

## THE NEW OLD LEGAL REALISM

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## INTRODUCTION

Judges produce opinions for numerous purposes. A judicial opinion decides a case and informs the parties whether they won or lost. But in a common law system, the most important purpose of the opinion, particularly the appellate opinion, is to educate prospective litigants, lawyers, and lower court judges about the law: what it is and how it applies to a specific set of facts. Without this purpose, courts could more quickly and efficiently

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issue one-sentence rulings rather than set forth reasons. By issuing opinions, courts give actors a means of evaluating whether their actions are within the bounds of law. Under this predictive conception, when an opinion suggests a change in how a particular legal regime will apply in the future, one would expect individuals to adjust their behavior. The judicial system is leveraged in that appellate courts issue opinions in a small percentage of disputes; however, the explanations for how and why the appellate court decided particular cases are used to predict outcomes across a range of varying factual scenarios.

The importance of judicial opinions to legal education cannot be overstated. Case law is the dominant teaching tool for the vast majority of law school classes, especially in the first year. Law professors parse the language and logic of opinions in critical analyses of the answers to legal questions. The higher the court, the more care is taken in parsing the texts that the court produces, and the wording of Supreme Court opinions is sometimes given the type of care ordinarily reserved for religious texts. Arguably, the primary skill that law schools teach (“thinking like a lawyer”) is the ability to carefully parse judicial opinions.<sup>1</sup> By contrast, other materials that might be thought to contain information about the operation of law—statutes, contracts, property deeds, and academic studies—are typically used only as supplements to the cases.

An often unstated assumption of scholarship and education is that the reasons the judges offer in judicial opinions are central to understanding law.<sup>2</sup> Indeed, the sometimes heated debates between traditional legal scholars and political scientists center on what to make of the reasons offered by judges.<sup>3</sup> Although social scientists are generally skeptical of the importance that traditional legal scholars attach to the textual parsing of judicial opinions, the social scientists who study law also use opinions as sources of insight. For example, some scholars use opinions as evidence of underlying preferences and institutional dynamics.<sup>4</sup> Yet whether judicial opinions ex-

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<sup>1</sup> Orin Kerr explains that “[l]earning to ‘think like a lawyer’ often means learning to think like a judge, which means learning how to evaluate what rules and explanations are strong and which are weak.” Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2D 51, 61 (2007), available at <http://volokh.com/files/howtoreadv2.pdf>.

<sup>2</sup> Some scholars have argued that the reasons offered are far more important than the outcome reached in a particular case. See, e.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

<sup>3</sup> A window into this debate is available through an exchange between two longtime federal appellate judges—and former law professors—over these assumptions. See RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177 (2010).

<sup>4</sup> For examples of early political science scholarship analyzing the content of judicial opinions either to make predictions about future court behavior or to gain insights into judicial preferences, see Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the “Right to Counsel” Cases*, 51 AM. POL. SCI. REV. 1 (1957); Glendon Schubert, *Jackson’s Judicial Philosophy*:

plain why an outcome is dictated by the law or reveal underlying policy views that justify and legitimize the exercise of judicial authority, they tell consumers of law what they should expect courts to do in the future.

But are the pronouncements in these appellate opinions in fact an accurate reflection of the law as understood in the world beyond the courthouse? In our study of the effects of a particular employment discrimination case in the Nevada casino industry, we found that judicial opinions had little salience in the communities that we had expected to be affected by the court's reasoning. And while opinions *may* help predict how lower courts will act in the future, they do not tell us whether and which cases will be brought to court with sufficient resources and legal skill to allow for a meaningful resolution on the merits. In light of these limitations on the power of appellate opinions, we should reconsider their central role in our understanding of the relationship between law and those governed by it.

We can better understand law by moving beyond our court-centric perspective to a view that includes community understanding. Two classic studies, Stewart Macaulay's examination of how business people in Wisconsin understood their contracts<sup>5</sup> and Robert Ellickson's study of property disputes among neighboring ranchers in Shasta County, California,<sup>6</sup> examined the influence of formal law in social context. In both studies, social realities were far more important than formal law in shaping behavior. Both Macaulay and Ellickson were building on the insights of the original Legal Realists: to understand law, we must go out and see what the law means to people whose actions are governed by it. Macaulay looked at contracts; Ellickson looked at statutes. Seeking to build on their work, our focus in this Article is on the primary teaching tool of the law professor: the appellate opinion.

The Legal Realists' original idea was to understand law by looking at how it worked in the real world. The Old Realism was premised on the idea that legal scholars should go out into the field and collect data (although the original scholars often included more arguments for empirical work than actual examples of it).<sup>7</sup> In recent years, building on the increasing influence of both political science and economics on legal scholarship, a New Legal Realism has emerged whose proponents are often skilled empi-

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*An Exploration in Value Analysis*, 59 AM. POL. SCI. REV. 940 (1965); and S. Sidney Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 LAW & CONTEMP. PROBS. 164 (1963). For more recent examples, see Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813 (2010); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963 (1992); and Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004).

<sup>5</sup> Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

<sup>6</sup> ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>7</sup> See *infra* notes 20–21 and accompanying text.

ricists and whose focus is on how lawyers and judges in fact operate in context.<sup>8</sup> New Legal Realists look at lawyers and judges in context and seek to test models of judicial behavior, the most common being that judicial behavior is driven by judges' policy preferences.<sup>9</sup> Broadly speaking, the New Legal Realism generally has a top-down feel to it: the scholars posit models based on theory and then collect data to test the model. We do not quarrel with this method of study—to do so would be more than a bit hypocritical for at least two of us.<sup>10</sup> But it strikes us as somewhat at odds with the old Legal Realism.<sup>11</sup> The Old Realism was more oriented toward studying law from the bottom up: the researcher looked to the actions and perspectives of individuals to help understand how law operated.<sup>12</sup> It was not about understanding judicial behavior and courts in context but rather about the operation of law in context.<sup>13</sup>

The current project seeks to add to our knowledge of the relevance of case law by focusing on an area that has received little examination: how pronouncements about employment discrimination law by appellate courts translate into the understandings and behavior of employees, employers, and their attorneys. As our lens, we use evidence of how people *talk* about the relevance of changes in the law. Law professors typically assume that lawyers read appellate cases carefully and then translate their nuances into instructions and arguments for their clients. After all, that is our justification for spending three years teaching law students how to read these cases.

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<sup>8</sup> See, e.g., Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

<sup>9</sup> *Id.* at 835.

<sup>10</sup> See, e.g., Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157.

<sup>11</sup> To be fair, Professors Nourse and Shaffer, in their articulation of what New Legal Realism covers, do include "bottom-up" contextual studies. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism, Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 70 (2010). And the primary example of this kind of work is Macaulay's study of contracting practices among Wisconsin businessmen.

<sup>12</sup> The top-down/bottom-up distinction captures two aspects of Legal Realism. First, theories are derived from observations "on the ground" (empirical research in the relevant communities) rather than being driven either by abstract theory or by the ability to use the newest statistical tools on large datasets. Second, the theories look beyond the boundaries of formal law. See Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339–41 (describing the bottom-up approach); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (a seminal article on the uses of empirical data to illuminate the differences between legal conceptions of contract and actual practices).

<sup>13</sup> Karl Llewellyn, in his classic *The Cheyenne Way*, used the techniques of anthropology to study the quasi-legal institutions and norms (which he described collectively as "law-ways") of the Cheyenne Indians, including substantive rights and dispute resolution bodies. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

But there has been little attempt to inquire into whether social realities undermine that assumption.

We examine the impact of an en banc Ninth Circuit employment discrimination decision from 2006, *Jespersen v. Harrah's Operating Co.*<sup>14</sup> At issue was a policy requiring female, but not male, bartenders to wear "[m]ake up (foundation/concealer and/or face powder, as well as blush and mascara) . . . and . . . [l]ip color . . . at all times."<sup>15</sup> Darlene Jespersen, a veteran casino bartender, sued Harrah's for sex discrimination.<sup>16</sup> Jespersen lost at every stage but did make it all the way to the en banc Ninth Circuit.<sup>17</sup> And the en banc court granted a small victory to Jespersen's supporters: the majority hinted that it would be receptive to future challenges to appearance standards on the ground that they are based on sexual stereotyping. Many workplace grooming guidelines would not survive such a test.<sup>18</sup> Few other appellate cases from that period generated anywhere near the amount of attention among legal academics that this case did. It arguably represented a significant change in the law regarding appearance discrimination. At the very least, it added clarity to a highly ambiguous area of law. Either way, this was precisely the type of case that should have influenced understandings of law on the ground.

In Part I we describe the scholarship and ideas behind the work of the original Legal Realists and our reasons for utilizing their techniques. In Part II we explain our choice of *Jespersen* as a case study. Part III lays out methodology and data. Part IV describes our findings from interviews with three sets of local actors: casino employees, lawyers, and judges. Part V concludes by asking if and when case law is relevant locally.

## I. OLD LEGAL REALISM

Beginning in the 1930s, Legal Realists advocated for a more realistic view of courts and law than the dominant formalist view, which empha-

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<sup>14</sup> 444 F.3d 1104 (9th Cir. 2006) (en banc).

<sup>15</sup> *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1078 n.2 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104.

<sup>16</sup> *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd*, 392 F.3d 1076, *aff'd en banc*, 444 F.3d 1104. Jespersen concurrently filed tort and contract claims in state court. *Jespersen v. Harrah's Operating Co.*, No. CV02-04471 (Nev. Dist. Ct. 2002) (granting motion to dismiss), *aff'd*, 131 P.3d 614 (Table) (Nev. 2004).

<sup>17</sup> *Jespersen*, 280 F. Supp. 2d 1189.

<sup>18</sup> See, e.g., Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 279–80 (2007) (concluding that casino cocktail waitress uniforms would not meet required bona fide occupational qualification standards); Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857, 892–93 (2006) (arguing that, strictly speaking, a sex stereotyping prohibition should prohibit sex-specific grooming codes but observing that no court had yet struck down such a grooming code on stereotyping grounds).

sized the constraining role of legal text on the behavior of judges.<sup>19</sup> The Realists were a loosely connected group of lawyers, judges, and legal academics united more by their opposition to formalism than by their support for any particular theory of law. Some Realists emphasized the role of personal beliefs and values in shaping judicial decisions; others focused on describing the divergence between the law on the books and the law in action.

The first Legal Realists were law professors who went out into the world to see how the law operated in action.<sup>20</sup> Underhill Moore and Charles Callahan literally looked outside their office windows to see how parking regulations affected the actions of automobile drivers in New Haven, Connecticut.<sup>21</sup> Although it focused on driver compliance with posted time limits for parking, a relatively inconsequential legal issue except when one is actually hunting for the elusive urban parking space, Moore and Callahan's methodology was significant because it reflected and anticipated a movement to examine the relationship between law and context.<sup>22</sup>

In his lifelong study of state courts, *The Common Law Tradition: Deciding Appeals*, Karl Llewellyn, a true Old Realist in his methods, explained that he attempted "to use that child's-eye approach advocated by the realistic realists of the late '20's and the early '30's."<sup>23</sup> Realism, argued Llewellyn, is a method, rather than a philosophy.<sup>24</sup> Llewellyn counseled scholars to "[s]ee it fresh" and "[s]ee it as it works."<sup>25</sup> Llewellyn was seeking to explain how judges reached certain decisions given the law that existed at the time. How did judges use the law? And when and how would they set it aside?

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<sup>19</sup> For a history of American Legal Realism, see generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986), and JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

<sup>20</sup> See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930) (applying psychological model to study of modern legal mind); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). Llewellyn later claimed to have introduced the "Realistic Jurisprudence" label into legal scholarship in his 1930 *Columbia Law Review* article. LLEWELLYN, *supra*, at 512.

<sup>21</sup> See Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943); see also John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980) (discussing the significance of Moore and Callahan's work).

<sup>22</sup> See F.S.C. Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950).

<sup>23</sup> LLEWELLYN, *supra* note 20, at 508; see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973) (providing a more thorough discussion of Llewellyn's association with the realist movement).

<sup>24</sup> See LLEWELLYN, *supra* note 20, at 509 & n.2.

<sup>25</sup> See *id.* at 510.

Numerous scholars followed Llewellyn's advice to "[s]ee [the law] as it works."<sup>26</sup> The Warren Court's criminal procedure rulings, for example, inspired several studies of the effects of such rulings on the behavior of police officers and criminals.<sup>27</sup> An enterprising group of Yale law students observed New Haven police interrogations; interviewed detectives, lawyers, and suspects; and collected arrest, charge, and conviction numbers to evaluate the impact of *Miranda*.<sup>28</sup> But after the initial burst of interest, such empirical studies disappeared for two decades even though debates over *Miranda* continued.<sup>29</sup>

We are all Realists now,<sup>30</sup> or so it is said. New Legal Realism can be found in legal theories such as law and economics, cognitive psychology and law, empirical legal studies, and sociolegal scholarship.<sup>31</sup> But New Legal Realism has deviated from the original goals of Legal Realism.<sup>32</sup> New

<sup>26</sup> See, e.g., H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189 (1968) (investigating the effects of the Court's First Amendment Establishment Clause decisions on school boards and personnel).

<sup>27</sup> The most studied decisions were *Mapp v. Ohio*, 367 U.S. 643 (1961), which adopted the exclusionary rule preventing the introduction of evidence obtained as a result of an unconstitutional search and seizure, and *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires police officers to advise custodial suspects of their rights prior to interrogation. See, e.g., NEAL A. MILNER, *THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA* (1971); JAMES F. RICHARDSON, *URBAN POLICE IN THE UNITED STATES* 151–52 (1974) (finding that police generally seek to bypass legal rulings that limit their productivity, especially as measured by clearance rates); Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); see also Lawrence Baum, *Police Response to Appellate Court Decisions: Mapp and Miranda*, 7 POL'Y STUD. J. 425 (1978) (building a theory of the possible effects of exclusionary rules on police investigations and briefly reviewing empirical research examining police response); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 631 n.72 (1996) (citing studies published shortly after *Miranda* was issued).

<sup>28</sup> Michael Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

<sup>29</sup> Richard Leo found that empirical studies of the impact of *Miranda* disappeared by 1973 when James W. Witt published his study, *Non-coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973). Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-first Century*, 99 MICH. L. REV. 1000, 1005 (2001). After more than two decades without any real world study, Leo and others have returned to the field to examine the effect of *Miranda*. See, e.g., Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

<sup>30</sup> Although he has expressed skepticism of this general claim, Richard Posner recognizes that "[t]hrough Holmes is venerated by lawyers and judges, the legalistic view continues to dominate professional discourse about judging"—a problem Posner attempts to tackle. Posner, *supra* note 3, at 1178.

<sup>31</sup> For a discussion of the rise and scope of New Legal Realism, see Nourse & Shaffer, *supra* note 11, which "map[s] the precursors to an emerging 'new legal realism,' address[es] how the varieties of new legal realism build from their realist forbears, critique[s] these varieties, and attempt[s] to provide a new framework for moving forward." *Id.* at 64.

<sup>32</sup> For Stewart Macaulay's own review of the evolution of Legal Realism from the old to the new, see Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365. See also Erlanger et al., *supra* note 12 (noting the challenges to a truly interdisciplinary approach to the study of law).

Legal Realist scholarship often makes crucial assumptions about the communication of law and the awareness of legal rules when examining the influence or possible effects of law on behavior. But this scholarship rarely tests that assumption. Ellickson, for example, sought to bring some “realism” to law and economics’ embrace of the Coase Theorem by interviewing real cattle ranchers like those imagined by Coase.<sup>33</sup> He reports that, counter to the assumption of Coase, “it turns out, perhaps counterintuitively, that legal rules hardly ever influence the settlement of cattle-trespass disputes” among the ranchers in his study.<sup>34</sup>

We take an approach we term “New Old Realism”: a revival of the original Legal Realist ideas from the vantage point of New Realism. The methodology of old Legal Realism has much to offer that informs our study of law and legal institutions and our models of human behavior. Like Llewellyn, we want to look at the law and “[h]ow it has been working.”<sup>35</sup> And we share his skepticism for the method of teaching that focuses almost exclusively on the parsing of appellate cases. However, the case studies of Old Realism should work side by side with both schools of New Realism: the realistic doctrinal work as well as the statistically sophisticated empirical studies. Both types of scholarship are richer when informed by, and even constrained by, the law as the parties describe it. We are interested in the same subjects that fascinated Ellickson and Macaulay—the people who are acting in the shadow of the law. How do they perceive that shadow? How do they talk about it? Does the law guide and influence their actions in the ways that legal scholars assume? We seek to answer that question by focusing on a specific legal rule and how it has been understood by its intended audience.

## II. A CASE FOR STUDY: *JESPersen V. HARRAH’S OPERATING CO.*

Our project examines how the dictates of appellate opinions are understood on the ground. For judicial decisions to operate effectively as law, lawyers must interpret and transmit them to those whose behavior should be governed by the new ruling. To examine that assumption, we focus our study on the impact of one case, *Jespersen v. Harrah’s Operating Co.*<sup>36</sup> *Jespersen* is the type of case that makes its way into both the academic canon and the practitioner playbook. In this Part, we describe the case, its lit-

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<sup>33</sup> ELLICKSON, *supra* note 6. Coase hypothesized that when parties can privately exchange rights and face no transaction costs, the efficient allocation of property rights (or liability) will result regardless of the original distribution of those rights. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Parties will respond to the rule by buying (or selling) their rights to the appropriate relative value to both sides. *Id.* at 4–8.

<sup>34</sup> ELLICKSON, *supra* note 6, at 40.

<sup>35</sup> LLEWELLYN, *supra* note 20, at 510.

<sup>36</sup> 444 F.3d 1104 (9th Cir. 2006) (en banc).



igation history, and its visible impact on the legal academy, law firm practice, and public media.

### A. The Case: Dispute, Litigation, and Outcome

In 2001, Harrah's Operating Company, a major U.S. gaming company, adopted a "Personal Best" program<sup>37</sup> as part of the company's attempt to make over and upgrade its image.<sup>38</sup> As part of this program, women had to wear makeup, style their hair, and polish their nails every day consistent with a postmakeover photograph.<sup>39</sup> Men, for their part, were prohibited from wearing makeup and were required to keep their nails clean and hair short.<sup>40</sup> Darlene Jespersen, a Reno bartender, worked in a Harrah's casino for more than twenty years before she was fired for failing to wear makeup.<sup>41</sup> She filed a Title VII sex discrimination lawsuit against Harrah's on July 6, 2001.<sup>42</sup> Two Reno solo practitioners, Kenneth McKenna and Jeffrey Dickerson, represented Jespersen in the trial court. On June 19, 2002, Harrah's counsel moved for summary judgment.<sup>43</sup> The first judicial ruling on Jespersen's claim came from Senior District Judge Edward Reed, who found, quite incredibly, that grooming requirements could not violate Title

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<sup>37</sup> Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077–78 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104. The opinion describes Harrah's "'Beverage Department Image Transformation' program" and its stated goal "to create a 'brand standard of excellence' throughout Harrah's operations, with an emphasis on guest service positions." *Id.* The centerpiece of the BDIT program was new appearance standards called the "Personal Best" program, which was implemented in twenty of Harrah's locations. *Id.*

<sup>38</sup> See Defendant's Motion for Summary Judgment at 4, Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002) (CV-N-01-0401-ECR-VPC), 2002 WL 32980097 ("Harrah's implemented the Beverage Department Image Transformation ('BDIT') program . . . [as] a comprehensive initiative to raise the total service performance of the Harrah's beverage team . . ."). Although our focus is on the litigation in the federal courts, Jespersen also filed a wrongful discharge suit in Nevada state court, where her tort and contract claims were dismissed with little treatment of the issues. Order Granting Motion to Dismiss, Jespersen v. Harrah's Operating Co., No. CV02-04471 (Nev. Dist.Ct. Oct. 15, 2002). The evolution of the litigation, including both the state and federal court processes, is described in Dianne Avery and Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 45–57 (2007).

<sup>39</sup> See Jespersen, 392 F.3d at 1083–84 (Thomas, J., dissenting) (explaining that an image consultant gave each woman a makeover and took a postmakeover photograph, which was used as an "appearance measurement tool" to which the employee was held "accountable" daily, but did not give men a makeover).

<sup>40</sup> See Appellant's Corrected Opening Brief at 6, Jespersen, 392 F.3d 1076 (CV-N-01-0401-ECR-VPC), 2003 WL 25859577. Harrah's dictated a common uniform for men and women but set forth sharply contrasting grooming guidelines. Men had to keep their hair short while women had to wear their hair "down" and "tease[, curl[] or style[] [it] every day." *Id.* at 6. Men could not wear makeup, but women had to wear "face powder, blush and mascara . . . in complimentary colors" and "[l]ip color . . . at all times." *Id.*

<sup>41</sup> *Id.* at 2–7.

<sup>42</sup> *Id.*

<sup>43</sup> Defendant's Motion for Summary Judgment, *supra* note 38.

VII because they did not involve an immutable characteristic.<sup>44</sup> He granted summary judgment in favor of Harrah's.<sup>45</sup>

Lambda Legal Defense and Education Fund, Inc., the preeminent gay rights litigation organization in the United States, took the lead on Jespersen's appeal because it saw the case as an opportunity to urge an expansion of Title VII to include more claims by lesbian, gay, bisexual, and transgendered (LGBT) employees.<sup>46</sup> Courts had uniformly interpreted Title VII as inapplicable to sexual orientation discrimination.<sup>47</sup> But, in *Price Waterhouse v. Hopkins*, the Supreme Court concluded that Title VII prohibited adverse employment decisions based on an employee's failure to adhere to sex stereotypes.<sup>48</sup> Gay rights advocates had tried with limited success to use *Price Waterhouse* to argue that an employer illegally discriminated against an LGBT employee based on the employee's failure to comply with sex stereotypes.<sup>49</sup> If Lambda Legal could persuade courts to accept that appearance codes based on sex stereotypes were a form of sex discrimination, then such claims, which often would be asserted by LGBT employees, could be brought under Title VII.<sup>50</sup>

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<sup>44</sup> *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1192 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006). The details of the lower federal court litigation are included in Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Story of Jespersen v. Harrah's: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 120–24 (Joel Wm. Friedman ed., 2006).

<sup>45</sup> *Jespersen*, 280 F. Supp. 2d at 1195.

<sup>46</sup> See Ann Rostow, *Lesbian Loses Dress Code Discrimination Suit*, DALL. VOICE, Apr. 21, 2006, available at [http://www.dallasvoice.com/artman/publish/article\\_1892.php](http://www.dallasvoice.com/artman/publish/article_1892.php) (quoting Lambda Legal lawyer Jennifer Pizer as saying that the *Jespersen* case helped push the law on sex stereotyping forward).

<sup>47</sup> See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 714–15 (2010).

<sup>48</sup> 490 U.S. 228, 250–52 (1989).

<sup>49</sup> See McGinley, *supra* note 47, at 732–44, 750–57 (explaining that some courts interpret *Price Waterhouse* to protect gay, lesbian, and transgendered individuals, but others do not); Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 NW. U. L. REV. 1, 6–16 (2010) (concluding that while courts sometimes use language implying that protection could extend to effeminate men and masculine women, they have been largely unwilling to protect gender nonconformists).

<sup>50</sup> As described *infra* Part III, we conducted in-person interviews to assess the impact of *Jespersen*. (To maintain confidentiality we have chosen not to reveal the names of those interviewed.) One of our interview subjects who had been involved with the litigation at an early stage explained: “The Ninth was the Circuit most likely to be receptive . . . you know, to an expansion of the law in the direction of giving gay and lesbian plaintiffs greater protection against discrimination in the workplace. There was already good precedent in the Ninth Circuit. Those prior cases could provide the necessary building blocks for a more robust anti-stereotyping doctrine. This was a good case with a sympathetic plaintiff. It was just a matter of getting the right panel.” Two of those Ninth Circuit cases are *Gerdorn v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (*en banc*), which struck down weight limits for female flight attendants; and *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000), which struck down differential weight limits for men and women when the limits for women were much stricter.

The original three-judge appellate panel was divided on Jespersen's claim.<sup>51</sup> All three judges rejected Judge Reed's immutability theory.<sup>52</sup> However, Judges Wallace Tashima and Barry Silverman concluded that appearance regulations imposing different requirements on men and women were not necessarily discriminatory as a legal matter. In order to be discriminatory, the requirements had to impose a greater burden on one sex than on the other. The majority opinion stated that while unequal burdens would be actionable, Jespersen failed to introduce evidence that women faced a greater burden than men.<sup>53</sup> Judge Sidney Thomas wrote a heated dissent, arguing that his colleagues ignored the sex stereotyping and degradation inherent in the casino's policy.<sup>54</sup>

In a highly unusual move, the Ninth Circuit reheard Jespersen's appeal en banc.<sup>55</sup> A divided eleven-judge en banc panel upheld the three-judge panel's ruling as well as its conclusion that Jespersen failed to offer evidence of an unequal burden imposed by the Personal Best policy.<sup>56</sup> The majority further held that she had failed to prove that the policy involved sexual stereotyping, which could have been an independent basis for a viable Title VII claim.<sup>57</sup> It marked the first time a federal appeals court stated

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<sup>51</sup> *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

<sup>52</sup> *Id.* at 1080 (explaining that, while early decisions found that appearance standards regulating "mutable" characteristics did not discriminate based on sex, "later cases recognized, however, that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only 'mutable' characteristics such as weight").

<sup>53</sup> *Id.* at 1081–83.

<sup>54</sup> *Id.* at 1085 (Thomas, J., dissenting) ("Title VII does not make exceptions for particular industries, and we should not write them in. Pervasive discrimination often persists within an industry with exceptional tenacity, and the force of law is sometimes required to overcome it."). In particular, Judge Thomas faulted the majority for failing to follow the dictates of *Price Waterhouse v. Hopkins*. *Id.* at 1084. For a more thorough description of these opinions, see Carbado et al., *supra* note 44, at 130–32.

<sup>55</sup> *Jespersen v. Harrah's Operating Co.*, 409 F.3d 1061 (9th Cir. 2005). The Ninth Circuit decided 6197 cases on the merits from October 2004 to September 2005 but only 15 cases en banc, yielding an en banc review rate of less than 0.2%. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.S-1 (2005) (reporting "U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2005").

<sup>56</sup> *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc). Chief Judge Schroeder wrote the majority opinion joined by Judges Rymer, Silverman, Tallman, Clifton, Callahan, and Bea. *Id.* at 1104–113. Judge Pregerson filed a dissenting opinion joined by Judges Kozinski, Graber, and Fletcher, *id.* at 1113–17, and Judge Kozinski filed a dissenting opinion joined by Judges Graber and Fletcher, *id.* at 1117–18. A majority of nonrecused judges had voted to grant rehearing en banc on May 13, 2005. 409 F.3d 1061 (9th Cir. 2005). Not all of the Ninth Circuit's judges sat in this case: the court uses a mini-en banc procedure whereby ten randomly selected judges and the circuit chief judge sit as the en banc court. Even though only a subset of judges sits, a majority of all active circuit judges must vote to grant en banc review. See 28 U.S.C. § 46(c) (2006); FED. R. APP. P. 35-3.

<sup>57</sup> *Jespersen*, 444 F.3d at 1111–12.

that an appearance code could violate Title VII if the employer's policy stereotyped the employee based on sex.

Most relevant, for our purposes, is what the en banc panel said. Jespersen's claim of sex discrimination was premised on the notion that it was obvious that the burdens imposed on female bartenders were greater than those imposed on male bartenders. She also claimed that requiring women (and not men) to wear makeup constituted impermissible sex stereotyping—that is, requiring women to conform to a stereotype to which men were not required to conform.<sup>58</sup> The court accepted the premise that it was indeed discriminatory for a casino to impose different grooming requirements on men and women but only if it were shown by evidence that the burdens on one sex were significantly greater than those on the other. Yet Jespersen had not adduced evidence demonstrating the greater burden that she was claiming; she had simply asserted it.<sup>59</sup> If she had demonstrated the differential burden, with concrete evidence, the en banc majority suggested that she might have won.<sup>60</sup> The dissenters, particularly current Chief Judge Alex Kozinski, saw the matter differently. It was obvious, Judge Kozinski observed, that imposing a makeup requirement on women and not on men created materially different burdens.<sup>61</sup> Furthermore, the majority stated that there could be a potential cause of action under Title VII if the employer's appearance policy unreasonably stereotyped a person because of sex.<sup>62</sup>

One of the most surprising aspects of the case was how Judge Kozinski and then-Chief Judge Mary Schroeder came out. Chief Judge Schroeder, a prominent liberal, was part of a majority ruling against a female plaintiff in a high-profile employment discrimination case. (Three of the four women judges on the panel voted against Jespersen.)<sup>63</sup> Schroeder not only voted against an exemplary female employee who was fired for refusing to bend to her employer's stereotype of women but also took a leadership role by

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<sup>58</sup> *Id.* at 1112.

<sup>59</sup> The court stated that “none [of the policies’ requirements] on its face places a greater burden on one gender . . . . It is for the most part unisex, . . . [not] adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.” *Id.* at 1109–12.

<sup>60</sup> *Id.* at 1109–11.

<sup>61</sup> *Id.* at 1117 (Kozinski, J., dissenting).

<sup>62</sup> *Id.* at 1111 (majority opinion).

<sup>63</sup> *Id.* This result is especially surprising in light of empirical studies finding that female circuit judges are more receptive to employment discrimination suits claiming gender bias than are their male colleagues. See, e.g., Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (finding both direct gender effects in sex discrimination cases in the courts of appeals, i.e., that male judges are less likely than female judges to favor the employee, and indirect gender effects, i.e., that a male judge is more likely to favor the employee if one of his co-panelists is a woman); Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981–1996* (June 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with the authors and the Northwestern University Law Review) (concluding, after a systematic consideration of courts of appeals decisions from 1981 to 1996, that female judges were more likely than male judges to vote in favor of plaintiffs in employment discrimination cases claiming gender bias).

writing the majority opinion rejecting Jespersen's claim. On the other hand, Judge Kozinski, one of the most prominent conservative judges in the country, was the leader of the dissenters.<sup>64</sup> Kozinski appeared to put himself in Jespersen's shoes, deciding that it was humiliating to be asked to wear makeup.<sup>65</sup>

Chief Judge Schroeder's decision may have been a strategic one.<sup>66</sup> Based on her prior decisions,<sup>67</sup> we would expect her to support a claimant like Darlene Jespersen. Her single vote, however, would not have won the case for Jespersen. And because the majority opinion was issued by an en banc court, it would have superseded prior Ninth Circuit law, including an important en banc employment discrimination case, also written by Chief Judge Schroeder, that had invalidated weight restrictions for female flight attendants.<sup>68</sup> Thus, realizing the importance of gaining control of the majority opinion, Chief Judge Schroeder likely chose to vote with the majority so that she could assign the opinion to herself. While this meant that Jespersen would lose the case, women employees in general would be better off because Judge Schroeder could craft an opinion that not only preserved the existing protections against gender discrimination but perhaps even advanced those protections.<sup>69</sup>

The shape of the final opinion in *Jespersen* suggests the validity of a strategic theory of Chief Judge Schroeder's behavior. The majority opinion

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<sup>64</sup> Judge Kozinski is known for his free market views, which presumably include a high degree of deference to employers trying to figure out how to run their businesses. See Shikha Dalmia, *Searching for Alex Kozinski*, REASON, July 2006, at 41, available at <http://reason.com/archives/2006/07/01/searching-for-alex-kozinski>.

<sup>65</sup> Judge Kozinski wrote: "Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance." *Jespersen*, 444 F.3d at 1118 (Kozinski, J., dissenting). Conversely, Chief Judge Schroeder also may have put herself in Jespersen's shoes and decided that being asked to wear a minimal amount of makeup was not a big deal—that, in the fight for gender equality, this was not a battle worth winning. *Id.* at 1109 (majority opinion) (concluding that the makeup "requirements . . . , on their face, are not more onerous for one gender than the other").

<sup>66</sup> For a discussion of strategic voting to influence opinion content, see VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2006), and FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (2000).

<sup>67</sup> See, e.g., *Gerdorn v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc); see also Mary M. Schroeder, *Compassion on Appeal*, 22 ARIZ. ST. L.J. 45, 48–51 (1990) (arguing that statutes with a compassionate purpose, like employment discrimination laws, should be interpreted with compassion).

<sup>68</sup> The case was *Gerdorn v. Continental Airlines*, which struck down weight restrictions for female flight attendants more than two decades earlier. 692 F.2d 602. The *Jespersen* panel relied heavily on this case for its conclusion that appearance standards could constitute sex discrimination in violation of Title VII. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080–81 (9th Cir. 2004).

<sup>69</sup> None of the *Jespersen* judges spoke with us about how they reached their decisions, but many people involved in the litigation shared their views on what might have been behind the judges' actions. Specifically, several respondents suggested that while Schroeder's sympathies were probably with Jespersen, she knew she was going to be in the minority if she voted for Jespersen.

held that Darlene Jespersen lost because she had not produced enough evidence of an unequal burden on women, but it then proceeded to lay out a road map for future plaintiffs.<sup>70</sup> More importantly, the opinion also added clarity to the emerging law on stereotyping. Chief Judge Schroeder, in dicta, constructed a stereotyping claim for discrimination cases involving appearance discrimination: plaintiffs (at least in the Ninth Circuit) can now bring claims challenging appearance policies that, as an objective matter, stereotype either men or women because of their sex. Schroeder explained that “[i]f a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under *Price Waterhouse*.”<sup>71</sup> Moreover, Jespersen did not offer any evidence that Harrah’s makeup policy was motivated by a desire to stereotype women.<sup>72</sup> As examples of the type of sexual stereotyping that could support a cause of action under Title VII, the majority focused on appearance policies that unduly sexualize the claimant and, as a result, either subject employees to higher risk of sexual harassment or lead to unequal treatment of employees based on sex.<sup>73</sup>

*Jespersen* appeared to change the rules of the game, significantly increasing the risk of litigation losses for casinos.<sup>74</sup> Casino cocktail servers,

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<sup>70</sup> See, e.g., Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen’s Fight Against Barbiefication of Bartenders*, 14 DUKE J. GENDER L. & POL’Y 285, 313 (2007) (stating that the majority presented an evidentiary roadmap for future challenges to gender-based dress codes and that the dissenting opinions and the majority opinions taken together “moved the law forward in ways that may make future challenges to stereotypical dress and grooming rules easier to win”); Recent Case, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*), 120 HARV. L. REV. 651, 654 (2006) (noting that the Ninth Circuit suggested that a showing can be made in the future of unequal burdens and stating that plaintiffs can and should make this showing).

<sup>71</sup> *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (*en banc*).

<sup>72</sup> *Id.* at 1112.

<sup>73</sup> See McGinley, *supra* note 18, at 270–82 (concluding that hiring exclusively female cocktail servers and dressing them in sexually explicit costumes likely violates Title VII after *Jespersen*); Pizer, *supra* note 70, at 308–13 (pointing to the language in the case and concluding that there may exist a good cause of action for discrimination by female cocktail servers wearing skimpy outfits under Title VII after *Jespersen*). We should note that not every discussion of *Jespersen* in the academic literature attaches importance to the portion of the opinion that suggests that outfits assigned according to gender stereotypes might fall afoul of Title VII. See DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 120–22 (2010) (focusing instead on the unequal burdens portion of the opinion rather than the sex stereotyping portion). The dress-code-discrimination aspect of the case is of greatest importance only in those industries where employers mandate the kinds of outfits that implicate issues of stereotyping, e.g., the casino industry.

<sup>74</sup> At a conference held by the *Duke Journal of Gender Law and Policy* soon after the release of the final *Jespersen* opinion, a senior casino lawyer told us that he and others in the casino industry were concerned about the implications of the case for categories of employees other than bartenders, given certain language in Chief Judge Schroeder’s opinion. Apparently, these questions were extensively discussed at a conference of entertainment industry managers and lawyers that occurred soon after the opinion came down. An interviewee who was high in the management chain at Harrah’s also told us that, in the interviewee’s opinion, it was ridiculous to hold Darlene Jespersen to the makeup requirement.

for example, wear highly sexualized uniforms that should support “easy” claims.<sup>75</sup> After *Jespersen*, women casino employees could simply introduce financial records, their own testimony, or an expert witness to prove that the dress and makeup requirements being imposed on them but not men were costly.<sup>76</sup> Casinos could overcome this evidence only by proving that the appearance requirements were necessary or integral to the job at hand and to the essence of the particular business: that is, that the appearance requirements were a bona fide occupational qualification (BFOQ).<sup>77</sup> However, courts traditionally have been willing to grant only the narrowest of BFOQ exceptions.<sup>78</sup>

### B. *The Impact: Popular Press, Legal Scholarship, and Law Firm Alerts*

The *Jespersen* opinions grabbed an extraordinary level of notice from law professors and students, journalists, and law firms.<sup>79</sup> Hundreds of law journal pages were written analyzing it.<sup>80</sup> And the en banc court’s opinions quickly became part of standard teaching materials in courses examining gender discrimination in the workplace.<sup>81</sup> As the nature of employment dis-

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This interviewee, however, believed that it was important to have makeup and other sex-specific requirements for cocktail servers.

<sup>75</sup> Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women’s Work After Jespersen v. Harrah’s Operating Company, Inc.*, 42 U.S.F. L. REV. 299, 320–21 (2008) (“Even the Ninth Circuit is not likely to tolerate under Title VII an employer policy that makes baristas wear negligees in order to have the job of selling steamed coffee at a roadside stand. Such a policy, assuming the employer meets the numerosity requirements of Title VII, would signal an intent to make the employee ‘sexually provocative, and tending to stereotype women as sex objects.’ Dress codes mandating that female employees wear sexy, revealing tops, short skirts, and high heels should be the ‘easy’ cases under existing Title VII doctrine, whether the theory is that such dress rules demean and objectify women or that they expose women to sexual harassment from supervisors, co-workers, and customers.” (footnotes omitted)).

<sup>76</sup> For a discussion of possible future litigation, see *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*), *supra* note 70, at 654 (noting that “the court left open the possibility that a future plaintiff who submits more evidence of unequal burdens may succeed in a Title VII action” and describing how plaintiffs could prove that makeup policies impose unequal economic, physical, and psychological burdens, any one of which would be sufficient under the court’s language).

<sup>77</sup> See McGinley, *supra* note 18; Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (2004).

<sup>78</sup> Appearance requirements for airline attendants, for example, do not fit the category. Southwest Airlines famously lost its argument that it needed to be able to do gender-specific hiring so as to maintain its image as the “love airline” because the judge found that sexual titillation was tangential to the business in question. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981); see also Yuracko, *supra* note 18, at 872–74 (discussing *Wilson v. Southwest*).

<sup>79</sup> The district court decision itself was the basis of academic attention. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240 (2004).

<sup>80</sup> As of November 2010, more than 150 published articles have cited the case. Interest peaked when the en banc opinion was released in 2006.

<sup>81</sup> See, e.g., KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 82–96 (5th ed. 2009); ROBERT BELTON ET AL., 2008 SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 37–52

crimination has changed over the years from a focus on explicit and overt animus to more subtle forms of hostility, appearance issues have provided especially fertile ground for broader debates about the directions that discrimination law should take. In particular, the question of whether the law protects against stereotyping and discrimination based on “mutable characteristics” dominates discussion. Moreover, appearance policies are salient to the debates over whether there should be protections against sexual orientation discrimination. The *Jespersen* case brought aspects of all of these issues in front of one of the most important courts in the country, and unsurprisingly, academics reacted with great interest. For example, a comparison of the number of law journal citations to each of the opinions published by a federal circuit court of appeals during the year 2006, showed *Jespersen* to be one of only five cases to have received over fifty citations as of January 1, 2009.<sup>82</sup> In other words, it garnered more interest than cases on abortion, the death penalty, gay marriage, and so on. At a minimum, it was the most prominent employment discrimination case written during that three-year period.

The case also generated considerable attention in the press, both before and after the decision.<sup>83</sup> The media’s interest is explained by three considerations. First, the issue was straightforward and understandable: Is it gender discrimination for an employer to mandate that its female employees wear makeup? For some people, *Jespersen* symbolized the absurdity of antidiscrimination laws by encouraging litigation over trivial issues. For others, the biased mandate that women wear makeup, with no similar requirement for men, demonstrated the willingness of employers and society more generally to constrain and discipline women while allowing men wide latitude in their workplace choices. Second, the case involved a casino. If a casino, which trades on a highly sexualized, make-believe environment, cannot require its female bartenders to wear makeup, does that mean that other employers cannot require their female cocktail servers to wear skimpy outfits, high heels, and so on? Third, the case had an undercurrent of conflict between the interests of the gay community and the women’s rights movement. The gay rights group litigating the case, Lamb-

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(2008); SUSAN GROVER ET AL., *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* (2011); STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 504–13 (4th ed. 2008); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 347–53 (7th ed. 2008); Carbado et al., *supra* note 44, at 105.

<sup>82</sup> The one appeals court excluded from this comparison was the Federal Circuit, which has a largely specialized docket. Summary data is on file with the *Northwestern University Law Review*. For background on the methodology used, see Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

<sup>83</sup> See, e.g., Stephanie Armour, *Your Appearance, Good or Bad, Can Affect Size of Your Paycheck*, USA TODAY, July 20, 2005, at 1B; Bob Egelko, *Court OKs Sex-Based Grooming Standards*, S.F. CHRON., Apr. 15, 2006, at B1; Carol Kleiman, *Judges Embrace Mandatory Makeup*, CHI. TRIB., Mar. 1, 2005, § 3, at 2; Henry Weinstein, *Court Rules Bartender Was Justly Fired for Refusing to Wear Makeup*, L.A. TIMES, Dec. 29, 2004, at A18.



da Legal, saw it as an opportunity to move the law in a favorable direction for LGBT claimants. The prominent women's rights groups, on the other hand, took a back seat in both the litigation and the debates in the press.<sup>84</sup> And when the case finally came down, the majority opinion was written by a prominent, liberal, female judge. And with current Chief Judge Kozinski, Chief Judge Schroeder's loudest (and most articulate) conservative colleague, in dissent, the case made great legal theater.<sup>85</sup>

Finally, employment and labor lawyers responded to the case in bar and industry journals and in their public communications to clients (and presumably with greater frequency in private communications).<sup>86</sup> Numerous law firm client memos were immediately propagated, announcing that the Ninth Circuit, sitting en banc, had issued an opinion tackling appearance discrimination. Most of those memos, though noting that Darlene Jespersen had lost her case, cautioned employers that there was language in the Ninth Circuit's opinion that should cause them to be extremely careful with their dress and appearance policies.<sup>87</sup> The title of one memo cautioned clients: *Reconsider Your Grooming and Appearance Policies for Possible Gender*

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<sup>84</sup> Lambda Legal represented Jespersen before the three-judge Ninth Circuit panel and in the en banc rehearing. Several regional women's rights groups filed amicus briefs in support of Jespersen, but national women's rights groups were notably absent. For a discussion of women's rights groups' involvement in the case, see Carbado et al., *supra* note 44, at 124–27.

<sup>85</sup> Apart from press attention, the case even found its way into a documentary on American attitudes toward appearance involving, among others, Paris Hilton. *AMERICA THE BEAUTIFUL* (Darryl Roberts 2007).

<sup>86</sup> See, e.g., Ellen M. Martin, *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, in 2 37TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 441 (2008); Brent A. Olson, *Gender Discrimination* § 13:11, in MINNESOTA PRACTICE SERIES: BUSINESS LAW DESKBOOK, FORMATION AND OPERATION OF BUSINESSES (2009); Gregory J. Kamer & Edwin A. Keller Jr., *Give Me \$5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 335 (2003) (advising employers on how to avoid “the potential legal minefields gaming establishments face when working to create a particular image or theme for their casino and surrounding services”); E. Fredrick Preis Jr. et al., *Employment in Gaming: Recent Discrimination Issues*, 8 GAMING L. REV. 89 (2004).

<sup>87</sup> *Gambling with Appearances: Employer's Makeup Rule Draws Sex Discrimination Suit*, EMP. L. BRIEFING (Hall, Render, Killian, Heath & Lyman P.S.C., Indianapolis, Ind.), July/Aug. 2005, at 3–5, <http://www.hallrender.com/library/newsletters/49/ELBja05.pdf>; *Female Bartender Loses Her Challenge to Casino's Requirement that She Must Wear Makeup*, EMP. L. ALERT (Nixon Peabody LLP, Bos., Mass.), Aug./Sept. 2006, at 5–7, [http://www.nixonpeabody.com/linked\\_media/publications/ELA\\_08002006.pdf](http://www.nixonpeabody.com/linked_media/publications/ELA_08002006.pdf); *Sex Discrimination Claims*, EMP. L. COUNSELING & TRAINING TIP OF THE MONTH (Proskauer Rose LLP, New York, N.Y.) Aug. 2009, <http://www.proskauer.com/news/detail.aspx?news=3065>; *Hair-Dos, Tattoos, and Body Piercings: Is Your Dress Code Lawful?*, LAB. & EMP. L. ALERT (Stoel Rives LLP, Portland, Or.), Apr. 17, 2006, <http://www.stoel.com/showalert.aspx?Show=2361>; *Ninth Circuit Finds that Dress and Grooming Standards Policy Did Not Violate Title VII's Prohibitions Against Gender Discrimination and "Sex Stereotyping"*, BRIEFING: LAB. & EMP. PRAC. (Winston & Strawn LLP, Chi., Ill.), Apr. 2006, <http://www.winston.com/siteFiles/publications/DressAndGroomingStandards.pdf>.

*Discrimination, Ninth Circuit Suggests.*<sup>88</sup> Another said, *Ninth Circuit Upholds Make-Up Requirement—But Cautions Employers.*<sup>89</sup>

### C. Theoretical Model for Predicted Impact

If judicial opinions matter, then we would expect the *Jespersen* opinions to be consequential in Nevada for several reasons. First, the factual focus, appearance standards in casinos, is highly salient in the local community, in which casinos are the dominant industry and sex and sexuality are treated as commodities. Second, the court acted in the most powerful way possible by hearing the case en banc. With more judges and rulings than any other court, the Ninth Circuit is the largest appellate court in the country, and it covers a broad swath of the population. Hence, it would not be surprising if an ordinary panel opinion were overlooked. But if any court of appeals decision gets attention, then one by a divided en banc panel with a long majority opinion and two dissents, including a very colorful one, should be noted. Third, the opinion broke new ground by laying out a way to meaningfully expand employee rights. Fourth, the language sent a clear signal to potential litigants that they could qualify for class action certification, damages, or both, sufficient to motivate entrepreneurial plaintiffs' lawyers.

Although the *Jespersen* opinion appears to have had a measurable impact on legal scholarship, law school teaching, popular press accounts, and practitioners' writing, a change in casino workplace policies (or at least a review of those policies) and litigation challenging those policies would be the most direct measure of an effect on everyday life. But at least initially, the casinos did nothing, and no employees complained.<sup>90</sup> Legal academics, the judges on the Ninth Circuit, the employment discrimination practitioners, and Lambda Legal all might have been wrong in attaching so much importance to the reasoning in the opinion. The casinos' failure to respond is unexpected because the conventional wisdom on legal advice in the wake of ambiguous court decisions suggests that attorneys typically push their clients toward overcorrecting to protect against potential legal risk. It is in the interests of lawyers to exaggerate legal risks both to enhance their importance to the client and also to give the lawyers more work to do.<sup>91</sup> At

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<sup>88</sup> Paul Trimmer, *Reconsider Your Grooming and Appearance Policies for Possible Gender Discrimination, Ninth Circuit Suggests*, LAB. & EMP. L. ALERT (DLA Piper Rudnick Gray Cary US LLP, San Diego, Cal.), May 17, 2006, [http://www.dlapiper.com/files/upload/Labor\\_Emp\\_060517.htm](http://www.dlapiper.com/files/upload/Labor_Emp_060517.htm).

<sup>89</sup> *Ninth Circuit Upholds Make-up Requirement—But Cautions Employers*, FENWICK EMP. BRIEF (Fenwick & West LLP, Mountain View, Cal.), May 10, 2006, [http://www.fenwick.com/docstore/publications/Employment/EB\\_05-10-06.pdf](http://www.fenwick.com/docstore/publications/Employment/EB_05-10-06.pdf).

<sup>90</sup> See *infra* Part IV.

<sup>91</sup> Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 74–77 (1992). For other suggestions that lawyers overestimate legal risks, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. REV. 487, 529–32 (2003), and Donald C. Langevoort & Robert K. Rasmussen, *Skewing*

least within the context of the Las Vegas casino industry, however, reality seems to point in the opposite direction: lawyers on both sides are underestimating the implications of the relevant case law.

### III. METHODOLOGY AND DATA

The study in this Article examines how *Jespersen's* reasoning changed the behavior of legal actors on the ground. For our lens, we used how people talk about the relevance of changes in the law. Our data consists of subjects' stories about their experiences with the Las Vegas casino industry. The interviews reveal the perceived role law plays in their world as well as their view of the contradictions and complications posed by the specific environment in which they work and live. These stories are valuable as sources of insight into how people talk and think about a phenomenon. The stories, though, do not necessarily tell us how these same people act.

#### A. The Interviews

From 2008 to 2010, we conducted more than one hundred in-person interviews in the Las Vegas area.<sup>92</sup> The goal was to talk to people in three different roles: employees (potential litigants), lawyers (on both the defense and plaintiff sides), and judges (in both state and federal courts). We interviewed seventy casino employees,<sup>93</sup> twenty-seven lawyers, and ten judges. We also spoke with a small number of government officials and thirteen human resources personnel.

We identified subjects through the "snowball" method: our initial contacts yielded subsequent contacts.<sup>94</sup> This technique can produce a sample selection problem because subjects will be people known to other subjects. The risk of bias in the lawyer sample is small because the Nevada employment law bar is itself quite small.<sup>95</sup> Employment lawyers tend to know each

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*the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 375 (1997). Cf. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 92–95 (2007) (discussing the excessive risk aversion frequently displayed by lawyers for the government, such as those at the CIA).

<sup>92</sup> We obtained approval from the institutional review boards of each of our home institutions for this human subject study.

<sup>93</sup> Of this group, the largest subsample was of female cocktail servers; we spoke to twenty-seven.

<sup>94</sup> At the end of every interview, we asked each subject whom we ought to contact for additional interviews, which produces a snowball, or multiplication, effect on the sample. Snowball (or chain-referral) sampling is a nonprobability method that makes it easier, quicker, and cheaper to identify subjects but may not reflect a representative cross section of the population. See generally James S. Coleman, *Relational Analysis: The Study of Social Organizations with Survey Methods*, 17 HUMAN ORG. 28 (1958) (introducing this methodology); Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981). We used this method because of the difficulty of identifying interviewees and obtaining interviews from our target population. Referrals acted as a means to identify current or former casino employees and as a way to gain access to casino employees and employment discrimination lawyers.

<sup>95</sup> A search by librarians at the UNLV Wiener–Rogers Law Library of the databases of federal and state filings demonstrated that while many firms having Nevada offices list employment law as one of

other, and our subjects were highly representative of the characteristics of employment attorneys practicing in Las Vegas. The same can be said of the sample of judges. Thus, we are confident that we have a representative sample of lawyers and judges. On the other hand, the relevant employee population is sizeable; hence, any method of selection other than random selection with an unbiased response rate poses a risk of bias.

Our initial attempts at asking for interviews from casino employees met with little success. No one was willing to talk to us; their immediate reaction was that we were “trouble.” One female bartender whom we attempted to interview at an early stage (in the mid-afternoon) was kind enough to tell one of us:

Honey, let me give you some advice. You aren’t going to get anyone to talk to you unless you are spending money gambling. Otherwise, even if one of us wants to talk to you, it looks suspicious. And another thing: You can’t find out anything coming here in the afternoon. You need to be out at night and that too at the clubs at places like the Hard Rock. That is where the action is. It isn’t here.

Lacking the expertise and income necessary to be interesting as customers (to say nothing of our inability to stay up late enough to go to the clubs at the appropriate hours), the enterprise seemed doomed to failure.<sup>96</sup>

Unexpectedly, teaching gave us a means to meet and interview employees.<sup>97</sup> As part of the research project, two of the authors taught a class at the UNLV William S. Boyd School of Law on dress and appearance regulation in the casino industry. We discussed our preliminary findings with our students. The class was made up of twenty-five students, many of whom had worked in the industry as dancers, models, servers, managers, executives, or auditors. The rest had a high degree of familiarity with the workings of the casino business. Every day, as we taught our intensive one-week class, which met for five hours a day, the students would bring their experiences to bear on our discussions of employment discrimination jurisprudence and theory—usually to show us how our understandings of the casino industry were flawed in light of their personal experiences and those

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their specialties in MartindaleHubbell.com, only twenty-two of the listed firms and individuals had appeared in employment litigation in federal or state court in Nevada from 2000 to 2010. In addition, in the course of our interviews, many of which were with lawyers and judges, we always asked our subjects for suggestions as to others in the employment area whom we should interview. The same short list of names arose repeatedly.

<sup>96</sup> The author of an outstanding ethnography of the casino industry took jobs working in casinos in order to gain insights to this world. See JEFFREY J. SALLAZ, *THE LABOR OF LUCK: CASINO CAPITALISM IN THE UNITED STATES AND SOUTH AFRICA* (2009).

<sup>97</sup> The class also provided another means of reaching out to the local legal community: Nevada attorneys and others working in the business spoke to our class about the gaming industry. Those guest lecturers, in turn, gave us increased access to these lawyers as well as their contacts, who were generally willing to help us once they realized that the issues we were interested in discussing were innocuous from their perspective.

of their friends and family. In addition, because part of the assignment for the class involved the students' observations of employment practices in two contrasting settings (e.g., a smaller local casino compared to a large casino on the Las Vegas Strip), they sometimes invited us to go along on their observation trips. The students introduced us to employees who agreed to participate in the study. In the end we were able to speak to a wide variety of people who were working in or were aware of the casino industry. Moreover, the effect of any selection bias would be expected to undermine our hypothesis that *Jespersen* did not affect behavior because the employees whom we interviewed (casino workers seeking law degrees and their friends and families) would be more likely than other employees to believe that court decisions affect behavior.

We conducted the interviews without a fixed set of questions but instead began by explaining the *Jespersen* decision and asking for the subject's view of its effects on the local community.<sup>98</sup> Our subsequent questions encouraged respondents to tell their stories. The interviews ranged from roughly a half hour to two hours.<sup>99</sup> We conducted all but a handful of our interviews with at least two of the investigators present because each author brought different perspectives to the topic. Given the initial reluctance and suspicion we had already encountered, we also decided at the outset not to tape any of the interviews and instead to take handwritten notes. Even with multiple sets of notes, though, the quotations are not always verbatim.

In Part III, we report on the common themes we perceived in the narratives. Our impressions are necessarily subjective. Our interest is in reporting patterns in the ways in which the various individuals in the industry talk about law and, specifically, how they talk about a case considered important by legal academics and the national employment bar. Some of our interviewees may not have been completely candid with us, but they generally appeared comfortable and forthcoming, especially after fifteen minutes or so of discussion. Even if they were spinning a story, our interest was in whether there were common themes in the spinning.<sup>100</sup> In addition, we were

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<sup>98</sup> We formally began each interview with a statement about the subject's rights of confidentiality and anonymity, repeating information included in our oral and written communication with them prior to the interview.

<sup>99</sup> On average, the employee interviews tended to be on the shorter side (under an hour), whereas all but a handful of the lawyer and judge interviews lasted for more than an hour. This was at least partially a function of location and structure because the process of making appointments for the interviews with lawyers and judges was more involved, and the interviews themselves were almost all conducted in the offices of the respondents.

<sup>100</sup> For methodology, we drew from the work of legal anthropologist John Conley. See, e.g., Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 768–69 (2011) (using an interview-based method to study the diversity of corporate boards); John M. Conley, *Tales of Diversity: Lawyers Narratives of Racial Equity in Law Firms*, 31 LAW & SOC. INQUIRY 831 (2006) (using the ethnographical method to study law firm diversity).

interested in whether the various respondents would recount common myths, stories, or vignettes.

### B. *The Community*

Almost all of our interviews were focused on the implications of the *Jespersen* case for the casino industry in Las Vegas. Las Vegas has the largest casino industry in the world and is within the jurisdiction of the Ninth Circuit.<sup>101</sup> Thus, the impact of the case was most likely to be felt there.

A handful of idiosyncrasies about the Las Vegas legal market are worth noting. Although Las Vegas is one of the nation's largest cities, with a metropolitan population close to two million, its legal market is underdeveloped relative to other major American cities.<sup>102</sup> Few large national firms have offices there, due in part to the State Bar Code of Professional Responsibility, which made it difficult, although not impossible, to open a branch office in Nevada.<sup>103</sup> Most of the local law firms are small; twenty-

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<sup>101</sup> For background on the casino industry in Las Vegas, see CHRISTINA BRINKLEY, WINNER TAKES ALL: STEVE WYNN, KIRK KERKORIAN, GARY LOVEMAN, AND THE RACE TO OWN LAS VEGAS (2008). On the dominance of Las Vegas in the casino industry in the United States and abroad, see Ronald M. Pavalko, *Casino Gambling: Competing with Other Forms of Entertainment*, in *INDUSTRY STUDIES* 196–97 (Larry L. Duetsch ed., 2002).

<sup>102</sup> For population statistics for Las Vegas city (ranked twenty-eighth in 2009) and the metropolitan area (ranked forty-seventh in 2009), see U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR INCORPORATED PLACES OVER 100,000, RANKED BY JULY 1, 2009 POPULATION: APRIL 1, 2000 TO JULY 1, 2009, <http://www.census.gov/popest/cities/tables/SUB-EST2009-01.xls> (last visited May 18, 2011), and U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION OF METROPOLITAN AND MICROPOLITAN STATISTICAL AREAS: APRIL 1, 2000 TO JULY 1, 2009, <http://www.census.gov/popest/metro/tables/2009/CBSA-EST2009-01.xls> (last visited Oct. 22, 2010). According to the American Bar Association, Nevada in 2009 had 6395 lawyers, or 0.5% of the country's 1.18 million attorneys. See AM. BAR ASS'N MARKET RESEARCH DEP'T, NATIONAL LAWYER POPULATION BY STATE (2009), [http://new.abanet.org/marketresearch/PublicDocuments/2009\\_NATL\\_LAWYER\\_by\\_State.pdf](http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf). On a per capita basis, Nevada has 2.4 attorneys for every 1000 people. The national average is 3.8 attorneys per 1000 people. Thus, the national rate of lawyers per capita is fifty percent higher than the Nevada per capita. Compare *id.*, with U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2009, <http://www.census.gov/popest/states/tables/NST-EST2009-01.xls> (last visited May 18, 2011) [hereinafter ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES] (calculated by dividing the attorney population of Nevada and the United States with the population of Nevada and the United States, respectively).

<sup>103</sup> See Mike Fimea, *Firm Battles Nevada Rule on Names*, ARIZ. BUS. GAZETTE, June 24, 1999, at BG1 (describing Nevada Supreme Court Rule 199 which barred out-of-state law firms from using the names of lawyers who were not licensed to practice in Nevada in the firms' name). But see *Michel v. Bare*, 230 F. Supp. 2d 1147 (D. Nev. 2002) (enjoining the enforcement of part of Rule 199 on the ground that the rule impermissibly intruded on lawyers' First Amendment rights). Within the last few years, several National Law Journal top 250 firms, including Greenberg Traurig, Holland & Hart, and Ogletree Deakins, have opened small offices in Las Vegas, typically by acquiring existing firms. See, e.g., *Pair of Law Firms Announce Merger Plan*, LAS VEGAS REV.-J., May 28, 2008, at 2D (reporting that Holland & Hart LLP would merge with Hale Lane Peek Dennison and Howard P.C.). This may lead to or result from a change in the legal culture—probably a bit of both.

five lawyers is considered a big firm.<sup>104</sup> Our interviews demonstrated that the plaintiffs' bar is smaller than that of comparably sized cities and is composed mainly of solo practitioners. Class action practice appears to be rare, at least in the employment law area. The immaturity of the local legal market may be due to the absence of an in-state law school until 1998 when the William S. Boyd School of Law, named for a major casino owner, was opened at UNLV. Higher education in general is also less developed in Nevada than in some surrounding states, which may also affect the nature of legal practice.<sup>105</sup>

Finally, perhaps the most sophisticated lawyers in the Nevada legal community are those who practice before the State Gaming Control Board and the Nevada Gaming Commission, which are arguably the most powerful entities in the state. The Gaming Commission has the power to grant and revoke gaming licenses, and it strictly regulates businesses that hold gaming licenses. The Gaming Control Board is an enforcement agency that conducts investigations and brings charges before the Nevada Gaming Commission.<sup>106</sup>

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<sup>104</sup> According to May 2010 data, the average size of the twenty-five largest Nevada firms is twenty-seven lawyers. See Ulf Bucholz, *The List: Law Firms*, IN BUS. LAS VEGAS, July 16–22, 2010, at 12–13 (reporting results from a survey of firms); see also NEV. LEGAL NEWS, NEVADA LEGAL DIRECTORY (July 2010) (listing by name attorneys in firms with at least two attorneys). The biggest firm, Lionel Sawyer & Collins P.C., has sixty-eight attorneys in Nevada. LIONEL SAWYER, [http://www.lionelsawyer.com/index.cfm?page\\_id=5](http://www.lionelsawyer.com/index.cfm?page_id=5) (last visited May 18, 2011). Fourteen firms had more than twenty-five lawyers in 2010. Bucholz, *supra*, at 12.

<sup>105</sup> According to the U.S. Department of Education, Nevada has twenty-one degree-granting institutions and branches (including public, not-for-profit, and for-profit institutions), or 0.79 per 100,000 residents, which is lower than neighboring Utah's thirty-eight (1.36 per 100,000) and Arizona's seventy-five (1.14 per 100,000). Compare NAT'L CTR. FOR EDUC. STATS., DIGEST OF EDUCATION STATISTICS: 2009, at tbl.266, [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_266.asp](http://nces.ed.gov/programs/digest/d09/tables/dt09_266.asp), with ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, *supra* note 102 (calculated by dividing the number of degree-granting institutions by the population of each state). Fewer than one-quarter of Las Vegas residents twenty-five and older have a bachelor's degree or higher. DIGEST OF EDUCATION STATISTICS, *supra*, at tbl.14, [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_014.asp](http://nces.ed.gov/programs/digest/d09/tables/dt09_014.asp) (last visited May 18, 2011). The Las Vegas metropolitan area ranks forty-seventh out of fifty-one metropolitan areas with populations greater than one million. *Id.*

<sup>106</sup> Gaming is tightly regulated in Nevada. See STATE GAMING CONTROL BD. & NEV. GAMING COMM'N, GAMING REGULATION IN NEVADA: AN UPDATE... (July 2006), available at [http://gaming.nv.gov/documents/pdf/gaming\\_regulation\\_nevada.pdf](http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf) (providing a history and update on gaming regulation in Nevada). The State Gaming Control Board is an administrative agency of the State of Nevada charged with the administration and enforcement of the gaming laws of Nevada. See NEV. REV. STAT. §§ 463.030, 463.140 (2010) (regulating gaming control and licensing). The gaming laws are set forth in Title 41 of the Nevada Revised Statutes and the Regulations of the Nevada Gaming Commission. The Nevada Gaming Commission has the power to limit, condition, suspend, or revoke a gaming license or fine any person for any cause deemed reasonable. *Id.* § 463.310(4)(a)–(d). The Nevada Gaming Control Board is authorized by statute to observe the conduct of licensees to ensure that gaming operations are not conducted in an unsuitable manner, *id.* § 463.1405(1); Nev. Gaming Comm'n Reg. 5.040 (2010), and to conduct appropriate investigations to determine whether there have been violations of the gaming laws. NEV. REV. STAT. § 463.310(1).

The state and federal judiciaries also are distinctive in terms of composition and process. State judges are elected, and casino contributions and endorsements are perceived as crucial to winning an election.<sup>107</sup> Federal judges obviously are not elected, but Senator Harry Reid is credited with playing a particularly important role in most appointments.<sup>108</sup> Women play an increasingly prominent role on the state bench in Nevada, as they have in other states, but they have not kept pace on the federal bench.<sup>109</sup> Racial minorities are underrepresented on both state and federal courts.<sup>110</sup> Approximately 40% of the Las Vegas federal judiciary belongs to the Church of the Latter Day Saints (LDS), even though members of the LDS Church make up slightly less than 10% of the population of the city.<sup>111</sup> In many states, in-

<sup>107</sup> All state judges in Nevada are chosen in nonpartisan elections. *Judicial Selection in the States: Nevada*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NV](http://www.judicialselection.us/judicial_selection/index.cfm?state=NV). For investigative reporting on casino contributions to Nevada judicial campaigns, see, for example, Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, at A1 (discussing the influence of elected judiciaries on judges in Las Vegas); Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11, 11–18 (discussing several states' experiences with elected judiciaries). Nevada ranked eighth in judicial campaign contributions, but in 2010, its citizens considered a ballot measure to move to merit selection, which was supported by Justice Sandra Day O'Connor. Justice Sandra Day O'Connor, Opinion, *Take Justice off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9. Nevada voters rejected the referendum with 58% voting against merit selection and to retain direct election of state judges. Doug McMurdo, *Voters Reject Changing Judge Selection*, LAS VEGAS REV.-J., Nov. 3, 2010, at 7B.

<sup>108</sup> See, e.g., Tony Batt & Ed Vogel, *Senate OKs Sandoval for Federal Bench*, LAS VEGAS REV.-J., Oct. 25, 2005, at 2B (noting that President Bush nominated Sandoval for a federal district court position after receiving a recommendation from Senator Reid, who, under the Bush Administration, had the opportunity to select every fourth nominee); Steve Tetreault & Carri Geer Thevenot, *Judicial Pick Confirmed*, LAS VEGAS REV.-J., May 6, 2010, at 2B (crediting Senator Reid with moving the appointment of Gloria Navarro to a federal judgeship quickly); Carri Geer Thevenot, *Reid List Could Be Diverse*, LAS VEGAS REV.-J., Nov. 28, 2009, at 1B (“As the senior Democrat in Nevada’s congressional delegation, Reid has the privilege of recommending candidates for the state’s political patronage jobs while a Democrat occupies the White House.”).

<sup>109</sup> See Mark Curriden, *Tipping the Scales*, A.B.A. J., July 2010, at 37, available at [http://www.abajournal.com/magazine/article/tipping\\_the\\_scales](http://www.abajournal.com/magazine/article/tipping_the_scales) (examining the increasing number of women on state courts in the South); *Judicial Biographies Database*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/export.html> (last visited May 18, 2011) (listing biographies of all federal judges and revealing that 20% of sitting federal district judges are women whereas only 10% of federal judges in Nevada); *Statistics: 2010 Representation of United States State Court Women Judges*, NAT'L ASS'N OF WOMEN JUDGES (2010), [http://www.nawj.org/us\\_state\\_court\\_statistics\\_2010.asp](http://www.nawj.org/us_state_court_statistics_2010.asp) (reporting that 30% of Nevada state judges are women compared to 26% of all state judges).

<sup>110</sup> See AM. BAR ASS'N, DIRECTORY OF MINORITY JUDGES (4th ed. 2008); *Judicial Biographies Database*, *supra* note 109 (listing members of racial minorities serving as judges and revealing that 16% of federal district judges are racial minorities whereas only 10% in Nevada are (the only female judge is also a minority)).

<sup>111</sup> The Federal Judicial Center does not report religious affiliation of judges. The authors collected the religious affiliation data from various secondary sources, including newspaper reports from the time of nomination to biographies listing volunteer activities. See Religious and Political Affiliations of Nevada’s Federal District Court Judges and Magistrate Judges (June 21, 2011) (on file with Northwestern University Law Review). Where we could not clearly ascertain religion, we treated the judge as not Mormon. Based on informal conversations, we suspect our count is an underestimate. For statistics on



cluding neighboring California, state employment discrimination remedies are more attractive than federal remedies, but Nevada state law offers no greater protection than federal law.<sup>112</sup> Thus, plaintiffs may find that, because they are bringing a federal claim, federal court may be a more appealing forum for employment discrimination claims. Employment discrimination claimants may also prefer federal district court because it channels most employment discrimination suits through an innovative prelitigation, magistrate-supervised mediation process in which a federal magistrate judge sits down with the parties, evaluates evidence, and provides the litigants with the magistrate's sense of how their case is likely to fare.<sup>113</sup>

Government lawyers and legal reform organizations who might have an interest in employment cases, particularly those seeking widespread changes in industry practices, are generally absent from Nevada. The EEOC, the federal agency charged with policing antidiscrimination law, has had little or no presence in Las Vegas until very recently and even now has only a minimal presence.<sup>114</sup> Most national legal reform organizations such as NAACP LDF, Lambda Legal, and the ACLU have their main regional offices in Los Angeles or San Francisco. Whereas the Nevada affiliate of the ACLU has grown rapidly over the past fifteen years, only two permanent paid lawyers are on staff.<sup>115</sup> The ACLU of Nevada is the "largest and most active" nongovernmental body in the state dedicated to protecting civil rights and civil liberties.<sup>116</sup>

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the Mormon church in Las Vegas, see *Las Vegas Mormon Temple*, [http://www.onlinenevada.org/Las\\_Vegas\\_Mormon\\_Temple](http://www.onlinenevada.org/Las_Vegas_Mormon_Temple) (last visited May 18, 2011).

<sup>112</sup> In Nevada, plaintiffs may file a sex discrimination suit with the Nevada Equal Rights Commission. Available remedies under the statute include injunctive relief and backpay, but do not include compensatory and punitive damages. See NEV. REV. STAT. §§ 233.170–233.180 (2010) (administrative remedies); *id.* § 613.330 (banning sex discrimination in employment); *id.* § 613.420 (allowing plaintiffs to go to district court if the Nevada Equal Rights Commission does not find for the plaintiff). Under Title VII, plaintiffs may collect both compensatory and punitive damages as well as attorneys' fees in addition to backpay. 42 U.S.C. § 1981a (2006).

<sup>113</sup> For a discussion of the process, see Kathleen M. Paustian, *ENE—What Is It? Does It Work?*, NEV. LAW., Jan. 2007, at 28 (describing the Early Neutral Evaluation program in the U.S. District Court for Nevada).

<sup>114</sup> The EEOC opened a Las Vegas local office of its Los Angeles District in August 2006. Press Release, EEOC, EEOC Opens Las Vegas Office (Aug. 6, 2006), <http://www.eeoc.gov/eeoc/newsroom/release/8-9-06.cfm>. A local office, i.e. the type that was opened in Las Vegas, is the smallest unit within the EEOC structure; district offices are the largest units, and field offices and area offices rank above local offices. *Id.* The Los Angeles District includes southern California and southern Nevada. *EEOC Office List and Jurisdictional Map*, EEOC, <http://www.eeoc.gov/field/index.cfm> (last visited May 19, 2011). The office accepts and investigates complaints, but all decisions regarding complaints are made by the district director in Los Angeles District Office. See also Matt Ward, *EEOC Establishes Vegas Presence: Rising Tide of Sexual-Harassment Complaints Prompts Move*, LAS VEGAS BUS. PRESS, Nov. 13, 2006, at P14 (describing the events which led to the opening of an office in Las Vegas).

<sup>115</sup> See *Staff Members*, ACLU OF NEV., <http://www.aclunv.org/staff> (last visited May 19, 2011). The ACLU of Nevada also recently added a legal fellow to its staff. *Id.*

<sup>116</sup> See *History of the ACLU of Nevada*, ACLU OF NEV., <http://www.aclunv.org/node/114> (last visited May 19, 2011).

Unions play a significant role in the Las Vegas casino and hospitality industries and are a much more important part of employment law practice here than elsewhere. The Culinary Workers of America is a particularly prominent player.<sup>117</sup> Most of the major casinos have at least a partially unionized workforce, and the casino industry and unions appear to have learned to cooperate on major issues.<sup>118</sup> Some of our employee respondents mentioned the importance of the unions in protecting employee rights.

#### IV. SOCIAL REALITIES

We predicted that the *Jespersen* decision would garner attention in the Las Vegas legal community and among casino workers and insiders there for multiple reasons. First, Las Vegas is dominated by the casino industry, and this case squarely tackled appearance discrimination in the casino setting.<sup>119</sup> Second, the casino industry in Las Vegas attaches, to put it mildly, a high degree of importance to appearance: especially gender-differentiated and sexualized appearance. Third, the prior case law on appearance discrimination was thin. *Jespersen* not only promised to shape future law on the subject, but it also constituted binding precedent on the federal district courts in Nevada. Fourth, because the casinos ask for a high degree of uniformity in appearance from their employees, they issue explicit instructions to their employees. And explicit instructions are easier to challenge than the informal social pressures that other employers might use. In sum, this was not a case whose dictates could be easily ignored. Or so we thought.

At first glance, the practitioner literature suggested that we were on the right track. From the beginning of the litigation in the district court, the case garnered attention from practitioners around the country. And this included leading lawyers in Nevada, who both produced client alert memos

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<sup>117</sup> According to its webpage, the local Culinary Workers Union “is one of the fastest growing private sector local unions in the United States. Membership has climbed from 18,000 union workers in 1987 to approximately 60,000 members today. Culinary 226 represents more members than any other union in Nevada.” *About the Culinary Workers Union Local 226*, CULINARY WORKERS UNION LOCAL 226, <http://www.culinaryunion226.org/about.asp> (last visited Aug. 26, 2011); see also Courtney Alexander, *Rise to Power: The Recent History of the Culinary Union in Las Vegas*, in *THE GRIT BENEATH THE GLITTER: TALES FROM THE REAL LAS VEGAS* 145, 146 (Hal K. Rothman & Mike Davis eds., 2002) (describing the success of the Culinary Workers Union).

<sup>118</sup> See Dorothee Benz, *Labor’s Ace in the Hole: Casino Organizing in Las Vegas*, 26 NEW POL. SCI. 525, 526 (2004) (stating that union density in Las Vegas casinos is 65% and on the Strip is 90%, which far surpasses the 8.2% union density found in private employers nationwide); see also *id.* at 533 (explaining the union organizing techniques and the “labor–management partnership” that resulted in Las Vegas casinos).

<sup>119</sup> See John M. Broder, *When a City Discovers the Virtues of Vice. And Vice Versa*, N.Y. TIMES, June 4, 2004, at A20 (describing the interrelationship between Nevada and Clark County governments and the casino industry and demonstrating that the casino industry is the most powerful industry in Nevada). For a discussion of the growth of the casino industry in Nevada, see HAL K. ROTHMAN, *DEVIL’S BARGAINS* 313–37 (1998).

and wrote articles for *Gaming Law Review*.<sup>120</sup> *Gaming Law Review* even reproduced the en banc and the three-judge panel opinions in full for its readers.<sup>121</sup> Finally, the memos and articles that tackled the en banc decision generally cautioned clients that, although the casino had won in this case, the en banc opinion left the door open to future litigation on the appearance issue.<sup>122</sup>

What we found at the ground level, however, did not match our predictions. We begin with some general impressions from the interviews in section A before moving to the specifics in sections B and C.

### A. General Impressions

From what we were told, the impact of the case on the casino community in Las Vegas was, at most, negligible. No more than a handful of lawyers we spoke to—all of whom spent significant portions of their time tackling employment issues—was familiar with the specifics of the case and the nuances of the language. Most of these lawyers appeared to have barely skimmed the decision, often in preparation for their meetings with us. At least a couple of the plaintiff-side lawyers did not seem to realize that the case had been decided at the en banc level. The defense-side lawyers, in numerous client alert memos circulated immediately after the case, urged employers to pay attention to the case and consider reviewing their appearance codes and policies.<sup>123</sup> But no one with whom we talked gave us the impression that the case had generated much new work in terms of designing new techniques of compliance or litigation protection. We also found, according to lawyers, judges, and government officials, that there was no indication that anyone had seen an increase in litigation against the casinos building on the guidance provided by *Jespersen*. Similarly, our interviews did not suggest that settlement amounts in appearance discrimina-

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<sup>120</sup> See, e.g., Kamer & Keller, *supra* note 86, at 336–37 (reporting on the district court decision in *Jespersen*); Preis et al., *supra* note 86, at 89–91 (same); Courtney Brevette, *A Grooming Standards Win for Employers*, 4 HOTELIERS (Oct. 27, 2005), [http://www.4hoteliers.com/4hots\\_fshw.php?mwi=978](http://www.4hoteliers.com/4hots_fshw.php?mwi=978) (reporting on the three-judge opinion on the appeals court); Patrick Hicks & Veronica Arechederra Hall, *Makeup Rule Upheld by Ninth Circuit*, HR.COM (July 1, 2005), [http://www.hr.com/en/communities/legal/makeup-rule-upheld-by-ninth-circuit\\_ead1ze8f.html](http://www.hr.com/en/communities/legal/makeup-rule-upheld-by-ninth-circuit_ead1ze8f.html) (reporting on the Ninth Circuit panel's decision in *Jespersen*).

<sup>121</sup> *Jespersen v. Harrah's Operating Co.*, 10 GAMING L. REV. 379 (2006) (reprinting the en banc opinion); *Jespersen v. Harrah's Operating Co.*, 9 GAMING L. REV. 187 (2005) (reprinting the initial Ninth Circuit opinion).

<sup>122</sup> Patrick H. Hicks et al., *Reasonable Dress and Grooming Requirements Survive Court Scrutiny*, 10 GAMING L. REV. 342, 345–46 (2006); *Special Alert!—Ninth Circuit Issues Final Decision on Harrah's Appearance Policy Requiring Certain Female Employees to Wear Makeup*, EMPLOYER REP. (Kamer Zucker Abbott, Las Vegas, Nev.), Apr. 18, 2006, <http://www.kzalaw.com/printreport.php?vol=5&iss=3&art=1>.

<sup>123</sup> See *supra* notes 86–87 (citing to memos and articles alerting clients as to the new risks).

tion cases had increased after *Jespersen*.<sup>124</sup> That said, our findings are consistent with the possibility that lawyers representing casinos had advised their clients before *Jespersen* was decided about possible strategies and tactics to avoid litigation based on appearance and dress codes. We discuss some of these strategies below.

As for whether there had been on-the-ground reactions to the case, e.g., alterations in training sessions, instruction manuals, or incentive schemes, our questions were generally met with puzzlement from nonlawyer employees. They said, in effect, “Why would you expect any reaction from the casinos?” Among the more than seventy employee interviews, we did not have one single respondent who thought that there had been a perceptible response to the case. More than a few of our respondents, however, asked, as the interview was winding down, “Didn’t the casino win the case?”

We discerned several repeated themes from our interviews. These syntheses of the respondents’ narratives are necessarily subjective and interpretive because they are based on our readings of the interviews. From our initial set of about a dozen respondents, we got a uniform starting point for our discussions: there had been little on-the-ground reaction to *Jespersen*. So we explained our project to our respondents, letting them know we were interested in how this case affected everyday practices. But we also told our respondents that we were puzzled by our initial findings that not much had happened in reaction to the case. We explained that we were curious as to whether we were wrong in terms of our initial findings and, if not, how to explain the lack of response.<sup>125</sup> The narratives, therefore, are stories about why there was no reaction.

The narratives are reported in the next two sections. Section B reports on the reactions from employees at the various casinos. The majority of these are interviews with women working as servers and bartenders, although we also spoke to some male employees and some executives and managers. Section C reports on our interviews with lawyers and judges whose work involves the industry.

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<sup>124</sup> We are grateful to Frank Easterbrook and Bill Landes for raising the question of settlement amounts. We also made inquiries as to whether there was any perception among insurance companies that the price of litigation insurance for casinos had increased as a result of this case. We found no indication of an increase in the cost of insurance either.

<sup>125</sup> In effect, by telling our later interviewees what we found in the initial dozen interviews, we may have produced something of a framing effect because we may have introduced a cognitive bias that caused our later respondents to also report that they had not perceived any change in the wake of *Jespersen*. We expect, however, that any such bias would have been overcome if a respondent had seen a real change in appearance policies.

### B. The Employees/Nonlawyers

1. *Assumption of Risk* (“We Would Choose to Wear Makeup”).—With our nonlawyer respondents, we began conversations by describing the basics of *Jespersen*. Afterward we explained what we were interested in learning about by discussing *Jespersen*: that is, how the law in judicial opinions translates into behavior on the ground. In response to our introductions, even though we never asked anyone whether they had heard about the case, a number of respondents professed to having at least heard about the *Jespersen* case. (They typically referred to it as the “makeup case.”)<sup>126</sup> None of the employee respondents had a clear memory of the issues, but many remembered that the case had been in the news. The ones who did remember something about the case frequently mentioned that the employee had worked in a Reno casino, a significant fact for these respondents.

The respondents explained that Reno’s casino industry is different from that of Las Vegas, which is younger, hipper, more attractive, and more sexualized. Respondents depicted the Reno jobs as less glamorous—almost depressing. As one respondent explained: “Reno is different; the casino industry there is older; something like this would not have happened here.” We also heard multiple versions of: “Las Vegas does not just sell gambling; it sells a fantasy.” According to the respondents, Las Vegas casino workers are not as likely to bring a lawsuit because they understand the requirements of the job to include being part of the construction of a fantasy experience for customers. In essence, respondents noted that Las Vegas casino employees work in a different environment from that of Reno casino workers. This difference affects the workers’ view of what the job entailed and their willingness to bring suit.

Some employee respondents used the term “assumption of risk” to describe their point. The other explanation that we frequently got was that Nevada was a “right to work” state. Perhaps because the three of us are trained as lawyers, we found the invocations of these legal terms by nonlawyers fascinating. Not only are “assumption of risk” and “right to work” legal terms of art, but the terms’ conventional meanings did not fit the context in which the employee respondents used them. When someone invoked those terms, we would typically follow up by trying to clarify that because Title VII, the federal antidiscrimination law, is mandatory, a casino defendant cannot use the excuse that an employee has assumed the risk. Often we used an example like the following to illustrate our point:

An employer cannot escape liability for race discrimination by telling all its racial minority employees ahead of time that it plans to give them lower sala-

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<sup>126</sup> This was less true with our last set of employee interviews in early 2010, when none of our approximately half-dozen interviewees gave us an affirmative indication of remembering the case (although they also did not affirmatively say that they had not heard of it).

ries and plans not to promote them. The same applies here. Employers cannot escape the application of antidiscrimination law simply by warning female employees ahead of time.

Despite our comments, the respondents did not change their explanations. They continued to insist that Las Vegas casinos provided an atypical work situation.

As for the “Nevada is a ‘right to work’ state” argument, we were initially confused about how the respondents were using that term. Eventually we understood the term to refer to antiunion legislation.<sup>127</sup> Here, respondents seemed to be talking about another legal concept, employment at will. However, the idea of employment at will, which says that employers, absent an explicit employment contract stating otherwise, can fire employees without any need to show cause, is also irrelevant to federal antidiscrimination law. In sum these employees told us that they were restricted in their ability to sue in ways that they were actually not.

This consistent underestimation of legal rights was not what we had expected. Pauline Kim’s now-classic study on employee perceptions about “employment at will” showed that employees often think they have more rights than they do: the majority of employees in her study thought that they could be fired only for cause.<sup>128</sup> In Las Vegas, we saw something different. Another perception connects to the distinction our respondents were drawing between Las Vegas and Reno. They seemed to say that the rules that applied in Las Vegas were different, particularly for this special category of younger and more attractive employees.

If we had expected our respondents, mostly young women working in various jobs in the casinos, to be relieved to hear that they had more legal rights to bring gender discrimination claims than they had believed, we would have been disappointed. It seemed not to matter that we had explained that bringing suits might actually be easier. The bottom line was still that these employees did not expect suits to be brought.<sup>129</sup>

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<sup>127</sup> Specifically, “right to work laws” are statutes that exist in a number of U.S. states that bar agreements between trade union and employers making union membership, dues, or fees a condition on entry to the job. See, e.g., *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding constitutionality of right to work laws).

<sup>128</sup> See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (“[W]orkers appear to systematically overestimate the protections afforded by law, believing that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract.”).

<sup>129</sup> A caveat here is that our mode of questioning—where we said that we were puzzled by the lack of reaction in Las Vegas to this big case—may have induced defensiveness in some of our respondents. We did take steps, however, to communicate neutrality in the interviews. That said, there is literature on the stories and myths that develop in certain communities that help make sense of what might otherwise be inconsistencies. See, e.g., KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* (2005); Karl E. Weick, *The Collapse of Sensemaking in Organizations: The Mann Gulch Disaster*, 38 ADMIN. SCI. Q. 628 (1993) (reanalyzing the Mann Gulch fire disaster to illustrate problems in our understanding of organizations). These stories and myths sometimes have little basis in fact: they are just explanations,

2. *Bigger Tips for Bigger Breasts.*—After we had finished our introductions with one union officer but before we had even begun the interview, he said, “You should know. I’ve had women members tell me that they get bigger tips if they have bigger boobs. I’m not going to do anything that hurts my members.” The themes of breast size and particularly breast augmentation surgery were ones that our employee respondents frequently brought up. Indeed, to the discomfort of at least one of us, students raised questions in our meetings about whether certain casino employers were paying for breast augmentations and other cosmetic surgeries and whether such expenditures were tax deductible.

Generally, a conversation’s transition to the topic of breast size occurred in the following fashion. *Jespersen* involved a female bartender who refused to comply with the casino’s mandatory makeup requirement. Our conversations with casino employees, though, quickly turned from *Jespersen*’s implications for bartenders to its implications for cocktail servers. Cocktail service appears to be the job with the most marked gender differences: there are hardly any men who work as servers in any of the major casinos. Female cocktail servers, for their part, wear high heels, skimpy costumes, and makeup, to say nothing of requirements regarding their hair and other aspects of their appearance. High heels and skimpy outfits can have negative health effects. Carrying heavy trays of drinks for multiple hours in high heels is not good for one’s ankles, nor is wearing minimal clothing in low temperatures.<sup>130</sup> The women working in these jobs are often slender, which suggests that the long-term impact of carrying heavy drink trays in low temperatures might be especially problematic for them.

Our respondents had no problems whatsoever in understanding and articulating the gendered burdens imposed on female cocktail servers. But even while articulating these burdens, they did not perceive them as gender discrimination. Women cocktail servers saw themselves as privileged both over men, who couldn’t get these jobs, and over older and less attractive women. The frequent refrain, in the words of one cocktail server, was this: “We earn more in tips because we wear makeup, short skirts, and have bigger—you know—breasts [laugh]. Men cannot get these jobs.”

We were told repeatedly that female cocktail servers with the better shifts at upscale casinos could earn upwards of \$150,000 to \$200,000 per

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perhaps just explanations given to outsiders asking stupid questions. See generally Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts and the Hunt for Pari Passu* (U.N.C. Legal Studies Research Paper No. 1633439, 2011), available at <http://ssrn.com/abstract=1633439>.

<sup>130</sup> See D. Casey Kerrigan et al., *Knee Osteoarthritis and High-Heeled Shoes*, 351 LANCET 1399 (1998); cf. Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 296 (1997) (“[S]eventy-five percent of the problems eventuating in . . . [the foot] corrections performed annually in the United States ‘either result from or are greatly aggravated by the use of high-fashion footwear.’” (quoting Francesca Thompson & Michael Coughlin, *The High Price of High-Fashion Footwear*, 76 AM. J. BONE & JOINT SURGERY 1586, 1587 (1994))).

year, including tips. Many of our respondents felt that, with that much earning power, there was little reason to sue. These women had jobs that were hard to get; they were not going to upset the apple cart. We kept hearing that, if anything, it was the men who should be arguing that they were being discriminated against by not being given jobs as cocktail servers. But our interviewees also said that customers would not like male cocktail servers and would not tip them as well. One interviewee explained that there are male cocktail servers working outside at the swimming pools, but they do not work on the “more formal” casino floor.<sup>131</sup>

Often, while we were talking about the issue of tips and appearance, the respondents themselves would point out that not all the cocktail servers were thin and young, especially at older casinos with powerful unions. On a couple of occasions, we were advised to go to casinos such as Caesar’s Palace to observe the servers working the afternoon shifts. Apparently, the disjunction between the outfits and the people wearing them was extreme, according to our generally younger respondents. The point seemed to be that even these women, who were older and perhaps heavier, were required to wear the high heels and skimpy outfits.<sup>132</sup> In the end, tips appeared to be only part of the equation: having the most attractive female cocktail servers was central to the casino’s image.

These questions of appearance and gender raise a few other theoretical points worth mentioning. First, our respondents brought up the interesting and difficult legal question of whether an employer who refuses to hire men for a job then gets *carte blanche* to impose whatever restrictions it wants on the women, including imposing stereotyped images. We suspect that a federal judge would have little sympathy for the argument that employers can opt out of gender discrimination law by engaging in a different kind of discrimination against men. But this also raises a different question: if these cocktail server jobs are so good, why are no men suing to get them—especially today, as Las Vegas is still reeling from the financial crisis? Do the male potential cocktail servers in Las Vegas also believe that even if they got these jobs, they would not be able to earn tips? Given that many casinos have tip-sharing arrangements, it is not clear why men would worry

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<sup>131</sup> Some months after the interview that we quote in the text, we interviewed a male server who worked at the pools. He explained that his situation was different not only because he could not be a server inside the casino but also because the work was seasonal because it was outside at the pool. We asked him whether he felt this was unfair. He responded that he did not mind the seasonality of the job. He explained that he and the other servers could do other jobs or take classes during the year. He valued the flexibility he got by only having to work his server job during the summer.

<sup>132</sup> Some interviewees also suggested that the uniforms in older casinos with older waitresses who were represented by the union were more modest. Based on what we could tell, the uniforms were still skimpy but less so than some of the newer casinos’. And at least one human resources executive thought that the outfits at places like the Mirage and Caesar’s Palace were more modest because management did not want to put the really skimpy costumes on older female servers. We were also told that there are some casinos where there is a choice of costumes, all of them pretty similar but some of them slightly longer, and so on.



about their individual tips. Or are the men who would apply for these jobs deterred by their efforts to maintain their dignity and masculinity?

Masculinities theory suggests that men are driven by a need to prove their masculinity and demonstrate that they are different from women and what they perceive as feminine.<sup>133</sup> The job of cocktail server is considered a woman's job by both employees and employers, and it would take a brave man to apply for a job that is traditionally associated with feminine sexuality. Furthermore, the casinos may discourage men from applying for cocktail server jobs. One human resources executive told us that she had anticipated the "problem" of a man applying for a cocktail server job. She considered it a problem because she believed customers prefer female cocktail servers.<sup>134</sup> To avoid a lawsuit and still deter men from applying for the job, she had a very skimpy costume to show to male applicants that they would be asked to wear. Interestingly, there is one major casino that does have male cocktail servers on the casino floor. The male and female cocktail servers are called "bevertainers." The women are dressed in lace teddies, and the men wear a costume that appears like pajamas with long pants and short-sleeve shirts with a v-neck. There is a clear difference in the amount of flesh displayed by the male and female costumes.

The second point, which was reinforced by the human resources executive mentioned above, has to do with customer preferences. Respondents frequently argued that casinos have to employ female cocktail servers who fit a certain mold because this is what customers want. More specifically, they emphasized that cocktail servers are a key element in creating the special and unique Las Vegas image. But as a matter of discrimination law, employers cannot justify discriminatory practices on the basis of customer preferences.<sup>135</sup> The only exception to this is the narrow set of cases that fit within the BFOQ category. But commentators, the courts, and the EEOC all seem to agree that establishing an employment criterion as a BFOQ is very difficult. Sex is a BFOQ only for the narrow sets of jobs for which sex or gender is essential; Playboy Bunnies and private nurses are frequently

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<sup>133</sup> See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in FEMINISM AND MASCULINITIES 182, 185–86 (Peter F. Murphy ed., 2004); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in FEMINISM AND MASCULINITIES, *supra*, at 57, 61–62.

<sup>134</sup> Along a similar vein, a male blackjack dealer complained that when he applied for his job at a local casino, he was told that the casino wanted to hire female dealers because the clientele liked attractive women. For a number of years, the management "kicked all of the men (dealers) out of the high limit pit." Recently, the dealer noted, the casino has moved more men into the high limit pit because the women complained about the clientele acting up. See also *Brooks v. Hilton Casinos, Inc.*, 714 F. Supp. 1115 (D. Nev. 1989) (holding that the defendant casino had violated Title VII by firing thirty-seven male dealers and floormen and replacing them with twenty-four women and thirteen men, a disproportionate number of women compared to the hiring pool).

<sup>135</sup> See 29 C.F.R. § 1604.2(a)(1)(iii) (2010); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding that an airline is not allowed to discriminate against males in hiring because customers prefer female flight attendants).

invoked as examples.<sup>136</sup> Assuming that neither the lack of men in the job nor the BFOQ exception poses barriers to women bringing a case, the cocktail servers in Las Vegas casinos would likely have a case of unequal burdens on men and women in the casino that employs both men and women as cocktail servers and in other casinos in which men and women occupy jobs with similar tasks and different titles and have disparately revealing uniforms. They also have a claim for sex stereotyping for provocative uniforms that cause vulnerability to sex harassment. In other words, they could bring precisely the type of case that *Jespersen* seemed to say would result in victory for the plaintiffs. Our respondents saw matters differently. They saw us as failing to understand the casino industry and the culture of Las Vegas. And they seemed invested in making the Vegas “fantasy” model work by permitting employers to require sexually suggestive appearance.

3. *Looking in All the Wrong Places.*—A persistent theme in the narratives was that makeup issues were simply not very important. Our respondents could readily identify areas in which they thought the casinos were concerned about legal regulation: first and foremost was the issue of weight. Casino executives, especially of the high-end casinos, care desperately about the weight of female servers. Our respondents were convinced that the casino lawyers and managers were constantly thinking of ways to get around antidiscrimination laws that might keep employers from imposing weight restrictions.<sup>137</sup> More than twenty-five years ago, the Ninth Circuit held that female flight attendants could make out a prima facie case of sex discrimination based on weight requirements that an airline had admittedly imposed to create an image of a slender female flight crew.<sup>138</sup> Although employers and their representatives whom we interviewed paid attention to issues of weight discrimination, they seemed unconcerned with other types of discrimination that were also at least arguably illegal under *Jespersen*.<sup>139</sup> Second and relatedly, we were also told that casino management worries about dealing with pregnancy: not only what to do with the pregnant women (“how to hide them,” as one executive phrased it) but also how to get them back to their original weights once they returned to their

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<sup>136</sup> See McGinley, *supra* note 18, at 269 (discussing how the BFOQ defense applies to Playboy Bunnies); Yuracko, *supra* note 77, at 149 (discussing exceptions to the rule that it is illegal for employers to discriminate on the basis of sex).

<sup>137</sup> Consistent with what our nonlawyer respondents suggested, a number of the lawyer respondents confirmed that a major concern of the casinos was dealing with overweight cocktail servers. We heard the story of a prominent casino owner who was misheard by a group of cocktail servers as having called them “blue whales.” That apparently caused a great deal of unhappiness among the servers. According to our respondents, this owner, though famously concerned about regulating the weight of his female employees, had said something else with the prefix blue and had been misheard.

<sup>138</sup> *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 608 (9th Cir. 1982); see also Yuracko, *supra* note 49, at 20 (explaining *Gerdom* in the context of appearance code cases).

<sup>139</sup> A different possibility is that the union agreements that apply in some casinos have protections against weight discrimination. But none of our respondents pointed to these.

jobs. Third (although this did not come up as often as we thought it might), our respondents addressed the question of how to tackle the problem of aging cocktail servers, who are, the implication was, less attractive and heavier.

A number of our respondents were convinced that some of the casinos had developed strategies to circumvent the law. Reportedly, some casinos changed the definition of jobs from “cocktail servers” to “dancers” or “entertainers” on the theory that dancers could be required to be young and thin because they had to be fit to dance. According to some of our respondents, the management could therefore put employees who were listed as dancers through fitness trials and weigh them. Another example some respondents brought up was of certain casinos defining their server jobs as a combination of model and server to make it acceptable to impose even more stringent weight restrictions than those imposed on non-model cocktail waitresses. A third reported strategy was to use subcontractors and independent contractors. Apparently, the casinos preferred to subcontract out the work for some of the female dancer jobs at high-end night clubs, and the subcontracting firms, in turn, hire independent contractors. A final reported strategy involved the recent opening of private clubs within the casinos that are open to adults only. These member-only clubs, which are often operated by companies other than the casinos, advertise an atmosphere of heightened female sexuality, with women bartenders and cocktail servers wearing skimpy outfits and with admission advertised as free for women in an effort to attract male customers. Because these clubs are open to adults only, casinos would have a better argument that imposing a sexy dress code on female employees is a BFOQ. We confess that we remain unsure of how well any of the other strategies work to bypass legal requirements, but a number of our respondents pointed to the independent contractor phenomenon and wondered whether it was part of a strategy to impose greater restrictions on employees.<sup>140</sup> Our guess is that at least some federal judges would be skeptical about, if not hostile toward, these strategies. Our respondents emphasized, though, that, with the exception of the growth of the club culture, none of these strategies or concerns on the part of the employers is new. They all predated *Jespersen*.

### C. Lawyers and Judges

This section reports on conversations with twenty-seven lawyers and ten judges in the Las Vegas area. The lawyers were about equally divided between the plaintiff side and the casino defense side. The vast majority of our defense-lawyer respondents were male. On the plaintiff side, the gend-

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<sup>140</sup> One respondent speculated that the independent-contractor technique might be a method of getting particular jobs, for which the casinos wanted the dancers or servers to be especially young and attractive, out of the ambit of the union’s collective bargaining agreements. In other words, the respondent suggested that this technique was not about avoiding Title VII liability at all.

er balance was more even. At the outset of this project, we were concerned about sample bias problems because we were using the snowball method of collecting interviews. However, the number of lawyers and judges in Las Vegas who do employment discrimination work and could discuss the impact of *Jespersen* on casino industry practices is small. Based both on our prior knowledge and what we learned during our interviews, we suspect we spoke to at least 30% to 40% of the population that might be meaningfully studied.

Although we report the lawyer narratives as a whole, there were some structural differences between the practices of the plaintiff-side and defense-side lawyers. The former tended to be in rather ramshackle small, often solo, practices, whereas the latter appeared better-heeled and tended to be in larger practices, including, of course, in-house practice at casino management companies. We note instances in which there were systematic differences in the narratives of the plaintiff- and defense-side lawyers.

We report on the judge interviews last because the judges, more than any of our other respondents, attempted to step back and provide explanations for the phenomena that we had observed. Also, perhaps because judges, like legal academics, are socialized to attach importance to judicial reasoning, they seemed to understand what puzzled us. It is hard for us to know how seriously any of our respondents took our inquiries. But as a group, the judges were the most gracious and gave us the most time: almost all our interviews went well over the one hour that we typically scheduled.

1. *A Race to the Bottom and Weight Problems (Again).*—A frequent refrain from the lawyers, consistent with what we heard from the employees, was that the employment discrimination issues that the casinos cared about were not the ones we were investigating. Specifically, legal issues relating to makeup requirements and dress codes were not big concerns to casinos. They were most concerned about their employees' weights and perhaps their ages. With respect to makeup and dress codes, the lawyers reported that casinos had to ensure that the employees did not wear too much makeup or clothing that was too sexualized. In some locales, they were more concerned about poor grooming. In this context, a number of respondents sought to tell us the "real" story about *Jespersen*. They recounted that the company had been attempting to make its operation, particularly its casinos in Reno, more "professional."<sup>141</sup> Apparently, a number of casinos were concerned that their employees were not taking adequate care of their appearances. Harrah's, in particular, was trying to institute scientific management techniques to create greater uniformity and accountability among its employees. And as part of a package of reforms that were put in place, Harrah's imposed uniform appearance standards. If Harrah's or other casinos wanted their employees to be more sexualized, one

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<sup>141</sup> This story is consistent with the research reported in Avery & Crain, *supra* note 38, at 57–78.

respondent explained, they only needed to relax their appearance codes. The servers, seeking more tips, would have shown up in outfits more outrageous and sexualized than anything the casino could have come up with. One respondent triumphantly concluded that people who did not understand the casino industry were getting the problem exactly backwards. The casinos often have to desexualize their employees and strictly regulate their behavior with customers so that the employees will not harm the reputation of the casinos in their desire to gain more income in tips.<sup>142</sup>

We were told repeatedly that the issue that employers really cared about was weight. And this was particularly true with respect to female cocktail servers and dancers. Employers very much wanted to impose strict weight restrictions but were concerned about running afoul of anti-discrimination law. The lawyers we spoke with all indicated familiarity with the airline cases from the 1970s and 1980s, when airlines lost on multiple occasions in litigation over whether they could impose more stringent weight restrictions on female employees.<sup>143</sup> To the extent that counsel for the casinos thought about strategies to protect their employers from discrimination cases, their task was to figure out how to avoid suit over weight restrictions. In this context, they often mentioned the strategy used by one casino, redesignating the jobs of its cocktail servers as entertainers (“bevertainers” to be specific). As noted, this story had also come up frequently in the employee narratives. That strategy, some lawyers speculated, might have allowed the casino to impose more stringent weight restrictions on its employees. After all, some respondents explained, everyone knows that dancers have to be thin and fit. We found the bevertainer strategy particularly interesting when we made our own reconnaissance trip to the casino in question. The female bevertainers, dressed in outfits best described as lace teddies, were moving around the casino floor with heavy trays of cocktails. Their few male counterparts, dressed in long pajamas and loose fitting tops, also served drinks. But after waiting for nearly an hour to see any dancing or entertainment and asking various employees when the dancing would start, we finally had to go up to one of the bevertainers and ask her whether she also did the dances that we had been told about. In response, she asked us to wait for a few minutes and then got up on a small stage in the middle of the casino floor and lip-synched a song into a microphone. There was, in our opinion, minimal dancing and entertainment value. To be fair to her, it was early evening, not exactly peak casino time, and middle-aged law professors hardly looked to be big tippers. After doing her song and dance rou-

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<sup>142</sup> The adjective “professional” also came up frequently in conversations with employees, who appeared to attach significant importance to the professional nature of their jobs. It did not matter that in some cases these were jobs that required minimal clothing, such as serving cocktails or attending to customers poolside. If anything, the less clothing the more important it was for the employees in question to describe themselves as professional.

<sup>143</sup> See, e.g., *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 437, 454 (D.C. Cir. 1976) (holding that imposing weight restrictions on women but not on men was disparate treatment under Title VII).

tine, our bevertainer took her tip, grabbed her tray, gave us a puzzled look and ran off to serve more drinks.

As in our employee interviews, we were puzzled by the lawyers' repeated invocation of concerns about weight discrimination language in *Gerdorm* because they did not react the same way to the sex stereotyping language of *Jespersen*. If a casino employee brought a Title VII suit alleging discrimination based on the sex stereotyping underlying certain weight requirements, she might succeed under *Gerdorm*. However, such a case is not clearly stronger than one asserting discrimination based on sex stereotyping underlying other sex-differentiated appearance standards applied in casinos under *Jespersen*. Plus, *Gerdorm* was decided in a different work setting, in which safety rather than entertainment is the primary task of the employee. We also expected the lawyers to be more concerned about *Jespersen* than *Gerdorm* because it struck closer to home, given that the factual situation involved a casino server. Moreover, the weight component of casino appearance policies could more easily be applied in a gender-neutral way than many of the other appearance guidelines.<sup>144</sup> In response to a lawyer-respondent bringing up the concern about weight discrimination lawsuits, one of us asked, "If this is such a big concern, why not simply hire some men and subject them to equally stringent weight restrictions? After all, that would produce a scenario with equally bad treatment of both genders." In response, the lawyer we were interviewing did not say anything; he just looked incredulous that we would have brought up such a ridiculous hypothetical.<sup>145</sup>

The casinos' disinterest in *Jespersen* is even more confusing because, even if the primary concern of the casinos was the possibility of a weight discrimination claim, *Jespersen* should have been important to their calculations. In theory, gender discrimination law could be brought to bear on the weight discrimination issue even if a casino only had female employees in the relevant job category. But doing so would require stretching the logic of the sex stereotyping line of cases to apply to weight. Female plaintiffs

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<sup>144</sup> Of course, if a woman gains weight because she is pregnant, she will be protected by the Pregnancy Discrimination Act, which is an amendment to Title VII. 42 U.S.C. § 2000e(k) (2006) (defining discrimination prohibited "because of sex" to include discrimination "on the basis of pregnancy, childbirth or related medical conditions"). Moreover, there are some cases under the Americans with Disabilities Act that prohibit discrimination based on the disability of being morbidly obese. See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (suggesting that morbid obesity, when associated with a physiological condition, is a disability under the ADA); *Gaddis v. Oregon*, 21 F. App'x 642, 643 (9th Cir. 2001) (stating that morbid obesity is a disability under the ADA). But the concern about weight in the casinos, while also applicable to pregnant women, went beyond pregnant women and occurred long before an employee could be considered "morbidly obese."

<sup>145</sup> A similar point to the one we made in our interview, however, was made in an article in *Gaming Law Review* by partners in a prominent defense-side firm in an article advising casino clients about weight discrimination issues. See Kamer & Keller, *supra* note 86, at 344 (advising clients that if they were going to impose weight restrictions on female employees, they would have to impose similarly stringent restrictions on the male employees as well).

would have to argue that the female employees subjected to these weight restrictions were being unduly burdened. This is ironic because the most important case on stereotyping—and one that would control any case decided in Las Vegas—is *Jespersen*. Put differently, if the biggest concern of casino lawyers is handling weight discrimination lawsuits, then that concern should have made them intimately familiar with the discussion of stereotyping in *Jespersen*. Specifically, *Jespersen* could be read to say that gender stereotyping falls afoul of Title VII when the stereotyping results in making job performance unduly difficult (e.g., by requiring employees to wear the type of outfits that then subjected them to harassment by customers). But not only did none of our respondents bring up this connection between weight discrimination and *Jespersen*, to our chagrin, they also did not show the least bit of interest in hearing us talk about it. In sum, the lawyers of Las Vegas were clearly concerned about weight discrimination. But their concern seemed somewhat attenuated from the legal restrictions on discrimination. Something else was going on.

2. *Not Remunerative Enough*.—The explanation most often given by the judges echoed one that we received also from the lawyers. It was that the set of cases that might be generated by the roadmap laid out in *Jespersen*—high heels, sexy outfits, makeup, etc.—were not profitable enough for plaintiff-side lawyers to take on. This explanation intrigued us because, elsewhere in the country, federal employment discrimination litigation had been one of the fastest growing practice areas until about ten years ago.<sup>146</sup> The nationwide decline in filings of employment discrimination cases<sup>147</sup> may in part account for the lack of appearance discrimination cases. Yet the judges we interviewed did not report an overall marked decline in employment discrimination cases, and the empirical data show that the Ninth

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<sup>146</sup> Federal employment civil rights filings increased from 12,962 to 21,157 between the 1993 and 2000 terms, which reflects an increase from 5.7% to 8.2% of all civil filings. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS app. tbl.C-2A (2008) (reporting, for U.S. district courts, the number of civil cases commenced, by nature of suit, during the twelve-month period ending September 30, 1997), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/appendices/c2asep97.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS app. tbl.C-2A (2001) (reporting, for U.S. district courts, the number of civil cases commenced, by nature of suit, during the twelve-month period ending September 30, 2001), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2001/appendices/c02asep01.pdf>. For the prior period, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 986 (1991). More recent research suggests that filings in this area have declined over the past decade, that employment discrimination cases account for less than six percent of the federal docket, and that employment discrimination claims are no longer the largest category of cases. Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009).

<sup>147</sup> See Clermont & Schwab, *supra* note 146, at 116–21 (describing the drop in employment discrimination filings that occurred after 1998).

Circuit has seen a slower overall decline than many other circuits.<sup>148</sup> Instead, judges specifically stated that they had not seen any appearance discrimination cases even though they acknowledged that the casino industry emphasizes sexuality and appearance. The lack of appearance code litigation puzzled us given that casinos are well-heeled defendants and (to our minds) the cases would be winnable.<sup>149</sup>

As we began to discern that there had been little reaction to *Jespersen*, we were so confused that we were briefly concerned we had misread the case. But even if we have, none of our judicial respondents raised significant issues with our reading of *Jespersen*. A couple of them pointed out that, despite the dicta we were asking about, *Jespersen* had lost, and the case's outcome might be the lesson that lawyers and litigants would take out of the case. But the judges themselves indicated that they would be guided by the reasoning, not the disposition, of the en banc panel's opinion. Perhaps the judges were humoring us or being polite, but they seemed to recognize that the language in the Ninth Circuit's en banc decision potentially opened the gates wider for litigation against the casinos.

What we were missing, the judges explained, was an understanding of financial dynamics of these cases. A hypothetical plaintiff suing a casino for employment discrimination is unlikely to generate a significant enough dollar amount of damages to make the case worth investing in for a plaintiff's lawyer. Assuming the plaintiff was fired, she could at best hope to receive lost wages for a short period of time. Further, if she were working in the industry, it is likely that she would already be working at a new job. If so, her damages would be even smaller, and she would probably be required to wear the same outfits, or at least something similar, to what she had been required to wear at her last job.

The next explanation was that the casinos are unlikely to readily settle a case attacking something as basic to their image as the appearance rules governing cocktail server outfits. The plaintiff-side lawyers in Las Vegas, typically solo practitioners with limited assets, cannot afford drawn-out litigation against the casinos. As one judge put it, they would get "buried" if they tried to fight the casinos on an issue like this.

In addition, Las Vegas is a "one industry town." If an employee develops a reputation as a troublemaker, she might get blacklisted. Once an employee is blacklisted in the casino industry, the judge respondents explained, it is difficult to get rehired. These are scarce jobs; employees who want to keep working in the industry are unlikely to sue. Our respondents emphasized that the information-sharing mechanisms in the casino industry

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<sup>148</sup> See *id.* at 120 n.47 (finding that the Ninth Circuit had a smaller differential between the plaintiffs' reversal rate and the defendants' reversal rate than the national average).

<sup>149</sup> Nationwide, it is likely that appearance discrimination cases have not made up a significant portion of the increase in employment discrimination cases. Given the importance of appearances in the casino business, though, we expected more litigation on that front in Las Vegas.



are superior to those in most other settings. Because Las Vegas attracts more than its share of troublemakers, our respondents suggested, casinos spend significant resources trying to identify them ahead of time. Casinos are also willing to cooperate with each other in policing problematic employees despite a state law prohibiting blacklisting. Apparently, the security experts at the casinos regularly share information with each other about misbehaving guests and employees.

3. *The Missing Class Action Bar.*—The foregoing story about the high costs of these cases made us ask: What precisely is so costly about bringing this type of a case, especially given the possibility of recovering generous attorney's fees under Title VII?<sup>150</sup> As we conceptualized the hypothetical case, the facts would be simple: female servers are required to wear high heels and short outfits that expose them to higher risks of foot injury and respiratory infection whereas the men are not. Alternatively, the case might involve female cocktail servers who, because of their outfits, are subjected to harassment by male customers. With a large enough number of cocktail servers as plaintiffs, these cases should be relatively easy—finding experts to testify about the health burdens or likely levels of harassment should not be difficult. Our respondents suggested, however, that our assumptions might be wrong on multiple grounds. First, we were thinking in terms of class actions. Local employment lawyers in Las Vegas bring individual cases, not class actions. There is no meaningful class action practice in the employment discrimination area in Las Vegas.<sup>151</sup> Second, these employees not only value their jobs but also value the ability to switch jobs. Even with minimal education, they could earn the kind of income that few other jobs could provide; thus they are unlikely to get together to form a class.

A few things puzzled us about the absence of a significant class action bar in Las Vegas. If there are profitable cases to be brought, why does a sophisticated class action firm from, for example, nearby California, not show up to take on the case?<sup>152</sup> The story about casino workers being un-

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<sup>150</sup> See 42 U.S.C. § 2000e-5(k) (2006).

<sup>151</sup> A search of Westlaw uncovered three class action employment discrimination suits filed in the District Court for the District of Nevada. We ran the search string "co(nv) & ((employ! /s discrim!)/p ("class action"))" in the FED9-ALL database. Only one was brought by a private firm: Carelli & Martin, a Las Vegas firm, brought an Age Discrimination in Employment Act suit on behalf of University of Nevada employees. *Keeton v. Univ. of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998). The two other class actions were brought by the EEOC. *EEOC v. Bill Heard Chevrolet Corp.*, No. 2:07-cv-01195-RLH-PAL, 2009 WL 2489282 (D. Nev. Aug. 12, 2009); *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117 (D. Nev. 2007).

<sup>152</sup> California law firms and public interest law groups have taken antidiscrimination suits in California and elsewhere and have successfully filed for class certification. The largest class-action suit in history was filed by California lawyers against Wal-Mart. Although the district court certified the class and the appeals court affirmed, the U.S. Supreme Court held that certification was improper. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 576–77 (9th Cir. 2010) (en banc), *rev'd*, 131 S.Ct. 2541 (2011).

willing to sue because their jobs are so remunerative also has some holes in it. Even if the jobs pay well, our subjects indicated that they also tend to be short-lived in many cases. The most remunerative of cocktail server jobs are reserved for the young and attractive. When these employees are no longer young and attractive and are in danger of losing their jobs, why would they not sue? We frequently raised these questions but did not come away with clear answers. Still, it bears mentioning that the explanation that employees are reluctant to sue because they consider themselves fortunate to have highly remunerative jobs in the casino industry is consistent with what we heard from both the employees and the plaintiff-side lawyers.

4. *The EEOC's Role.*—Absent an adequate class action bar, why has the EEOC not brought an appearance discrimination suit against the casinos? The EEOC, unlike the Las Vegas plaintiffs' bar, is not substantially limited in either money or expertise. Our judicial respondents noted, however, that although one might ordinarily expect the EEOC to step in, it did not have a significant presence in Las Vegas. That led us to ask why. We hypothesized that casinos had exerted their influence in Washington, D.C., to make sure that the EEOC left the casino industry alone. Our interviewees explained that the local EEOC office had opened only a few years before and had been staffed by a recent graduate of UNLV,<sup>153</sup> who quit relatively soon, leaving the Las Vegas office with no on-site attorneys for nearly a year. During that time period, Las Vegas matters were handled by the Los Angeles office.<sup>154</sup>

As best we can tell, there is no sinister story behind the EEOC's limited presence in Las Vegas. It turns out that the Los Angeles office is responsible for a large geographic area, with minimal staff. Moreover, with the limited staff available to the EEOC, the agency has brought a number of significant cases against the casinos for harassment occurring in the back of the casinos. The harassment alleged in these cases was severe, often constituting rape, and the EEOC believed that handling these cases first was a priority. We also heard that Washington, D.C., had not shown any great enthusiasm for the aggressive policing of employment discrimination cases during the two Bush Administrations, but we heard nothing specific about the casino industry.

That said, our interviews demonstrate that the EEOC has made choices regarding what kinds of cases to pursue in Las Vegas. And appearance discrimination cases, which might have followed in the wake of *Jespersen*, have not been on its agenda. The EEOC has investigated casinos, but our interviewees explained that its primary interest has been in sex harassment cases. Our impression is that the EEOC's agenda is, in part, demand-driven, i.e., its agenda is a function of the kinds of cases that come in the

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<sup>153</sup> The office opened on August 9, 2006. Press Release, *supra* note 114.

<sup>154</sup> See Ward, *supra* note 114.

door rather than a broader strategy that attempts to fill gaps in the litigation landscape. Not one of our respondents appeared to lay blame at the feet of the EEOC, however. Most respondents, at least those who are plaintiff-oriented, thought that the EEOC's presence in Las Vegas has improved matters on the antidiscrimination front because the state's equal rights offices had been doing precious little.

5. *Judicial Hostility*.—Given the rates at which federal judges grant motions for summary judgment in Title VII cases,<sup>155</sup> we expected judges to treat our project with skepticism if not hostility. These rates suggested to us that judges perceive a high fraction of employment discrimination cases to be baseless. If our assumptions were right, then the last thing judges would be interested in was a project asking why there were not more cases being brought. The judges, however, claimed to be open to the concept of an appearance discrimination class action claim against the casinos. Whether they would indeed be willing to certify such a class is unknown given the lack of litigation. Litigants may not file such suits in Nevada because of a perception that local judges are hostile to appearance discrimination suits.

The judges with whom we spoke, however, demonstrated no open hostility to either the broad category of Title VII cases or the subcategory of appearance discrimination cases although, as mentioned above, they did question the value of our project. Indeed, the judges did not indicate that they perceived an excess of cases in this area. Nor did they evince any unwillingness to follow the dictates of the Ninth Circuit. They recognized the same passages in *Jespersen* that we had flagged as potentially opening the doors to increased litigation over appearance discrimination. Unlike us, however, they were not surprised that there had been little on-the-ground reaction to *Jespersen*. The bottom line for the judges was that appearance discrimination cases were simply not being brought. The judges we spoke to may have been socially conservative (they appeared to be, based on the nature and tone of their comments), but they indicated interest in the puzzle and seemed willing to give us their time and intellectual energy to help figure out why *Jespersen* has had so little impact. In hindsight, it is not sur-

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<sup>155</sup> See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 fig.1 (2007) (reporting that in 1989 5% of cases in their sample and in 2000 less than 10% were terminated by summary judgment motion); Clermont & Schwab, *supra* note 146, at 128; Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 439 fig.6, 440, 457 app. (2004) (reporting that approximately 20% of all types of employment discrimination cases in U.S. district courts between 1979 and 2000 were terminated by nontrial adjudication (identified as "motions" and comprising summary judgment and limited other types of motions), averaging 16.63% before 1992 and 20.89% from 1992 to 2001); see also Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

prising that these judges displayed no hostility to *Jespersen*-type cases; they do not see enough of them to be hostile to them. As to Title VII cases generally, although we perceived no hostility, the plaintiffs' bar certainly believes, and statistics support their belief to a certain extent, that the judges are, if not hostile, at least aggressive in granting summary judgment.<sup>156</sup> And a recent article by Kevin Clermont and Stewart Schwab suggests that an overall drop in employment discrimination cases nationwide may have resulted from excessive judicial pretrial adjudication in defendants' favor.<sup>157</sup>

The federal judges with whom we spoke had seen enough employment discrimination cases to understand their dynamics especially well. The federal courts in Nevada run an "early neutral evaluation" mediation program in which all employment discrimination cases go through a preliminary screening by a magistrate judge.<sup>158</sup> The magistrate judge evaluates the complaint, sits down with the parties, and tries to give them a realistic picture of the strengths and weaknesses of their case. If there had been even the smallest spike in employment litigation as a result of *Jespersen*, these magistrate judges would have seen it. The magistrate judges with whom we spoke saw no effect, though, not even in terms of preliminary mediations. As one judge observed, it was hardly surprising that the casinos had not reacted to *Jespersen* by altering their behavior: the litigation risk landscape had not changed as a result of the case, so why should they alter their behavior?<sup>159</sup>

6. *Dennis Rodman and the Wild Wild West*.—Like the various casino employees we interviewed, our judicial respondents took pains to try to explain to us the unique nature of the Las Vegas casino industry. This is a town dominated by a single industry and one that has grown into a major metropolis only relatively recently. Judges told us that the legal market is not as sophisticated as those in most other major U.S. cities. It was only a decade ago that the state got its first law school, at UNLV. We also heard on multiple occasions that, as a cultural matter, the people of Las Vegas do not like regulation; most of them are attracted to Las Vegas because it is the "Wild West."

The casino industry sells a sexualized product. Las Vegas attempted to become more "family-friendly" about a decade ago, but it did not work. No one pretends that attracting families is the primary goal any longer. The new promotion slogan is "What happens in Vegas, stays in Vegas," a motto that is decidedly not aimed at filling the casinos with families. According

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<sup>156</sup> See Clermont & Schwab, *supra* note 146, at 128.

<sup>157</sup> See *id.* at 127–28.

<sup>158</sup> See *supra* note 113.

<sup>159</sup> As noted earlier, conversations with those familiar with the insurance industry indicated that nothing had changed as a result of *Jespersen*. One interviewee, an expert in Nevada insurance law, told us that there was nothing in the literature that even hinted at appearance and dress codes litigation as a potential risk.

to one respondent, “The industry quickly realized that these families simply did not spend enough, and they certainly did not spend irresponsibly. It is the twenty-three-year-old from Los Angeles who is going to drop \$5,000 sitting at the craps table.” The general theme in the explanations we received was as follows: once the business model changed and advertising stopped trying to attract families, the “packaging” changed. Whereas Las Vegas was always known for commodifying sex, even while it sold its “family-friendly” image, the new packaging is even more sexual than before. And the outfits of the cocktail servers are a crucial element of the fantasy being sold. The casino industry in Las Vegas is not going to alter its behavior in the ways that the language in *Jespersen* might have it do. The casinos have tried the family-resort model, and it failed; they are not going back.

Our respondents took pains to emphasize that the foregoing does not mean that there are no limits. In illustrating these limits, multiple respondents brought up a set of highly publicized incidents involving the infamous former professional basketball player Dennis Rodman. Apparently, Rodman used to be a frequent visitor to Las Vegas. He was also legendary for his misbehavior, particularly for sexually harassing employees. In one incident that was recounted to us, he reached across the table to grab an employee’s breasts. These incidents resulted in legal action by the employees who were harassed, and the casino management was quite unhappy with Rodman’s behavior.<sup>160</sup>

#### CONCLUSION: THE IRRELEVANCE OF CASE LAW?

An initial conclusion that might be drawn from our study is that case law, and specifically the nuanced judicial reasoning of appellate judges, is largely irrelevant to the day-to-day realities of life in Las Vegas. Even when a case has a myriad of factors predicting a significant impact on the ground, it can in fact have only a negligible impact. Indeed, nothing changed as a result of *Jespersen*.<sup>161</sup> In light of this finding, we sought to

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<sup>160</sup> See, e.g., Carri Geer, *Hilton Sued by Waitress*, LAS VEGAS REV.-J., July 16, 1999, at 1B (stating that a cocktail waitress filed a Federal Title VII action against her employer for sexual harassment, alleging that Dennis Rodman had grabbed her breasts); James Jahnke, *Check It Out, Mate: Slick Digs for Chess Tourney*, DETROIT FREE PRESS, Apr. 29, 2009, at 18A; *The Buzz*, NEWSDAY, Nov. 26, 2007, at A10 (describing lawsuits against Dennis Rodman for sexual assault in Las Vegas); Eeyore, *Dennis Rodman Needs to Keep His Hands to Himself*, CELEB GOSSIP JUNKIE (Nov. 26, 2007, 7:47 AM), <http://celebgossipjunkie.blogspot.com/2007/11/dennis-rodman-needs-to-keep-his-hands.html>. Interview subjects repeatedly used these “Rodman stories” to illustrate the boundaries of what was considered acceptable behavior. Rodman’s antics were not considered acceptable. Even some of our cab drivers who were not interview subjects but liked to share their views of Vegas, told stories about him.

<sup>161</sup> The observation that even the most canonical of cases can sometimes have little real impact on on-the-ground realities, however, is not new. For example, the question of what impact, minimal or not, *Brown v. Board of Education* had has been the subject of much debate. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) (challenging the view that *Brown* promoted racial justice); GERALD ROSENBERG, *HOLLOW HOPE:*

discover the factors which limited the opinion's impact. What our respondents gave us were their explanations, as daily observers of this particular setting, for why there was not an impact.

Those explanations suggest a view of legal impact that puts social and economic factors at the center of the model of legal impact. Cases cannot have an impact if the local social and economic variables are not aligned in a fashion that allows the impact to occur. Sociologist Kieran Healy's research on presumed consent laws and organ donations is illustrative.<sup>162</sup> Healy examined the effects of presumed consent laws on rates of cadaveric organ donation, i.e., donations from the dead.<sup>163</sup> The general assumption in the literature on organ donation is that presumed consent laws are crucial in inducing higher rates of donation—and the high rates of organ donation in Spain are frequently invoked in the context.<sup>164</sup> Healy's cross-country empirical analysis, however, suggests that differences in the legal regimes cannot explain differences in behavior. Altering the relevant law, he finds, makes little difference unless there are changes in the relevant social institutions. In the Spanish approach, the key was that a "proactive donor detection program performed by well-trained transplant coordinators, the introduction of systematic death audits in hospitals, and the combination of a positive social atmosphere with adequate economic reimbursement for the hospitals have accounted for this success."<sup>165</sup>

A number of factors in the casino industry might have combined to negate any possible impact of *Jespersen*. Those include the high wages (including tips) that casino industry workers make, the information-sharing mechanisms of the casinos, the nature of the legal market, the absence of a highly developed class action bar, the strength of the unions, the possibly low level of education of the workforce, and the lack of a significant EEOC office. The bottom line is not that case law is irrelevant or unable to produce social change but rather that its relevance on the ground is likely dependent on the operation of local social and economic dynamics. The case law can change radically; however, if local actors earn such high wages that they have no incentive to sue, if local plaintiff lawyers lack the ability to coordinate and finance the appropriate lawsuit, or if the defense lawyers and their clients simply seem too strong and too wealthy to allow any lawsuit against them to succeed, the end result will be that there are no cases. And that, in turn, will result in minimal on-the-ground impact.

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CAN COURTS BRING ABOUT SOCIAL CHANGE? 72–106 (2d ed. 2008) (presenting the "constrained court" view, which finds that case decisions do not promote social reform); David Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994) (criticizing the view that *Brown* did not have a significant impact).

<sup>162</sup> See Kieran Healy, *Do Presumed-Consent Laws Raise Organ Procurement Rates?*, 55 DEPAUL L. REV. 1017 (2006).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1018.

<sup>165</sup> *Id.* at 1040.

One study of one case does not undermine the central assumption of the common law system that case law matters. But it does tell us something about how judicial opinions may or may not influence law in the real world. This, in turn, should inform our scholarship and teaching.

