally, the layout of the controls could have been conceived in such a way as to allow people with multiple ranges of motion to be able to operate them, such as clustering certain controls together, reducing the amount of space across which the controls were dispersed, or by making a single easily reachable control perform multiple functions. Additionally, Boyd could have included Ozark's plane manufacturers, such as McDonnell or Boeing, as defendants to ensure that both the employer airlines and the makers

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the undue hardship model suggested in note 82.

94. ROBERTA L. NULL & KENNETH F. CHERRY, UNIVERSAL DESIGN: CREATIVE SOLUTIONS FOR ADA COMPLIANCE 27 (1996).

95. *Id.* at 25.

96. *Id.*

97. *See supra* note 72 and accompanying text.

98. *See* Appendix A for photographs of the cockpits of planes used by Ozark Airlines in the 1970s (appendices are on file with author). The positioning of controls and the cockpit seat require that a person be of a particular height to see over the plane's dash and have a certain minimum reach to be able to effectively negotiate the controls.

of the planes themselves were held accountable.[99]

While no planes have been constructed according to universal design principles, car manufacturers Suzuki and Mitsubishi have created vehicles with ergonomic cockpits.[100] In addition to putting such cars and SUVs on the market, Mitsubishi has also participated in the Japanese Ministry of Transport's Advanced Safety Vehicle ("ASV") program.[101] Among the features of Mitsubishi's ASV is a universal design cockpit with pedal-free controls, swivel seats, and multi-function instruments.[102] Universal design exemplifies the sort of creative thinking about how to create environments absent of sexist or ablest assumptions, ensuring all people receive equal access and opportunity. It is the best remedy for built-environment discrimination of all kinds, including the new variety of disparate impact sex-discrimination claim proposed by this Article.

CONCLUSION

This Article places arguments about equal access for women within a disability rights framework. Through the use of disability theory, disparate impact claims can challenge built-environment sex discrimination, proposing accommodation as a remedy. The Article began with the notion that the specter of the able body floats throughout traditional built space, its presence implied by narrow doorways, stairwells, and doorknobs. Likewise, when we look at traditional work envi-

99. Although not the rule in the Eighth Circuit where Boyd brought her claim, the Ninth Circuit has held that, for the purposes of the Fair Labor Standards Act, "[w]here an individual exercises 'control over the nature and structure of the employment relationship,' or 'economic control' over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability." Lambert v. Ackerley, 180 F.3d 997, 1012 (9th Cir. 1999) (quoting Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)). Boyd could have attempted to include the plane manufacturers under this theory. Weber notes that "[c]arriers' legal departments have occasionally contacted manufacturers out of a fear that the airline will be sued for employment discrimination because height and strength requirements for pilots are so high as to exclude a significant number of women." Weber, *supra* note 37, at 247. However, she notes that "[c]ustomer preference and a vague fear of litigation provide the only incentives for altering cockpit technology." *Id.* Joining the manufacturers themselves as parties to the lawsuit would provide an even stronger incentive for these companies to experiment with creative, nondiscriminatory design.

100. *See* Appendix B for photographs and information on ergonomic cockpits (appendices are on file with author).

101. *See* Appendix B3 (appendices are on file with author).

102. *See id.*

ronments, we can feel the presence of a man, implicit in the equipment designed for his height, weight, and physical abilities. The *Boyd* case in Part IV demonstrated that the built environment is a particularly nefarious agent of discrimination because of its deceptively neutral appearance. Even disparate impact law, designed specifically to ferret out unintentional discrimination, has failed to understand the built environment as an agent in the exclusion of women from traditionally male jobs. Yet relocating the source of exclusion from the individual body to the built environment is not enough to ensure equality. Actions must be taken to remove structural barriers and allow for equal access. Reasonable accommodation and architectural innovation serve as vehicles for de-sexing and de-abling our world. If we recognize that the built environment is designed and constructed by human beings we can begin to understand how this silent discriminator functions and begin to build environments that are equally accessible to everyone, able-bodied or disabled, male or female.

APPENDICES (ON FILE WITH AUTHOR)

A. *Plane Cockpits*
   1. DC-9-10 Cockpit Photograph
   2. DCH 6 Cockpit Photograph
   3. DCH 6 Cockpit Diagram
   4. FH-227B Cockpit Photograph

B. *Ergonomic/Universal Design Cockpits*
   1. Ergonomic Cockpit – Mitsubishi Truck
   2. Ergonomic Cockpit – Suzuki SUV
   3. Universal Design Cockpit – Mitsubishi Corporation