

DECOUPLING EMPLOYMENT

by
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The protected class approach to employment discrimination has not solved the problem of discrimination or of a just distribution of resources. Not only do race and sex prejudice continue to exist, but material and subjective disadvantage continues to be strongly linked to race and sex. While our laws have made social changes, progress on those changes stalled in the 1980s. Some might even say that the protected class approach to discrimination has actually entrenched inequality more deeply into our social fabric.

This Article seeks a purpose-driven approach to finding solutions to the problems of discrimination, asking why it is that we prohibit discrimination and what we hope to accomplish through law. It advocates for a focus on some baseline of substantive equity for everyone, separated from particular employment relationships, and not contingent on identity. Such a shift might take pressure off of our antidiscrimination laws, which in turn might allow them and the market to operate to promote more equality for historically disadvantaged groups.

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I. INTRODUCTION

The world envisioned by Gene Rodenberry in his *Star Trek* series, a world further developed in subsequent spinoff series, has solved the problem of discrimination on Earth. There is no more discrimination on the basis of race, sex, sexual orientation, sexual identity, religion, or even planet of origin. There is also no more want. The “replicator” produces anything needed at a voice command, and the transporter and faster-than-light-speed space travel combine to take people “where no one has gone before.” While that world is science fiction, the aspirations for that world exist in our real world very strongly, and have for a long time.

It seems that there are two paths to follow to get to that world, or at least to get closer to it. One path would be to eliminate discrimination, so that resources could be divided much more equally; this, in turn, would reduce want significantly. The other path would eliminate scarcity, or take care of the physical needs of people so that they would no longer need to compete for basic resources. This lack of competition would, over time, break down arbitrary barriers. This is because so little would be at stake in the outcome of any given human interaction governing access to those resources that extraneous, irrelevant matters would not be considered as often. We have chosen the first path, with mixed results. This Article suggests that we think harder about the second.

The protected class approach to employment discrimination has not solved the problems of discrimination or the uneven distribution of resources. Not only do race and sex prejudice continue to exist, but a person’s level of well-being continues to be strongly linked to race and sex. While our laws have made social changes, those changes stalled in the 1980s, and we have made little progress on measures of equality since. Some might even say that the protected class approach to discrimination has actually entrenched inequality more deeply into our social fabric.

This Article, part of Lewis & Clark Law School’s Business Law Fall Forum, The Protected-Class Approach to Antidiscrimination Law: Logic, Effects, Reform, seeks a purpose-driven approach to finding solutions to the problems of discrimination, asking why it is that we prohibit discrimination and what we hope to accomplish through law. Beginning with those first principles, as if we were starting with a clean slate, might illuminate ways to reform the current system.

We prohibit employment discrimination for deontological reasons and for instrumental reasons. Deontologically, we prohibit discrimination because it is wrong, because all human beings are fundamentally equal, with equal dignity and deserving of equal rights. Instrumentally, we prohibit discrimination because systematically disadvantaging a group or limiting access to social goods can create an underclass of people whose talents are wasted and who are more likely to

engage in social unrest. When disadvantages persist intergenerationally, that underclass can become permanent, increasing the likelihood of unrest and cementing a loss of talent that would otherwise serve the public good.

Thus, although our laws that prohibit employment discrimination speak in terms of formal equality, they also seek to improve substantive equality by creating conditions for people to access social goods such as jobs. Over time, formal equality should, in theory, allow people to develop their individual talents without having disadvantage imposed on the basis of their status. This, in turn, will result in greater substantive equality among groups.

But it has not worked. Our focus on protected classes and formal equality has instead distracted us from this goal, and has been used to justify cementing the effects of prior discrimination onto subsequent generations. So what if we removed the substantive piece from the equation? We must also provide for greater substantive equality, so that workplace discrimination is no longer causing that particular injury or responsible for that particular cure.

We use work as a delivery device for most of our social policies. Work is the mechanism by which we seek to distribute social goods in a just manner. The employment relationship is so overburdened by all of this that the prohibition on employment discrimination because of protected class status cannot serve the substantive equality goal. Ultimately, we have put private sector employers in the role of gatekeepers to our social safety net. And they are simply too powerful and unaccountable to serve in that role.

If we decouple those policies from the employment relationship, we might solve two problems: (1) we might get to our goal of substantive equality faster; and (2) we might make race, color, national origin, sex, or religion less relevant to the need for employment, allowing employee choice to create a labor market that could operate to drive out discrimination and free up employer resources to allow more risk-taking in choosing employees.

Part II of this Article will show just how much social policy is accomplished through the employment relationship. Given that context, Part III will identify what the goals of employment discrimination law are and what our legal approach currently is, highlighting some of the problems with the protected class approach. Part IV will explore which social policies and programs can be decoupled from the employment relationship. Part V will conclude and discuss how that decoupling might affect employment decisions.

II. SOCIAL POLICY AND WORK

As I write this Article, the media is in an all-out frenzy about the economy in the United States and globally. Congress just went through a very messy process to raise the country's debt limit, Standard & Poor's

reduced the country's bond rating, and trading on the stock markets is extremely volatile.¹ A USA Today/Gallup poll conducted on August 2, 2011, the day after the bill to raise the debt ceiling was passed, showed that more people disapproved of the agreement than approved of it, and nearly half of those polled thought that the agreement would make the economy worse.² By the end of that week, economic confidence plunged to its lowest levels since March 2009, in the depth of recession.³ And the worry is that we are about to enter a "double dip" recession.⁴

The focus to resolve the economic problems? Jobs. As the President said the day after the debt ceiling agreement was reached:

[W]e have now averted what could have been a disastrous blow to the economy. . . . In the meantime, the American people have been continuing to worry about the underlying state of the economy, about jobs, about their wages, about reduced hours, about fewer customers. . . . So I'm meeting with my Cabinet here to make sure that, even as they have been throughout these last several weeks, they are redoubling their efforts to focus on what matters most to the American people, and that is: how are we going to put people back to work; how are we going to raise their wages, increase their security; how are we going to make sure that they recover fully, as families and as communities, from the worst recession we've had since the Great Depression.⁵

The employment relationship is clearly central to our economic policies.

Drilling down, our economic policy is closely tied to our social policies as well, and many aspects of our social policies are carried out through the employment relationship. As our economic woes and the push for health care reform have demonstrated, our economy and social

¹ See STANDARD & POOR'S, UNITED STATES OF AMERICA LONG-TERM RATING LOWERED TO 'AA+' ON POLITICAL RISKS AND RISING DEBT BURDEN; OUTLOOK NEGATIVE 2-4 (2011); Ken Sweet, *Dow Plunges After S&P Downgrade*, CNN MONEY (Aug. 8, 2011, 4:48 PM), http://money.cnn.com/2011/08/08/markets/markets_newyork/index.htm; *The Debt Ceiling: Scheme, Stonewall and Fulminate*, ECONOMIST, July 23, 2011, at 65.

² Jeffrey M. Jones, *More Americans Oppose than Favor Debt Ceiling Agreement*, GALLUP (Aug. 3, 2011), <http://www.gallup.com/poll/148802/Americans-Oppose-Favor-Debt-Ceiling-Agreement.aspx>.

³ The National Bureau of Economic Research measured the recession as beginning in December of 2007, *Determination of the December 2007 Peak in Economic Activity*, NAT'L BUREAU OF ECON. RES., <http://www.nber.org/dec2008.html> (last visited Mar. 10, 2011), and ending in June 2009, *Business Cycle Dating Committee Meeting Report*, NAT'L BUREAU OF ECON. RES. (Sept. 20, 2010), <http://www.nber.org/cycles/sept2010.html>.

⁴ 24/7 Wall St., *10 Signs a Double-Dip Recession Is Around the Corner*, ATLANTIC (Aug. 1, 2011, 1:30 PM), <http://www.theatlantic.com/business/archive/2011/08/10-signs-a-double-dip-recession-is-around-the-corner/242888/>.

⁵ Remarks Prior to a Cabinet Meeting and an Exchange with Reporters, 2011 DAILY COMP. PRES. DOC. 544, at 1 (Aug. 3, 2011). Later that same day at a Democratic National Committee event, the President again focused on the jobs message. Remarks at a Democratic National Committee Fundraiser in Chicago, Illinois, 2011 DAILY COMP. PRES. DOC. 545, at 2-4 (Aug. 3, 2011) (making remarks regarding quality of life and economic growth, all related to jobs and job losses).

welfare system depend upon an effectively functioning system of employment. Work is the vehicle through which we distribute money and social goods. For example, health care and support during the post-work period of retirement are both primarily effectuated through the employment relationship. While employers do not have to provide health benefits or retirement benefits, many do, and that is the primary means by which people obtain health care and save for retirement.⁶ Moreover, our Social Security and Medicare systems are dependent on the employment relationship and taxes collected from earned income.

It is not only health care and retirement that we provide for through employment. It is also income insurance, like unemployment insurance and disability insurance.⁷ And more fundamentally, work is the means by which people get resources necessary for housing, education, food, and other things required for subsistence. We even use employment to accomplish the redistributive goal of support for groups in the lowest socioeconomic tiers. There is very little direct government payment to poor people in this country,⁸ and in fact, about fifteen years ago we reformed the welfare system to promote work as the primary delivery device for welfare support.⁹ In a very real sense, work is our social safety net.

Work is not only a distributional device; it is itself, at least in the aggregate, a social good to be distributed. To allow the broadest distribution of this social good and the other social goods to which work serves as the gateway, we regulate work to enable larger numbers of people access to jobs. So we allow workers to bargain collectively for things like job security,¹⁰ we give incentives to employers to limit the number of hours any particular employee can work,¹¹ and we require at

⁶ See CRAIG COPELAND, EMP. BENEFIT RESEARCH INST., ISSUE BRIEF NO. 311, EMPLOYMENT-BASED RETIREMENT PLAN PARTICIPATION 4 (2007), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_11-20074.pdf; David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 23–24 (2001) (concerning the provision of health insurance); William J. Wiatrowski, *Changing Landscape of Employment-Based Retirement Benefits*, BUREAU OF LABOR STATISTICS (Sept. 29, 2011), <http://bls.gov/opub/cwc/cm20110927ar01p1.htm> (documenting the way people save for retirement and the trends in the types of plans available to employees).

⁷ See Bureau of Labor Statistics, *Life and Disability Insurance Benefits*, PROGRAM PERSPECTIVES, Dec. 2010, at 1–3, *available at* http://www.bls.gov/opub/perspectives/program_perspectives_vol2_issue7.pdf (collecting statistics of disability insurance coverage for American employees); Sachin S. Pandya, *Retrofitting Unemployment Insurance To Cover Temporary Workers*, 17 YALE L. & POL'Y REV. 907, 907 (1999).

⁸ See Nada Eissa & Hilary Hoynes, *Redistribution and Tax Expenditures: The Earned Income Tax Credit*, 64 NAT'L TAX J. 689, 689–90 (2011) (noting the “erosion of the traditional welfare system” and stating that the federal income tax system is now “[t]he primary means of providing cash assistance to lower-income families”).

⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 824, 110 Stat. 2105, 2323.

¹⁰ National Labor Relations Act, 29 U.S.C. §§ 159–161 (2006).

¹¹ Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2006).

least in some cases a minimum wage to ensure a subsistence level amount of income.¹² We regulate within the employment relationship as well—to ensure the health and safety of employees,¹³ to ensure that they can continue working as long as feasible,¹⁴ and to ensure that politically less powerful groups are not systematically denied access to employment,¹⁵ and, through employment, social goods that come with it.

So how did we get to this point? Through a combination of happenstance and design. The virtue of work has long been part of American culture and is at least to some extent an outgrowth of the Protestant work ethic, an ethic that many of our first settlers considered central to their religious beliefs.¹⁶ For example, the virtue in work was evident in the welfare-to-work movement, and even continues today, as shown by the media coverage of the emotional toll that unemployment and underemployment is wreaking on people in the current economic crisis.¹⁷ This country has also long been seen as the land of opportunity, a place to emigrate to, a place where anyone can become rich through hard work.

While that description begins to explain the centrality of work to American identity, the use of work to deliver other social goods happened, at least originally, less by design. Great economic disruptions in U.S. history have caused huge shifts in employment. For example, during the Great Depression, our political leaders saw work as central to recovery, and much of the legislation making up the New Deal was enacted to spread work to more people and to raise wages.¹⁸ During World War II, amid labor shortages and to prevent war profiteering, the federal government imposed strict price controls, which meant that

¹² *Id.* § 206.

¹³ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

¹⁴ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); *see also* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117 (2006).

¹⁵ 42 U.S.C. §§ 12101–12117; Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e–2000e-17 (2006).

¹⁶ *See generally* MAX WEBER, *THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM* (1905), *reprinted in* *THE PROTESTANT ETHIC AND THE “SPIRIT” OF CAPITALISM AND OTHER WRITINGS I* (Peter Baehr & Gordon C. Wells eds. & trans., 2002).

¹⁷ *E.g.*, Michelle Hirsch & Eric Pianin, *Mental Toll of Extended Unemployment Looms Large*, WASH. POST (Sept. 30, 2011), http://www.washingtonpost.com/business/mental-toll-of-extended-usunemployment-looms-large/2011/09/27/gIQA5Lv9K_story.html; Alix Spiegel, *Economic Crisis, Unemployment Take Emotional Toll*, NPR (Feb. 13, 2009), <http://www.npr.org/templates/story/story.php?storyId=100600029>; *Long-Term Joblessness Takes Emotional, Spiritual Toll on ‘99ers’*, PBS NEWSHOUR (Aug. 6, 2010), http://www.pbs.org/newshour/bb/business/july-dec10/99ers_08-06.html.

¹⁸ *See* Alan Brinkley, *The New Deal Experiments*, in *THE ACHIEVEMENT OF AMERICAN LIBERALISM: THE NEW DEAL AND ITS LEGACIES I*, 11, 13 (William H. Chafe ed., 2003) (describing the National Industrial Recovery Act and subsequent successful pieces of legislation); Greg Hannsgen & Dmitri Papadimitriou, *Did the New Deal Prolong or Worsen the Great Depression?*, CHALLENGE, Jan.–Feb. 2010, at 63, 66–67, 72–74.

wages were capped and not allowed to increase.¹⁹ In order to attract the most qualified employees, many employers began offering health insurance and pensions as forms of compensation.²⁰ That way, real compensation could be higher than the wage controls would allow. The rise of unions, which bargained for these kinds of benefits at a time when labor was in shorter supply, meant that even non-unionized employers had to provide the same kinds of benefits to remain competitive.²¹ So to some extent, we simply got in the habit of using work in this way.

More recently, we have ramped up the use of work to deliver social goods. The welfare reform passed during the Clinton Administration focused on moving the poor from receiving direct payments from the government to at least partly supporting themselves with work.²² Federal policy also shifted to use the income tax system, and the earned income tax credit in particular, as the primary method of redistributive assistance for the poor.²³ Of course to be benefitted by an income tax credit, a person must have some income, which generally requires being employed. While at one time we engaged in more direct wealth redistribution to support at least some of our safety net programs, the reductions in the capital gains tax and estate tax²⁴ in the last couple of decades has meant that any appreciable wealth redistribution for safety net programs has been significantly reduced. We now focus almost exclusively on individual income to accomplish the redistribution. And although one proposal for the recent reform of health care would have removed health insurance from the employment context, the reform enacted instead used the employment relationship as a primary means to provide health insurance, reinforcing the link between employment and health care.²⁵

¹⁹ See Marcia Angell, *The Doctor as Double Agent*, 3 KENNEDY INST. ETHICS J. 279, 280 (1993); Hyman & Hall, *supra* note 6, at 25.

²⁰ Hyman & Hall, *supra* note 6, at 25.

²¹ *Id.* at 25–26.

²² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 103, 824, 110 Stat. 2105, 2112–13, 2323 (replacing Aid to Families with Dependent Children to Temporary Assistance for Needy Families and requiring recipients to begin working).

²³ Eissa & Hoynes, *supra* note 8, at 689–90.

²⁴ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501, 511, 646, 115 Stat. 38, 69–70, 85, 144 (reducing the estate tax); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 301, 117 Stat. 752, 758 (reducing the capital gains tax); Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a “Voluntary” Tax?*, 20 STAN. L. & POL’Y REV. 153, 155 (2009) (describing the estate tax as designed to prevent concentrations of wealth and describing the temporary repeal of the tax in 2001).

²⁵ Some employers will have to offer their employees coverage. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1513, 124 Stat. 119, 253–54, (2010) (imposing tax penalties on employers of at least fifty employees who do not offer affordable minimum coverage for employees). Other employers may be eligible to receive subsidies to offer their employees coverage. *Id.* § 1421, 124 Stat. at 237–38. And

Despite our efforts to distribute work, and thus social goods, equitably, we do not seem to be accomplishing that goal. The U.S. workforce lacks racial and gender equality under almost any measure: employment rates, wages, job integration, and labor force participation.²⁶ Income and wealth inequality are growing, and they are growing in a gendered and racially disparate manner.²⁷ Sex and race segregation in the labor market, while less severe than in the days of legal (and even legally required) segregation, remain high; men of color and women of all colors are concentrated in lower-paying jobs,²⁸ exacerbating the income inequality problem. Moreover, the effects of the recent recession hit people of color and women harder than it did white men.²⁹ The next Part will describe how our laws against employment discrimination were supposed to remedy this problem and why they are less effective than we might hope.

III. EMPLOYMENT DISCRIMINATION AND THE PROBLEMS WITH THE PROTECTED CLASS APPROACH

Even though work is central to our economic system—or maybe *because* it is—neither legislatures nor courts seem very interested in interfering with the employment relationship. The default rule which most employers and certainly all labor and employment lawyers are familiar with is that employment is at-will, which of course means that the employee can be fired “for a good reason, a bad reason, or no reason at all.”³⁰ We simply tinker around the edges of that rule, prohibiting only

finally, the individual mandate will be enforced by a tax penalty enforced through the income tax code. *Id.* §§ 1501, 10106(b)(1), 124 Stat. at 242, 909.

²⁶ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, at 2 & n.5, 5–6 (2006); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171, 1184 (2006); Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353, 353 (2007); Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899, 900 (2005).

²⁷ MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* 15, 28–32 (2010); RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., *TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS* 1 (2011), available at http://pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

²⁸ See U.S. BUREAU OF LABOR STATISTICS, REPORT 1025, *HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009*, at 2, 4 chart 4, 9–34 tbl.2 (2010); U.S. BUREAU OF LABOR STATISTICS, REPORT 1026, *LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2009*, at 2, 3 (2010).

²⁹ See KOCHHAR ET AL., *supra* note 27, at 10, 12 (reporting that minorities experienced a greater rate of home foreclosures, a greater rate of unemployment, and a greater drop in household income than did whites).

³⁰ *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054 (5th Cir. Unit A July 1981); see also *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884) (describing at-will employment as allowing termination “for good cause, for no cause or even for cause morally wrong”).

very few employment actions that are motivated by a few narrow categories of status or conduct. One of these prohibitions, of course, is the prohibition of discrimination in employment on the basis of membership in certain protected classes. Employers may not take adverse employment actions against employees because of the employees' race, color, national origin, religion, sex,³¹ age,³² or disability.³³

Choosing to focus on these statuses made sense given this country's history of excluding some people from work and other social goods because of their race, color, national origin, religion, sex, age, or disability. But the statutes enacted to prohibit discrimination framed the protected classes in neutral terms, while that history of exclusion was not neutral.

A. *Neutral Framing and Formal Equality*

Consider the wording of the antidiscrimination provisions of the Ku Klux Klan Acts, the civil rights statutes enacted during Reconstruction:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.³⁴

And:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.³⁵

This language, framed in terms of equalizing others with whites, recognized that *de jure* discrimination had privileged white people and had disadvantaged people of other races.³⁶ The language appears to be designed to allow the government to take actions that lift up people who were not white even if that might foreclose some opportunity for a white person.

³¹ 42 U.S.C. § 2000e-2 (2006).

³² 29 U.S.C. § 623(a) (2006).

³³ 42 U.S.C. § 12112.

³⁴ *Id.* § 1981(a).

³⁵ *Id.* § 1982.

³⁶ Not all antidiscrimination law was framed race consciously during this time. The Thirteenth and Fourteenth Amendments were framed without reference to race at all, and the Fifteenth Amendment provided that the right to vote may not be abridged on the basis of "race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

Compare the language of the Ku Klux Klan Acts to the language of Title VII of the Civil Rights Act of 1964:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.³⁷

Title VII focuses on race as a category rather than on a particular race or races, even though the discrimination in this country that led to enactment of Title VII was against non-whites—primarily African-Americans—just like the discrimination targeted by the Ku Klux Klan Acts. All races did not suffer equally from the Jim Crow era, but all races are protected by the language in Title VII.

The shift to neutrality made a difference in the operation of the law as well. Consider the example of sex discrimination. At the turn of the twentieth century, a number of states had enacted sex-specific labor legislation that at least purported to improve the lives of women.³⁸ Sex-specific labor legislation was then struck down by the courts when Title VII was enacted, because Title VII required sex neutrality.³⁹ This shift to neutrality was accompanied by a strong commitment to formal equality.

Formal equality is sometimes also called equality of rights or equal opportunity. In the law, formal equality usually refers either to the absence of classification or to a mandate not to classify on the basis of membership in a particular group.⁴⁰ Formal equality is focused on the individual rather than on the group that the individual may be a member

³⁷ 42 U.S.C. § 2000e-2.

³⁸ See *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a law that limited the number of hours per day and per week that women could work against a constitutional challenge). The effects of those laws were not necessarily to improve women's lives, since they led to employers tending not to hire women. See BARBARA ALLEN BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 86–87, 105–06, 111–12 (2d ed. 1996); ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 11–12, 24, 34–40 (1990); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 191, 195–96, 201 (2003).

³⁹ E.g., *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219, 1224 (C.D. Cal. 1968).

⁴⁰ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108–21 (1976) (using the term antidiscrimination to describe anticlassification or formal equality).

of.⁴¹ Formal equality is nothing more or less than the Aristotelian principle that likes should be treated alike while those who are not alike should be treated differently.⁴²

An alternate approach to equality is substantive equality or equality of outcomes or results. Substantive equality generally refers to equality in the distribution of goods, resources, and power, and is often described as embodying an anti-subordination principle.⁴³ This anti-subordination principle provides that actions enforcing the inferior status of historically oppressed groups should be prohibited.⁴⁴

In the years since Title VII was enacted, formal equality has become firmly entrenched as the primary equality norm both as a matter of constitutional interpretation, and, generally, as a matter of legislative policy and statutory interpretation.⁴⁵ As a result, even so-called benign classifications, classifications at least nominally aimed at benefitting social groups historically oppressed, have been struck down as violating the Constitution.⁴⁶ Any facial race consciousness, and to a lesser extent, sex

⁴¹ See *id.* at 123, 126–27; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472 (2004).

⁴² ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE bk. V, at 145, 153, 265–67 (F.H. Peters trans., C. Kegan Paul & Co. 1881) (those who are equal should receive equal shares and those not equal should not); see, e.g., *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885) (adopting this framework).

⁴³ Siegel, *supra* note 41, at 1472–73.

⁴⁴ *Id.*

⁴⁵ Compare *Ricci v. DeStefano*, 129 S.Ct. 2658, 2681–82, (2009) (Scalia, J., concurring), with *id.* at 2689–90 (Ginsburg, J., dissenting). The majority in *Ricci* uses formal equality principles to hold that consideration of the racial impact of a test was race discrimination. Justice Scalia's concurrence suggests that a statute that requires the government to provide substantive equality or equality of results may violate the Equal Protection Clause. Justice Ginsberg's dissent puts the city's actions in the context of a long history of race discrimination, promoting the city's actions as necessary for substantive equality. See also Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321 (2008) (discussing color-blind and color-conscious approaches by the Supreme Court); Siegel, *supra* note 41, at 1473; J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 946 (1975) (arguing that the Court should promote political equality and equality of opportunity, but refrain from promoting economic equality).

⁴⁶ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–08 (1989) (applying strict scrutiny to a program that the government asserted was designed to benefit racial minorities, and striking the program down on the ground that remedying historical societal discrimination was not, by itself, a compelling governmental interest); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (striking down the exclusion of men from a nursing program argued to be a way to increase opportunities for women). Of course, the policies at issue in those cases may not actually have benefitted people of color or women, at least in some senses. Even if they did, there may have been significant costs imposed as well. The policy barring men from the Mississippi University for Women's nursing program, for example, may have served to promote sex segregation in the health services fields, segregation that generally results in lower pay for jobs dominated by women. In addition, yet another

consciousness, imperils a statute or government action.⁴⁷ On the other hand, laws neutral as to race or sex on their face generally are upheld as valid exercises of government power even if the primary effects of such laws are to penalize or benefit individuals on the basis of race or sex.⁴⁸

This approach to equality has, to at least some extent, frozen historical inequities in place. Consider this allegory:

Two groups—one white, the other black—are playing a game of poker. They have been playing the same game for some 400 years, during which time the white group has cheated on numerous occasions. The white group now announces that “from this day forward, we will stop cheating.” “That’s fine,” the black group responds, “but what are you going to do about all those poker chips that have stacked up on your side of the table all these years.” “We’re going to give them to current and future members of our

so-called benign classification was struck down in the Title VII context. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (striking down a fetal protection policy that affected only women as a violation of Title VII). The fetal protection policy at issue in *Johnson Controls* “protected” women who could not prove they were infertile from higher paying jobs that exposed them to higher levels of lead, on the ground that the exposure ran the risk of injury to fetuses the women might be carrying. The policy did not allow men to opt out of those jobs despite the link between male exposure to lead and health risks to fetuses fathered. The ban on women serving in ground combat positions in the military seems to present a similar kind of “benefit.” Women are protected from some kinds of casualties, but their ability to advance within the military is limited. Of course, if the reason for the ban is not the danger to the women themselves, but instead the danger that male troops would face because they would risk more to be chivalrous to protect their sisters-in-arms, then maybe the policy would not be considered a “benign” classification.

⁴⁷ *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring) (suggesting that a prohibition of disparate impact, or discrimination in outcome, by private parties may violate the Fifth Amendment by requiring private parties to discriminate by taking race into account); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (plurality opinion) (striking down the use of race to assign grade school students to schools and noting that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).

⁴⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977) (holding that only intentional discrimination violates the Equal Protection Clause but that such intent can be shown by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decision-makers); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that disparate impact discrimination is not cognizable under the Fourteenth Amendment). *But cf.* *Gomillion v. Lightfoot*, 364 U.S. 339, 340–41 (1960) (considering redistricting that changed the boundaries of a district “from a square to an uncouth twenty-eight-sided figure” that excluded all but four or five of the 400 black voters and no white voter as evidence of race-based intent); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a neutral ordinance applied to put only Chinese laundry owners out of business demonstrated intent to discriminate on the basis of race).

group,” the white group replies. “So, whites will continue to benefit from past cheating; that’s not fair,” the black group insists.⁴⁹

As this allegory might suggest, this approach to equality views social goods as fixed resources, and race, sex, and each other status as a closed system. In a closed system with scarce resources, every context is zero-sum. To give to one is to take away from another. Privilege, in the sense of a head start or relative advantage, is invisible, and the distribution of resources and social goods appears natural, at least to those who have more.⁵⁰ Not only are real redistributions seen as punitive, but even moderate changes in the mechanisms of distribution are seen as impinging on “rights” that members of the dominant group have to a continued disproportionate share.⁵¹

Not all distributions of social goods like jobs are so explicitly motivated by race or sex. Much of the distribution to future members of the same group comes through the process of homosocial reproduction. Organizational studies demonstrate that leaders or gatekeepers in a variety of situations are likely to prefer subordinates who are socially similar to themselves.⁵² This preference is a way that people hedge against uncertainty in predicting good job performance or even in pinning down what it is that marks good job performance.⁵³ These gatekeepers may or may not realize at a fully conscious level that they are taking race, sex, or other protected characteristics into account; they are simply choosing people who live in the “right” parts of town, belong to the “right” organizations, went to the “right” schools, and do the “right” things in

⁴⁹ ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 3 (3d ed. 2005).

⁵⁰ People tend to attribute their successes to themselves, believing that they achieved what they did through their own efforts. See Thomas Shelley Duval & Paul J. Silvia, *Self-Awareness, Probability of Improvement, and the Self-Serving Bias*, 82 J. PERSONALITY & SOC. PSYCHOL. 49, 49 (2002); Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, 82 PSYCHOL. BULL. 213, 213 (1975).

⁵¹ See Caron & Repetti, *supra* note 24, at 156–58 (documenting the way that rhetoric has been used in the estate tax debate to gather support against explicitly redistributive policies); Ronald Turner, *On Palatable, Palliative, and Paralytic Affirmative Action, Grutter-Style*, in LAW, CULTURE & AFRICANA STUDIES 103, 107–08 (James L. Conyers, Jr. ed., 2008) (discussing the role that rhetoric about harm to white “innocents” serves in galvanizing opposition to affirmative action). Individuals seem to generally favor equality of distributions in the abstract, when not applied to themselves, but even when distributional changes are applied to others whom the test subjects believe have greater ability or put in greater effort, at least white men, and to a lesser extent, white women, value efficiency over equality. Philip A. Michelbach et al., *Doing Rawls Justice: An Experimental Study of Income Distribution Norms*, 47 AM. J. POL. SCI. 523, 527–31 (2003).

⁵² ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 47–48, 54, 68 (1993).

⁵³ *Id.* at 54, 61–63.

their free time.⁵⁴ Those people also tend to share the same race, sex, or other protected status with the gatekeepers.⁵⁵

Distribution of tangible goods and wealth is not always carried out through what we would ordinarily think about as discrimination. Much wealth, at least, is built intergenerationally, and it is this fact that has led to a huge racial wealth gap.⁵⁶ People tend to transfer whatever wealth they have to their descendants, and those descendants are usually of the same race because of patterns of reproduction and marriage. Another source of wealth is homeownership, and because of racial segregation in housing, plus the racially disparate effects of the recent housing crisis, black and Latino households have lost much of the wealth they might have had even a couple of years ago.⁵⁷

The story is a little different for women. Although women can inherit wealth to exactly the same extent as male heirs and are currently outperforming men in educational achievement and thus have access to wealth-building tools,⁵⁸ women own less than forty percent of what men own, in part because of the way work and family care are structured, and in part because of what happens to women who never marry men or who are no longer married to men.⁵⁹

Because it is difficult to link racially and sexually disparate effects to some conscious decision to classify people on the basis of race or sex, formal equality cannot do much to address them. Complicating this fact is that even where there might be a decision in the background that someone could point to, proving discrimination is a real challenge.

B. Narrowness of the Prohibition in an At-Will Background

As the foregoing discussion suggests, in terms of achieving social transformation, formal equality is of very limited utility. Even apart from social transformation, however, vindicating the interests of workers in any level of job security or fair treatment at work on an individual level indicates that prohibiting only a narrow class of decisions is also of extremely limited utility.

When a person is injured by something that happened at work, if the person lacks a collective bargaining agreement (which most of us lack),

⁵⁴ See *id.* at 61–62.

⁵⁵ See *id.* at 68; Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1584 (2004) (considering “homosocial reproduction” in corporate boards).

⁵⁶ Currently, the median wealth of white households is 20 times that of black households and 18 times that of Hispanic households. KOCHHAR ET AL., *supra* note 27, at 1.

⁵⁷ *Id.* at 1–2, 4.

⁵⁸ CHANG, *supra* note 27, at 2.

⁵⁹ *Id.* at 2, 8–10.

that person has only a few statutory avenues for relief.⁶⁰ In order to pursue that relief, a person has to fit his or her story into what one of those statutes prohibits.⁶¹ For the employment discrimination statutes, that means first choosing one of the identities protected by Title VII and categorizing oneself in that manner. That choice may not be problematic for some people, but it may be for others. Requiring a person to adopt a racial label—or reducing a person to that label, for example—may impose something that person resists, or may be something that does not describe that person’s identity well.

Additionally, the person has to fit what happened to him or her into the relatively narrow box of what discrimination because of this status is supposed to look like. Even if the person believes that his or her protected status was the cause of the employer’s action, an outsider viewing that situation might be skeptical, especially if the action itself would not be a violation of any laws—and it is only the alleged motive that makes it so.⁶²

The combination of the need to label oneself in a particular way and to shoehorn the story into a narrow narrative is likely to translate into a significant number of particularly weak-looking charges at the EEOC and at least some weak-looking cases filed in court. And the presence of those weak-looking cases may taint the stronger cases, either by diluting the pool as a whole or by confirming the suspicion that many complaints of discrimination are frivolous.

C. Intent and Problems of Proof and of Implicit Bias as the Mechanism for Discrimination

The prohibition on discrimination is narrow in another way. For practical purposes, the only forms of discrimination that are truly recognized by courts are intentional discrimination and disparate treatment. Although Title VII also prohibits disparate impact, its utility seems to be fading, and judges seem to be very reluctant to enforce that prohibition.⁶³ Therefore, discriminatory intent is the single thing that creates liability. But proving intent—what was actually inside a person’s head when that person made the decision at issue—can be very difficult,

⁶⁰ See Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 68–70 (2008); Joseph E. Slater, *The “American Rule” that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL’Y J. 53, 55 (2007).

⁶¹ See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 77–80 (2007) (discussing the narrowness of the protection against discrimination on the basis of race).

⁶² *Id.* at 79–82.

⁶³ *E.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672–73, 2675–76 (2009) (concluding that the doctrine was judicially created, but not really a part of Title VII, and that it was adopted much later by Congress only as a secondary goal); *see also, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548, 2554 (2011) (failing to reach the plaintiff class’s claims that subjective decision-making and a sexist corporate culture created a disparate impact on women).

especially when *any* reason other than the person's protected status means that no liability results.⁶⁴

Intent is problematic not just because of problems of proof, though. The very meaning of intent—or when a person's protected status causes the decision-maker to take a particular action—is a bit unsettled.⁶⁵ Discrimination is often not a fully self-aware consideration of protected status that a person has chosen to make; rather, our decision-making is heavily influenced by processes that occur outside of our normal self-awareness, but which bias our actions in predictable and systematic ways.⁶⁶

Cognitive psychological research demonstrates that our beliefs and experiences filter our perception in fundamental ways, and the way that we then perceive matters reinforces our beliefs recursively.⁶⁷ According to these studies, humans naturally classify things in the world in order to function. The things in our world are infinitely varied, and we simply cannot fully process the impact of each variation we encounter.⁶⁸ So we generalize about things—objects and people alike—based on a few encounters with them. We then use those generalizations to define categories, and in the future, quickly sort what we encounter into those categories without reflection.⁶⁹ We use the definitions of our categories to define the thing we have encountered and to predict how that thing is likely to act or be acted upon.⁷⁰ This sorting function facilitates quick judgments, makes the world seem more predictable, and allows us to act.

Although this process is important to our ability to function, relying on categories—essentially creating group identities—has far-reaching consequences. When we have assigned an object to a group, we then

⁶⁴ See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508–09 (1993) (holding that plaintiffs needed to prove that their protected class status was the reason for the adverse employment action challenged, and that proving the asserted reason to be a pretext was not necessarily enough).

⁶⁵ See Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Legal Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 645, 683 (2011); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 913–25 (2005) (discussing the debates over what “discriminate” means).

⁶⁶ Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

⁶⁷ See *id.* at 1202; Eleanor Rosch, *Human Categorization*, in 1 STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 1–2 (Neil Warren ed., 1977) [hereinafter Rosch, *Human Categorization*]; Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27, 27–28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) [hereinafter Rosch, *Principles*].

⁶⁸ See Rosch, *Human Categorization*, *supra* note 67, at 1–2.

⁶⁹ *Id.* (“Since no organism can cope with infinite diversity, one of the most basic functions of all organisms is the cutting up of the environment into classifications by which non-identical stimuli can be treated as equivalent.”); Rosch, *Principles*, *supra* note 67, at 27–28.

⁷⁰ Krieger, *supra* note 66, at 1188–89.

perceive it as more like other things within that group and less like things outside of that group.⁷¹ This process gets personalized when *people* are given group identities. Even when the distinction is arbitrary, as with people randomly assigned to teams, people view members of their own group (the “in-group”) as more like them, and others (the “out-group”) as more different from them than they would if group identity had not been assigned.⁷² We do not only assign other people to groups or get assigned randomly; we also willingly identify ourselves with groups. That process has similar important consequences: people who choose to identify as part of an in-group are far less likely to identify differences between members of the out-group.⁷³

Groups or categories are created by the “salience” of characteristics.⁷⁴ Once a characteristic, such as gender or race, becomes salient, or noticeable, to a person, that characteristic defines a group. But what becomes salient is neither inevitable nor natural. Individuals define what

⁷¹ *Id.* at 1186 (describing two studies and citing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101, 104 (1963) (finding that, when lines were grouped, participants judged the comparative length of those lines as more similar when they compared lines within the same group and more different from each other when they compared a line to one in the other group than the same people did when they compared the length of lines not assigned to any group); Henri Tajfel, *Cognitive Aspects of Prejudice*, J. SOC. ISSUES, Autumn 1969, at 79, 83–86 (describing the same experiment in more detail); Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 J. ABNORMAL & SOC. PSYCHOL. 350, 355 (1956) (finding that when nonsense syllables were linked to a spot on a spatial continuum, participants tended to judge nonsense syllables linked to another spot as more different than those that were not)).

⁷² Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 160, 164–65 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Anne Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); see also David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

⁷³ David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 131 (John F. Dovidio & Samuel L. Gaertner eds., 1986). Numerous studies that support this assertion are summarized in Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup—Outgroup Perception*, in PREJUDICE, DISCRIMINATION, AND RACISM 165, 168–73 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (commenting on studies that included things like asking members of student groups to rate the similarity of members of their own and other groups, asking members of student groups to assess the traits of members of their own and different groups even when the students were given identical information about the individual people they were being asked about, asking people to assess how likely someone in their group would be to fit a stereotype and how likely someone outside of their group would, and asking people with a particular opinion to rate the similarity of people with the same or a different opinion).

⁷⁴ See Krieger, *supra* note 66, at 1190 (describing how categorical structures are triggered).

is salient in any given context, often choosing what their culture defines as salient.⁷⁵ In other words, our choices may be constrained or structured by the broader society we are a part of, but they are still choices. Because choices about salience are within our control, we can control how our brains categorize people into groups.⁷⁶ The operation of choice makes the effects of these cognitive shortcuts appropriate for regulation.⁷⁷

One such effect is the tendency to stereotype—essentially, to create a cognitive shortcut that links personal traits with a salient characteristic in order “to simplify the task of perceiving, processing, and retaining information about people.”⁷⁸ Once set, these cognitive shortcuts “bias[] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people,” and they influence judgment continuously.⁷⁹

These cognitive shortcuts create expectations that transform the way we perceive others, remember things about others, and interpret

⁷⁵ That is not to say that in every instance individuals make a conscious choice about which characteristics matter. Conscious adoption is possible, but individuals also absorb information about what characteristics matter to others (and therefore should matter to them) from exposure to the culture they live in. See HOWARD J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 35 (1973); Richard E. Nisbett et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 *PSYCHOL. REV.* 291, 291 (2001).

⁷⁶ Even though some categories become salient because we absorb them, see *supra* note 75 and accompanying text, the lack of fully self-aware adoption does not mean that salience and categorizations are outside of our control. They do not function entirely automatically and can be confronted and changed by conscious effort. See Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 *PERSONALITY & SOC. PSYCHOL. REV.* 242, 242–47, 255–56 (2002); Ann C. McGinley, ¡Viva la Evolución!: *Recognizing Unconscious Motive in Title VII*, 9 *CORNELL J.L. & PUB. POL'Y* 415, 430–32 (2000); see also JACK MEZIROW, *TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING* 186–88 (1991); Jack Mezirow, *Transformation Theory of Adult Learning*, in *IN DEFENSE OF THE LIFEWORLD: CRITICAL PERSPECTIVES ON ADULT LEARNING* 39, 39 (Michael R. Welton ed., 1995).

⁷⁷ See Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 *EMP. RTS. & EMP. POL'Y J.* 459, 464 (2003) (analogizing liability for discrimination caused by cognitive bias to the law related to dangerous conditions on land); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 *IND. L.J.* 1233, 1241, 1248 (1999). But see Amy L. Wax, *Discrimination as Accident*, 74 *IND. L.J.* 1129, 1226, 1228 (1999) (arguing that there should be no remedy for the kind of discrimination that is caused by implicit bias).

⁷⁸ Krieger, *supra* note 66, at 1187–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 *CONTEMP. SOC.* 319, 320–22 (2000). While this description of how stereotypes are functioning may sound very benign, stereotypes in a society with power imbalances such as ours have operated to perpetuate and even aggravate those power imbalances.

⁷⁹ Krieger, *supra* note 66, at 1188. Just as for salience, which defines groupness in the first place, we decide what behaviors to attribute to particular groups either consciously or through exposure to culture. David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, in 12 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 53, 64 (Leonard Berkowitz ed., 1979).

motivations for the actions of others.⁸⁰ Memory is particularly tricky. We tend to remember a person's actions only if those actions fit our stereotypes of that person, we tend to "remember" actions that fit our stereotypes even if the person never engaged in those actions, and we tend to forget actions that did not fit our stereotypes.⁸¹ Additionally, we tend to assume that a person who acts consistently with a stereotype acted because of innate characteristics—that this person will usually act this way because he or she is this type of person—but a person who acts inconsistently with a stereotype acted because of transitional or situational factors—that this person does not usually act this way because he or she is not this type of person.⁸² For example, if we believe that male professionals tend not to have family responsibilities, then we are likely to believe that a man who steps out of the office at 2:30 in the afternoon must be going to a meeting and not picking up his children from school even if he is, in fact, picking his children up from school.⁸³

And so discrimination occurs through an ongoing process of interaction that often happens outside of our normal self-awareness, but the impact of these cognitive biases does not stop there. The judgments we make about situations that we observe but are not a part of are colored in the same way through the same process. Consequently, those who interpret and enforce the law are prone to the same kinds of biases about people and situations that we all are. To the extent that those who interpret and enforce the law tend to belong to majority groups and to the extent that some stereotypes of women and people of color are pervasive in our culture, they will tend to interpret the claims of women and people of color as not constituting any sort of discrimination. Thus, decision-makers bring into the decision-making process their own worldviews about what discrimination is, what people who claim they have been discriminated against are like, and what members of particular races, sexes, religions, and national origins are like. These worldviews influence the way that decision-makers interact with people and how they view the interactions of others.

⁸⁰ See Krieger, *supra* note 66, at 1200–09.

⁸¹ *Id.* at 1207–09 (summarizing research on stereotypes and memory); see also Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41–45 (1977).

⁸² Krieger, *supra* note 66, at 1204–07. For example, because women with children are presumed to innately make their children, rather than their jobs, their first priority, when a woman with children is late to work, her boss is likely to assume that her innate characteristic of prioritizing childcare responsibilities was the cause. On the other hand, because men are presumed to put work first, a man late for work may be assumed to have been caught in traffic, a transitional cause. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 433–34 (2003).

⁸³ This example was given over lunch during Lewis & Clark Law School's 16th Annual Business Law Fall Forum by one of the attendees who related that her husband, who was in a top leadership position at his company, nonetheless was relieved at the assumption of his coworkers.

D. Each Class Is Viewed as Discrete and Insular—The Problems of Intersectionality

The prohibition on discrimination because of protected class status is narrow in yet another way. Each status in Title VII is viewed as if it were truly separate and capable of scientific identification, and as if people only have one. This is not accurate. First, no status is bounded by bright lines or as capable of scientific identification as we might think. It is surprisingly difficult to identify what “race” or even “sex” mean. There are debates about whether “sex” encompasses only the biological differences that are true for all or nearly all women, or also differences in behavior that are believed to be linked to sex.⁸⁴ The debate over balancing work and family is a great example of this. While women are overwhelmingly more likely than men to be responsible within the family for caregiving even when they are also wage-earners outside the home, penalizing employees because they provide care is not considered sex discrimination.⁸⁵ Another classic example is present in grooming codes that regulate behavior along gender lines: having sex-specific rules for appearance is generally not considered to be discrimination, even when employers classify men and women and prescribe different rules for each.⁸⁶ Finally, there are also debates about whether sexual identity or sexual orientation are a part of what sex is or whether they are something separable from sex.⁸⁷ Race is even more clearly socially constructed, despite the fact that many people believe that there are biological differences among races.⁸⁸

⁸⁴ Compare LOUANN BRIZENDINE, *THE FEMALE BRAIN* (2006) (arguing that women and men have different behavior linked to neurological differences), with CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* (2010) (pointing out the weaknesses in research linking behavior to neurological differences and arguing that researchers’ biases make them construct findings to support those differences), and REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* (2010) (same).

⁸⁵ See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1–2, 14–15 (2000); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

⁸⁶ See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004) (upholding a requirement that women wear “full” makeup and men not wear any as not discriminatory even though men and women were required to do different things).

⁸⁷ See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761–65 (6th Cir. 2006); I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991).

⁸⁸ See Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. Rev. 1455, 1459–60 (2002); John Levi Martin & King-To Yeung, *The Use of the Conceptual Category of Race in American Sociology, 1937–99*, 18 SOC. F. 521, 521–22 (2003); see generally ANN MORNING, *THE NATURE OF RACE: HOW SCIENTISTS THINK AND TEACH ABOUT HUMAN DIFFERENCE* (2011) (exploring different conceptions of race held by scientists and students); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-

Moreover, just as motives that mix protected-status and unprotected-status reasons may create problems with proving causation,⁸⁹ so do motives that focus on one subgroup of a protected class. If only one subgroup is affected by an employer's decision, there may be no discrimination against a member of that subgroup on the basis of the larger status. Pregnancy is a classic example of this problem. Even though all pregnant individuals are women,⁹⁰ the class of people who are not pregnant is comprised of both men and women. It was this lack of perfect symmetry between the classes that led the Supreme Court to hold that discrimination on the basis of pregnancy was not sex discrimination.⁹¹

Another problem similar to the multiple motives problem occurs because every one of us has multiple identities: we each have a race, a sex, a religion (or lack of religion), a national origin, and a color. Focusing on only one aspect of a person's multiple identities tends to obscure how those multiple identities acting together may have led to what happened to them. Intersecting identities, though present in every case, can become problematic for those for whom more than one identity is actually visible, as when more than one identity is non-majority and implicated in the case. For example, if a black woman is fired because of stereotypes of black women, she may be found not to have suffered any discrimination at all if those stereotypes differ from stereotypes of white women or of black men. In such a situation, a decision-maker would be likely to find that the woman was not discriminated against because of her race, because other members of her race (black men) did not suffer from application of the same stereotype. That decision-maker would also likely find that she was not discriminated against because of her sex, because other members of her sex (white women) did not suffer from application of the same stereotype.⁹²

C.L. L. REV. 1 (1994) (considering and rejecting a biological and hereditary conception of race).

⁸⁹ See Sullivan, *supra* note 65, at 937 & n.108.

⁹⁰ More accurately, only people with at least a functioning uterus, whether they identify as male or female, can currently become pregnant. At least three transgendered men have borne children. Patrick Califia-Rice, *Family Values: Two Dads with a Difference—Neither of Us Was Born Male*, VILLAGE VOICE (June 20, 2000), <http://www.villagevoice.com/2000-06-20/news/family-values> (describing how he and his partner Matt Rice had their son); Neil Nagraj, *Meet the World's Second 'Pregnant Man'*, N.Y. DAILY NEWS (Jan. 26, 2010), http://articles.nydailynews.com/2010-01-26/news/17943275_1_pregnant-man-paper-reports-scott-moore (describing the pregnancy of Scott Moore); Guy Trebay, *He's Pregnant. You're Speechless.*, N.Y. TIMES, June 22, 2008, § 9 (Sunday Styles), at 1 (discussing the pregnancy of Thomas Beatie).

⁹¹ Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)) (holding that discrimination on the basis of pregnancy was not discrimination on the basis of sex under Title VII even though only women were affected); Geduldig v. Aiello, 417 U.S. 484, 494–96 (1974) (holding that pregnancy and sex were analytically distinct under the Equal Protection Clause).

⁹² See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,

These problems with the protected class approach to employment discrimination seem intractable. We have been using this approach for the better part of the last 50 or 60 years, and while our society has made significant gains, we seem not to have moved significantly forward for the last 20 or 30 years. It is time to consider something new.

IV. SOCIAL POLICIES AND PROGRAMS THAT CAN BE DECOUPLED FROM THE EMPLOYMENT RELATIONSHIP

At the most fundamental level, physical security for individuals is provided mostly by work.⁹³ At one time, many people grew or raised their own food and traded for the things they could not produce. With the Industrial Revolution, that changed, and people began working for wages in increasing numbers. Over time, the percentage of the population in the workforce has continued to rise, and the primary source of support for most households in the United States is the work of one or more members of those households.⁹⁴

Today about 64% of those eligible to work in the United States do work.⁹⁵ That figure is the lowest that it has been in a decade, largely due to the recent recession.⁹⁶ And despite this, many of those working have great difficulty purchasing the things necessary for physical security like food and shelter.⁹⁷ Even more are able to provide those things, but have

1989 U. CHI. LEGAL F. 139, 150. For more on how a focus on women's rights has disproportionately benefitted upper and middle class white women, see for example, ESTELLE B. FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* ch. 4 (2002), Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 251, 253 (Toni Morrison ed., 1992), and Julianne Malveaux, *Comparable Worth and Its Impact on Black Women*, *REV. BLACK POL. ECON.*, Dec. 1985, at 47, 48 (1985).

⁹³ Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523, 532 (1997).

⁹⁴ See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR*, at xiv-xvii (1995) (describing the shift to wage dependence); Karst, *supra* note 93, at 532.

⁹⁵ *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/LNS11300000> (data extracted Sept. 15, 2011, 4:32 PM) (showing labor force statistics from the Current Population Survey from 2001 to 2011).

⁹⁶ *Id.* Interestingly, although the recession ended in 2009, with the participation rate a full percentage point lower than at the beginning of the recession, participation fell just over another full percentage point from January 2010 until mid-year, 2011.

⁹⁷ "In 2009 . . . about 43.6 million people, or 14.3 percent of the Nation's population, lived at or below the official poverty level," and 10.4 million of those worked. U.S. BUREAU OF LABOR STATISTICS, *REPORT 1027, A PROFILE OF THE WORKING POOR*, 2009, at 1 (2011), available at <http://www.bls.gov/cps/cpswp2009.pdf>; see generally DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004) (documenting the lives of those who live at or close to the poverty line despite working).

so little saved that any disruption in work or unforeseen expense can be catastrophic.⁹⁸

Work is the primary way in which we ensure people have food, shelter, and clothing, but much of our safety net comes from programs that provide wage insurance or savings to substitute for wages. These programs include unemployment insurance, most obviously, but also disability insurance, workers' compensation, social security, and pensions and other retirement savings. The only social benefit that is not as clearly linked to wage insurance is health insurance.

The social policies that can most easily be separated from the employment relationship are the ones that already are, at least in part: health care and old-age or work-related long-term disability support. The policies that would be more difficult to separate are the subsistence kinds of benefits. While philosophers and economists have proposed a basic income for everyone, that idea has not taken root in the United States.⁹⁹

As explained before, health care was linked to the employment relationship in the first place, at least in part, because doing so was a way to provide compensation to employees otherwise barred by the price controls that limited wages during World War II. Those benefits became popular and were demanded by organized labor. Then, to compete for workers, even workplaces that were not organized began to offer health benefits.¹⁰⁰

There was additional logic to the link as well. By and large, we distribute health care in this country by having individuals purchase services from doctors and hospitals. We then secure the ability of people to purchase those services by having them buy insurance.¹⁰¹ Health insurance spreads the costs of purchasing health care among a group of people with the idea that most of them at any given time will not need to draw on the funds.¹⁰² Thus, to work well, the pool of those paying in and bearing the risk has to have a low overall risk of needing to draw on the funds. So the pool has to be big enough and diverse enough to

⁹⁸ In the first quarter of 2011, 28% of consumers in North America reported that they had no discretionary income. NIELSEN, GLOBAL ONLINE CONSUMER CONFIDENCE, CONCERNS AND SPENDING INTENTIONS 7 (2011). A few years ago, the Nielsen Consumer Confidence Survey found that only about 63% of consumers had little or no savings or investments. See NIELSEN, CONSUMER CONFIDENCE, CONCERNS AND SPENDING INTENTIONS 5 (2008), available at <http://pl.nielsen.com/trends/documents/GlobalReportConsumerConfidence2ndhalf07b.pdf>.

⁹⁹ See GIJS VAN DONSELAAR, THE RIGHT TO EXPLOIT: PARASITISM, SCARCITY, BASIC INCOME 102–03 (2009); PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM?, at 1–2 (1995); DANIEL RAVENTÓS, BASIC INCOME: THE MATERIAL CONDITIONS OF FREEDOM 8 (Julie Wark trans., 2007).

¹⁰⁰ See *supra* notes 18–21 and accompanying text.

¹⁰¹ See M. Kate Bundorf & Mark V. Pauly, *United States*, in THE WORLD BANK, GLOBAL MARKETPLACE FOR PRIVATE HEALTH INSURANCE: STRENGTH IN NUMBERS 253 (Alexander S. Preker et al. eds., 2010).

¹⁰² *Id.* at 253, 259.

accomplish this. The employees of large employers formed relatively good risk pools because they tended to be big enough and diverse enough to spread the risk—or spread the cost—well. So providing insurance through employment made sense from an insurance perspective as well.¹⁰³

The link between old-age support and employment has a similar history. Pensions were a way to provide compensation not otherwise possible; they were popular, demanded by unions, and were then demanded more broadly.¹⁰⁴ They provided a means of support when a person was no longer able to work because of infirmity associated with aging. Pensions also had another function for employers, though. They provided longevity and loyalty to the employer and were something of a reward for a lifetime of service. The availability of pensions reduced turnover, but also encouraged older workers to leave the workplace, making room to bring in younger workers. The timing of those exits became more predictable and thus more manageable.¹⁰⁵

Support for those who could once support themselves through work but become unable to do so because of injury or disease is a bit more complicated. Social Security was expanded in the 1950s to include insurance for those who became disabled.¹⁰⁶ Many employers provide private insurance benefits as well, but not on as wide a scale as health benefits.¹⁰⁷

Although there has been logic in the connection, there is no necessary link between work and health care or work and old-age support. More closely connected with work are those programs that were designed to deal with income insecurity because of disruptions in work: workers' compensation and unemployment insurance benefits, for example.

V. CONCLUSION: ON DECOUPLING

The point of this Article is not to argue for some sort of socialist or Marxist utopian collective—from each according to his ability to each according to his need—but to simply argue that we should stop using the employment relationship to shoulder so much of the social justice burden. From the employee's perspective, it is easy to see why getting a job and keeping that job is so important. The job is the key to some minimal level of physical and financial security. It is the pathway to health care and to old-age or disability benefits.

¹⁰³ See Hyman & Hall, *supra* note 6, at 31.

¹⁰⁴ See JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 7 (2004).

¹⁰⁵ *Id.* at 3–10.

¹⁰⁶ See Edward D. Berkowitz & Wendy Wolff, *Disability Insurance and the Limits of American History*, PUB. HISTORIAN, Spring 1986, at 65, 68.

¹⁰⁷ See *Life and Disability Insurance Benefits*, *supra* note 7, at 1–2.

Especially in labor markets with a large supply of labor, employees have powerful motives to make sure that they do not give employers a reason not to hire them or to discharge them once they are hired. Employees subject to discrimination may not be able to afford to exercise the one right they have under the at-will rule: to leave. And it is the power of employees to leave a discriminatory environment that may give employers an incentive to curb that discriminatory behavior. Several scholars have argued that to the extent that discrimination is irrational, the market should correct discrimination by itself.¹⁰⁸ If there is any hope of the markets working this way, employees have to be able to exercise the one power they have: the power to quit.

Employees lack the practical power to quit because of the economic dependence they have on an employer and the vulnerability they face as a result of potential retaliation by their employer or potential future employers if they allege that they have experienced discrimination.¹⁰⁹ This threat of retaliation affects the functioning of any market correction for discrimination by suppressing accurate information about employers, as well.

There are informational asymmetries on both sides of the employment relationship. The prospective employee may not have access to sufficient information on how an employer treats employees. Likewise, employers may not have access to sufficient information on how well a particular person will perform a job or fit into the workplace. These asymmetries have different effects, but both are important. On the employee side, the asymmetry prevents the market from eradicating discrimination. If employees cannot talk about conditions at work, or cannot talk about why they left, employees that take their places will not know what the workplace is actually like. If they had access to this information, new employees might decline to work for the employer, shrinking the available labor pool, or they might demand higher wages to put up with the environment—either one of which would drive up costs to the employer. And as long as employees cannot talk about conditions at work out of fear of retaliation, the asymmetries on the employee side will remain.

The informational asymmetries that the employer experiences interfere with the eradication of discrimination in a very different way. Informational asymmetries create an environment of risk in hiring and in dealing with employees. That risk is heightened by the administrative and financial burden that comes with employing someone. Risk exacerbates

¹⁰⁸ Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 696–714 (2007) (outlining the law and economics analyses of the extent of employment discrimination and the potential forces driving it).

¹⁰⁹ See Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 211–12 (2009) (summarizing arguments about employee vulnerability to retaliation).

the likelihood that decisions will be influenced by implicit biases.¹¹⁰ Without some way to give employers an incentive to examine their implicit biases, the employment relationship is likely to remain mired in their operation. If there were less at stake in the employment relationship, however, perhaps implicit biases would be less likely to operate. Moreover, with less at stake in the employment relationship, less would be at stake in any threatened litigation arising out of the employment relationship. Perhaps that, too, would make it less risky for managers to examine their thought processes to avoid implicit biases.

Giving people a real voice is not only important to make real their ability to exit the employment relationship; it is also a good in its own right. People want to be heard. Those who feel wronged want a voice, to tell their story in such a way that someone has to listen. Story-telling may be part of the process of getting past the injury, of moving on. Or it may be a way of warning others who might come after about dangers they may face. Putting words to the pain may help contain it, to separate the pain or the injury from oneself, as a first step to letting it go. Telling that story and having it validated externally are thus important for the employees who feel aggrieved.

Getting the story out is also important for the rest of us. We have an interest in knowing what happens behind the closed doors of many workplaces. We have interests as consumers or potential business partners in knowing what kinds of conduct we are supporting through our support or partnership. We have an interest as potential employees, too, in knowing what kind of environment we would be signing up for. And at the broadest social level, we have an interest in learning what conduct employers are engaging in and what makes workers feel they have been injured in order to know how to regulate that employment relationship.

Thus, the ability of workers to tell their stories is important for them and important for us. The potential for the story to be told is also important for employers. For companies with more than a few employees and multiple layers of supervision, it is easy for the owner or top level of management not to know what conduct lower-level supervisors and employees might be engaging in. This interferes with production of the product or delivery of the service the employer provides. Moreover, if a supervisor or lower-level employee knows that other people will find out what happened, that person will think twice about engaging in bad conduct in the first place. Sunshine is the best disinfectant, as they say.

Yet telling a story with a villain and a victim, which is what a story about an injury often is, is dangerous to the victim in two ways. First, making that story public invites retaliation by the villain or allies of that villain, who likely have an interest in the story being kept secret. Second,

¹¹⁰ See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973–75 (2006) (describing how people make hard decisions through the use of easier heuristics).

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portraying oneself as a victim, at least of some kinds of injuries, can cause those not allied with the villain to punish the victim. For example, people who claim they have been discriminated against are viewed negatively by others even when those other people know that the claim is true and that the person was actually discriminated against.

By removing pieces of our social safety net from the employment relationship, we would make it easier for employees to leave, easier for them to tell their stories, and would make them less likely to litigate what happened to them. We also might make it easier for employers to take risks in hiring or retaining employees they have concerns about, and create less of a disincentive for managers to explore their thought processes more closely. In the end, that is good for all of us.