CHANGING WORKFORCE DEMOGRAPHICS AND THE FUTURE OF THE PROTECTED CLASS APPROACH

by
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The composition and identity characteristics of the American workforce are changing. The population in this country is rising, aging, and becoming much more racially and ethnically diverse. Appearance norms are shifting, too. These changes have enormous implications for constitutional and employment discrimination law. In both equal protection and employment discrimination cases, recovery usually depends on membership in a constitutionally or statutorily protected category. Yet the statutory approach to antidiscrimination law has stagnated. Part of the difficulty of the protected class approach is that it is based on something of a paradox—the paradox of exceptionalism. Class-based protection requires individuals to prove immutable or deeply embedded differences to obtain protection from being treated differently. The categorical approach also means that some types and lived experiences of discrimination are simply omitted from federal and state protection.

This Article discusses cramped doctrinal interpretations, narrow intersectional analysis, and the problematic of intragroup distinctions—all of which inhibit the reach of Title VII and state laws. The proposal to reinvigorate the antidiscrimination frontiers envisions constructing a judicial and regulatory patchwork of protections. The Article recommends expanding doctrinal coverage for new types of discrimination, as well as building on the efforts of various states and municipalities, which have begun to provide somewhat more robust antidiscrimination protection than is afforded under federal law. Finally, the Article suggests that one of the more promising avenues for addressing the types of discrimination that will face the workforce of the future is to endeavor to change cultural understandings about identity characteristics through media efforts.

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I. INTRODUCTION

By 2042, a generation from now, racial and ethnic minorities will become a majority of the U.S. population and whites will be a racial minority.[1] In roughly that same time span, the number of multiracial individuals in the United States will triple.[2] According to Census Bureau projections, by 2040, the number of people aged 65 and older will more than double.[3] Already, employees in the ADEA-protected[4] age group comprise more than half of the workforce in this country.[5] The population in this country is rising, aging, and becoming much more

[1] Sam Roberts, *A Generation Away, Minorities May Become the Majority in U.S.*, N.Y. TIMES, Aug. 14, 2008, at A1.

[2] Jennifer M. Ortman & Christine E. Guarneri, U.S. Census Bureau, United States Population Projections: 2000 to 2050, at 16 tbl.1, *available at* http://www.census.gov/population/www/projections/analytical-document09.pdf.

[3] *Projected Future Growth of the Older Population*, ADMIN. ON AGING, http://www.aoa.gov/aoaroot/aging_statistics/future_growth/future_growth.aspx.

[4] For a discussion of the Age Discrimination in Employment Act, see *infra* text accompanying notes 134–39.

[5] Thomas W.H. Ng & Daniel C. Feldman, *The Relationships of Age with Job Attitudes: A Meta-Analysis*, 63 PERSONNEL PSYCHOL. 677, 677 (2010) (noting that 54% of the U.S. workforce is between 40 and 75 years old).

racially and ethnically diverse. Appearance norms are shifting too. More than one-third of Americans aged 18 to 29 sport at least one tattoo.[6] Fourteen percent of all Americans have body piercings other than in their earlobes.[7] America is also becoming increasingly economically stratified, with ever greater differences between the haves and the have-nots.[8] This is just a sketch of the numerous ways that the composition and identity characteristics of the American workforce are changing. These changes have enormous implications for constitutional and employment discrimination law.

In both constitutional equal protection cases and employment discrimination suits, recovery almost always depends on membership in a constitutionally or statutorily protected category.[9] This Article centers on the ways in which these protected classes themselves—and doctrinal interpretations of them—have not kept pace with the demographics of a changing population and workforce, the lived experiences of discrimination, or the cognitive understandings about how discrimination operates.

Part II examines the historical development of the protected class approach in equal protection jurisprudence and reveals the paradox underlying this approach—the paradox of exceptionalism.[10] The protected class approach generally requires proof of individual "differentness" that corresponds to a discrete and immutable group in order to obtain remedies compelling "sameness" of treatment.[11] However, individuals will face increasing difficulty proving membership in a protected group as demographic changes blur group lines.

Part III evaluates the limits of statutory coverage and the flaws of the categorical approach to antidiscrimination law. Federal and most state statutes do not protect some identity characteristics that are prime targets

[6] Anne E. Laumann & Amy J. Derick, *Tattoos and Body Piercings in the United States: A National Data Set*, 55 J. AM. ACAD. DERMATOLOGY 413, 414 tbl.1 (2006) (noting that 36% of those surveyed who were born between 1975 and 1986 reported having a tattoo).

[7] *Id.* at 418.

[8] Hope Yen, *Income Gap Widens: Census Finds Record Gap Between Rich and Poor*, HUFFINGTON POST (Sept. 28, 2010, 10:42 PM), http://www.huffingtonpost.com/2010/09/28/income-gap-widens-census-_n_741386.html.

[9] In a rare case, a group may be afforded protection under an elevated rational basis (or rational basis with a bite) test. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–42, 447–50 (1985). Similarly, a small number of cases are brought on retaliation or vicarious discrimination theories where the plaintiff is not in a protected class. But, in both of these instances, group membership is still important in different ways.

[10] Bradley Areheart has similarly and eloquently written about a shift in employment discrimination jurisprudence. He argues there has been a recent turn away from antisubordination values—and toward anticlassification ideals—in employment discrimination law. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1887772.

[11] *See infra* Part II.A.

for discrimination, such as class, sexual orientation, and appearance. In addition, structural changes in the workplace mean that existing protections apply to fewer workers. With a rise in the contingent and part-time workforce, increasing numbers of workers are outside the protective benefits of federal and state statutes.[12]

Part III also explains that cramped judicial interpretations of statutory protections have curtailed the reach and efficacy of the primary federal statutes. If individuals experience discrimination on the basis of more than one identity trait, antidiscrimination law may fail them by inadequately protecting the intersection of identity characteristics. Similarly, as the workforce changes demographically, discrimination in the future may increasingly be based on intragroup distinctions, such as skin color. Yet courts seem wedded to binary approaches to the protected categories that do not comprehend discrimination along a spectrum such as color. Also, despite ever greater social tolerance for variability in attire, body art, and personal presentation, courts cling to traditional modes of legal analysis to uphold fairly arbitrary employer grooming and dress codes.

In spite of rapidly changing workforce demographics, radical change is not on the visible horizon. The current structure of constitutional classes and Title VII's categorical architecture probably will not be dismantled in the short or intermediate term. Part IV of this Article thus begins with the premise that incremental change is inevitable and antidiscrimination law will evolve as a patchwork of protections. Recognizing this reality, Part IV suggests that holes in antidiscrimination law might be patched by using theories to doctrinally expand the boundaries of federal categories and by relying on innovative state antidiscrimination provisions to fill gaps in coverage.

Part IV also addresses the need to look outside antidiscrimination law for remedies in the realm of cultural education. It examines recent work in cognitive and social psychology that sheds light on the ways in which different types of prejudice operate. These studies establish that much discrimination operates on the basis of implicit biases that are not reachable through standard anti-discrimination mechanisms.[13]

The Article ends by recognizing that all civil rights movements progress by developing a patchwork of laws. Laws, of course, form only a piece of the larger mosaic of policies, approaches, and sentiments about equality. But perhaps legal reform, augmented by broader social awareness of the stereotypes underlying different forms of discrimination, can help change cultural norms for the workplace of the future.

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[12] *See infra* Part III.A.1.

[13] *See infra* text accompanying notes 162–63. Yet the U.S. Supreme Court seemed skeptical of such implicit bias claims in its recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554–55 (2011).

II. CONSTITUTIONAL CATEGORIES AND THE PARADOX OF PROTECTION

A. The Limits of a Class-Based Approach to Protection

Almost seventy-five years ago, the U.S. Supreme Court created the protected class idea in the constitutional arena in *United States v. Carolene Products Co.* when it suggested that "prejudice against discrete and insular minorities may be a special condition" that calls for a "more searching judicial inquiry" on behalf of groups that are more likely to experience state-sponsored discrimination.[14] As the protected class doctrine developed, another formulation of it came to protect groups that were marked by immutable characteristics and had suffered a history of political powerlessness and discrimination.[15]

Yet, the Court has only afforded heightened scrutiny to a very limited set of group characteristics—race, sex, national origin, alienage, and nonmarital parentage.[16] The Court has declined to extend this protection to classifications based on age and disability,[17] and avoided the question of extending protection based on sexual orientation.[18] Although the justifications for invoking heightened scrutiny may apply to categories based on socioeconomic class,[19] no constitutional protection exists for the poor as a group or for being impoverished as a condition.[20] Despite evidence of anti-minority initiatives, the Supreme Court is unwilling to

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[14] 304 U.S. 144, 153 n.4 (1938).

[15] *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[16] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

[17] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441–42 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) ("[O]ld age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span." (citation omitted) (quoting *Carolene Products Co.*, 304 U.S. at 153 n.4)).

[18] Yoshino, *supra* note 16, at 756 & n.70 (citing Romer v. Evans, 517 U.S. 620, 633 (1996)). Along a different path, Professor Paul Secunda has argued that *Lawrence v. Texas* establishes a right to sexual privacy for homosexuals and heterosexuals. Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 144 & n.130 (2005); *see also* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 107–08, 116–18 (2006).

[19] Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 119–26 (2009).

[20] *Rodriguez*, 411 U.S. at 5, 28 (rejecting the application of heightened scrutiny based on socioeconomic class status: "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). *See generally* Barnes & Chemerinsky, *supra* note 19.

afford much, if any, protection to groups other than those identified as suspect classes.[21]

In 1976, the U.S. Supreme Court decided *Massachusetts Board of Retirement v. Murgia*,[22] a case that is emblematic of the Court's categorical approach to equal protection. The Court held that old age is not a suspect classification, reasoning that older people are not a marginalized "discrete and insular" minority, nor do they share an immutable trait; instead, old age merely "marks a stage that each of us will reach if we live out our normal span."[23] As *Murgia* demonstrates, the Court has found that discrimination can be identified and addressed when people can be neatly arranged into a finite number of—preferably binary—categories. However, when the categories start to gradate, as age unavoidably does, the Supreme Court has been unwilling to second-guess, as a matter of constitutional law, what it views as inevitable and somewhat arbitrary legislative line-drawing.[24]

The protected class approach is valuable in some respects. It identifies starkly disadvantaged classes and provides some redress from extreme excercises of state power. Perhaps it keeps litigation from sprawling based on multiple amorphous characteristics. But the parameters of protection remain sharply confined to existing categories, and use of the protected class approach in equal protection jurisprudence has stalled. Over the past four decades, the Court has added no new protected classes to the list of those that are subject to heightened scrutiny.[25]

B. The Paradox of Protection

Part of the inadequacy of the protected class approach is that it is based on something of a paradox—the paradox of exceptionalism. Class-based protection requires individuals to prove immutable or deeply

[21] Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 518 (1999). The Court has engaged in rational basis "with a bite" review to look somewhat more skeptically at the treatment of disempowered groups, such as in *Cleburne*, 473 U.S. at 447–50. *See* Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972) (discussing the practice and originating the phrasing). Yet, the Court's failure to articulate what factors trigger this form of heightened rational basis review leaves the promise of heightened review unable to provide any reliable protection. Gayle Lynne Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987).

[22] 427 U.S. 307 (1976).

[23] *Id.* at 313–14 (quoting United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938)).

[24] *Id.* at 314 (calling it "peculiarly a legislative task and an unavoidable one").

[25] Barnes & Chemerinsky, *supra* note 19, at 123 (observing that the Court has not applied heightened scrutiny to any new category of discrimination since *Mathews v. Lucas*, 427 U.S. 495, 505–07 (1976), in which the Court applied intermediate scrutiny to discrimination based on parentage).

embedded differences to obtain protection from being treated differently.[26] But the individual differences must be the same as those of a discrete and identifiable group. The protected class approach thus operates against the backdrop of a default assumption of equal treatment; it provides remedies to identifiable groups that have been excluded in a wholesale way.

The transformation of the workplace in the next couple of decades—with people aging, races mixing, class-based divides increasing, and individual appearances becoming more distinct—will occur in directions that make people *less* different in group-based ways, but perhaps more uniquely different as individuals. These changes mean that the remedies afforded by any system of class-based protections will fail to redress systematically the real discrimination happening in workplaces. This underscores Professor Bruce Ackerman's critique from more than a quarter century ago that "groups that are 'anonymous and diffuse'" may be more "systematically disadvantaged in a pluralist democracy" than "discrete and insular" groups.[27]

III. THE STAGNATION OF STATUTORY ANTIDISCRIMINATION LAW

A. Categorical Thinking and Statutory Limits

Like the U.S. Supreme Court's equal protection jurisprudence, discussed above, antidiscrimination statutes always prohibit certain categories of discrimination. Similarly, even generally applicable antidiscrimination statutes nevertheless limit their protections to certain categories of workers. The Family and Medical Leave Act (FMLA), for instance, only grants 12 weeks of *unpaid* leave to employees who worked at least 1250 hours in the current or prior year for employers with 50 or more employees.[28] This means that in 2005 it covered only 54% of the workforce[29]—and of those who are eligible, most simply cannot afford to use it.[30] Title VII applies to employees who work for employers with 15 or more employees, but only prohibits discrimination based on race, sex, religion, color, national origin, and retaliation relating to these

[26] *See In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008) (discussing the suspect class status afforded to religion and alienage, although they are not immutable characteristics).

[27] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985).

[28] 29 U.S.C. § 2611(2) (Supp. II 2008).

[29] Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35551, 35622 (June 28, 2007).

[30] *111th Congress Work and Family Agenda*, NAT'L P'SHIP FOR WOMEN & FAMILIES (May 19, 2010), http://www.nationalpartnership.org/site/DocServer/111th_Congress_Work_and_Family_Agenda_4.25.10.pdf?docID=7022 ("Among FMLA-qualified workers who needed leave but did not take it, three in four did not do so because they could not afford time off without pay.").

categories.[31] According to one estimate from a decade ago, "nineteen percent of the American workforce is not covered by Title VII"[32]—and that figure has probably increased, given the rise of independent contractors and contingent workers who are not covered. While state laws and § 1981 may cover some of these employees,[33] statutory protections against workplace discrimination are always limited by the characteristics of the employee and the employer.

1. Structural Workforce Changes

Workers may be outside the ambit of the principal federal statutes for other reasons as well. They may be managerial or professional employees, who are exempt from Fair Labor Standards Act protections.[34] Or they may be temporary or part-time workers. In the past two decades, employers have been restructuring their workforces to hire fewer permanent and more temporary employees.[35] Labor economists forecast "an explosion in the use of contingent labor as U.S. businesses emerge from the recession."[36] According to one study, the contingent workforce—contract, flex-time, and temporary workers—could eventually encompass "as much as 30 to 50[%] of the entire U.S. workforce," which is about triple the 2008 average of 13%.[37]

These temporary workers are often outside the benefits afforded by statutes such as Title VII and the FMLA. Contingent workers benefit from many of the same statutory protections as non-contingent or traditional workers, such as workers' compensation laws, health and safety laws, and

[31] Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e(b), 2000e-2(a), 2000e-3(a) (2006).

[32] Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 368 (2001) (calculating this "[b]ased on extrapolation from census data").

[33] *See infra* text accompanying notes 153–56; 42 U.S.C. § 1981 (2006).

[34] Estimates vary, but probably between 15 and 20% of the workforce comes within the "white collar" exemption from Fair Labor Standards Act coverage. *See* L. Camille Hébert, *"Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 51, 118 n.88 (2003) (providing different estimates); 29 U.S.C. § 213(a)(1) (2006).

[35] The number of temporary workers increased five-fold in the 1980s and '90s, from 417,000 in 1982 to 2.3 million in 1996. Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 304 n.9 (1999). The number continued to rise in the first decade of the new millennium, with the Bureau of Labor Statistics (BLS) reporting as many as 5.7 million contingent employees in 2005, or 4% of the workforce. *Contingent and Alternative Employment Arrangements, February 2005*, BUREAU OF LAB. STATS. (July 27, 2005), http://www.bls.gov/news.release/conemp.nr0.htm [hereinafter *Contingent and Alternative Employment Arrangements*].

That same year the nation's 10.3 million independent contractors made up 7.4% of the workforce. *Id.* As for temporary employees, the BLS predicts that the number of temporary employees will grow 19% by 2018. *Career Guide to Industries, 2010–11 Edition: Employment Services*, BUREAU OF LAB. STATS., http://www.bls.gov/oco/cg/cgs039.htm.

[36] Irwin Speizer, *An On-Demand Workforce*, 88 WORKFORCE MGMT. 45 (2009), *available at* 2009 WLNR 22136430.

[37] *Id.*

minimum wage laws, even though the employer providing the coverage may be different than for other employees at the same job site.[38] However, the similarities end there. Leased, outsourced, and temporary employees—all of whom are employed directly by a staffing firm—may be protected from client-company discrimination by judicial extensions of Title VII,[39] but their practical ability to challenge an employment decision by the client company is much more difficult than for traditional workers.[40] As for independent contractors, the largest component of the contingent workforce,[41] courts around the country have concurred that they are not covered by Title VII because they do not have an employment relationship with any entity.[42] And for all contingent workers, the practical realities of their working arrangements make it difficult to meet the 1250 hours of work for the same employer in a single calendar year required to qualify for FMLA benefits.[43]

This rise in the contingent workforce is accompanied by structural transformations in jobs themselves. In the twenty-first century, jobs in almost all sectors are characterized by ever more narrow and more technical specialization.[44] This increased specialization means that it is hard for employees to find comparators in parallel jobs to establish discriminatory treatment.[45] Thus, the changing nature of many

[38] Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 256–62, 266–67 (2006). However, the dynamics of the contingent employment relationship can raise uncertainty about which employer is responsible for providing these benefits and whether the worker should be classified as an "employee" or "independent contractor." *See* César Cuauhtémoc García Hernández, Note, *Feeble, Circular, and Unpredictable: OSHA's Failure to Protect Temporary Workers*, 27 B.C. THIRD WORLD L.J. 193, 196–97 (2007) (arguing that, in practice, the level of occupational health and safety protection is inferior for contingent workers).

[39] Jason E. Pirruccello, Note, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191, 193–204 (2005).

[40] Katherine M. Forster, Note, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 559 (2001).

[41] In 2005, the Bureau of Labor Statistics estimated that 10 million workers, or 7.4% of the workforce, could be classified as "independent contractors," while 4.5 million workers, making up almost 4% of the workforce, were denominated "temporary." *Contingent and Alternative Employment Arrangements*, *supra* note 35.

[42] Stone, *supra* note 38, at 279–80; *see also* Cobb v. Sun Papers, Inc., 673 F.2d 337, 339–41 (11th Cir. 1982) (refusing to extend Title VII protection to independent contractors).

[43] 29 U.S.C. § 2611(2) (Supp. II 2008); *see also* Stone, *supra* note 38, at 263.

[44] *See* Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 AM. BUS. L.J. 205, 248 (2003).

[45] *See* Charles A. Sullivan, *The Phoenix From the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 208 (2009) (noting that courts "tend[] to find comparators critical for pretext proof"); *see also* Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1781026 (discussing the challenges of finding comparators for lawsuits by lawyers: "Perhaps the plaintiff is a lateral, or

workforces creates proof problems even for those workers who ought to receive the benefit of statutory coverage.

2. Omitted Groups

On the positive side, some state and local antidiscrimination statutes or ordinances cover more employers than federal statutes,[46] while others have more encompassing definitions of, for example, disability[47] or protected age categories.[48] Yet fewer than half the states extend protection against employment discrimination based on sexual orientation, and only about a third of the states offer protection against discrimination based on gender identity.[49] Actionable harassment is limited to sexual (and not non-sexual) harassment, and workers have only limited protection against bullying by co-workers or the misuse of authority by their superiors.[50] Only a small number of states and municipalities ban discrimination based on appearance (or some facet of appearance such as height and weight),[51] marital status,[52] or domestic violence victim status.[53] Fewer still ban discrimination based on class.[54]

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in the bankruptcy department, or someone who has moved from real estate to bankruptcy. Or the female plaintiff who is a document reviewer is unable to show any disparate treatment because the law firm has no males doing document review. The plaintiff may be someone who has performance issues. In short, most law practice is so individualized that comparator evidence simply does not exist.").

[46] *E.g.*, MO. ANN. STAT. § 213.010(7) (West 2004) (including employers who have six or more employees).

[47] *E.g.*, CAL. GOV'T CODE § 12926(*l*)(1)(B) (West 2012) (defining a disability as a condition that "limits a major life activity").

[48] *E.g.*, ALASKA STAT. ANN. § 18.80.220 (West 2011) (establishing no upper age limit for discrimination claims); IOWA CODE ANN. § 216.6 (West 2011) (providing protection for age discrimination for people age eighteen and older).

[49] *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN (July 11, 2011), *available at* http://www.hrc.org/files/assets/resources/Employment_Laws_and_Policies.pdf (listing 21 states that protect against employment discrimination based on sexual orientation and 15 that protect against discrimination based on gender identity).

[50] *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 8, 15 (1988); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 73 (2001); Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1263 (2010); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 253 (2010).

[51] *See, e.g.*, D.C. CODE § 2-1401.02(22) (LexisNexis 2001); MICH. COMP. LAWS SERV. § 37.2102(1) (LexisNexis 2010), SANTA CRUZ, CAL. MUN. CODE § 9.83.010 (2011), *available at* http://www.codepublishing.com/CA/SantaCruz/.

[52] *See, e.g.*, N.J. STAT. ANN. § 10:5-12(a) (West 2011). Fewer than half of the states prohibit discrimination in employment based on marital status. Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 15–16 (2000) (finding 21 jurisdictions with laws prohibiting discrimination in employment based on marital status).

[53] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 180/1–180/30 (West 2011); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2005 & Supp. 2010); OR. REV. STAT. ANN. §§ 659A.290,

The categorical box approach to discrimination means that some types and lived experiences of discrimination are simply omitted from federal and state protection. Take socioeconomic status for example. During the economic downturn, a practice emerged of posting job announcements excluding the jobless from consideration.[55] For instance, one job posting by Sony Ericsson bluntly advised that "[n]o unemployed candidates will be considered at all."[56] This practice snowballed across industries, with exclusionary postings turning up for positions ranging from freight handlers to restaurant managers to electrical engineers.[57]

These job postings only highlight what has been a long-standing prejudice against hiring unemployed job applicants.[58] Employers maintain that the practice is legitimate because a prospective worker's current employment status is at least one indicator of an employee's quality, since companies might lay off their most unproductive workers during recessionary downsizing.[59] Despite media condemnation of the practice, it may not be illegal. The Equal Employment Opportunity Commission is currently reviewing the automatic exclusion of unemployed job seekers,[60] and evaluating whether the flat prohibition on hiring the jobless is discriminatory disparate treatment or violates disparate impact because of disproportionate effects on racial or ethnic minorities or the disabled.[61] The lack of protection in existing law prompted New Jersey to legislatively ban the practice[62] and led to a proposed amendment to the Civil Rights Act of 1964 that would prohibit

659A.885 (West 2011); *see also* Robin R. Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims: An Update*, HUMAN RTS., Summer 2010, 13, 16.

[54] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2009).

[55] Op-Ed., *The Unemployed Need Not Apply*, N.Y. TIMES, Feb. 20, 2011, § 4 (Week in Review), at 9; Laura Bassett, *Employers Continue to Discriminate Against Jobless, Think 'The Best People Are Already Working'*, HUFFINGTON POST (Oct. 8, 2010), http://www.huffingtonpost.com/2010/10/08/employers-continue-to-dis_n_756136.html.

[56] Dan Chapman, *Long-Term Jobless Told Not to Apply; Some Positions Off-Limits if You Haven't Worked Recently*, ATLANTA J.-CONST., Oct. 4, 2010, at 1A. A number of major companies have explicitly stated that applicants "must be currently employed." *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed from Job Opportunities, as Discriminatory Ads Persist*, NAT'L EMP. LAW PROJECT (July 12, 2011), http://www.nelp.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf.

[57] Written Testimony of Helen Norton at the EEOC Meeting of Feb. 16, 2011, *available at* http://www.eeoc.gov/eeoc/meetings/2-16-11/norton.cfm.

[58] *Cf.* Bassett, *supra* note 55 ("[E]mployers are still openly discriminating against the unemployed.").

[59] *See* Chapman, *supra* note 56.

[60] Press Release, EEOC, Out of Work? Out of Luck: EEOC Examines Employers' Treatment of Unemployed Job Applicants at Hearing (Feb. 16, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm.

[61] Written Testimony of Helen Norton at the EEOC Meeting of Feb. 16, 2011, *supra* note 57.

[62] N.J. STAT. ANN. § 34:8B-1 (West 2011).

discrimination based on employment status.[63] More recently, President Obama proposed a bill protecting the unemployed from bias in hiring as part of his efforts to reduce the nation's unemployment.[64]

Cumulatively, these omitted categories suggest the need for additional worker-protection doctrines. However, if the thirty-eight year struggle for protection against discrimination based on sexual orientation under the Civil Rights Act and the repeatedly introduced Employment Non-Discrimination Act is any indication,[65] federal legislation to shield new identity categories from discrimination is unlikely. But not only are much-needed new categories not being added, judicial interpretations of existing categories remain restricted.

B. Cramped Doctrinal Interpretations

Limited doctrinal interpretations are also part of this categorical thinking. Case law interpretations of the Pregnancy Discrimination Act, for example, require only minimal accommodation of pregnancy. In the words of Judge Posner, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[66] In many jurisdictions, sexual harassment victims who have been harassed by someone who is "indiscriminately vulgar and offensive" or "obnoxious to men and women alike" are left with no remedy against the "'equal opportunity' harasser."[67] Only a minority of courts recognize sex discrimination against lesbians, gay men, bisexuals, and the transgendered under the *Price Waterhouse* sex stereotyping theory of

[63] Fair Employment Act of 2011, H.R. 1113, 112th Cong. § 2 (2011) (referred to Subcommittee on Health, Employment, Labor & Pensions on Apr. 4, 2011). The Fair Employment Opportunity Act of 2011, which would prohibit discrimination against the unemployed, remains pending in Congress. Robert J. Grossman, *Hidden Costs of Layoffs*, HR MAG., Feb. 2012, at 24, 29.

[64] Robert Pear, *Obama Seeks to Prohibit 'No Jobless Need Apply'*, N.Y. TIMES, Sept. 27, 2011, at A14.

[65] Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L REV. 1, 8–9 (2009) (citing H.R. 14752, 93d Cong. (1974)).

[66] Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

[67] Shylah Miles, Comment, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 614 (2001) (citing Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 319 (2d Cir. 1999); Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 270 (5th Cir. 1998); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (evidence that a manager's behavior was "indiscriminately vulgar and offensive" and "obnoxious to men and women alike" presents "an imposing obstacle to proving that the harassment was sex-based"); Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("[T]his circuit does not recognize Title VII sexual harassment claims in the case of the 'equal opportunity' harasser.").

failure to conform to gender stereotypes.[68] For an example of rigid judicial decisions, one need look no further than the U.S. Supreme Court's decisions so drastically narrowing the intended definition of "disability" under the Americans with Disabilities Act that Congress was compelled to pass the Americans With Disabilities Act Amendments Act of 2008.[69] In short, courts' shriveled interpretation of the reach of federal statutes denies protection to entire categories of people who are mistreated because of what ought to be, under those same statutes, protectable identity characteristics.

1. Narrow Intersectional Analysis

One cramped doctrinal interpretation, the impact of which will be heightened given the changing demographics of the U.S. workforce,[70] is

[68] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Schroer v. Billington, 424 F. Supp. 2d 203, 213 (D.D.C. 2006).

[69] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 (Supp. III 2009)) (overturning Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)).

[70] In the future, people will be less likely to fit neatly into a single identity group. Thirty-two years ago, in 1980, only 20% of the population was nonwhite. Campell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, at 19 tbl.1 (U.S. Census Bureau, Working Paper No. 56, 2002), *available at* http://www.census.gov/population/www/documentation/twps0056/twps0056.pdf. Today 36% are nonwhite. Karen R. Humes et al., *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU, 3 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. More than half of the babies born in this country each day are nonwhite. *Minorities Make up Majority of U.S. Babies*, CBS NEWS (June 23, 2011), *available at* http://www.cbsnews.com/stories/2011/06/23/national/main20073650.shtml. Between 2000 and 2009, the foreign-born population of the United States increased 7.4 million to 38.5 million, a 24% increase. This elevated the foreign-born proportion of the population to roughly 13%, twice what it was in 1980. Elizabeth M. Greico & Edward N. Trevelyan, *Place of Birth of the Foreign-Born Population: 2009*, U.S. CENSUS BUREAU, 1–2 (Oct. 2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-15.pdf. These immigrants' countries of origin have changed drastically as well. While in 1960, 75% of immigrants arrived from European countries, in 2009, 81% of immigrants came from Latin America and Asia. *Id.*

Even though the United States remains an overwhelmingly religious nation, the faiths held by its citizens have become increasingly diverse. The United States is slowly becoming less Christian, but while non-Christian religions have seen moderate gains in the past decade, the most significant growth has been among the "nones": atheists, agnostics, or those who have no religious preference. BARRY A. KOSMIN & ANGELA KEYSER, AMERICAN RELIGIOUS IDENTIFICATION SURVEY [ARIS 2008]: SUMMARY REPORT: MARCH 2009, at 3, *available at* http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf (finding that the Christian percentage of the population declined from 86% in 1990 to 76% in 2008, while non-Christian religions, including Buddhism, Hinduism, Islam and New Religious Movements grew by half a percentage point; the percentage of "nones" grew by 7% during that time). Discrimination based on national origin status and religion are beyond the scope of this Article, but have been developed well elsewhere. *See, e.g.*, Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 515 (2003) (distinguishing discrimination based on immigrant status from discrimination based on national origin); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees:*

the way courts treat claims of intersectional discrimination under Title VII. In the 1980s, commentators began to recognize that people suffered discrimination as dual or multiple minorities.[71] A black woman, for example, might be vulnerable to harsh treatment in the workplace based on the intersection of her race and her sex.[72] Discrimination may occur because of the intersection of several protected and unprotected characteristics, such as sex, race, nationality, socioeconomic status, and sexual orientation. Yet most courts, to the extent that they permit intersectional claims at all, follow the "just pick two" rule articulated by the U.S. District Court for the District of Columbia in *Judge v. Marsh*, limiting claims for intersectional discrimination to "employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic."[73]

2. Intragroup Distinctions

Many of the discrimination cases of the future will not be about wholesale group exclusion, but instead about intra-group distinctions.[74] The reliance on categories can be especially problematic here. Professor Nancy Leong argues that multirace individuals are almost invisible in current antidiscrimination jurisprudence and identifies a number of difficulties with multiracial discrimination claims.[75] Courts may deny claims of mixed-race individuals because they view the people whom the plaintiff identifies as comparators as, at least in part, belonging to the

Proposals for an Amendment, 21 BERKELEY J. EMP. & LAB. L. 575, 581 (2000) (documenting the limited range of religious accommodations required by Title VII).

[71] *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40.

[72] *Id.* at 140 ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

[73] 649 F. Supp. 770, 780 (D.D.C. 1986); *see, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987); Payne v. Travenol Labs., Inc., 673 F.2d 798, 822–23 (5th Cir. 1982); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980); Nieto v. Kapoor, 182 F. Supp. 2d 1114, 1140 (D.N.M. 2000); Luce v. Dalton, 166 F.R.D. 457, 459–60 (S.D. Cal. 1996); Daniel v. Church's Chicken, 942 F. Supp. 533, 538 (S.D. Ala. 1996); Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994); Sims v. Montgomery Cnty. Comm'n, 766 F. Supp. 1052, 1099 & n.131 (M.D. Ala. 1990); Prince v. Comm'r, U.S. INS, 713 F. Supp. 984, 992 (E.D. Mich. 1989); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 942 (D. Neb. 1986); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984); Vuyanich v. Republic Nat'l Bank of Dall., 505 F. Supp. 224, 233 (N.D. Tex. 1980). *But see* Lam v. Univ. of Haw., 40 F.3d 1551, 1561 n.16, 1562 (9th Cir. 1994) (permitting an intersectional claim of discrimination based on race, sex, and national origin to proceed).

[74] *Cf.* Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 660 (2010).

[75] Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469 (2010).

plaintiff's own racial group.[76] Furthermore, Leong points out that current antidiscrimination law is "category-dependent," and judges are so accustomed to analyzing cases within a racially binary framework that they "are ignoring or eliding at least some cases that reflect a multiracial narrative of discrimination in order to harmonize those cases with traditional categorical doctrine."[77] When courts revise plaintiffs' narratives by classifying those plaintiffs within single-race categories, they fail to recognize multiracial discrimination and perpetuate the problem.[78]

A separate but related form of discrimination is colorism. Given the changing demographics of this country, the next couple of decades are likely to witness a rise in the number of lawsuits based on skin color, rather than racial, discrimination. Title VII protects against discrimination based on color or skin tone as well as on the basis of race.[79] Courts, however, seem to have difficulty distinguishing allegations of skin color discrimination from claims of race discrimination.[80] Professor Taunya Lovell Banks notes that at times courts treat color discrimination as simply a subset of race discrimination, especially when the plaintiff's race is clear, but that they may be more willing to recognize color discrimination when race is ambiguous.[81]

In a related area, although most courts permit discrimination claims based on associational discrimination—a relationship with someone in a protected class—not all do.[82] Thus, people in interracial marriages or relationships may be left with no remedy under Title VII for discrimination against their interracial associations.

A primary challenge of intra-group discrimination cases is that they defy the ways most people think about discrimination—as cross racial and in black and white terms.[83] Plaintiffs also face proof problems because "markers like skin color or hair . . . are less defined and less

[76] *Id.* at 515–16 (citing Moore v. Dolgencorp, Inc., No. 1:05-CV-107, 2006 WL 2701058, at *2–4 (W.D. Mich. Sept. 19, 2006)).

[77] *Id.* at 527–28.

[78] *Id.* at 477.

[79] Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-(2)(a) (2006).

[80] *See, e.g.*, Arrocha v. City Univ. of N.Y., No. CV021868(SJF)(LB), 2004 WL 594981, at *6–7 (E.D.N.Y. Feb. 9, 2004); Brack v. Shoney's, Inc., 249 F. Supp. 2d 938, 954 (W.D. Tenn. 2003); Hill v. Textron Auto. Interiors, Inc., 160 F. Supp. 2d 179, 187–88 (D.N.H. 2001); Walker v. Sec'y of Treasury, IRS, 742 F. Supp. 670, 676 (N.D. Ga. 1990); Felix v. Marquez, No. 78-2314, 1981 WL 275, at *11 (D.D.C. Mar. 26, 1981); *see also* Jones, *supra* note 74, at 671 ("[P]laintiff success rates in colorism cases appear to be lower than plaintiff success rates in other discrimination cases.").

[81] Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1727 (2000).

[82] Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 244 (2009).

[83] Jones, *supra* note 74, at 677, 680; *see id.* at 682 ("[V]ertical intra-group discrimination is assumed to be so rare, so seemingly against the norm and illogical, that jurors may deny it or be skeptical about whether it occurs.").

widely understood bases for discrimination."[84] In short, as Professor Angela Harris capsulizes, color discrimination claims may afford victims little relief because they "violate expectations about what racial discrimination looks like."[85]

3. Visible Differences—Appearance Discrimination and Cultural Norms

Discrimination relating to more subtle countercultural deviations along various dimensions of identity remains unprotected. Consider, for example, employers' regulation of employees' appearances.

The recent failure of lawsuits attacking employer appearance codes leaves no doubt that employers can compel gender performance by forcing employees to dress and groom themselves according to sex-based stereotypes. *Jespersen v. Harrah's Operating Co.*[86] is the stuff of instant legends. While all of the casino's employees had to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform," it got worse from there.[87] Harrah's required female bartenders to have their hair "teased, curled, or styled," and wear stockings and nail polish.[88] Women also had to wear face powder, blush, mascara, and "lip color . . . at all times,"[89] as prescribed by an "image consultant[]."[90] Male bartenders, on the other hand, only had to have their hair cut above collar-length, trim their nails and *not* wear nail polish or makeup.[91]

The Ninth Circuit Court of Appeals concluded that this sex-differentiated grooming policy did not violate Title VII because the plaintiff did not provide evidence that the requirements imposed on women would unduly burden them by taking more time and money than those imposed on men.[92] Thus, even where employers impose different grooming requirements on men and women, plaintiffs have to meet the proof threshold of "undue burden" with empirical evidence.[93] Of course,

[84] *Id.* at 701.

[85] Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 57–58 (2008).

[86] 444 F.3d 1104 (9th Cir. 2006).

[87] *Id.* at 1107.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1114 (Pregerson, J., dissenting).

[91] *Id.* at 1107.

[92] *Id.* at 1109–10 ("Grooming standards that appropriately differentiate between the genders are not facially discriminatory."); *see also* Bjornson v. Dave Smith Motors/Frontier Leasing & Sales, No. CV 04-0285-N-MHW, 2007 WL 2705585, at *10–11 (D. Idaho Sep. 12, 2007) (holding that the plaintiff failed to make a case for gender discrimination when the claimed retaliation came in the form of a citation for failure to adhere to a gendered dress policy).

[93] Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1096 (2010) (observing that future plaintiffs will "have to go to great lengths to support their claims by putting forensic cosmetologists on the stand to prove the obvious about the costs of make up application in terms of money and time").

the Harrah's policy is not only demonstrably gendered, it is subtly racialized as well—imposing significant additional burdens on black women who have to "tease, curl, or style" their "tightly coiled" hair.[94]

Other grooming code decisions are more explicitly racialized. Thirty years ago, in *Rogers v. American Airlines, Inc.*, a federal district court held that an employer could prohibit a black woman from wearing an all-braided or cornrow hairstyle.[95] The *Rogers* court rejected the plaintiff's conclusion that because principally black women wore their hair in cornrows, the employer's policy targeted them. The court found no violation of Title VII because the policy did not regulate based on "any immutable characteristic of the employees involved."[96] Since then, a number of other courts have unthinkingly followed the reasoning in *Rogers*.

In one case, *Pitts v. Wild Adventures, Inc.*, a theme park manager told a guest services supervisor that she could not wear her hair in cornrows and that "'she should get her hair done in a 'pretty style.'"[97] When the plaintiff attempted to comply by adding hair extensions and styling her hair into two twists, the manager again complained, saying that this looked like dreadlocks. The manager then wrote a memo prohibiting employees from wearing "dreadlocks, cornrows, beads, and shells" that were not covered by a hat.[98] In another, *Santee v. Windsor Court Hotel L.P.*, a black woman who had dyed her hair blonde claimed that she was denied a job as a housekeeper because her hair violated the hotel's policy against extreme hair color.[99] The *Santee* court stated that hair color was not an immutable characteristic nor was it a protected category under Title VII. Thus, the court approved of hiring policies that allowed employers to distinguish based on hair color as "related more closely to the employer's choice of how to run his business than to equality of employment opportunity."[100] None of these more recent decisions acknowledged at all the racialized effects of these arbitrary employment policies.[101]

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[94] *Id.* at 1085. *See also* Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, *in* EMPLOYMENT DISCRIMINATION STORIES 105, 119, 132–34 (Joel Wm. Friedman ed., 2006).

[95] 527 F. Supp. 229 (S.D.N.Y. 1981).

[96] *Id.* at 231.

[97] No. 7:06-CV-62-HL, 2008 WL 1899306, at *1 (M.D. Ga. Apr. 25, 2008).

[98] *Id.*

[99] No. Civ.A.99-3891, 2000 WL 1610775, at *1 (E.D. La. Oct. 26, 2000).

[100] *Id.* at *3 (quoting Willingham v. Macon Tel. Publi'g Co., 507 F.2d 1084, 91 (5th Cir. 1975)).

[101] *See* D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 426–28 (2011); *see also* Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786(RMB)(THK), 2010 WL 1948322, at *1–2 (S.D.N.Y. May 10, 2010) (holding that a black employee could be fired under Abercrombie & Fitch's "Look Policy" for sporting two-toned hair).

In general, courts protect employers' rights to require employees to present a "professional" appearance. Piercings and tattoos receive virtually no protection. In *Cloutier v. Costco Wholesale Corp.*, the First Circuit acknowledged that an employee's facial piercing might constitute a religious practice according to the Church of Body Modification, but nonetheless accommodating it would impose an undue hardship on the employer.[102] As commentators have noted, "all tattoos are not created equal in the eyes of the courts."[103] Thus, visible religious tattoos may be treated differently than tattoos representing racist images.[104]

Some courts have recognized appearance-based claims when they are tied to already-protected categories such as sex or race. In *Price Waterhouse v. Hopkins*, the U.S. Supreme Court recognized that discrimination based on the failure to conform to stereotypic expectations of gender was sex discrimination.[105] Since then, a handful of courts have applied the sex stereotyping rationale to address claims of what was essentially transgender discrimination or appearance-based discrimination,[106] but these decisions are the exception rather than the norm.[107]

Cumulatively, judicial decisions offer very limited protection against appearance discrimination.[108] No federal statute creates a claim for appearance discrimination "unless the particular aspect of appearance constitutes a disability under the Americans with Disabilities Act."[109] On the state level, only Michigan and the District of Columbia have appearance-specific discrimination provisions, apart from the Title VII

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[102] 390 F.3d 126, 129, 134–37 (1st Cir. 2004).

[103] Laura Hazen & Jenna Syrdahl, *Dress Codes and Appearance Policies: What Not to Wear at Work*, COLO. LAW., Sept. 2010, at 55, 56.

[104] *Id.* (comparing EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005), with Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976 (N.D. Ind. 2000)).

[105] 490 U.S. 228, 235–37 (1989) (noting that the plaintiff was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry") (internal quotation marks omitted).

[106] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

[107] *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007) (determining that the employer's reason for firing a "transsexual" woman—that she planned "to use women's public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia"—was legitimate and non-pretextual); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977) (deciding, before *Price Waterhouse* expanded coverage to sex stereotyping, that Title VII covers "only the traditional notions of 'sex'" and not transitioning); Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *5–6, *8 (E.D. La. Sept. 16, 2002) (granting summary judgment to a defendant employer where a male truck driver who dressed in woman's clothing outside of work was fired for doing so).

[108] Mary Nell Trautner & Samantha Kwan, *Gendered Appearance Norms: An Analysis of Employment Discrimination Lawsuits, 1970–2008*, 20 RES. SOC. WORK 127, 129 (2010) (reviewing outcomes in lawsuits and concluding that "federal courts have not only reinforced appearance norms, but they have reinforced *gendered* appearance norms").

[109] William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 624 (2011).

protected traits.[110] Around the country, only a few municipal ordinances address the issue.[111] Thus, appearance-based discrimination remains rampant and imposes enormous social, psychic, and economic costs on workers.[112]

IV. MAKING IT WORK: REINVIGORATING ANTIDISCRIMINATION PROTECTION

A. Large Scale Architectural Changes

Sweeping changes to make the federal template of legal remedies address the lived realities of discrimination are unlikely in the shorter term of the next several decades. Given the incoherence of federal statutory protection for employment discrimination, scholars have argued for comprehensive changes to the architecture of Title VII and the Age Discrimination in Employment Act (ADEA). In 1996, Professor Ann McGinley made a thoughtful argument that, other than with respect to harassment and retaliation law, Congress should replace Title VII, the ADEA, and variable state employment-at-will exceptions with a federal wrongful discharge law that protects all workers from arbitrary discharge.[113] Yet in the past two decades, there is no record of legislators introducing any comprehensive federal "wrongful discharge" bill.[114]

Nor have state courts stepped in to fill the gap left by the absence of statutory protections against arbitrary discharge. Wrongful discharge has always been considered a state-law issue better handled by the common

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[110] D.C. CODE § 2-1402.11(a) (LexisNexis 2011) (prohibiting discrimination based upon "personal appearance"); MICH. COMP. LAWS SERV. § 37.2202(1) (LexisNexis 2010) (prohibiting discrimination based upon "height" or "weight").

[111] DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 126–34 (2010).

[112] *See* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1037–48 (2009); *see also* Michael Newman & Faith Isenhath, *Appearance: A New Protected Class Under Title VII?*, FED. LAW., Nov./Dec. 2010, at 16 ("Research suggests that one's appearance matters in modern society. Studies have shown that good-looking students tend to receive higher grades than their less attractive counterparts. Similarly, 'plain-looking' individuals earn 5 to 10 percent less than 'average-looking' individuals, who in turn earn three to eight percent less than 'good-looking' people. Height can also affect income, with each inch earning individuals $700 or more per year. Research likewise reveals attractive people often receive better medical attention from doctors and lighter sentencing from the criminal justice system.").

[113] Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1447 (1996).

[114] From the 101st Congress (1989) to the present 112th (2011), the phrase "wrongful discharge" surfaces in only nine bills, all of which are variations on union-management or union organizing amendments to the National Labor Relations Act. *See* The Library of Congress, http://thomas.loc.gov/.

law and now the *Restatement of Employment Law*.[115] But only a small minority of state courts have found that the implied covenant of good faith and fair dealing in the workplace context requires just cause for termination.[116] Moreover, the minimal gains in this area have been more than offset by the tendency to curtail the scope of the covenant in jurisdictions where it was embraced.[117] And there has been only limited movement toward a just cause or reasonableness approach in the past quarter-century.[118]

Several recent pieces of legislation have responded to relatively narrow discriminatory behaviors, such as employment discrimination based on indebtedness or genetic information.[119] However, other efforts toward federal workplace protection legislation have foundered. For example, the Employment Non-Discrimination Act, which would protect employees against job discrimination based on sexual orientation or gender identity, has been introduced unsuccessfully in Congress almost every year since 1994.[120]

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[115] RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01 (Tentative Draft No. 2, 2009), *available at* http://www.ali.org/00021333/Employment%20Law%20TD%20No%202%20-%20Revised%20-%20September%202009.pdf.

[116] *See* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 4 (finding 11 states recognize implied covenant of good faith and fair dealing in at-will employment agreements); *see also* CLYDE W. SUMMERS ET AL., LEGAL RIGHTS AND INTERESTS IN THE WORKPLACE: STATUTORY SUPPLEMENT AND MATERIALS 193–200 (2007) (finding ten states accept implied covenant of good faith and fair dealing in at-will employment settings).

[117] *See* James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL'Y J. 773, 791–92 (2011) ("In retrospect, the covenant's halcyon days within American employment law probably occurred during the 1980s. . . . Since this surge of enthusiasm, however, judicial interest in the covenant has notably abated. After 1990, it appears that only two states have joined the initial group endorsing good faith. By contrast, a far greater number of state courts have announced or reiterated their rejection of the covenant in the employment setting. In addition, courts that had recognized good faith have retreated with respect to the scope of their commitment." (footnotes omitted)).

[118] *See, e.g.*, *id.*; *see also* Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 110–11 (2006) (calling for requiring a reasonable business justification in all terminations); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 3.05 (Council Draft No. 7, 2012), *available at* http://www.ali.org/00021333/Employment%20Law%20CD7-%20online.pdf (proposing an implied covenant of good faith and fair dealing in all employment relationships, although the scope of that implied covenant is narrow and as written would not seem to cover instances of firing for such matters as appearance issues).

[119] *See* Consumer Credit Protection Act § 304, 15 U.S.C. § 1674(a) (2006) ("No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."); Genetic Information Nondiscrimination Act of 2008 § 202, 42 U.S.C. § 2000ff-1(a) (Supp. III 2009) (prohibiting employers from taking adverse employment actions "because of genetic information with respect to the employee").

[120] *See, e.g.*, Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 4. It also would have exempted businesses with fewer than fifteen employees and

Large scale changes in the architecture of worker protection are not on the immediate horizon. It may help instead to envision the antidiscrimination frontier of the next generation as building a judicial and regulatory patchwork of protections.

B. Further Constructing the Patchwork of Protections

As with the history of battles for religious tolerance, disability rights, and racial and gender equality, the process of securing rights for the country's future workforce will be incremental. Progressive change will most likely be achieved piecemeal, through small victories on single issues in individual jurisdictions rather than through coordinated doctrinal or legislative efforts.[121]

Some commentators have supported the process of incremental changes based on respect for history and tradition, arguing that incremental approaches promote deliberative democratic change.[122] Yet, the endorsement of incremental change is problematic, as Suzanne Goldberg points out, because "[e]mbedded in the argument that the state can move incrementally to redress inequality is a claim that because the state has gone some way to rectify past inequities, it should be excused, in effect, from having to rectify those inequities fully."[123] Incrementalism also poses problems of competing interest group coalitions[124] and seems backward looking, shining the spotlight on civil rights "advances" that depart from past barbaric practices while ignoring continuing injustices.[125]

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religious and military organizations. *Id.* at §§ 3(a)(4), 6, 7; *see also supra* note 65 and accompanying text.

[121] *See* Ryan E. Mensing, Note, *A New York State of Mind: Reconciling Legislative Incrementalism with Sexual Orientation Jurisprudence*, 69 BROOK. L. REV. 1159, 1160–61 (2004).

[122] *E.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1067–68 (1990).

[123] Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1417 (2009).

[124] *See generally* Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 850 (2010) (capturing some of the difficulties with incremental changes, but noting that many of these problems surface less with expansion of protected classes). *See also* Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66, 74–75 (2011), http://www.columbialawreview.org/assets/sidebar/volume/111/66_Glazer.pdf (discussing "[t]he recent exclusion of transgender people from an earlier draft of the Employment Non-Discrimination Act (ENDA) on the theory that their inclusion would prevent ENDA's eventual passage, which has not yet occurred" (footnote omitted)).

[125] Goldberg, *supra* note 123, at 1417 (noting that incrementalism "justif[ies] the continuation of past discriminatory practices into the future," and that "the state need not even justify its choice of a stopping point in remedying past problems other than by citing how far it has moved from past practice").

Ultimately, the debate about constitutional and statutory incrementalism is a philosophical one, because the process of incremental change is virtually inevitable. Most new approaches are rooted in existing doctrines, and even when laws "'mak[e] statements' . . . designed to change social norms,"[126] a period of incremental change is still unavoidable because it takes time to build social support and understanding for these new norms.

Thus, incrementalism is less a purposeful legislative and litigative strategy than an inevitable political reality. In discussing the progress toward same-sex marriage equality, Evan Wolfson described "the classic American pattern of civil rights advance," with some states moving more quickly toward rights recognition, and other states engaging in resistance, regression, and backlash.[127] The challenge for reformers is how to make the process of incremental change more rapid, and how to assess which changes will build coalitions or lead to sturdier reforms.[128]

A patchwork of rights will probably be both complex and incomplete, but supporting the steps that broaden rights at various levels may be the best way to capitalize on the process of incremental change as social norms evolve. These next parts consider ways to piece together workplace protections through doctrinal advances that reshape the contours of protected categories, state antidiscrimination statutes, and educational approaches that are built on understandings about how various types of discrimination operate.

Given the problematics of categories, it might seem ironic that one of the first strategies for incremental change is adding categories and expanding the meaning of existing categories. Yet incremental change necessitates working within the existing framework.

1. Reshaping the Contours of Federal Categories

A distinctive feature of federal statutory protections is that Congress can offer broader protection by expanding their categories. This does not happen often, but Congress has redrawn protected categories in a few important instances. For example, the Supreme Court's decision in *General Electric Co. v. Gilbert*,[129] holding that exclusion of pregnancy coverage in an employer's insurance plan was not sex discrimination, prompted Congress to override the Court with the Pregnancy Discrimination Act.[130] Similarly, when the Supreme Court issued a series

[126] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

[127] Pam Belluck, *Maybe Same-Sex Marriage Didn't Make the Difference*, N.Y. TIMES, Nov. 7, 2004, § 4 (Week in Review), at 5.

[128] *See* Robert Kuttner, *Keynote Address*, 15 GEO. J. ON POVERTY L. & POL'Y 417, 431 (2008) (endorsing "strategic incrementalism").

[129] 429 U.S. 125 (1976).

[130] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)); *see also* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 469–73 (2011).

of decisions in 1989 that made it much easier for employers to defend discriminatory job actions,[131] Congress responded by enacting the Civil Rights Act of 1991 to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection for victims of discrimination."[132] And when the U.S. Supreme Court restrictively interpreted the meaning of disability, Congress responded by enacting the Americans With Disabilities Act Amendments Act of 2008.[133]

Congress also broadened the reach of the Age Discrimination in Employment Act by expanding and then removing the Act's upper age limit. When Congress first passed the ADEA in 1967, it only protected workers up to age 65.[134] In 1978, Congress raised the age cap to 70,[135] and less than ten years later, in 1986, Congress completely removed the maximum age limit.[136] While the ADEA still excludes workers under the minimum age of 40,[137] some states have picked up where federal protections leave off.[138] These changes to the ADEA did succeed in expanding at least the number of colorable claims filed under the ADEA.[139]

Although a Congressional redrawing of the contours of protected categories might be the most direct solution, it is not likely to happen in the near future.[140] In the interim, doctrinal advances may be the best way to expand the reach of the categories of people protected.

One way to enlarge protections under existing statutes is to redefine the boundaries of the protected categories. Consider, for example, the strategies that have been used to address discrimination based on family

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[131] *See* Patterson v. McClean Credit Union, 491 U.S. 164 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[132] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071.

[133] *See supra* text accompanying note 69.

[134] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

[135] Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189, 189.

[136] Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342.

[137] 29 U.S.C. § 631(a) (2006).

[138] Some state statutes impose no minimum age limits; others place minimum age limits at eighteen or twenty-five years. *See, e.g.*, ALASKA STAT. ANN. § 18.80.220 (West 2011) (creating no age limit for discrimination claims); FLA. STAT. ANN. § 112.043 (West 2011) (same); IOWA CODE ANN. § 216.6(3) (West 2011) (defining the protected category for age discrimination to include individuals at least eighteen years of age); MINN. STAT. ANN. § 363A.03(2), (West 2004) (protecting individuals at least twenty-five years of age); MONT. CODE ANN. § 49-1-102(1) (2011) (creating no age limit).

[139] *See* David T. Vlink, Note, *"Growing Pains" in Indiana Age Discrimination Law*, 44 IND. L. REV. 627, 627 (2011) ("From 2007 to 2008, age discrimination claims increased nearly 29%, more than doubling the increase in claims for sex discrimination (14%), and nearly tripling the increase in claims for race discrimination (11%).").

[140] *See supra* notes 119–20 and accompanying text.

responsibilities. Professor Joan Williams, Cynthia Thomas Calvert, the Center for WorkLife Law, and others have documented that employers discriminate against workers who have family caregiving responsibilities.[141] Building on a number of different legal theories, including disparate treatment, sex stereotyping, and hostile work environment harassment, these scholars created a new theory of recovery, family responsibilities discrimination (or FRD).[142]

This doctrinal advance has had a significant real-world impact. During the decade between 1996 and 2005, family responsibilities discrimination cases increased by more than 400% and they were more successful than most other types of employment discrimination cases.[143] Notably, while many of the FRD plaintiffs have been women who hit the "maternal wall," these theories have also been useful for men who experience caregiver bias because they are defying traditional expectations of masculinity by assuming familial responsibilities[144]

Another example of doctrinally expanded Title VII protections is in the areas of sexual orientation and gender identity discrimination. Early decisions held that Title VII did not protect against discrimination based on sexual orientation because the statutorily specified categories did not include sexual orientation and Congress did not intend discrimination "because of sex" to reach discrimination based on sexual orientation or gender identity.[145] Addressing the situation of a transgendered worker who was terminated, the Ninth Circuit capsulized the opinion of courts at the time, holding that the legislative history of Title VII indicated only an intent to "place women on an equal footing with men."[146]

However, in 1989, the U.S. Supreme Court decided *Price Waterhouse v. Hopkins*,[147] in which it held that discrimination based on gender

[141] *See, e.g.*, Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369, 1372 (2008); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204 (2001); JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (2006), *available at* http://www.worklifelaw.org.

[142] WILLIAMS & CALVERT, *supra* note 141 (documenting cases brought under statutes as well, including the Americans With Disabilities Act and the Family and Medical Leave Act).

[143] MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2 (2006), *available at* http://www.worklifelaw.org/pubs/FRDreport.pdf.

[144] Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1320–22 (2008).

[145] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085–87 (7th Cir. 1984) (interpreting 42 U.S.C. § 2000e–2(a)(1) (2006)); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) (same).

[146] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

[147] 490 U.S. 228 (1989).

stereotypes is sex discrimination in violation of Title VII.[148] Subsequently, several federal district and appellate courts—although still a distinct minority—have relied on the sex stereotyping theory in *Price Waterhouse* to hold that Title VII protects workers when they fail to conform to the stereotypic expectations of their gender. This extension of Title VII to reach gender-nonconforming behavior has benefitted the transgendered more than those discriminated against based on their sexual orientation,[149] unless the plaintiff is a masculine lesbian or an effeminate gay male.[150]

The majority view, though, is still that discrimination against gay men or lesbians is not cognizable under Title VII and that the sex stereotyping theory cannot be used to "bootstrap protection for sexual orientation into Title VII."[151] But during the same time period that many of these cases were being pursued—and lost—under Title VII, other courts were finding protection for sexual orientation in state antidiscrimination laws.[152]

2. State Antidiscrimination Laws

States and municipalities have begun to provide more robust antidiscrimination protection than is afforded under federal law.[153] For

[148] *Id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

[149] Regarding protections for transgendered workers, see, e.g., Myers v. Cuyahoga Cnty., 182 F. App'x 510 (6th Cir. 2006); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006). *But see* Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (declining to extend protection to a worker deemed to be a transvestite). Regarding protection for discrimination based on sexual orientation, see, for example, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001). *But see* McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 543 (8th Cir. 2003); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001).

[150] *See* William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CALIF. L. REV. 487, 534 (2011).

[151] Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)); *see also* DiPetto v. U.S. Postal Serv., 383 F. App'x. 102, 104 n.1 (2d Cir. 2010); Pagan v. Holder, 741 F. Supp. 2d 687, 695 (D.N.J. 2010); Ceslik v. Miller Ford, Inc., 584 F. Supp. 2d 433, 444 (D. Conn. 2008); Benson v. N. Shore-Long Island Jewish Health Sys., 482 F. Supp. 2d 320, 329 (E.D.N.Y. 2007); Graziano v. Village of Oak Park, 401 F. Supp. 2d 918, 927 n.12 (N.D. Ill. 2005).

[152] Rohn Padmore, Inc. v. LC Play Inc., 679 F. Supp. 2d 454, 460–62 (S.D.N.Y. 2010) (finding sexual orientation discrimination actionable under New York's state human rights law); Dawson v. Entek Int'l, 662 F. Supp. 2d 1277, 1288 (D. Or. 2009) (ditto Oregon).

[153] *See* John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1417 (1991) (noting that in the 1970s a number of states added "marital status" as a protected category in their state antidiscrimination laws); Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse*

instance, twenty-one states and the District of Columbia ban discrimination in employment based on sexual orientation, while fifteen states and the District of Columbia ban discrimination based on gender identity.[154] This second tier of state-level protection has expanded rapidly, with eight of the fifteen states expanding their coverage to prohibit discrimination based on gender identity in the past five years alone.[155]

While some state laws and municipal ordinances provide greater coverage than federal laws afford, they only offer pockets of security, limited by geography. These recent state and local laws result in a national red and blue patchwork of protection.[156]

3. Understandings About How Discrimination Operates

One of the more promising avenues for addressing the types of discrimination that will face the workforce of the future is to work on changing cultural understandings about identity characteristics. Employers operate with various culturally acquired assumptions about workers' abilities and engage in varying forms of ingroup and outgroup stereotyping. This Part evaluates discrimination based on race, age, and appearance, and suggests that because those forms of prejudice differ in their underlying motivations, eradicating them, or at least diminishing their occurrence, may necessitate different remedial approaches.

a. Race Discrimination

In this country, racial prejudice was historically based on animus—a deep antipathy and ideology of inferiority.[157] These prejudices became institutionalized so that racial disparities continue to affect employment, housing, education, health care, and criminal justice.[158] Although civil rights laws ended many blatant discriminatory practices and overt exercises of prejudice inside and outside the workplace, the nation's embedded racial stratification continues to convey messages about this "culture's commitment to minority inferiority."[159]

Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination, 42 WAKE FOREST L. REV. 991, 995–96 (2007) (listing the handful of states that provide ex-offenders protection against employment discrimination).

[154] HUMAN RIGHTS CAMPAIGN, *supra* note 49.

[155] *Id.*; s*ee also* Dan Taglioli, *Connecticut Passes Transgender Anti-Discrimination Bill*, JURIST (June 5, 2011, 10:00 AM), http://jurist.org/paperchase/2011/06/connecticut-passes-transgender-anti-discrimination-bill.php.

[156] *See generally* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

[157] *See generally* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (3d ed. 1903).

[158] *See* Ian F. Haney López, *Race Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1201 (1997); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1151 (2010).

[159] Spann, *supra* note 158, at 1152; *see also* Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 ANN. REV. SOCIOL. 299, 299 (2006) ("[P]rejudice and discrimination have taken on new and more subtle forms.").

Much modern racial prejudice manifests in unconscious stereotypes,[160] "fatigue" with racial issues, and beliefs that true discrimination is a phenomenon of the past.[161] Most people "have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary,"[162] and work in social cognition theory explains how even people with egalitarian beliefs harbor unconscious racial prejudices.[163]

Antidiscrimination law, most of which targets intentional discrimination, has a very difficult time reaching unconscious forms of bias.[164] Given the reflexive nature of racial prejudice, a number of commentators have urged structural changes in workplace practices as a solution.[165] They suggest establishing procedures that limit subjective judgments in hirings or promotions, developing performance standards and parameters for job decisions, and creating structures of responsibility "specifically [to] identif[y] individuals whose job it [i]s to implement working diversity policies."[166] Recent longitudinal studies in the social sciences have compared the efficacy of strategies to combat discrimination and increase diversity in management.[167] Studying more than seven hundred private sector workplaces between 1971 and 2002, and evaluating plans such as diversity training, networking and mentoring programs, and creating structures with a locus of accountability, Alexandra Kalev and her co-investigators found that "[s]tructures that embed accountability, authority, and expertise (affirmative action plans, diversity committees and taskforces, diversity managers and departments) are the most effective means of increasing the proportions of white women, black women, and black men in private

[160] *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[161] Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1559–60 (2010).

[162] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005).

[163] *See, e.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 (2007); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 972 (2006); Ann C. McGinley, ¡Viva la Evolución!*: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 417–18 (2000). "Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions." Lawrence, *supra* note 160, at 322.

[164] *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 753 (2001).

[165] *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 499–500 (2001).

[166] Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 419 (2008).

[167] Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006).

sector management."[168] In short, race discrimination may be based on embedded antipathy and demand structural solutions.[169]

b. Appearance Discrimination

Over a half-century ago, Gordon Allport's seminal work *The Nature of Prejudice* posited that contact between members of different racial and ethnic groups is an effective method of diminishing stereotypes.[170] Since then, numerous studies in social psychology have confirmed Allport's "intergroup contact hypothesis," finding that under favorable conditions, such as equal status among the parties and opportunities to develop personal relationships, intergroup contact is a reliable way of reducing prejudice toward groups of people.[171] Although the majority of these studies have examined relationships between different racial and ethnic group members, other studies suggest that this principle holds true in other intergroup contexts.[172]

Relying on this expansive body of intergroup contact research, Professor Tristin Green has argued that employers should be required to accommodate employees' appearance traits, especially when they signal group membership for Title VII protected categories.[173] Green acknowledges that intergroup contact theory supports the proposition that prejudice can best be reduced by promoting contact between different groups.[174] She does point out, though, that to be effective, intergroup contact must generalize beyond the individual participants to the different groups and to do so the participants must see each other as representative or "typical" members of each group rather than exceptional or extraordinary individuals.[175] Therefore, Green argues that "permitting identification with socially salient categories such as race and gender is more likely to translate into reduced prejudice than attempting

[168] *Id.* at 611.

[169] Of course, it may be nearly impossible to use the class action device as a means for imposing structural solutions after *Wal-Mart v. Dukes*. *See* Marcia McCormick, *Win for Wal-Mart in Dukes Case*, WORKPLACE PROF BLOG (June 20, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/06/win-for-wal-mart-in-dukes-case.html.

[170] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 267 (Anchor Books 1958) (1954).

[171] Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 757, 766 (2006) (surveying 713 independent samples from 515 intergroup contact studies).

[172] *Id.* at 766. For an application of intergroup contact theory outside the racial and ethnic group context, see Dominic Abrams et al., *An Age Apart: The Effects of Intergenerational Contact and Stereotype Threat on Performance and Intergroup Bias*, 21 PSYCHOL. & AGING 691 (2006).

[173] Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 418 (2008). Prejudice will be reduced in "workplace contact if women and people of color are permitted to signal identification with gender and racial categories." *Id.* at 387.

[174] *Id.* at 385.

[175] *Id.* at 407–10.

to eliminate or eclipse entirely those categories."[176] Thus, Green found that while allowing workers to signal their identity via their appearance helps break down stereotypes, suppressing visual manifestations of identity characteristics raised the potential for hostility.[177] Restrictions that suppress appearance performances thus not only stand in the way of reducing prejudice, they foster a potentially hostile work environment.

Green's observation that physical appearance plays a critical role in effective intergroup contact holds true outside of the race and gender context. Researchers have found that intergroup contact reduces prejudice in three principal ways: by increasing the participants' knowledge of the other group, by reducing their anxiety toward the other group, and by promoting empathy and perspective-taking.[178] Additionally, the affective factors—anxiety and empathy—are probably more powerful mediating factors than the cognitive factor, knowledge.[179] Regulating workplace assimilation restrictions that target other types of appearance performances according to intergroup contact theory will undoubtedly help foster the knowledge, trust, and empathy that further the goal of social equality.

There also may be room for educating people about inequalities based on appearance and physical attractiveness. Sociologists of education Samantha Kwan and Mary Nell Trautner have documented the paucity of attention to create student understanding of beauty biases—despite a wealth of literature about institutional initiatives to inform students about race, sex, and class biases.[180] Kwan and Trautner also explain several classroom techniques to inform students about "lookism" biases and demonstrate that students are very receptive to this information.[181]

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[176] *Id.* at 385. Green offers the following examples of times when an employer would be required to provide accommodation under her proposal:

- A Latino man with a tattoo who claims that the tattoo signals identification with his racial group.
- A black man wearing baggy jeans who claims that the jeans signal identification with his racial group.
- A black woman with a braided hairstyle who claims that the hairstyle signals identification with her racial or gender group.
- A woman who wears makeup and who claims that wearing makeup signals identification with her gender group.

. . . .

- A man wearing a dress or long hair who claims that the dress or hair signals identification with his gender group. *Id.* at 427–28.

[177] *Id.* at 401.

[178] Thomas F. Pettigrew & Linda R. Tropp, *How Does Intergroup Contact Reduce Prejudice?: Meta-Analytic Test of Three Mediators*, 38 EUR. J. SOC. PSYCHOL. 922, 929 (2008).

[179] *Id.*

[180] Samantha Kwan & Mary Nell Trautner, *Judging Books by Their Covers: Teaching About Physical Attractiveness Bias*, 39 TEACHING SOC. 16, 16 (2011).

[181] *Id.* at 22.

c. Age Discrimination

The graying of America is the primary demographic change that will affect the entire U.S. workforce in the coming decades. It is crucial to recognize that age discrimination is based on a different set of motivations and assumptions than the types of discrimination previously addressed.[182] While race discrimination and certain forms of appearance discrimination are animus-based,[183] age discrimination is based on stereotypical assumptions about older workers' job performance.[184] In other words, the stereotypes are based on assumptions about abilities and costs. As the U.S. Supreme Court noted in *Hazen Paper Co. v. Biggins*, "the very essence of age discrimination [is that] the employer believes that productivity and competence decline with old age."[185]

Congress passed the Age Discrimination in Employment Act to address the stereotypes that stigmatized older workers.[186] However, the protections it provides have not been up to the challenge. Age discrimination suits are among the most likely to settle and the most difficult to win. According to one calculation, plaintiffs prevail in less than 9% of litigated cases,[187] which is a much lower success rate than the average of 39.5% for civil-rights jobs cases that proceed to trial.[188]

Employers tend to voice a common set of concerns about older workers' abilities, worrying that they may be less physically capable or technologically adept than other workers and more interested in spending time with their families than in building their career.[189] Employers buy into ageist stereotypes and hesitate to hire older workers because they anticipate that older workers will be "difficult to train, resistant to change, and less flexible and adaptable than younger

[182] EEOC v. Wyoming, 460 U.S. 226, 231 (1983) ("[A]ge discrimination rarely was based on the sort of animus motivating some other forms of discrimination . . . .").

[183] *See* Elizabeth E. Theran, *"Free to Be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 195 (2001) ("I do not mean that obesity discrimination is 'like' racial discrimination in general, or that the magnitudes are comparable. What I do mean, however, is that antifat stereotypes and prejudices are usually based in the kind of animus and disapproval that have surrounded race-based discrimination throughout its history.").

[184] SEC'Y OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 206 (1965).

[185] 507 U.S. 604, 610 (1993).

[186] 29 U.S.C. § 621(b) (2006) (noting the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment").

[187] George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 513 (1995).

[188] Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1457 (2009).

[189] *See* Thomas W.H. Ng & Daniel C. Feldman, *The Relationship of Age to Ten Dimensions of Job Performance*, 93 J. APPLIED PSYCHOL. 392, 392 (2008).

workers"—in short—"unable to 'learn new tricks.'"[190] Another concern is employer apprehension that older workers will drive up their organization's health care costs.[191] During economic downturns, employers may find it easiest to reduce payroll costs by slashing positions that command higher salaries, which tend to be those occupied by older workers.[192]

Like appearance-based bias, prejudice against the elderly may be reduced by direct contact.[193] Additionally, evidence is emerging that educating employers about their erroneous assumptions can yield positive results. Employers' attitudes toward older workers are a strong predictor of discriminatory employment practices.[194] Researchers have also found that undermining employers' stereotypes promotes positive attitudes toward older workers and significantly increases the likelihood that they will hire older workers.[195]

In contrast to employers' stereotypes, numerous empirical studies attest to the value of older workers. A meta-analysis of studies examining the relationship between age and ten different measures of job performance showed that older workers surpassed younger workers on seven of the ten measures of productivity and matched their younger counterparts on the remaining three performance dimensions.[196] This major quantitative review of the literature found that age made no difference in a worker's core job task performance and that older

[190] Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. SOCIOLOGY & SOC. WELFARE 9, 11 (2011).

[191] *The 'Silver Tsunami': Why Older Workers Offer Better Value than Younger Ones*, KNOWLEDGE@WHARTON (Dec. 6, 2010), http://knowledge.wharton.upenn.edu/article.cfm?articleid=2644.

[192] Amanda Zaremba, Comment, *The ADEA and Reverse Age Discrimination: The Realities and Implications of* Cline v. General Dynamics Land Systems, Inc., 72 U. CIN. L. REV. 389, 391 (2003).

[193] Sheila Murphy-Russell et al., *Changing Attitudes Towards the Elderly: The Impact of Three Methods of Attitude Change*, 12 EDUC. GERONTOLOGY 241, 246–48 (1986).

[194] *See, e.g.*, Philip Taylor & Alan Walker, *Employers and Older Workers: Attitudes and Employment Practices*, 18 AGEING & SOC'Y 641 (1998); *see also* Wendy Loretto & Phil White, *Employers' Attitudes, Practices and Policies Towards Older Workers*, 16 HUM. RES. MGMT. J. 313, 327 (2006) (arguing discriminatory practices are best explained as a nexus of attitude and employer policy).

[195] *E.g.*, EYAL GRINGART ET AL., THE ROLE OF STEREOTYPES IN AGE DISCRIMINATION IN HIRING: EVALUATION AND INTERVENTION (2010); Eyal Gringart et al., *Harnessing Cognitive Dissonance to Promote Positive Attitudes Toward Older Workers in Australia*, 38 J. APPLIED SOC. PYSCHOL. 751 (2008). *But see* Rothenberg & Gardner, *supra* note 190, at 15. Rothenberg and Gardner argue that although Congress enacted the ADEA under the belief that ageism could be eliminated by educating employers about their false stereotypes of older workers, this approach was insufficient because ageism is inherent in "capitalist development and wage labor." More persuasive is the authors' observation that the ADEA's anemic enforcement mechanism prevented it from having a more significant impact on age discrimination. *Id.* at 15–16.

[196] Ng & Feldman, *supra* note 189, at 392.

workers excelled at on-the-job safety, building community in the workplace, and were much less likely to engage in counter-productive behaviors, such as substance abuse at work, aggression, tardiness, and absenteeism.[197]

The findings of this study harmonize with those of other studies showing that older workers suffer fewer injuries on the job[198] and handle interpersonal conflict much better than younger workers.[199] A 2006 poll by the Society of Human Resource Managers indicated that a sizeable majority of human resource professionals thought that older employees were, on the whole, more reliable and more flexible than younger employees and had better work ethics.[200]

Older workers actually impose fewer, rather than more, health care costs on their employers than younger workers. Management professor Peter Cappelli says that although "older workers may take longer to recover from injuries, studies show that they use fewer sick days on the whole than their younger counterparts."[201] In addition, older workers typically do not carry younger children as dependents on their health plans and their health care costs may further diminish when they become Medicare eligible at age 65.[202] These econometric models are borne out by experience. When retail pharmacy giant CVS began a concerted effort to recruit older workers to appeal to its customer demographics, it discovered in the process that its workers over age 50 use less health insurance than its younger workers.[203] A major bookseller, which began a similar recruitment effort to appeal to the disproportionately older customer demographic that purchases books at brick-and-mortar bookstores, found that "the turnover rate for workers over the age of 50 is 10 times less than those under 30."[204]

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[197] *Id.*

[198] Simo Salminen, *Have Young Workers More Injuries than Older Ones?: An International Literature Review*, 35 J. SAFETY RES. 513, 518 (2004).

[199] *See, e.g.*, Kelly E. Cichy et al., *Age Differences in Types of Interpersonal Tensions*, 64 INT'L. J. AGING & HUM. DEV. 171, 186 (2007) (finding older adults less likely to report interpersonal tension in work relationships); Mark H. Davis et al., *Age Differences in Responses to Conflict in the Workplace*, 68 INT'L. J. AGING & HUM. DEV. 339, 349–53 (2009) (finding that older workers were more likely to respond to conflict in a non-confrontational manner).

[200] *What Are the Advantages and Disadvantages of Hiring Older Workers? SHRM Poll*, SOC'Y FOR HUM. RES. MGMT. (Aug. 29, 2006), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/hiringolderworkers.aspx.

[201] *The 'Silver Tsunami': Why Older Workers Offer Better Value Than Younger Ones*, *supra* note 191.

[202] *Id.*

[203] Kim Clark, *A Fondness for Gray Hair*, U.S. NEWS & WORLD REP., Mar. 8, 2004, at 56, 57.

[204] Jessica Marquez, *Novel Ideas at Borders Lure Older Workers*, 84 WORKFORCE MGMT. 28 (2005), *available at* 2005 WLNR 7584138.

4. Building the Patchwork

The protected class approach may have a hard time eradicating subtle and erroneous beliefs about people's abilities. One of the most promising avenues for combating some of the more subtle forms of discriminatory behavior is to increase understanding about the different motivations underlying these different types of discrimination. Appearance-based discrimination may best be combated by repeated contact.[205] Race discrimination may necessitate more structural remedies.[206] Educating employers about the value of older employees may help curb age discrimination, because empirical evidence is mounting that for some jobs older workers are more productive than younger workers.[207] It is important to keep in mind, however, that many discrimination cases contain multiple claims regarding different or intersecting facets of identity, so the stereotyping that occurs in those "complex bias" cases may be much more nuanced than in single claim cases.[208]

Unmasking the diverse underpinnings of the various forms of discrimination does not suggest a simple, "one-size-fits-all" solution, but it does provide signposts for incremental change. In sum, different forms of discrimination may best be addressed in different ways. Expanding federal doctrinal categories and their interpretations, promoting initiatives and protections at the state and local level, and incorporating cognitive understandings about the nature of different prejudices into law are all threads to further construct the patchwork of employee protections.

V. CONCLUSION—CHANGING CULTURAL NORMS

The workforce of the future is going to be composed of increasingly greater numbers of people of color, older people, and people who are strikingly independent in their attire, as well as lesbians, gays, bisexuals, transgendered persons, and people from all across the economic spectrum. But current antidiscrimination laws leave gaping holes in coverage for the types of discrimination these workers will face. Categories that are prone to discrimination are omitted under federal and most state standards, and the traditional statutory categories and doctrinal interpretations of these categories cannot adequately protect the workforce of the next generation.

Despite the frailties of the protected class approach, Congress and the courts are unlikely to scrap or dramatically revise the categorical framework in the near term. Progressive change will probably follow the patchwork model of other civil rights movements, and the most

[205] *See supra* text accompanying notes 170–79.
[206] *See supra* text accompanying notes 160–69.
[207] *See supra* text accompanying notes 193–200.
[208] *See* Kotkin, *supra* note 188, at 1440.

promising hope at this juncture is to build the patchwork faster. Toward that end, advocates should consider the strategies that have been most effective in reshaping the contours of the protected categories. These strategies have usually been tied in some way to existing realms of protection. For example, the burgeoning theory of family responsibilities discrimination—discrimination based on parenthood or family status—built upon the success of cutting edge work in differential treatment based on sex.[209] Similarly, appearance discrimination suits have been most successful when tied to some other already protected category, such as race or gender presentation.[210]

Employment discrimination law is also most successful when it calls attention to normative changes. The law of sexual harassment, for example, was quickly implemented and accepted because it reflected cultural sentiments. For starters, a large coalition of women resented being treated like sex objects. Furthermore, sexual harassment is not about employment competence; it is about behavior that ranges from boorish at best to sexual assault at worst. There was very little constituency supporting sexual harassment. Everyone either has a mother, sister, or wife or is themself female, and no one wants their mom, sister, or wife treated poorly. Nor did employers want sexual harassment: in its quid pro quo incarnation, it is essentially theft of the employer's resources (job perks) for personal (sexual) gain, and in either incarnation it harms workplace morale. Legal reforms thus dovetailed with social sentiments. The publication of Catharine MacKinnon's book, *The Sexual Harassment of Working Women*, in 1979, the adoption of EEOC guidelines in 1980, and the Supreme Court decision *Meritor Savings Bank FSB v. Vinson* in 1986 all occurred within a very short span of legal time.[211]

Laws can also by themselves create awareness of the impropriety of types of discriminatory behavior.[212] Litigation, and the accompanying media airplay, can be an effective mechanism for educating the general public about inappropriate behaviors.[213] Laws can also create "legal consciousness"—the capacity for an individual to perceive discrimination, object to the discriminatory behavior, and seek appropriate remedies.[214] Laws, though, work most effectively to change behavioral norms when

[209] *See supra* text accompanying notes 141–44.

[210] *See supra* text accompanying notes 105–07.

[211] *See* Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1980); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[212] *See, e.g.*, Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425 (2000).

[213] Jean R. Sternlight, *Placing the Reality of Employment Discrimination Cases in a Comparative Context*, 11 EMP. RTS. & EMP. POL'Y J. 204, 216 (2007).

[214] Elizabeth Hirsh & Christopher J. Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 LAW & SOC'Y REV. 269, 271 (2010).

they build on cultural understandings. While courts and legislatures often generate cultural norms,[215] they typically prefer to respond to shifts in those norms.[216]

Perhaps part of the answer to filling the gaps in existing coverage is simply informational. For example, studies show that informing employers about the advantages of hiring older workers may produce an increased openness to older job candidates.[217] Another instance of the efficacy of educational initiatives is that many of the country's largest companies became industry leaders in offering partner benefits once they recognized that discrimination against LGBT employees was a form of irrational discrimination.[218]

But consciousness-raising and proactive education will not remedy all of the types of discrimination that are unrecognized under current law. There may never be consensus that discrimination against certain classes of people is wrong. And some characteristics, such as class, which are fluid and array along a spectrum, may not be sufficiently definite to be susceptible to prophylactic educational efforts. Yet creating public awareness is an important piece of any civil rights movement. In the sexual harassment area, for example, the Clarence Thomas hearings were a televised morality play that served as a national consciousness-raising incident.[219] Similarly, publicizing individual instances of discriminatory behavior may prove at least somewhat effective in creating social change, especially given the current capacities for social media to create awareness.[220]

This Article has just sketched the landscape of the ways that the protected class approach has not kept pace with the demographics and lived experiences of an ever-changing workforce. The workforce of the future will change in dramatic ways from the existing workforce, and rather than being embraced for their diversity or difference from the

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[215] ROBERT M. COVER ET AL., PROCEDURE 225–26 (1988).

[216] *See, e.g.*, Robert C. Post, *The Supreme Court 2000 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 80–84 (2003).

[217] *See supra* text accompanying notes 193–204.

[218] HUM. RTS. CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2006: A REPORT CARD ON GAY, LESBIAN, BISEXUAL, AND TRANSGENDER EQUALITY IN CORPORATE AMERICA 7 (2006), *available at* http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2006.pdf ("[M]ore than half of Fortune 500 companies offered domestic partner health benefits to their employees.").

[219] Judith Resnick, *Hearing Women*, 65 S. CAL. L. REV. 1333, 1333–35 (1992).

[220] Professor Kerri Stone tells the story of a Starbucks customer who witnessed what seemed to be sexual orientation harassment and a constructive discharge, and then wrote about it on her blog—and the story went viral. Kerri Stone, *A New Twist on Customer Preference and Employment Discrimination*, PRAWFSBLAWG (June 15, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/a-new-twist-on-customer-preference-and-employment-discrimination.html#more (describing "a single customer /bystander's bringing to light and shaming a major national company over alleged employment discrimination, abuse, and bullying that is not unlawful under federal law—but should be").

current workforce, those very changes may trigger discrimination against certain workers. But much of this "new" discrimination will not be addressed by existing discrimination law. Of course, antidiscrimination laws alone cannot eradicate all types of discrimination.[221] Yet, enriched with understandings from cognitive psychology about the motivations underlying different types of discrimination—and accompanied by media airplay about inequities—laws do, over time, form part of a larger mosaic of sentiments, behaviors, and policies that change cultural norms. And new cultural norms may in turn presage a new future for the protected class approach to discrimination.

[221] Masen Davis & Kristina Wertz, *When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice*, 8 SEATTLE J. FOR SOC. JUST. 467, 478 (2010).