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LETTER FROM THE EDITOR

Dear Reader,

Civil liberties observers witnessed worldwide upheaval in 2011. Information leaks triggered criminal enforcement efforts at home; the information leaked ignited revolutions abroad. When protests reached our country in the form of Occupy Wall Street, our members wrote about the movement—its underpinnings, successes, challenges, and legal implications—in a series of posts available at our legal blog, tjclcr.blogspot.com. We discuss other topics at the blog, and invite you to join our dialogue. For other information, or to donate, visit our main website, txjclcr.org.

Our articles were selected for their usefulness both to practitioners and to legal academics. This issue begins with a comment by Marc Maurer about the meaning of the Fourteenth Amendment Equal Protection Clause as applied to persons with disabilities.

The first article, by Ella Callow, Kelly Buckland, and Shannon Jones, addresses an overlooked problem: some parents with disabilities lose custody of children based on their disabilities, not on the needs of the children. The article assembles lessons from advocacy efforts in several states and makes specific recommendations for model legislation, including provision-by-provision analysis. The article will be useful for anyone interested in the components of successful legislative strategies.

The second article, by James Concannon, concludes that mixed-motive retaliation claims in employment law are not viable after the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.* For employment plaintiffs, the article reaches a darker conclusion than Andrew Kenny's recent article, *The Meaning of 'Because' in Employment Discrimination Law: Causation in Title VII Retaliation Cases after* Gross, published in the University of Chicago Law Review.

The first note, by Justin Bernstein, uses game theory to develop a new public process for eminent domain takings. The process solves inefficiencies in takings policy, along with traditional holdout problems.

The second note, by Kristin Housh, critiques the presumption that men and women are drawn "by nature" to different employment opportunities. She shows that this view is biologically dubious.

Thank you for reading,

Michael Garemko
Editor-in-Chief

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Manuscript Submissions: The Editorial Board and The University of Texas are not in any way responsible for the views expressed by the contributors. We welcome the unsolicited submission of articles from scholars, practitioners, businesspeople, government officials, judges, and students on topics relating to recent developments in civil liberties and civil rights law.

The Journal adheres to the following deadlines for submissions. All submissions for the Fall 2012 issue are due by April 30, 2012. All submissions for the Spring 2013 issue are due by October 31, 2012. Regardless of deadlines, submissions will be accepted and considered. The Selection Committee seeks to provide authors with timely responses; however, the Committee will sometimes hold articles for consideration in a future publication unless the Journal is notified of a withdrawal. Please send submissions, accompanied by a curriculum vitae and a cover letter, to the Journal via ExpressO or by e-mail to tjclcr@law.utexas.edu.

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COMMENT

ARTICLES

NOTES

Comment

Creating Disability Rights: The Challenge for Disabled Americans*

Jacobus tenBroek Disability Law Symposium

Marc Maurer**

Although the Fourteenth Amendment to the Constitution of the United States declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[1] and although Section Five of the amendment declares that Congress has the power to enforce it by "appropriate legislation," what equality before the law means has been the subject of debate from the time of the beginning of our nation, and it remains a matter for interpretation by the courts. In considering equality before the law for disabled individuals, it is worth pondering whether the courts have been a help or a hindrance. If they have not been a help, it is worth considering what steps are required to change the judicial point of view.

In 1973, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, became law. This section declared at the time of enactment that no otherwise qualified handicapped individual could be denied the benefits of or participation in any program or activity receiving federal financial

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* A version of this piece originally appeared in the Braille Monitor. *See* Marc Maurer, *Creating Disability Rights: The Challenge for Blind Americans*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), January 2012, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm12/bm1201/bm120103.htm.

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[1] U.S. CONST. amend. XIV, § 1.

assistance. In 1985, the Supreme Court decided that this section of the rehabilitation act did not authorize individuals to recover damages against state institutions because claims for such damages were barred by the Eleventh Amendment.[2] Although the decision of the Supreme Court was later changed by congressional action in 1986, Justice Powell had declared that a state would be liable for damages only if it had waived sovereign immunity or Congress had authorized suits for damages pursuant to its power under the Fourteenth Amendment.[3] When the Americans with Disabilities Act (ADA) was enacted in 1990, Congress specifically included a reference to its enforcement power under the Fourteenth Amendment, "to invoke the sweep of congressional authority."[4] This should have ensured the broadest interpretation of enforceability for the act. However, in 2001 Chief Justice Rehnquist, writing for the Supreme Court, said that the Eleventh Amendment bars recovery of damages against states under the ADA because Congress had made an insufficient finding of a pattern of discrimination by the states against the disabled to invoke constitutional authority for abrogating sovereign immunity.[5]

In the history of the treatment of blind Americans, many states have adopted laws prohibiting blind Americans from serving on juries.[6] Federal law permits the disabled to be paid less than the minimum wage today.[7] In the interpretation of social welfare legislation, some states have required blind people to undergo sterilization operations if they wanted to receive public benefits or employment opportunities in certain state-run institutions.[8] The graduation rate for blind students from high school currently is at approximately 45%.[9] The unemployment rate for blind people currently is at approximately 70%.[10] More than 5,000 blind people are employed in sheltered workshops for the blind, where they

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[2] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) *superseded by statute,* Civil Rights Remedies Equalization Act of 1986, Pub. L. No. 99–506, 100 Stat. 1845 (1986).

[3] *Scanlon*, 473 U.S. 234 at 235-236.

[4] Americans with Disabilities Act, 42 U.S.C. § 12101(b)(4) (1990).

[5] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[6] *See, e.g., Blind Citizens One Step Closer to Jury Service in the District of Columbia,* THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), July 1993 at 815–819, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm93/brlm9307.htm#4; *Jury Service in Tennessee*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), July 1985 at 354–356, *available at* http://www.nfb.org/images/nfb/Publications/bm/bm85/bm8507/bm850713.htm.

[7] Fair Labor Standards Act, 29 U.S.C. § 214(c) (1938).

[8] SEVILLE ALLEN & CHARLES BROWN, NAT'L FED'N OF THE BLIND OF VA., VIRGINIA'S BLIND: FROM CUSTODIALISM TOWARD FREEDOM THROUGH THE NATIONAL FEDERATION OF THE BLIND (Jacqueline Brown ed., 2008).

[9] Fredric Schroeder, *Literacy, Learning, and Enlightenment*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), August/September 2008 at 666–669, *available at* http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0808/bm080809.htm.

[10] *See, e.g., Unemployment Rate Soars as Literacy Rate Declines*, NAT'L FED'N OF THE BLIND, http://www.nfb.org/images/nfb/documents/pdf/Braille%20Literacy%20Crisis%20flyer.pdf (last visited Feb. 20, 2012).

have rarely had opportunities for advancement into management.[11] Until the mid 1970s, employees in these sheltered environments were prohibited from joining unions or exercising the rights of collective bargaining.[12] The inequities for blind workers in the sheltered workshop system are sufficiently long-standing and so thoroughly incorporated into the daily experiences of blind people that folk songs have been written. Two well-known examples are the *Blind Workshop Blues* and *I've Been Working in the Workshop* (sung to the tune of *I've Been Working on the Railroad*). One experience these types of songs highlight is the predicament of many blind workers: that their bosses cannot raise their wages lest the workers lose their Social Security.[13] However, no pattern of discrimination exists, says the Supreme Court.

In the same case in which Chief Justice Rehnquist determined that no pattern of discrimination had been found, he implied that disabled individuals are by nature less capable of performance than others. He said, "It would be entirely rational, and therefore constitutional, for a state employer to preserve scarce financial resources by hiring employees who are able to use existing facilities...."[14] According to the Supreme Court, disabled individuals are more costly to employ than the nondisabled. Consequently, it is rational not to hire them—and constitutional. But there is no pattern of discrimination. I feel certain that the irony was lost upon the justices who employed a standard not supported by facts in the record and not offering equal protection to disabled and nondisabled individuals alike. The very language employed in this decision helps to establish the pattern of discrimination that was declared not to exist.

Dr. Jacobus tenBroek asserted that the Equal Protection Clause of the Fourteenth Amendment requires equality, which has been defined in three different ways.[15] One of these is that each person who is a citizen of the United States shall have equal opportunity to select government representatives without facing irrational burdens on the election process. One representation of this form of equality is captured in the phrase, "One person, one vote."[16] The second definition is that equal protection requires government guarantees of fundamental natural rights such as

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[11] Sheltered workshops for the blind receive federal contracts administered through an organization called National Industries for the Blind (NIB). The number of people employed in the workshops changes over time; NIB says it employed 6,100 people in 2011. *See 2012 Overview*, NAT'L INDUS. FOR THE BLIND, http://www.nib.org/sites/default/files/PublicPolicy/2012%20NIB%20Overview%20012412.pdf (last visited Feb. 20, 2012). For detailed information about conditions that have existed in the shops, *see* Jonathan Kwitny & Jerry Landauer, *Sheltered Shops Pay for the Blind Often Trails Minimum Wage at Charity Workrooms*, WALL ST. J., Jan. 24, 1979, at 1, 35; Jonathan Kwitny & Jerry Landauer, *Sheltered Shops How a Blind Worker Gets $1.85 an Hour After 20 Years on the Job*, WALL ST. J., Jan. 25, 1979, at 1, 31.

[12] Chi. Lighthouse for the Blind, 225 N.L.R.B. 46 (1976).

[13] NAT'L FED'N OF THE BLIND, NATIONAL FEDERATION OF THE BLIND SONG BOOK (1991).

[14] *Garrett*, 531 U.S. at 372.

[15] JACOBUS TENBROEK, EQUAL UNDER LAW 19 (Collier Books 1965) (1951).

[16] *Id.*

those denominated in the first eight amendments to the Constitution and other rights not listed in the document.[17] The third interpretation of this requirement is that all people similarly situated shall be treated equally by government. This interpretation of equality requires classification of individuals in accordance with characteristics that have a rational relationship to the classification.[18] A more rigorous test for classifications exists if those being classified are members of a "suspect class," but the disabled are not among this highly favored group.[19]

Much of the debate that occurred in fashioning the Fourteenth Amendment revolved around the proper classification of slaves. If slaves are property, the clause of the Fifth Amendment prohibiting the government from depriving an individual of property without due process of law protects the interests of the property owner in these slaves.[20] If the slaves are persons, the same clause of the Fifth Amendment prohibits slave holders from invoking governmental authority in support of their taking these persons who have a property interest in themselves, because these persons are protected against government-authorized taking without due process of law.[21]

Disabled individuals are bedeviled by arguments with respect to appropriate classification. Until 1990, the State Department refused to accept blind American citizens as applicants for the Foreign Service.[22] When protests regarding this policy incorporated reference to the nondiscrimination requirements of Section 504 of the Rehabilitation Act, officials of the State Department responded by agreeing to permit blind persons to apply. However, they said that strict equality would be required. Sighted people were offered the test for admission to the Foreign Service in print. Blind people would also be offered the test in print. Sighted people were not permitted to use the services of a reader during the administration of the test. Blind people would not be permitted to use the services of a reader during the administration of the test. If blind people could pass the test under these conditions, they would be accepted as employees of the service. Otherwise, they would not.[23]

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[17] *Id.* at 20.

[18] *Id.*

[19] City of Cleburne v. Cleburne Living Ctr., 473 U.S., 432 (1985).

[20] TENBROEK, *supra* note 15, at 42–56.

[21] *Id.*

[22] Rami Raby, *The Blind Applicant Rejected: Why Not Diplomacy for the Blind?*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Nov. 1989 at 686–691, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm89/brlm8911.htm#7; Gerry Sikorski, *Blind Persons in the U.S. Foreign Service: A View from Congress*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Nov. 1989 at 691–696, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm89/brlm8911.htm#8; Marc Maurer, *Presidential Report*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Sept. 1990 at 513–524, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm90/brlm9009.htm#3.

[23] *See supra* note 22.

When I was applying for admission to law school in the 1970s, I was told that because of my blindness I could not take the Law School Admissions Test. Today, the Law School Admissions Council (LSAC) permits blind applicants to take the test. However, the Council decides what kinds of access technology will be permitted to a blind applicant, and the LSAC website, a site that students must use for law school applications, has not been usable by blind applicants.[24] Similarly, until very recently, the National Conference of Bar Examiners (NCBE) decided how a blind person could take the bar exam.[25] Blind applicants seeking the opportunity to take the bar exam argued that they should have flexibility in what methods would be used to comprehend the content of the exam. Methods familiar to these blind applicants for comprehending the content of written material should be permitted. To insist that unfamiliar methods of understanding test content are required is to test the capacity of the applicant to learn how to use these methods rather than to determine their fitness to take the exam.

LSAC and NCBE may not harbor animus against the blind, but they do not appear to want to encourage blind people to participate in the legal profession. This is the inevitable conclusion of the decisions they have made to try to make it hard for the blind to get into law school and hard for the blind to get into the legal profession after graduation. They have classified blind people as undesirable, but there is no pattern of discrimination; the Supreme Court said so.

In 1927, the Supreme Court issued an opinion declaring that a Virginia statute authorizing forced sterilization of certain disabled individuals did not violate the Fourteenth Amendment.[26] In that case a woman denominated "feeble minded," who had born a child said to be "feeble minded" and who was the daughter of another woman said to be "feeble minded," faced involuntary sterilization. The court said, "Three generations of imbeciles are enough."[27] However, that decision was made more than eighty years ago. Surely, it may be argued, governmental interference with family and reproductive rights for disabled Americans is no longer tolerated.

In the spring of 2010, the newly born child of blind parents in Missouri was taken from them not because they were treating the child inhumanely; not because they were determined to be incapable of giving it love and affection; but because these parents are blind.[28]

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[24] In February 2009, a complaint entitled *National Federation of the Blind et al* v. *Law School Admissions Council* was filed in the Superior Court for the State of California, Alameda County, case number 09—436691. In this case complainants alleged a number of facts of discrimination against the Law School Admissions Council (LSAC). Although the defendants declined to acknowledge that these allegations are correct, the case is close to settlement with the understanding that access technology for the blind will be permitted to blind applicants.

[25] Enyart v. Nat'l Conference of Bar Examiners, Inc., 630 F.3d 1153 (9th Cir. 2011).

[26] Buck v. Bell, 274 U.S. 200 (1927).

[27] *Id.* at 207.

[28] Susan Donaldson James, *Baby Sent to Foster Care for 57 Days Because Parents Are Blind,* ABC

If disabled Americans are to have full access to government programs, public accommodations, and employment, the barriers to entry and use of such programs and facilities must be removed and a spirit welcoming participation must be created. The barriers to entry and use are physical, informational, and social. Physical barriers require redesign of doorways, entryways, bathrooms, and the like. They also require redesign of information management systems. Nonvisual access is needed for those who cannot effectively use print. This group includes the blind, those with severe dyslexia, those who cannot hold a book, and a number of others.

Although it is common to argue that the disabled are expensive, as Chief Justice Rehnquist did, it is less well-recognized that the nondisabled are also expensive. Because I am blind, I never use a computer screen, which costs money to construct and to operate. Nevertheless, the program which verbalizes information contained in my computer is regarded as an expensive accommodation, but the computer screen used by the sighted is not.

To welcome the disabled into the community on terms of equality with others demands an alteration of thought, and we who are disabled are the primary agents of change. If the rights of those possessing disabilities become the subject of discussion once every quarter century or so, they may be ignored with impunity. Consequently, if we want our fellow human beings to recognize our value and our right to exercise that value, we must take action to help them know this value exists. We must insist that we be admitted to the law schools, to the legal profession, and to the judiciary. We must befriend legislators and take office ourselves. We must draft legislation that protects our rights. When our rights are ignored, denied, or belittled, we must sue the people who do so. We must become acquainted with officials in the executive branch, and we ourselves must seek office in that branch of government to ensure that the administration of the legislation adopted fulfills the intent of legislators who direct that the disabled may not be subjected to discrimination.

Sometimes we will encounter members of the judiciary sufficiently benighted that they cannot imagine a pattern of discrimination, but sometimes we will get the justice we deserve. This cannot happen unless we demand it. We must insist upon respect at all levels of government and society, and we must welcome those who want to work with us to assure equality for all.

As we do all of these things, we will be regarded as uppity, pushy, obnoxious, and belligerent. This is unfortunate, but it is one element of the transition of a minority group to first-class status in any society. We will not always win. However, we cannot make progress unless we insist

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NEWS, July 28, 2010, http://abcnews.go.com/Health/missouri-takes-baby-blind-parents/story?id=11263491#.T0H2AvlsPz1.

that the value we represent is recognized. Consequently, we must constantly demand that we be given the equal protection that our Constitution guarantees. In the long run, tireless action will ensure the equality we demand.

Articles

Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community

Jacobus tenBroek Disability Law Symposium

Ella Callow, Kelly Buckland & Shannon Jones*

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* Ella Callow, J.D., developed and has served as Legal Program Director for The National Center on Parents with Disabilities and their Families since 2004. Callow provides direct technical assistance on the implications of disability law in cases where parents with disabilities' child custody is at stake. Callow conducts national research projects and supports legislative and policy efforts to improve outcomes for this population of families. She trains organizations worldwide, and collaborates with similarly focused professionals in other fields. Her work is funded primarily through the National Institute on Disability and Rehabilitation Research.

Kelly Buckland is a person with a disability who has been involved in disability issues since 1979. Kelly started as an employee for Idaho's Protection and Advocacy system. He served for over twenty years as the Executive Director of the Boise CIL, Living Independence Network Corp., and the Idaho State Independent Living Council. He has served on the Idaho Developmental Disabilities Council, the State Employment and Training Council, and the State Help America Vote Act Steering Committee. He has advocated for the Personal Assistance Services Act and the Fathers and Mothers Independently Living with their Youth (FAMILY) child custody laws.

Shannon Jones has been the Executive Director of the Statewide Independent Living Council of Kansas (SILCK) since 1994. Ms. Jones has advocated for laws and policies to protect the rights of persons with disabilities nationwide. Jones is a board member of the National Council on Independent Living (NCIL), and is a member of many local, state, and national consumer and professional organizations.

I. INTRODUCTION

Children from families with parental disability are unnecessarily removed from the custody of their parents at alarming rates. Frequently, the only basis for removal is the parent's disability and a baseless speculative concern that the parent will not be able to provide practically, developmentally, or in some other way for the child. One movement, espousing above all the right to self-determination and independence ("Nothing About Us Without Us Ever!" being one movement motto), has discovered that sometimes no amount of determination or independence—or perceived financial or ethnic privilege—can protect

the children of parents with disabilities once they become the object of custody litigation.[1]

The roots of this phenomenon are historical, but the consequences quite current. Whether in dependency or family law cases, such removals are devastating and traumatizing for the children and parents involved. For countless children, the trauma of losing their families—one of the most consequential traumas a child can endure—is heightened when they are abused or neglected in foster care settings or by co-parents or extended family members who have histories of violence, substance abuse, or neglect, and who would never have won custody from an able-bodied parent. Such suffering has repercussions not only for the children, but for society as well.

The rate of removal of children from families with parental disability is significantly higher than rates for children whose parents are not disabled, and the discrepancy is due to specific and avoidable problems within the social service and legal systems. The former are thus unfairly impacted and traumatized by removal and loss of familial integrity. Comprehensive legislative action that synthesizes other successful state and federal remedial legislation is needed to protect this population of children.

II. THE LAW AND HISTORY

A. Dependency Law

The freedom to parent without interference from the state is protected by the Fourteenth Amendment to the U.S. Constitution.[2] However, this right is balanced against the right of the state to protect its citizen children from harm.[3] The Supreme Court has struck a compromise: individuals cannot have their parental rights terminated by the state unless they are found "unfit."[4] Each state has its own rules on what constitutes a "fit" parent.[5] Typically a "fit" parent meets the

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[1] Interview with Judith Rogers, Occupational Therapist, Robert Wood Johnson fellow and author of the *Disabled Women's Guide to Pregnancy and Birth* (2005) and the *Baby Care Assessment for Parents with Physical Limitations or Disabilities* tool, in Berkeley, Cal. (Apr. 25, 2008).

[2] Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

[3] Reno v. Flores 507 U.S. 292, 303 (1993); Santosky, 455 U.S. at 766 (observing that the state has an "urgent interest in the welfare of the child") (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) (internal quotations omitted)); Prince v. Mass., 321 U.S. 158, 166 (1944).

[4] *See* Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion) (emphasizing that as long as a parent is "fit[], there will normally be no reason for the State to inject itself into the private realm of family.").

[5] Elizabeth Lightfoot & Traci LaLiberte, *The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes*, 17 J. RES. & TRAINING CTR. ON CMTY. LIVING 2 (2006) [hereinafter

physical, emotional, and health and safety needs of the child.[6]

In order to receive federal funding, a state must provide maintenance services before terminating rights[7] or must provide reunification services after terminating rights.[8] Exceptions exist: the Adoption and Safe Families Act allows for state termination of parental rights without maintenance or reunification services if a parent has previously murdered or severely abused a sibling of the child in question, or has subjected the child to severe abuse.[9] More controversially, services can be omitted if it is found that a parent's disability renders him or her unable to care for or control the child presently and will continue to do so in the future.[10]

In order to terminate parental rights, first courts must find the reunification efforts to be reasonable, though this need only be proven by a "preponderance of the evidence."[11] Secondly, the state must prove by "clear and convincing evidence"[12] that the parent is unfit.[13] In some states and counties, after determining that a parent is unfit, the court must make a third determination: the termination of parental rights is in the best interest of the child.[14]

B. Family Law

As noted above, the freedom to parent without interference from the state is protected by the Fourteenth Amendment. However, this situation is complicated when it is not the *state* interfering with one's

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Lightfoot, *Inclusion of Disability*] ("In addition to the ASFA-related TPR grounds, most states have additional grounds for TPR, some which date back many decades. States vary in their non-ASFA related grounds, with some having extensive and explicit lists of grounds for termination and others having very limited and/or very broad grounds for termination. Examples of other common grounds include chronic substance abuse, failure to maintain contact with a child or failure to maintain support of a child.").

[6] *Cf.* Stanley v. Ill., 405 U.S. 645, 652 (1972) (approving of but not adopting Illinois's interest in the "moral, emotional, mental, and physical welfare of the minor" in fitness determinations) (quoting ILL. REV. STAT., c. 37, s 701–2) (internal quotations omitted).

[7] *See* 42 U.S.C. § 671(a)(1) (2006) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides for foster care maintenance payments . . . .").

[8] *See* 42 U.S.C. § 671(a)(15)(B)(ii) (2006) ("[R]easonable efforts shall be made to preserve and reunify families . . . to make it possible for a child to safely return to the child's home.").

[9] Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(D)(ii); Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 228 (2009).

[10] CAL. FAM. CODE ANN. § 7827 (West 2003); Jennifer A. Culhane, *A Challenge of California Family Code Section 7827: Application of This Statute Violates the Fundamental Rights of Parents Who Have Been Labeled Mentally Disabled*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 131 (2003–04).

[11] *See, e.g.*, State *ex rel.* Dep't of Human Serv. v. T.F., 175 P.3d 976, 978 (Or. Ct. App. 2007).

[12] *Santosky*, 455 U.S. at 748.

[13] *Id.* at 760; *Quilloin*, 434 U.S. at 255 (citing Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1978) (Stewart, J., concurring).

[14] *E.g.*, N.Y. FAM. CT. ACT §§ 62–23, 631 (McKinney 2009); *T.F.*, 175 P.3d at 978.

parenting rights, but instead the *other parent* who possesses the same right. When parents cannot reach a custody agreement themselves, courts may decide custody based on the state's right to protect its citizen children from harm. The legal standard courts use to determine custody is the "best interest of the child."[15] Most states have developed their own factors to determine which custody arrangement is in the best interest of the child.

Typical factors include the following: which parent best meets the physical, emotional, intellectual, and basic health and safety needs of the child; what the child wants (if the age and maturity of the child render an expressed desire reliable); the length of the current custody arrangement and whether it is positive; whether the alternative arrangement is suitable and stable; primary caretaking history; evidence of domestic violence or substance abuse; evidence of lying to the court about domestic violence or other matters; or whether either placement involves a partner with a history of violence or dependency issues.[16] The best interest analysis always allows for a parent's own "health" to be considered.[17]

With such seemingly practical factors to determine custody in place, why are removal rates as much as 80% for children of parents with certain disabilities?[18] To understand this consideration, it is important to first examine the history of parenting with a disability in our country.

C. The History of Parenting in Communities of Disability

In the first half of the twentieth century, proponents of the eugenics movement influenced nearly thirty state legislatures to pass laws allowing the involuntary sterilization of people with developmental, mental, sensory, or physical disabilities.[19] This legislative trend was based on the belief that these and other "socially inadequate" populations[20] would produce offspring that would be burdensome to

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[15] *See, e.g., Quilloin*, 434 U.S. at 255.

[16] Factors compiled from review of statutory and case law from the seven states with the largest disability population; CAL. FAM. CODE § 3011 (West 1999); CONN. GEN. STAT. ANN. § 46b–56 (West 2008); FLA. STAT. ANN. § 61.13 (West 2006); MINN. STAT. ANN. § 518.17 (West 1999); N.Y. DOM. REL. LAW §70 (McKinney 2008) *construed in* Eschbach v. Eschbach, 56 N.Y.2d 167, 171–74 (1982); OKLA. STAT. ANN. tit. 43, § 112 (West 1999); TEX. FAM. CODE § 153.002 (West 2009).

[17] Miller v. Pipia, 297 A.D.2d 362, 364 (N.Y. App. Div. 2002) (listing the factors to be considered in determining a child's best interests).

[18] Lightfoot, *Inclusion of Disability, supra* note 5, at 2; MENTAL HEALTH AMERICA, WHEN A PARENT HAS A MENTAL ILLNESS: CHILD CUSTODY ISSUES (2011), http://www.nmha.org/go/information/get-info/strengthening-families/when-a-parent-has-a-mental-illness-child-custody-issues (last visited Dec. 23, 2011) [hereinafter Mental Health America].

[19] Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 864 (2004).

[20] Paul A. Lombardo, *Medicine, Eugenics and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3 (1996).

society.[21] The result of this policy was the forced sterilization of sixty thousand American citizens, some as young as ten years old.[22]

The judiciary supported the legislative trend toward sterilization. The pinnacle of this support was the Supreme Court's ruling in the seminal case of *Buck v. Bell*.[23] The plaintiff in the case was Carrie Buck, an eighteen-year-old who was a resident in the Virginia State Colony for Epileptics and Feeble Minded.[24] Despite the fact that Ms. Buck was only found to be "deviant" after giving birth to a little girl as a result of being raped by an older relative,[25] the Supreme Court upheld the Virginia statute that authorized her sterilization.[26]

By the 1970s, most sterilization laws were struck down on procedural grounds and rules were adopted that prohibited sterilization by institutions receiving federal funding. However, parenting with a disability is still not guaranteed. Currently there are seven states that retain a judicial process by which people with disabilities can be sterilized involuntarily.[27] Moreover, the debate about whether people with disabilities should be allowed to reproduce has been complicated by the regular denial of access to Assisted Reproductive Technologies (ART).[28]

While the justification for sterilization was to protect society, the justification for denial of ART is to protect children. Physicians most often deny treatment where they feel that the disability is uncontrolled and could affect the health of the child (such as diabetes), the disability carries a risk of genetic transmission (such as Tay-Sachs syndrome), or where they feel that patients will be incapable of providing stable home environments for children (such as those with a psychiatric disability).[29] While some of these denials may be more palatable than others, what is clear is that "[b]ecause denials of treatment take place in private and may not be reported, it is likely that the extent of medically based treatment denials is greater than the few cases reported in the literature."[30]

The same bias, ignorance, and poor practice that led to mass population sterilizations seems apparent in denial of ART and extremely high rates of child removal from the disability community.

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[21] *Id.* at 1, 3.

[22] PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 2 (1991).

[23] 274 U.S. 200 (1927).

[24] *Id.* at 205.

[25] Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 54 (1985).

[26] *Buck*, 274 U.S. at 207.

[27] Jana Leslie-Miller, *From Bell to Bell: Responsible Reproduction in the Twentieth Century*, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 136–37 (1997).

[28] Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, 50 UCLA L. REV. 17, 19 (2002).

[29] *Id.* at 29–31.

[30] *Id.* at 31.

III. THE POPULATION OF PARENTS WITH A DISABILITY AND RATES OF REMOVAL

Despite the social and practical barriers placed in their paths, people with disabilities do become parents. Six and one-half percent of all families with children under eighteen contain at least one parent with a disability.[31] The rates are even higher for some sub-groups of the population. For instance, 18.7% of African-American families, 16.3% of Hispanic families, and 24% of single-parent families contain at least one parent with a disability.[32]

The difficulty now is for parents with a disability to retain custody of their children. Statistics collected by independent organizations indicate that based on the disability population, removal ranges from 40–60% for parents with developmental disabilities[33] to as high as 70–80% for those with psychiatric disabilities.[34] Statistics on removal rates for parents with physical or sensory disabilities are not as readily available, though these communities report significantly heightened rates of removal. In one study of 1,000 predominantly physically disabled parents, 15% reported experiencing pathological, discriminatory treatment related to custody litigation.[35] This means that custody loss by parents with disabilities is affecting thousands of American children.

The National Child Abuse and Neglect Data Set (NCANDS), completed in 2011, identifies the portion of the child welfare population that is comprised of families where at least one parent has a disability. The NCANDS identifies caretakers, not specifically parents, in the study. In 2010, 95.9% of children had parents as their caretakers.[36] Based on a conservative sample of the nineteen most consistently reporting states, the organization Through the Looking Glass (TLG) found that in 2010, at least 12.9% of the children in child welfare cases have at least one parent with a disability.[37] This is a low estimate because, similar to the

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[31] H. Stephen Kaye, 2011 American Community Survey (2011) (unpublished tabulations) (on file with the Disability Statistics Center, University of California San Francisco).

[32] *Id.*

[33] DIFFERENT MOMS (The ARC of the United States and Lifetime Television 1999); Lightfoot, *Inclusion of Disability*, *supra* note 5, at 2; Mental Health America, *supra* note 18.

[34] Lightfoot, *Inclusion of Disability*, *supra* note 5, at 2; Mental Health America, *supra* note 18.

[35] LINDA TOMS BARKER & VIDA MARALANI, CHALLENGES AND STRATEGIES OF DISABLED PARENTS: FINDINGS FROM A NATIONAL SURVEY OF PARENTS WITH DISABILITIES 4-8, B-28 (1997). Of interest is the fact that most of the survey participants tended to be European-American, middle-income, and educated. These are not the demographics expected to report high levels of discrimination or involvement with custody litigation with the state.

[36] FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2011 (2011), http://www.childstats.gov/americaschildren/Famsoc1.asp (last visited Dec. 23, 2011).

[37] Ella Callow, Alison Gemmill, Jean Jacob & Sharon Riley, *Parents with Disabilities and their Families in Child Protective Services Systems: Practice and Prevalence* 2011. (unpublished) (Nat'l Center for Parents with Disabilities at Through the Looking Glass) (Study funded by the National Institute on Disability and Rehabilitation Research, U.S. Department of Education, Grant

treatment of children with disabilities in the child welfare system, adults with disabilities are not clinically assessed upon entering the system and are therefore often under-identified.[38]

As a companion to the NCANDS study, the TLG Legal Program conducted a qualitative study of 102 parents and grandparents with disabilities who contacted the program for technical assistance in a child custody case over the course of eighteen months. Calls came in from nineteen states including all states on both coasts. One hundred and fifty-five children were involved in the 102 reported proceedings. The distribution of parental disability was as follows: 38% of calls addressed a physical disability, 33% of calls addressed a psychiatric disability, 13% addressed an intellectual disability, 9% addressed a cognitive/intellectual disability, 5% addressed a visual disability, and 2% of calls addressed deafness.[39] Fifty percent of the calls related to the family court system, while 42% concerned the dependency system, and 8% concerned the probate court.[40] Probate court cases, including adoption and guardianship matters, accounted for 8% of all calls.[41] Three percent of calls were pre-emptive (no case yet filed) and 1.5% of callers could not explain the type of case with which they were involved.[42]

Some of the parents with disabilities believed that their children were secure from removal because their disability was not "as serious" or "as obvious" as other disabilities.[43] Some parents with disabilities believed that their financial resources, or the fact that they were not minorities, would protect them from losing custody to the state.[44] Still other parents felt that their gender, or perhaps the fact they lived in a more "progressive" state might protect them if they went through a divorce or even if they needed the help of social services.[45] The data,

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#H133A08003) (data on file with Through the Looking Glass) [hereinafter Demographic & Statistical Study].

[38] U.S. DEP'T OF HEALTH & HUMAN SERVS, ADMIN. ON CHILD., YOUTH & FAMILIES, CHILD MALTREATMENT (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf; Lightfoot, *Inclusion of Disability*, *supra* note 5, at 2 ("Likewise, parents with disabilities are increasingly involved in the child welfare system, *though the overall prevalence of such involvement is unknown due to inadequate record-keeping and the paucity of research*.").

[39] Ella Callow & Jean Jacob, The Perspectives and Demographics of Parents with Disabilities Contacting Through the Looking Glass' Legal Program Regarding Custody Issues (unpublished tabulations from the 2008-2011 study) (data on file with Through the Looking Glass). While 92% of calls implicated parent responsibilities, 8% involved another family member/caretaker. Fathers/male relatives constituted 29% of the calls, and mothers/female relatives constituted the other 71% of the calls. Of callers reporting ethnicity, 50% were European American, 18% were African American, 12% were Latino/a-Hispanic American, and 4% were Native American.

[40] *Id.* at 1.

[41] *Id.*

[42] Demographic & Statistical Study, *supra* note 37.

[43] Ella Callow, Legal Program Director, The National Center for Parents with Disabilities and their Families, Address at the National Council on Disability Living Forum (May 6, 2011); Ella Callow, Legal Program Director, The National Center for Parents with Disabilities and their Families, Address at the 2011 Jacobus tenBroek Disability Law Symposium (April 14, 2011).

[44] *Id.*

[45] *Id.*

however, says otherwise. Research suggests that no child from a family with parental disability is safe from inappropriate removal.[46] The existence of a parental disability renders all such children more vulnerable.

IV. THE CAUSES OF UNNECESSARY REMOVALS

Looking at the removal statistics, it is clear that the legal system is not protecting the children of parents with disabilities from the maladies associated with such a traumatic removal procedure.

Two-thirds of dependency statutes allow the court to determine that a parent is unfit—a determination necessary to terminate parental rights—based exclusively on the parent's disability.[47] In every state, disability may be considered when determining the best interest of a child for purposes of a custody determination in family court or dependency court.[48] In theory, there should always be a nexus shown between the disability and harm to the child, so that a child is only taken from a custodial parent when the parent's disability is creating detriment that cannot be alleviated. However, this is not the reality.

Six major barriers to preventing unnecessary removals have been identified.

A. Attitudinal Bias

Defined loosely as a general belief in the pathology of people with disabilities, attitudinal bias is still prevalent in American society.[49] Attitudinal bias leads to speculation by neighbors, family members, and medical personnel that a parent with a disability cannot be a safe parent. These are the individuals most likely to report a parent with a disability to a child welfare agency for no reason other than the disability, thus starting the family's dependency proceedings and often leading to termination of parental rights. Attitudinal bias also leads non-disabled

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[46] *See* Demographic & Statistical Study, *supra* note 37.

[47] Lightfoot, *Inclusion of Disability, supra* note 5, at 2.

[48] Factors compiled from review of statutory and case law from the seven states with the largest disability population; CAL. FAM. CODE § 3011 (West 1999); CONN. GEN. STAT. ANN. § 46b–56 (West 2008); FLA. STAT. ANN. § 61.13 (West 2006); MINN. STAT. ANN. § 518.17 (West 1999); OKLA. STAT. ANN. tit. 43, § 112 (West 1999); TEX. FAM. CODE § 153.002 (West 2009); N.Y. DOM. REL. LAW §70 (McKinney 2008) *construed in* Eschbach v. Eschbach, 56 N.Y.2d 167, 171–74 (1982); *see also* Miller v. Pipia, 297 A.D.2d 362, 364 (N.Y. App. Div. 2002) (listing the factors to be considered in determining a child's best interests).

[49] Megan Kirshbaum et al., *Parents with Disabilities: Problems in Family Court Practice,* 4 J. CTR. FOR FAM. CHILD. & CTS. 27, 37–39 (2003).

co-parents or extended family members—even those with substance abuse or violence issues—to become emboldened in their actions to move for custody in family court, sometimes doing so entirely on the basis of the custodial parent's disability. Professionals involved with custody cases, such as social workers, officers of the court, and legal and mental health professionals are not immune to this attitudinal bias.

In one example, a Georgia stay-at-home dad became a walking paraplegic[50] after sustaining an injury during a shooting while on police duty. After sustaining this injury, he was ordered by a family court judge to maintain a 24-hour-a-day nanny whenever he had custody of his three-year old daughter, Molly.[51] There was no evidence of any danger to the child, nor any past injuries or incidents giving cause for concern about her safety in his care. Despite being Molly's primary caretaker from her birth, this father was relegated to what amounted to supervised visitation because a judge assumed his parenting would be deficient based solely on his disability; at the same time, Molly was put into daycare for full days by her mother who chose to work. After the court reviewed the Adapted Baby Care assessment and expert testimony, the father ultimately received a successful adjudication.

In another instance, in a Wisconsin dependency case, a grandmother in her early sixties had arthritis that necessitated use of a walker.[52] She had custody of her two-year-old grandson, Bobby, since his birth. She was told by a social worker that she could keep Bobby until his third birthday (three weeks from the day of the conversation) because there was no immediate need for removal. However, the social worker added that she would not advocate for him to stay with the grandmother long-term because it was more appropriate to permanency planning to place Bobby with a young, healthy family, rather than with his grandmother who was "old and handicapped." She lost custody and Bobby was adopted after a harrowing experience in the foster care system (to be discussed later in this Article).

B. Lack of Disability Awareness and Knowledge Regarding Adaptive Equipment and Services

Most people do not know that adaptive equipment and adapted services, assessments, and evaluations can be critical in proper assessment for custody litigation, nor do they know what the terms

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[50] A walking paraplegic is someone who is diagnosed as a paraplegic, but has retained enough function to walk using walking canes or a walker.

[51] Telephone interviews with Allen James, Father with a disability, Ga. (Mar. 3, 2005–April 19, 2008).

[52] Telephone interviews with Eloise Holt, Grandmother with a disability, Wis. (Sept. 18, 2004–Feb. 15, 2005). All identifying information has been altered to protect confidentiality.

"adaptive equipment" or "adapted services" mean.[53]

Adaptive equipment can be used by parents with diverse disabilities to enable or strengthen their parenting of their child.[54] For example, a parent with a physical disability, such as a wheelchair user, can use a changing table modified to allow them to roll the wheelchair beneath the surface. A parent with a sensory disability, such as blindness, may use an adaptive device for measuring a child's medication. A parent with an intellectual disability may use an alarm or prompting system to remember to give a child medication.

Adapted services can be used by professionals to maximize the benefit of the service for the involved family.[55] For example, adapted parenting education for parents with intellectual disabilities often involves work inside the family's home, with higher frequency and duration of sessions than typically found in parenting classes. This service would also be expanded to focus on disability-specific issues such as modifying communication, facilitating the parent-child relationship and helping the parent to feel secure as a parent despite experiencing discrimination and abuse by this population throughout their lives. Finally, adapted services can include basic things such as an interpreter at a parenting class for a parent who is deaf, or referring a parent in a wheelchair to a therapist that is in an accessible location.

One type of adapted parenting assessment is the Adapted Baby Care Assessment for parents with physical limitations or disabilities.[56] This assessment involves multiple days of observation of the parent caring for the child in the home and on outings into the community.[57] The occupational therapist assesses the parenting for current functioning and aims to improve parenting wherever possible with adaptive equipment and parenting strategies and services.[58] The occupational therapist then produces a report that documents the parent's current functioning, decides which equipment or strategies and services could improve childcare, and determines whether it is a safe placement currently or with the adaptations in place.[59]

Adapted services, assessments, and evaluations for parents with disabilities that properly assess their parenting capacity are effective because they include the use of Adapted Baby Care equipment and adapted approaches to parenting. Adapted parenting evaluations for

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[53] Interview with Judith Rogers, Occupational Therapist, Robert Wood Johnson fellow and author of the *Disabled Women's Guide to Pregnancy and Birth* (2005) and the *Baby Care Assessment for Parents with Physical Limitations or Disabilities* tool, in Berkeley, Cal. (Apr. 25, 2008).

[54] *Id.*

[55] Interviews with Christi Tuleja, Director, Through the Looking Glass infant development/early intervention services, in Berkeley, Cal. (Aug. 2004–Jan. 2005).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

parents with physical or sensory disabilities focus on observation in the home, where adaptive equipment and child safety equipment is already set up for use by the parent.[60] Evaluations should not include measures that skew the result for parents, such as I.Q. testing for parents who have cognitive or learning disabilities.[61] The timing of a test should allow a parent with a psychiatric disability to adjust to new medications, or the test should be administered at a time of day when the parent is most able to undergo testing since some psychotropic medications leave the user feeling more tired and less focused at certain times of the day.

It is TLG's experience that because many social workers, mediators, evaluators, attorneys, and judges tend not to know about adaptive equipment, services and assessments, they take a defeatist view of parents with disabilities, assuming they cannot parent successfully. This defeatist view colors the process and the outcome of custody litigation. But, information regarding adaptive services can change that.

In one example, a California mother who was a wheelchair user faced removal of her medically fragile newborn, Kyle, based solely on the social worker's impression that because she was a wheelchair user and had some limited muscle control in her upper body, she could not care for her child.[62] After the social worker learned of the multiple forms of adaptive equipment that could be used to enable the mother to transfer, lift, diaper, and feed her newborn, Kyle was able to remain with his mother.[63]

In another example, four-year-old Kiara was removed from her grandmother in Utah because her grandmother was obese and had mobility impairment.[64] After the court ordered social services to pay for an Adapted Baby Care assessment, a favorable report was provided to the court.[65] Kiara was not only able to return to her grandmother, the grandmother was also able to adopt her.[66]

C. Barriers to Meaningful Participation in the Process

Because of inaccessible, inappropriate, or non-existent services, parents with disabilities are often prevented from meaningful

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[60] Interviews with Christi Tuleja, Director, Through the Looking Glass infant development/early intervention services, in Berkeley, Cal. (Aug. 2004–Jan. 2005).

[61] *Id.*

[62] Telephone interviews with Adrianna Terry, Mother with a disability, Cal. (Nov. 20, 2004–Jan. 24, 2005). All identifying information has been altered to protect confidentiality.

[63] *Id.*

[64] Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005). All identifying information has been altered to protect confidentiality.

[65] *Id.*

[66] *Id.*

participation in evaluations, mediations, case plan services, and court hearings.

In one example, a mother who was deaf was involved in family court mediation with her hearing husband, who had abused her.[67] The mediator chose to use the husband to interpret for the deaf mother rather than secure a professional interpreter.[68]

In another instance, a mother in Oklahoma experienced chronic pain and needed to make a telephonic appearance to participate in the hearing.[69] She could not get an answer on whether this would be allowed.[70] When TLG contacted the local court and requested to speak with the Americans with Disabilities Act (ADA) coordinator (required by federal law), the clerk not only did not know who the ADA coordinator was, she did not know what the ADA was.[71]

In numerous cases every year, parents with developmental and psychiatric disabilities are unable to truly participate in the family court process because they did not have an attorney and did not understand or were unable to communicate effectively with the court. In dependency cases, the parents may not receive state sponsored counsel until later in the process; however, in family court, it is uncommon for parents to receive state sponsored counsel.[72] This is a major problem and one reason why some civil version of *Gideon v. Wainwright*,[73] such as the right to counsel afforded to those accused of a crime, must be made available to parents with developmental or psychiatric disabilities in family and dependency court *from the time a case has begun.*[74]

D. Evidence

There is a failure of the bar to rise to the occasion and zealously work to win on evidence in parental rights cases. Evidence, such as Adapted Baby Care evaluation reports, or facts showing adaptive equipment that will enable a parent to care for a child or tackle emergency situations (like bed-shaking smoke alarms for parents who

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[67] Telephone interviews with Elain Diaz, Mother with a disability, Ill. (Apr. 22, 2008–Oct. 26, 2010). All identifying information has been altered to protect confidentiality.

[68] *Id.*

[69] Telephone interview with Jaden Oldford, Mother with a disability, Okla. (May 12, 2008). All identifying information has been altered to protect confidentiality.

[70] *Id.*

[71] *Id.*

[72] Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 366–67 (2005).

[73] 372 U.S. 335, 345 (1963) (holding that indigent defendants in criminal cases have a due process right to appointed counsel).

[74] *See* Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609 (2004).

are deaf), is rarely presented to the court. Finally, attorneys fail to challenge a biased and/or un-adapted parenting evaluation that recommends termination of rights or a switch in custody from a parent with a disability.

In a case in Washington, a mother with Friedreich's ataxia[75] who was a wheelchair user was faced with loss of custody of her three-year-old son, Jesse.[76] Her parents had called child protective services and simultaneously drove her to a nursing home and left her there because they did not want to assist her or her son any further.[77] The mother's attorney refused to arrange for an occupational therapy assessment because she feared the results would be negative.[78] TLG's staff felt that the attorney was so unfamiliar with adaptive equipment and adapted services that she could not envision a successful ending.

This failure to utilize experts to share evidence underestimates the professionalism of the bench and deprives the court of the opportunity to receive a fair account of the case.

E. Law

As discussed above, both dependency and family law statutes allow consideration of parental disability, and some specifically allow termination of parental rights based on disability. While case law has fleshed out the need to show a nexus between disability and detriment to the welfare of a child in some states,[79] the fact remains that such a nexus is often not shown, and few cases are ever appealed. In addition to these problems with substantive laws, there are also procedural aspects of laws that adversely impact the disability population.

The Adoption and Safe Families Act of 1997 mandates strict timelines in dependency cases that disparately impact parents with disabilities.[80] These timelines often present special difficulties for parents who must secure adaptive equipment and services that are more involved than those for non-disabled parents. In the case of parents with psychiatric disabilities, these timelines may be impossible because of the need for psychiatric inpatient care and treatment at some point in the dependency process.

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[75] Friedreich's ataxia is a disease that causes nervous system damage and results in impaired muscle coordination.

[76] Telephone interviews with Lorelei Gorman, Mother with a disability, Wash. (Jan. 18, 2005–Jan. 23, 2006). All identifying information has been altered to protect confidentiality.

[77] *Id.*

[78] *Id.*

[79] ELLA CALLOW ET AL., SUMMARIES OF LEGAL PRECEDENTS AND LAW REVIEW ARTICLES CONCERNING PARENTS WITH DISABILITIES, (Through the Looking Glass 2004 rev. 2005).

[80] Pub. L. No. 105-89, 111 Stat. 2115 (1997).

Often, TLG's Legal Program is contacted at the point in the dependency process where the court must determine whether further services should be provided to parents or if services should be ended and rights terminated (i.e., a permanency planning hearing). TLG is asked to produce an assessment of a parent with a disability in time for a hearing that is scheduled within ten to fourteen days of the request. However, because the disability may involve the need for an Adapted Baby Care assessment, the utilization of adaptive equipment, or a six to ten week series of observations for a parenting assessment, TLG is unable to work within this timeline to assist the court in making a fair determination.

F. Cost

Other than California, there is no known state that includes adaptive parenting equipment in its statutory definition of durable medical equipment that impoverished parents with disabilities qualify to receive. Since the cost of equipment is often prohibitive to parents with disabilities, their children are sometimes removed because of small financial shortfalls of a few hundred dollars.

V. THE EFFECT OF UNNECESSARY REMOVALS ON CHILDREN

A. Separation from the Primary Caretaker

Almost every child taken from a parent with a disability, whether in dependency or family court, experiences separation from his or her primary caretaker. This separation is a serious cause for concern. Researchers in the fields of psychology and cognitive science have documented a much clearer picture of the severe emotional and psychological damage infants and young children experience when separated from their primary caregivers.[81] In fact, the most significant issue for a child's development is now known to be a secure attachment to a sensitive, responsive, and reliable caregiver.[82]

When children are removed from their primary caregivers, they experience specific emotional phases.[83] The child will first express

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[81] *See generally* HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS (Jude Cassidy & Philip R. Shaver eds. 1999).

[82] *Id.*

[83] JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 32 (1988).

"protest" and do everything possible to try to get back to the caregiver.[84] The next phase is "despair," as the child begins to fear he or she will not be reunited with the caregiver.[85] Finally, the child will experience "detachment," at which point he or she gives up hope.[86] The pain is so great that many children lose hope of ever having that security and love again.[87]

The immediate result of this process can be pathological attachments to the old caregiver if reunited, or toward new caregivers during separations.[88] Insecure attachment, the more severe disorganized attachment–where a child wants but cannot bring himself to seek fully the soothing and comfort of a caregiver–and reactive attachment disorder–which is mentally and emotionally disabling, both fall within the spectrum of predictable outcomes from traumatic and/or repeated separations.[89]

The long-term effects are equally formidable. Traumatic or repeated separations from caregivers place children at an increased risk of conduct disturbances, disruptive behavioral problems, attention disorders, and mood disorders.[90] Children who are denied secure attachment due to separation are less able to cope with psychological trauma, self-regulate their behavior, handle social interactions, and build positive self-esteem and self-reliance.[91]

B. Special Issues in Dependency Cases

Despite the now established knowledge regarding the danger of removal and multiple-placements for young children, such procedures are still the norm for children involved in the dependency process. In TLG's experience, removal and reunification is more common than maintenance and services with the children in the home. Removal of a child usually results in many foster care placements for the child. For example, in Los Angeles, the nation's largest dependency system, 24.3% of children younger than one year old, 33.5% of children aged one to

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 32.
[88] BOWLBY, *supra* note 83, at 29.
[89] *See* Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 2 (2004), *available at* http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/spr%2004_1%20goldsmith%20et%20al.pdf.
[90] L. Allen Sroufe et al., *Relationships, Development, and Psychopathology, in* HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY 75, 80 (Arnold J. Sameroff, Michael Lewis, & Suzanne M. Miller eds, 2d ed. Kluwer Academic / Plenum Publishers 2000) (1990).
[91] Goldsmith, *supra* note 90, at 2.

two, and 38.8% of children aged three to five experienced three or more caretakers within a thirteen to twenty-three month stay in foster care.[92]

Moreover, after removal, children placed in foster care are two times more likely to die of abuse.[93] They are two to four times more likely to be sexually abused.[94] They are three times more likely to be physically abused.[95] They may be placed in the care of persons who have not had adequate criminal background checks.[96] They may be neglected, lost, or murdered.[97] Despite such dire outcomes, children are denied the legal protections and remedies against the foster system that are afforded to prisoners against the prison system, largely because the foster care system is considered benign.[98]

Earlier in this Article, two cases were discussed: four-year-old Kiara who was removed and quickly returned to her grandmother, and three-year-old Bobby who was kept in foster care and later adopted.[99] These cases contrast the effects of the foster care system on the well-being of young children removed from a non-offending parent with a disability.

In Kiara's case, she was taken from her pre-school by a social worker without any explanation of why she was being taken or when she would see her grandmother again.[100] She quickly moved from crying and fighting in protest, to despair.[101] Within days she withdrew from all playing, eating, and emoting.[102] Fortunately, Kiara's mother secured counsel who applied immediately for the court to order her back home and for TLG to conduct an Adapted Baby Care assessment.[103] She was then able to return home permanently soon after, and had only one outside placement.[104] She has since been adopted by her grandmother and she has shown no signs of subsequent maladjustment.[105]

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[92] CAL. DEP'T OF SOC. SERV. & UNIV. OF CAL. AT BERKELEY, CHILD WELFARE DYNAMIC REPORT SYSTEM (2011), http://cssr.berkeley.edu/ucb_childwelfare/default.aspx (last visited Dec. 23, 2011).

[93] Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 150 (2003).

[94] *Id.*

[95] *Id.*

[96] Ella Callow, Legal Program Director, The National Center for Parents with Disabilities and their Families, Address at the National Council on Disability Living Forum (May 6, 2011); Ella Callow, Legal Program Director, The National Center for Parents with Disabilities and their Families, Address at the 2011 Jacobus tenBroek Disability Law Symposium (Apr. 14, 2011).

[97] Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 205–07 (1988).

[98] *See id.* at 231–32.

[99] Telephone interviews with Eloise Holt, Grandmother with a disability, Wisc. (Sept. 18, 2004–Feb. 15, 2005); Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005). All identifying information has been altered to protect confidentiality.

[100] Telephone interviews with Eloise Holt, Grandmother with a disability, Wisc. (Sept. 18, 2004–Feb. 15, 2005). All identifying information has been altered to protect confidentiality.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Telephone interview with Eloise Holt, Grandmother with a disability, Wisc. (Sept. 18, 2004–Feb.

In Bobby's case, his grandmother did her best in the weeks between being told he would be removed and his actual removal to try to explain the unexplainable—why social services was taking him and when he could come home.[106] Bobby had just turned three at removal and continued in the protest phase for an extended period afterwards.[107] His behavior was viewed as pathological by the social worker who supervised visitation with his grandmother.[108] The social worker would repeatedly drag Bobby away from his grandmother at the end of visitation and threaten to end contact if he did not "behave."[109] Eventually, the social worker acted on that threat.[110] Bobby then became despairing and detached quite quickly.[111] He refused to eat, and when he did eat, he would throw up.[112] Social services placed Bobby in a hospital for barium treatments to see if there was a physiological cause for his behavior; there was not.[113] He then was injured in foster care and had to be hospitalized for the injury.[114] His grandmother was denied the chance to be with him (she had highly circumscribed visitation at this point) and his foster parents chose not to visit him.[115] As a result he spent his hospitalization alone in a crib with a top to prevent his getting out surrounded by IVs and other invasive equipment.[116]

After this point Bobby was labeled as "willful" and was considered a high-needs and difficult child.[117] This label was used as another reason not to return him to his grandmother.[118] Bobby was eventually adopted out of foster care.[119] The adoptive parents have kept some contact with the grandmother.[120] Her knowledge of what he experienced in foster care helps Bobby's adoptive parents understand the psychiatric work he now requires to deal with his reactive attachment disorder, claustrophobia, and ongoing nightmares.[121]

The following case of Jennifer underscores the abuse that children

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15, 2005).

[106] Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005). All identifying information has been altered to protect confidentiality.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Telephone interviews with Johanna Sutton, Grandmother with a disability, Utah (July 1, 2005–Aug. 26, 2005).

removed from parents with disabilities suffer after damaging removals.

In Minnesota, five-year-old Jennifer was being reintroduced to her estranged, biological father over the protests of her developmentally disabled mother.[122] The mother opposed reintroduction because she knew almost nothing about the biological father.[123] However, social workers in the case felt that it would be positive to support the child by having a relationship with her father, who was not disabled.[124] Jennifer began showing regressive behavior upon returning from visits with her father and showing anxiety and fear before visitation times.[125] Her mother noticed Jennifer's behaviors, reported these phenomena to the social worker, and renewed her protests.[126] The social workers, however, were fixated on having a non-disabled parent-child relationship for Jennifer.[127] Eventually, Jennifer returned home with physical evidence of severe sexual abuse, the father was prosecuted for the crime, and his rights were terminated.[128]

Had the mother not been developmentally disabled, it is likely that the social worker would not have been so inclined to promote the relationship between Jennifer and her father and disregard the mother's objective *and* intuitive resistance.

C. What About Family Law Cases?

Children removed from parents because of disability in family law cases not only suffer the same trauma from separation and loss of the primary caretaker, they also have a greatly increased risk for post-removal maltreatment.

TLG staffers have observed that court officers, evaluators, and mediators, as a biased response to a parent's disability, are frequently in a rush to justify a move from the parent with a disability to an able-bodied caregiver. This leads the courts to accept alternative placements that would be unacceptable were the disability not a factor. Unlike TLG's experiences with the general population in family court cases, children with a disabled parent are more frequently placed with the non-disabled parent or extended family member, regardless of whether that individual has a history of abuse, addiction, poor decision-making, or

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[122] Telephone interview with Keri Rogers, Mother with a disability, Alaska (July 4, 2004–Apr. 29, 2005). All identifying information has been altered to protect confidentiality.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Telephone interview with Keri Rogers, Mother with a disability, Alaska (July 4, 2004–Apr. 29, 2005).
[128] *Id.*

parenting. This individual may also have had little or no contact with the child, or will not be a "friendly parent"—i.e., one who will facilitate an ongoing relationship between the child and the parent with a disability.

VI. REMEDIAL STATE AND FEDERAL LEGISLATION OF INTEREST

The challenges and barriers discussed above have led to radical efforts to enact legislation affecting custody. Grassroots disability rights organizations in a number of states, including Idaho, Kansas, and California have altered their state statutes governing custody of children in a variety of ways. These disability-specific legislative changes should be models for similar legislation at the state or federal level. Some of the causes for unnecessary removal have not been addressed in specific legislation, yet they have been addressed in more general legislation in California and at the federal level.

A. Idaho

The pioneering effort to change legislation that victimized the children of parents with disabilities was undertaken by the Idaho State Independent Living Council's Committee on Fathers and Mothers Independently Living with their Youth (FAMILY).[129] The Idaho State Independent Living Council (SILC) is part of the cross-disability umbrella organization, National Council on Independent Living (NCIL), an organization that grew out of the Disability Rights Movement.[130]

As a grassroots organization, the Idaho SILC collects information on what consumers are most concerned about and includes these issues into the State Plan on Independent Living. In 2000, Idaho SILC reported that there was a growing fear of unwarranted removals of children from their parents with disabilities. The FAMILY Committee, headed by then Idaho SILC Executive Director Kelly Buckland, was formed to address this problem.[131] Buckland, who himself is a person with a disability,

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[129] IDAHO STATE INDEPENDENT LIVING COUNCIL, http://www.silc.idaho.gov. (last visited Dec. 23, 2011).

[130] THE NATIONAL COUNCIL ON INDEPENDENT LIVING—ABOUT, http://www.ncil.org/about.html (last visited Dec. 23, 2011). NCIL is the oldest existing cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals including: Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States.

[131] The FAMILY Committee worked closely with TLG during the process. TLG provided training and technical assistance, expertise with adaptive equipment and supportive services, and experience of working *specifically* with parents with disabilities. Dr. Megan Kirshbaum considered the process one of the most successful collaborations in the organization's history because of the tangible results

became a parent during the process, making the issue especially personal for him.

The FAMILY Committee worked with State Senator Robbi Barrutia, Representative Thomas Loertscher (the chairman of the Idaho House Health and Welfare Committee), and the Idaho Supreme Court. Over the course of two legislative sessions, the bills were defeated in House Committee. [132] But Chairman Loertscher had a change of heart after watching Sean Penn's depiction of a developmentally disabled dad fighting to keep his daughter.[133] As a result, four successful bills were passed over the 2002 and 2003 legislative sessions which have modified every custody-related section of the Idaho Statutes.

Cumulatively, these bills accomplished an enormous amount. They addressed: attitudinal bias, lack of knowledge of disability, adaptive equipment and services, problems in the production of good evidence and the challenge of bad evidence, and laws leading to discrimination by allowing the removal of children without showing a nexus between the disability and detriment to the child. These changes were accomplished by making the following additions and removals in the divorce, separation, and dependency statutes:

> 1. Adding non-discrimination statements regarding parents with disabilities;[134]
>
> 2. Adding definitions of "disability," "supportive services," and "adaptive equipment;"[135]
>
> 3. Adding a new section that specifically makes relevant and admissible evidence a parent with a disability may have regarding the services and adaptive equipment available to enable him or her to care for their child;[136]
>
> 4. Adding new language requiring any individual conducting a parenting evaluation to consider the use of adaptive equipment and supportive services for parents with disabilities and requiring that individual to have, or be assisted by

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achieved and the FAMILY Committee's ability to become experts in the phenomenon they sought to remedy.

[132] S.B. 1526, 55th Leg., 2d Reg. Sess. (Idaho 2000); Idaho State Independent Living Council, *SILC 2000 Post Legislative Update*, http://www.silc.idaho.gov/BLR/Apr00.htm (last visited Dec. 23, 2011); S.B. 1073, 56th Leg., 1st Reg. Sess. (Idaho 2001); S.B. 1074, 56th Leg., 1st Reg. Sess. (Idaho 2001); IDAHO STATE INDEPENDENT LIVING COUNCIL, *SILC 2001 Post Legislative Update*, http://www.silc.idaho.gov/BLR/May01.htm (last visited Dec. 23, 2011).

[133] I AM SAM (New Line Cinema 2001).

[134] IDAHO CODE ANN. §§ 16-1601, 16-2001(2), 32-717(5), 32-1005(3) (2011).

[135] *Id.* at §§ 16-1602(3), (14), (33), 16-2002(17)-(19), 32-717(4)(a)-(c), 32-1005(2)(a)-(c).

[136] *Id.* at §§ 16-1609(A), 16-2005(6).

> someone having, expertise in such equipment and services;[137]
>
> 5. Removing references to disability as a factor to be considered in custody determinations;[138] and
>
> 6. Adding a new section requiring a written statement by the court should it determine that disability is a relevant factor in a custody determination.[139]

The FAMILY Committee similarly lobbied for modifications of those statutes governing adoption and probate guardianships of children.[140]

Thus far, two cases involving the new legislation have reached the appellate level. In the first, *Doe v. Doe,* the court was unable to reach the merits of the case because it determined that the new legislation was not to be applied retroactively. [141] In the second, *Lieurance-Ross v. Ross,* a father appealed the decision of a family court magistrate finding that he could not be awarded custody of his children because he had a general guardianship as a result of stroke-impaired cognitive functioning.[142] In a decision that showed how much the court had learned from the new legislation, the conclusion included a discussion of adaptive parenting equipment and services and stated:

> [I]n light of our conclusion that a parent with a guardian is not precluded from seeking custody of his or her child, we see no reason to apply Section 32-717(2) differently in situations where a parent with a disability has a guardian from those situations where a parent with a disability does not have a guardian. In either scenario, the court is required to make findings regarding the effect the disability has on the parent's ability to carry out parenting responsibilities and whether adaptive equipment or supportive services can compensate for those aspects of the disability, which affect the parent's ability to care for his or her child.[143]

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[137] *Id.* at §§ 16-2008(b), 32-717(2).
[138] *Id.* at §§ 16-2008(b), 32-717(2); H.B. 557, 56th Leg., Reg. Sess. (Idaho 2002).
[139] IDAHO CODE ANN. § 32-717(5).
[140] *Id.* at §§ 15-5, 16-1500.
[141] 71 P.3d 1040, 1052 (Idaho 2003).
[142] 129 P.3d 1285, 1287-88 (Ct. App. Idaho 2006).
[143] *Id.* at 1291.

B. Kansas

Soon after the success in Idaho, the process of legislative amendment was facilitated by another SILC: the State Independent Living Council of Kansas (SILCK) under Executive Director Shannon Jones. The vehicle, Senate Bill 230, passed during the 2005 legislative session and went into effect in 2006.[144] This legislation included four major safeguards for parents with disabilities in the Revised Kansas Code for Care of Children, the new Article 22 of Chapter 38.[145] These four safeguards addressed issues of attitudinal bias; lack of knowledge of adaptive equipment; problems in the production of good evidence and the challenge of bad evidence; and laws leading to discrimination by allowing the removal of children without showing a nexus between the disability and detriment to the child. The legislation accomplished this through the following mechanisms:

> 1. A non-discrimination statement regarding parents with disabilities, thereby more fully encompassing them in the policy directive to protect the privacy and unity of the family;[146]
>
> 2. A statement that the disability of a parent will not constitute a ground for finding the child dependent or for removal of the child from the parent, without a specific showing of a causal relationship between the disability and harm to the child;[147]
>
> 3. A statement that the disability of a parent will not constitute a ground for terminating the parental rights of a parent with a disability, without a specific showing of a causal relationship between the disability and harm to the child;[148] and
>
> 4. A mandate that determinations regarding custody under the code will consider the availability and use of accommodations, specifically adaptive equipment and support services.[149]

Although more limited in scope (due to the fact that it was picked up as part of a revision of one specific code—the dependency code), the

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[144] S.B. 230, 81st Leg., 2005 Reg. Sess., (2006) (enacted), *available at* www.kansas.gov/government/legislative/bills/2006/230.pdf.
[145] Revised Kansas Code for Care of Children, KAN. STAT. ANN. § 38-2201 (2006).
[146] *Id.* at § 38-2201(c).
[147] *Id.* at § 38-2201(c)(1).
[148] *Id.*
[149] *Id.* at § 38-2201(c)(2).

Kansas legislation includes some of the most important protections for parents with disabilities. By requiring demonstration of the causation between harm to the child and the disability, the code, essentially, requires that proper services and adapted evaluations and assessments be performed. Moreover, these legislative changes set the stage for modification of other relevant Kansas codes, such as those effecting domestic relations, adoption, and guardianship.[150]

C. California

In 2010, *In re Marriage of Carney*[151] was codified.[152] *Carney* was a landmark case for parents with disabilities. The *Carney* court held as follows:

> [I]f a person has a physical handicap it is impermissible for the court [in a ruling on a custody matter] simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole.[153]

The court also noted that the father's physical handicap, which affected his ability to participate with his children in purely physical activities, did not constitute a changed circumstance of sufficient relevance and materiality to render it either "essential or expedient" for the children's welfare that they be taken from his custody.[154]

The codification is now contained as California Family Law § 3049 and specifies that "[i]t is the intent of the Legislature in enacting this section to codify the decision of the California Supreme Court in *In re Marriage of Carney*, with respect to custody and visitation determinations by the court involving a disabled parent."[155]

This was not the first time that efforts were made to address the

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[150] As in Idaho, TLG worked closely with SILCK, providing training, technical assistance and expertise during this process. One of the most interesting parts of the project was accessing the handbook and protocols used by social services in Kansas. For those in the legal program, it was the first time these types of documents had been available for review and exposed another area that should be reviewed for disability bias. As with Idaho, TLG found the determination of the Kansas SILC to utilize this opportunity heartening.

[151] 598 P.2d 36 (Cal. 1979).

[152] TLG's Legal Program provided technical assistance and public support for a successful collaborative effort by two policy organizations—Fathers and Families and Disability Rights California—to codify *Carney*.

[153] *Carney*, 598 P.2d. at 42.

[154] *Id.* at 44.

[155] CAL. FAM. CODE § 3049 (West 2011). Legal Program consumers in California are often provided reference to this code section for inclusion in pleadings or submissions to family law mediators during the course of family law proceedings.

needs of this population through legislative change in California. In 2000, changes to the California Welfare and Institutions Code caused Adapted Baby Care equipment to be included in the list of durable medical equipment covered by Medi-Cal (state means tested insurance program).[156] The landmark legislation expanded references to "conditions that interfere with normal activity" to include those that interfere with the ability to parent, identified such conditions as meeting the definition of "significant disability" rendering services medically necessary, and expanded the rights of Medi-Cal beneficiaries to include receiving adaptive parenting equipment within the definition of durable medical equipment.[157]

This legislation also addressed the problem of the cost-prohibitive nature of some adaptive equipment. Unfortunately, there has been no test case. There was a funding crisis at the time the legislation was passed that resulted in confusion about whether the new legislation would be funded. But within the last year, the state government has indicated that the legislation can be acted upon.[158]

D. The Indian Child Welfare Act

While the Indian Child Welfare Act (ICWA) is clearly not aimed at the disability community, the impetus for ICWA arose from circumstances similar to those surrounding families with parents who are disabled.[159] Both Native Americans and people with disabilities are historically oppressed minorities denied civil and human rights in this country. Both groups were systemically isolated from other sectors of society until mid-way through the last century. Both groups suffer extreme levels of poverty. Little is understood about their cultures, leading to generalized stereotyping and discrimination. Most importantly, both groups have been subjected to involuntary sterilization programs and massive removal of their children.

Congress passed ICWA in 1978 because Native American nations were losing custody of their children at an alarming and genocidal rate.[160] At the time, 25%–35% of Native children were being removed from their

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[156] *See id.* at §§ 14132, 14059 (West 2011). TLG teamed with the Los Angeles Office of Protection and Advocacy Inc. to create legislation affecting the California Welfare and Institutions Code.

[157] *See id.*

[158] Interview with Representative, Sacramento Medi-Cal, in Cal. (Aug. 2006).

[159] *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on the Interior and Insular Affairs,* 93d Cong. 15 (1974) (statement of William Byler, Executive Director, Association of American Indian Affairs, Inc.) (stating that studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25% to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions).

[160] *See id.*

families.[161] It was determined that a major cause of the removal of these children was the belief among Anglos that systemic removal of Native children from Native communities was always in the best interest of the Native child, as well as the pathologizing of childcare practices that were culturally healthy within the context of Native communities.[162] A common example is Anglo normalization of the nuclear family leading to the labeling of extended family childcare as "abandonment" or "neglect" by the Native parent for whom extended family care is the norm.[163] Indeed, Congress made the following findings:

> Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . (4) that an alarmingly high percentage of Indian families are broken up by the removal[s] . . . and (5) that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[164]

Lack of knowledge about the culture and parenting techniques of Native American people is very similar to lack of knowledge about the culture, adaptive equipment, supportive services, strengths, and parenting techniques of the disabled community. Because of this and other similarities between the causes of custody loss in the two communities—poverty, illiteracy, bias and discrimination—portions of the very successful ICWA that provide remedies for the Native American community should be borrowed to strengthen new legislation to protect the children of parents with disabilities.

The following selection of both substantive and procedural portions of ICWA, with attention to necessary disability adaptations (such as adaptations for parents who are non-readers or blind), can be applied in remedial legislation to address the following issues: lack of knowledge about adaptive equipment, services, and assessments; problems with the mandated timelines in dependency cases; lack of adequate legal counsel in the family courts and in portions of the dependency process; and a lack of adequate and timely adapted services in the dependency courts. Such portions include:

> 1. Mandatory written notification—with return receipt requested—must be provided to parents when a dependency

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[161] *Id.*

[162] Paul David Kouri, Note, In re M.J.J., J.P.L., & J.P.G: *The "Qualified Expert Witness" Requirements of the Indian Child Welfare Act*, 29 AM. INDIAN L. REV. 403, 404–05 (2004).

[163] Ester C. Kim, Comment, *Mississippi Ban of* Choctaw Indians v. Holyfield: *The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 765–66 (1991).

[164] 25 U.S.C. § 1901 (2011).

action is instituted. No action can be taken until ten days after receipt of the notice by the parent. Upon request, the parents shall have the right to an additional twenty days to prepare for any such proceeding;[165]

2. Mandatory appointment of counsel for the parent at the time of any removal, placement, or termination proceeding;[166]

3. A requirement that states provide evidence of active efforts to prevent the removal of a child or the termination of a parent's rights.[167] Active efforts have been interpreted in case law to require more vigorous intervention than reasonable efforts, the standard set forth in the Adoption and Safe Families Act;[168] and

4. A requirement that no removals or terminations may occur in the absence of a determination.[169] This must be supported by clear and convincing evidence in the cases of removals and by reasonable doubt in the cases of terminations.[170] Failure to remove or terminate will result in serious emotional or physical damage to the child.[171] Part of the showing must include the testimony of a qualified expert witness.[172]

VII. PROPOSED LEGISLATION: SUBSTANCE AND PROCEDURE

Together, the contents of the above section provide four tools to create comprehensive legislation.

A. Components of Future Legislation

Future legislation must combine the work of Idaho, Kansas, and California with the work done in ICWA. Together, the language of these statutes provides cohesive and comprehensive remedies to the six

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[165] 25 U.S.C. § 1912 (a) (2006).
[166] *Id.* at § 1912 (b).
[167] *Id.* at § 1912 (d).
[168] *Indian Child Welfare Act (ICWA) FAQ*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, http://www.nicwa.org/Indian_Child_Welfare_Act/faq/ (last visited Dec. 23, 2011).
[169] 25 U.S.C. § 1912 (e)–(f) (2006).
[170] *Id.*
[171] *Id.*
[172] *Id.*

common causes of children being removed from parent(s) with disabilities in family or dependency court and offers real protection for children of parents with disabilities.[173]

The following elements should be included in any future remedial legislation intended to prevent the unnecessary removal of children from disabled parents:

1. A non-discrimination statement with regard to parents with disabilities, utilizing the Kansas,[174] Idaho,[175] and California[176] models;

2. Definitions of "disability," and "supportive services," and "adaptive equipment" utilizing the Idaho model;[177]

3. Language requiring a showing of causation between the disability and detriment to the child when disability is a basis for removal of a child in dependency court or a determination to remove custody from a parent with a disability in family court utilizing the Kansas and Idaho models;[178]

4. Language requiring appointed counsel in family law court for parents with mental or intellectual disabilities, and that counsel in both dependency and family law cases be assigned at the outset of the case, utilizing the ICWA model;[179]

5. Language requiring active efforts to prevent removal or termination in dependency cases to the level of clear and convincing evidence, and especially noting that failure to provide parenting adaptations or adaptive equipment and supportive services will result in a finding that active efforts did not occur using the ICWA model;[180]

6. Language codifying the right of parents to (a) be notified of the availability of parenting adaptations/adaptive equipment and supportive services, and (b) have a person knowledgeable about parenting adaptations/adaptive equipment and

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[173] *See supra* Part IV.

[174] KAN. STAT. ANN. § 38-2201 to -2283 (2006).

[175] IDAHO CODE ANN. §§ 16-1601; 16-2001, 32-717 (5), 32-1005 (3) (2010).

[176] CAL. FAM. CODE § 16509.2 (West 2011) ("The physical or mental incapacity, or both, in itself, of a parent or a child, shall not result in a presumption of need for child welfare services.").

[177] *See* IDAHO CODE ANN. § 32-717(4)(a)–(c) (2007).

[178] *See* Kansas Code for Care of Children, KAN. STAT. ANN. § 38-2201(c)(1) (2010); IDAHO CODE ANN. § 32-717(2) (2007).

[179] *See* 25 U.S.C. § 1912(b) (2006).

[180] *See id.* at § 1912(d).

supportive services included in cases as an expert in both dependency and family court, using the Idaho model;[181]

7. Language codifying the right of parents with disabilities to present evidence to the dependency or family court regarding the parenting adaptations/adaptive equipment and supportive services available to them, using the Idaho and Kansas models;[182]

8. Language requiring parenting adaptations/adaptive equipment to be included in the durable medical equipment available to disabled recipients of state medical coverage, and language requiring parenting to be categorized as a major activity of daily living using the California model;[183] and

9. Language requiring a judge to issue a written ruling whenever disability is a basis for loss of custody in the dependency or family court, using the Idaho model.[184]

There are currently other efforts to address dependency codes separately, most notably by the Research and Training Center on Community Living (a program of the University of Minnesota), detailed in their policy research brief entitled "The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes."[185] As previously discussed in Part VI, addressing dependency cases separately was a first step in both the Kansas and Idaho legislative efforts.

However, simply removing disability as a grounds for termination will be a limited accomplishment—a paper tiger. Even if disability is removed as an explicit basis for removal of children in dependency court, the court, using the standard of parental fitness, may consider *anything* that impacts that parent's ability to care for the child. Moreover, 44% of TLG's Legal Program consumers enrolled in the 2011 *Perspectives* study were involved in family court cases—more than in dependency court. And, it is family court, using the best interest of the child standard, which may consider *anything* that could impact the well-being of the child. Meaningful substantive and procedural protections must be put in place; the changes cannot just trim away politically incorrect language.

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[181] *See* IDAHO CODE ANN. § 32-717(2) (2007).
[182] *See* KAN. STAT. ANN. § 38-2201(c)(2) (2010); *see also* IDAHO CODE ANN. § 32-717(4)(c) (2007).
[183] *See* CAL. WELF. & INST. CODE § 14132(m) (West 2011).
[184] *See* IDAHO CODE ANN. § 32-717(5)(a)–(c) (2007).
[185] Lightfoot, *Inclusion of Disability*, *supra* note 5, at 2.

B. State or Federal?

Legislation with meaningful substantive and procedural protections for parents with disabilities is addressable at the state level—Kansas, Idaho, and California's successes are evidence of this. However, advocates are interested in pursuing remedial legislation at the federal level. The benefits of a federal fix would include addressing a national problem at the national level and providing consistency for families with a disabled parent. Federal legislation would avoid the difficulties of making changes in states with large populations, like California and New York, or in states that are less politically accessible to the disability community, and would allow the national disability community to pool its resources and "people power" to lobby for one law instead of many.

Traditionally, the possibility of federal legislation has been met with resistance because of the view of family law as a matter for state governance. This notion grew out of *Barber v. Barber*.[186] *Barber* involved a wife trying to use the federal courts to enforce a judgment for divorce against her husband.[187] The court in dicta noted that it "disclaim[ed] altogether any jurisdiction in the courts of the United States" over the actual granting of divorce or alimony decrees.[188]

Almost a century and a half later, in 1992, the Supreme Court noted in *Ankenbrandt v. Richards* that the "domestic relations exception" was, in effect, not based on the accuracy of the historic justifications, but on the fact that Congress had apparently accepted this construction since 1859.[189]

Despite this, the federal government routinely *does* make policy that affects families directly. Among these policies are the Family Medical Leave Act of 1993,[190] the Adoption and Safe Families Act, [191] and federal laws requiring the states to adopt child support and enforcement schemes. Congress passed these laws using its powers under the Commerce Clause[192] and the Spending Clause.[193]

Recent cases have limited Congress's power to promulgate laws under the Commerce Clause to cases where the laws will do the following: 1) regulate the use of the channels of interstate commerce; 2) regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; or 3) regulate those activities

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[186] 62 U.S. 582 (1858).
[187] *Id.* at 583–84.
[188] *Id.* at 584.
[189] 504 U.S. 689, 700 (1992).
[190] 29 U.S.C. § 2601 (2006).
[191] 42 U.S.C. §§ 673b, 678, 679b (2006).
[192] U.S. CONST. art. I, § 8, cl. 3.
[193] U.S. CONST. art. I, § 8, cl. 1.

having a substantial relation to interstate commerce.[194] However, child support collection and enforcement is generally accepted as an appropriate use of the Commerce Clause.[195] Less restricted, the Spending Clause allows Congress to spend money for the general welfare of the citizenry, and includes the power to force the states to abide by national standards through the threat of withholding federal funds. The Adoption and Safe Families Act[196] is generally accepted as an appropriate use of the Spending Clause.[197]

Either clause may be a route to a federal fix for the loss of familial integrity experienced by the children of people with disabilities. However, it seems that the Commerce Clause is a less likely vehicle than the Spending Clause. An involved discussion of which power, or what other powers (such as Section 5 of the Fourteenth Amendment) might allow a federal fix are beyond the parameters of this Article. Pursuant to *Santosky v. Kramer*,[198] parenting rights are protected under the Fourteenth Amendment as a fundamental liberty interest. If, as is posited herein, parents are being deprived of this fundamental right without due process of law, or are being denied "the equal protection of the laws" based on their status as disabled, then Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[199] However, it is imperative that the possibility of a fix not be thrown out merely because of historic "hoary"[200] notions that the family is beyond the purview of the federal government.

Another logical starting point would explore how an amendment to the powerful American with Disabilities Act might be promulgated under these powers to protect the children of parents with disabilities from unnecessary removals.

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[194] United States v. Lopez, 514 U.S. 549, 558–59 (1995); United States v. Morrison, 529 U.S. 598, 608–09 (2000).

[195] *See, e.g.*, U.S. v. Parker, 108 F.3d 28, 30 (3d Cir. 1997); U.S. v. Hampshire, 95 F.3d 999, 1003–04 (10th Cir. 1996); U.S. v. Mussari, 95 F.3d 787, 790 (9th Cir. 1996); U.S. v. Sage, 92 F.3d 101, 104–07 (2d Cir. 1996).

[196] 42 U.S.C. §§ 620–29, 670–79 (2006).

[197] Mo. Child Care Ass'n v. Cross, 294 F.3d 1034, 1036 (8th Cir. 2002) (holding that the Adoption and Safe Families Act of 1997, which amended the Adoption Assistance and Child Welfare Act of 1980, was a valid exercise of the Spending Power and that through the Supremacy Clause preempted state law).

[198] 455 U.S. at 753.

[199] U.S. CONST. amend. XIV, §§ 1, 5. For scholarship debating the scope of Congress's Section Five power, *see* Larry D. Kramer, *The Supreme Court, 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 5, 136–53 (2001); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

[200] Sylvia Law, *Families and Federalism*, 4 WASH. U.J.L. & POL'Y 175, 179 (2000).

VIII. CONCLUSION

Millions of children of parents with disabilities are being removed from their families at alarming rates and are suffering the maladies that accompany such removals. The vast majority of these removals are unnecessary. They are based on a handful of major causes that can be remedied legislatively. Whether state or federal, it is imperative that legislation to remedy this problem be promulgated within this generation.

Unnecessary removal is not just an issue for American children of parents with disabilities. There is nothing specific to our culture that lends itself to this injustice. The United Nations General Assembly adoption of the Convention on the Rights of Persons with Disabilities (UNCRPD) features Article 23: Respect for home and the family, which alludes to adaptive equipment and services and emphasizes preventing a *child's loss of her parents*:[201]

> 1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others . . . .
>
> . . . .
>
> 2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
>
> . . . .
>
> 4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of

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[201] Convention on the Rights of Persons with Disabilities, art. 23, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3.

disability of either the child or one or both of the parents.[202]

In 2011, Legal Program Director (and one of the authors of this Article) Ella Callow presented a portion of the raw data contained in this Article to an audience of hundreds of disability activists, researchers and U.N. members gathered at the Nordic Network on Disability Research Conference, in Reykjavik, Iceland. The purpose of the conference was to bring the international disability community together to envision and discuss what the UNCRPD meant for people with disabilities, including families that contain a parent with a disability. Throughout the conference, people from other nations expressed how important it is, and how hopeful their communities are, that America will join with the 151 other nations that have ratified the UNCPRD as of 2011. Clearly, this is a global issue for which the time has come.

The American disability rights movement is still a young movement, but it has been breathtakingly successful for many individuals with disabilities. Protecting the rights of parents with disabilities and their children will be an important step in the movement's history. It will be very difficult; yet, what more important step can there be in a movement than to secure for its members the basic right to family, and to protect its children against wrongful removal, trauma, and great harm? We must be willing to take on great challenges for the sake of our children.

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[202] *Id.*

Reprisal Revisited: *Gross v. FBL Financial Services, Inc.* and the End of Mixed-Motive Title VII Retaliation

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I. INTRODUCTION

In 2009, the Supreme Court decided *Gross v. FBL Financial Services, Inc.*, an Age Discrimination in Employment Act (ADEA) case on appeal from the Eighth Circuit.[1] In *Gross*, the Court found that the mixed-motive burden-shifting standard first announced in *Price Waterhouse v. Hopkins*[2] is *never* available to ADEA plaintiffs, and that a plaintiff must instead "prove . . . that age was the 'but-for' cause of the challenged adverse employment action."[3] While it is clear that mixed-motive Title VII discrimination claims survive *Gross*—such claims are afforded explicit statutory support in § 2000e-2(m) of Title VII—it is far less clear whether plaintiffs suing under employment anti-discrimination statutes other than Title VII will be allowed to continue to use the mixed-motive framework. Additionally, it is unclear whether the mixed-motive framework will continue to be available to plaintiffs bringing claims under a provision of Title VII to which § 2000e-2(m) arguably does not extend: § 2000e-3(a), Title VII's anti-retaliation provision.

This Article examines the impact of *Gross* on mixed-motive Title VII retaliation claims. Part II discusses the history of retaliation under Title VII and other anti-discrimination statutes, as well as some recent developments in retaliation jurisprudence. Part III introduces the mixed-motive proof framework, and discusses the framework's origins and subsequent developments. Part IV discusses the application of the mixed-motive standard to Title VII retaliation claims, as well as the impact of both the Civil Rights Act of 1991 Amendments and the Supreme Court's decision in *Desert Palace, Inc. v. Costa* on such claims.[4] Part V analyzes the decisions of both the Eighth Circuit and the Supreme Court in *Gross*. Part VI discusses a number of early cases that address the impact of

[1] 129 S.Ct. 2343 (2009).
[2] 490 U.S. 228 (1989).
[3] *Gross*, 129 S.Ct. at 2345.
[4] 539 U.S. 90 (2003).

Gross: two widely-cited Seventh Circuit opinions applying *Gross* to a § 1983 claim and an ADA claim; a Fifth Circuit mixed-motive Title VII case finding that *Gross* does not preclude mixed-motive Title VII retaliation claims;[5] and four mixed-motive Title VII retaliation cases from the D.C. district court, two of which concluded the claims survived *Gross*, while two found they do not.[6] Part VII provides a critique of *Smith v. Xerox*, identifies two potential avenues for courts to preserve mixed-motive Title VII retaliation claims, and concludes that any decision that is truly loyal to the Court's holding in *Gross* will find that mixed-motive Title VII retaliation claims are no longer viable.

II. A BRIEF HISTORY OF RETALIATION

Section 704(a) of Title VII of the Civil Rights Act of 1964, now codified at 42 U.S.C. § 2000e-3, states:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees or applicants for employment . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[7]

This anti-retaliation provision is designed to "safeguard the operation of [Title VII's] procedures for enforcement":[8] the provision forbids employers from punishing employees for enforcing their rights under the anti-discrimination provisions of the Act.[9] If, for example, an employee believes that she was the victim of race discrimination by her employer, that person may file a charge with the Equal Employment Opportunity Commission (EEOC) seeking a right-to-sue letter under Title VII.[10] However, she might be discouraged from doing so if she thought that her employer would seek to punish her for filing such a charge. For example, she might face potential termination, demotion, or abuse at the workplace

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[5] Smith v. Xerox, 602 F.3d 320, 330 (5th Cir. 2010).

[6] Two of the D.C. district court cases concluded that such mixed-motive claims survive *Gross*. *See* Nuskey v. Hochberg, 730 F. Supp. 2d 1, 5 (D.D.C. 2010); Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 145 (D.D.C. 2010). However, two cases found that such claims do not survive *Gross*. *See* Hayes v. Sebelius, 762 F. Supp. 2d 90, 112 (D.D.C. 2011); Beckford v. Geithner, 661 F. Supp. 2d 17, 19–21 (D.D.C. 2009).

[7] 42 U.S.C. § 2000e-3(a) (2006).

[8] GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 151 (3d ed. 2010).

[9] *See* 42 U.S.C. § 2000e-2(a)–(d) (2006).

[10] This is somewhat of an oversimplification of the process for suing one's employer under Title VII. For example, a person must often exhaust state and local remedies before receiving a right-to-sue letter from the EEOC. *See* 42 U.S.C. § 2000e-5(c), (d) (2006); 29 C.F.R. § 1601.70 (2009); *see also* RUTHERGLEN, *supra* note 8, at 160–61.

for being the "squeaky wheel." Title VII's anti-retaliation provision seeks to mitigate such fears, promising punishment for such retaliatory acts by the employer that could undermine the statute's ultimate aim: protecting individuals against unlawful discrimination.

Two separate clauses presenting distinct legal questions comprise Title VII's retaliation provision.[11] The first clause—the "opposition clause"—prohibits retaliation for "oppos[ing] any practice made an unlawful employment practice."[12] The second clause—the "participation clause"—prohibits retaliation "because [an employee] has made a charge, testified, assisted, or participated . . . in an investigation, proceeding, or hearing" under the statute.[13] In our hypothetical example above, if the employee made internal complaints about discrimination—perhaps about discriminatory actions taken by her manager—to the human resources department, her actions would be considered "opposition." But upon filing charges with the EEOC, the conduct would switch from opposition to "participation." The distinction between conduct deemed opposition and that deemed participation is important for plaintiffs, because the "reasonable, good faith belief" requirement applies only to opposition conduct. Generally, any participation conduct will be protected, regardless of reasonableness.[14] Provided that she had a reasonable, good faith belief that the conduct complained of internally (and therefore *opposed*) was unlawful, both the internal complaints and the filing of charges with the EEOC would be protected activity under the statute.[15]

Title VII of the Civil Rights Act of 1964 is but one of several civil rights statutes that contain anti-retaliation provisions. Although Title VII's prohibition "was the dawn of the history of the law of retaliation in employment as it is known today,"[16] a number of other federal statutes that offer employment protection to individuals contain similar anti-retaliation provisions. Such statutes include the Age Discrimination in Employment Act (ADEA),[17] the Americans with Disabilities Act (ADA),[18] the Fair Labor Standards Act (FLSA),[19] the Equal Pay Act

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[11] MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 461 (7th ed. 2008).

[12] 42 U.S.C. § 2000e-3(a) (2006).

[13] *Id.*

[14] *See, e.g.,* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (finding that an employee's opposition conduct was not protected because "no one could reasonably believe that the incident . . . violated Title VII"); Glover v. S.C. Law Enf. Div., 170 F.3d 411, 412 (4th Cir. 1999) (finding that even "unreasonable" deposition testimony is protected by the participation clause). *But see* Johnson v. ITT Aerospace, 272 F.3d 498, 501 (7th Cir. 2001) (holding that the filing of frivolous charges against an employer does not meet the requirements of "participation activity").

[15] *See id.*

[16] Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 393 (2010).

[17] 29 U.S.C. § 623(d) (2006) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.").

[18] 42 U.S.C. § 12203(a) (2006) ("No person shall discriminate against any individual because such

(EPA),[20] the Family and Medical Leave Act (FMLA),[21] and the National Labor Relations Act (NLRA).[22]

In addition to statutes containing explicit retaliation provisions, the Supreme Court has found prohibitions against retaliation implied in other statutes. In the 2005 decision of *Jackson v. Birmingham Board of Education*, the Supreme Court found an implied prohibition against retaliation in Title IX of the Education Amendments of 1972.[23] Title IX's anti-discrimination provisions provide that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24] The Court held that because retaliation is an "intentional act," it was therefore a form of intentional discrimination under Title IX.[25] The defendant in *Jackson* claimed that the educational institution had retaliated against him by terminating him from his position as coach of a high school girls' basketball team after he complained to school authorities about sex discrimination.[26] After noting that Congress clearly intended to give the statute "a broad reach," the Court held that "[r]etaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,'" and that an implied claim for retaliation was therefore available to Jackson.[27]

In 2008, the Court again found implied prohibitions against retaliation in federal statutes. In *CBOCS West, Inc. v. Humphries*, the Court found an implied anti-retaliation provision in 42 U.S.C. § 1981.[28] On the same day, the Court decided *Gomez-Perez v. Potter*, in which a United States Postal Service employee sued the Postal Service under the federal-sector provisions of the ADEA for retaliation.[29] In a 6-3 decision, the Court held that despite the fact that § 633(a) of the ADEA contains

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individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

[19] 29 U.S.C. § 215(a)(3) (2006) protects employees bringing complaints under both the EPA and the FLSA. Under § 215(a)(3), it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under . . . this chapter, or has testified or is about to testify in any such proceeding.").

[20] 29 U.S.C. § 206 (2006).

[21] 29 U.S.C. § 2615(b) (2006) ("It shall be unlawful for any person to discharge or in any other manner discriminate against an individual because such individual—(1) has filed any charge, or has instituted . . . any proceeding . . . ; (2) has given . . . any information in connection with any inquiry or proceeding relating to any right provided under this subchapter . . . ; (3) has testified . . . in any inquiry or proceeding relating to any right provided under this subchapter. . . .").

[22] 29 U.S.C. § 158(a)(4) (2006) ("It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.").

[23] 544 U.S. 167, 171, 173–74 (2005).

[24] 20 U.S.C. § 1681(a) (2006).

[25] *Jackson*, 544 U.S. at 173–74.

[26] *Id.* at 171–72.

[27] *Id.* at 175–77.

[28] CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008).

[29] Gomez-Perez v. Potter, 553 U.S. 474, 478–79 (2008).

no provision mentioning retaliation, "such a claim is authorized."[30]

The Court's recent willingness to "read in" to these statutes implied anti-retaliation provisions exemplifies the Court's generally broad, employee-friendly interpretations of the law of workplace retaliation in the first decade of the twenty-first century. For example, in the 2006 case *Burlington Northern & Santa Fe Railway Co. v. White*,[31] the Court resolved a four-way circuit split[32] regarding the severity of the impact on an individual's employment that an individual must show in order to have a valid retaliation claim under Title VII.[33] In *Burlington Northern*, the plaintiff alleged that as a result of filing EEOC charges, she was reassigned and later suspended without pay.[34] However, after challenging the action through an internal grievance procedure, her employer reinstated her and gave her full back pay for the period in which she was suspended.[35] Despite the back pay award, the Court held that a reasonable employee could have found such circumstances "materially adverse," and that the employer's actions could therefore have served as a deterrent to a reasonable worker contemplating making or supporting an EEOC charge.[36] The Court characterized the new "materially adverse" standard as an objective one: the plaintiff need only show that the adverse decision was "materially adverse to a reasonable employee or job applicant" and "harmful to the point that . . . [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."[37]

In 2009, the Court, in *Crawford v. Metropolitan Government of Nashville*, found that retaliation protection extended to an employee who spoke out about sexual harassment "not on her own initiative," but rather in response to questions asked to her during an internal investigation of a fellow employee.[38] As part of an internal investigation of a school district employee relations director, a human resources officer approached Crawford and asked her whether she had witnessed any "inappropriate behavior" by the employee relations director under investigation.[39] Crawford—along with two other employees—reported that the director had in fact harassed them.[40] All three employees were subsequently terminated soon after the investigation was completed; the school district

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[30] *Id.* at 477.

[31] 548 U.S. 53 (2006).

[32] *See id.* at 60–61 (describing split between restrictive circuits that require more specific relationships between the retaliatory action and employment, and relaxed circuits that require only that the retaliatory action only be materially adverse to the employee or act as a deterrent against protected activities).

[33] *Id.* at 57.

[34] *Id.* at 58–59.

[35] *Id.*

[36] *Burlington Northern*, 548 U.S. at 71–73.

[37] *Id.* at 57.

[38] Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 849 (2009).

[39] *Id.*

[40] *Id.*

alleged that Crawford was terminated for embezzlement.[41]

The Sixth Circuit upheld summary judgment for the school district, finding that the "opposition clause" of Title VII's anti-retaliation provision "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation," and Crawford did "not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing."[42] The Supreme Court unanimously reversed, holding that the Sixth Circuit's active and consistent opposition requirement set an unreasonably high bar for conduct that constituted protected opposition.[43]

Given the Court's recently broad reading of anti-retaliation provisions paired with its willingness to imply anti-retaliation provisions in statutes that do not explicitly contain them, it is unsurprising that the number of retaliation charges filed with the EEOC has risen dramatically in recent years. In 1999, there were only 19,694 retaliation charges under all the statutes enforced by the EEOC.[44] In 2007—the year following *Burlington Northern*—26,663 charges were filed, an increase of more than 4,000 charges over the previous year's total.[45] The dramatic rise continued in 2010 with 36,258 retaliation charges being filed with the EEOC.[46] Using the year 2000 as a base, the 2010 number represents a 68% increase in the number of charges filed.[47]

Not only did the number of retaliation claims filed with the EEOC grow, but also the proportion of retaliation claims to other claims increased. In 1997, for example, retaliation made up 22.6% of all charges filed with the EEOC, making retaliation the third-most-filed charge with the EEOC.[48] By 2010, retaliation filings had exceeded race discrimination charges—long the most-filed charge—to become the single-most-filed charge with the EEOC, representing 36.3% of all charges filed.[49] Recent jury verdict research suggests that not only are retaliation claims popular, but also they are relatively profitable. One study shows "that from 2002 to 2008, retaliation claims resulted in the highest median awards for frequently occurring employment claims."[50]

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[41] *Id.*

[42] *Id.* at 850.

[43] *Crawford*, 129 S.Ct. at 851–52.

[44] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2010, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 3, 2010) [hereinafter U.S. EEOC].

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* (The EEOC lists ten types of charges: race, sex, national origin, religion, retaliation under all statutes, retaliation under Title VII only, age, disability, and those brought under the Equal Pay Act or GINA.)

[49] *See* U.S. EEOC, *supra* note 44.

[50] *See* Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 349, 397 (2010).

III. A BRIEF HISTORY OF MIXED-MOTIVE

A. Title VII's Two Proof Structures

Roughly speaking, Title VII prohibits adverse employment actions that are motivated by unlawful considerations—such as race, sex, and national origin. But what does "motivated by"—or, in the language of Title VII's anti-discrimination provision, "because of"—unlawful considerations actually mean, and how does one prove that such considerations were used? Professor Catherine Struve summarizes two of the general frameworks that are used in Title VII cases:

> Under the framework set by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine*, an employment discrimination plaintiff bears the burden of proving that discrimination was the *determinative factor* in the challenged employment decision. But under an alternative framework that burden can shift: in 1989 a fractured Supreme Court held that upon a showing that the plaintiff's protected status (such as sex) played a *motivating* (or substantial) part in the employer's adverse action, the burden would shift to the employer to prove that it would have made the same decision even if the plaintiff had not had that protected status.[51]

Under the *McDonnell Douglas* framework, the burden of persuasion never shifts from the plaintiff.[52] First, the plaintiff must establish a *prima facie* case of discrimination.[53] Once this has been established, the employer has the burden of *production* to put into evidence "some legitimate, nondiscriminatory reason" for the adverse employment action.[54] When the employer has carried this burden, the "presumption" of discrimination established by the plaintiff's prima facie showing is rebutted.[55] However, the plaintiff then has the opportunity to show that the employer's professed "nondiscriminatory reason" for the adverse action was in reality a pretext for a motivation that was actually discriminatory.[56]

McDonnell Douglas is the case most often cited in "single motive" cases: "the employer had either acted from discriminatory motives or it had acted because of its asserted 'legitimate,

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[51] Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 280–281 (2010) (emphasis added).
[52] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[53] *Id.* at 802.
[54] *Id.*
[55] ZIMMER ET AL., *supra* note 11, at 54.
[56] *McDonnell Douglas*, 411 U.S. at 802–04.

nondiscriminatory reason.'"[57] However, not all Title VII discrimination cases are so easily disposed of. In some cases, courts are presented with situations in which the adverse employment action was the result of a mixture of both legitimate and illegitimate considerations. Such cases are commonly referred to as "mixed-motive" cases.[58] In *Price Waterhouse v. Hopkins*, the Supreme Court made its first attempt at supplying an analytical framework for such situations.[59]

In *Price Waterhouse*, Ann Hopkins, a manager at an accounting firm, had her partnership application put on hold by the firm's Policy Board, which later refused to reconsider the application.[60] At trial, the judge found that certain aspects of Hopkins' behavior—she was considered to be prone to abrasiveness and was impatient with her staff—"doomed her bid for partnership."[61] However, "[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; [and] a third advised her to 'take a course at charm school.'"[62]

A plurality of the Court found the *McDonnell Douglas* framework unsuited to deal with such a mixed-motive case: "Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was *the* 'true reason,'"[63] the "determinative factor," or the "but for cause" of the decision made by the employer. Instead, the Court held that a burden-shifting framework should apply.[64] First, the plaintiff must show "that an impermissible motive played a motivating part in an adverse employment decision."[65] After this burden has been satisfied, the burden shifts to the employer to prove, by a preponderance of the evidence, "that it would have made the same decision in the absence of discrimination."[66] The Court characterized the employer's burden as an affirmative defense: "the plaintiff must persuade the factfinder" that an impermissible motive played a part in the employment decision, "and then the employer, if it wishes to prevail, must persuade" the factfinder that it would have made the same decision even without consideration of the impermissible factors.[67] This came to be known as the employer's

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[57] ZIMMER ET AL., *supra* note 11, at 43.

[58] David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 910 (2010).

[59] *See Price Waterhouse*, 490 U.S. at 228.

[60] *Id.* at 231–32.

[61] *Id.* at 234–35.

[62] *Id.* at 235 (internal citation omitted).

[63] *Id.* at 247 (internal quotations omitted).

[64] *Price Waterhouse*, 490 U.S. at 250.

[65] *Id.* at 250.

[66] *Id.* at 252–53.

[67] *Id.* at 246.

"same decision defense."[68]

B. Civil Rights Act of 1991

The *Price Waterhouse* decision was extremely advantageous to plaintiffs alleging unlawful employment discrimination. At the same time, however, the employer's affirmative defense was a powerful one under the standard established by the Court. Even if the employer *admitted* to using impermissible motives—such as race or gender discrimination—in making an employment decision, if the employer could show that it would have made the same decision *even if it had not* discriminated, the employer would escape liability entirely.[69] Congress responded to the *Price Waterhouse* decision with the Civil Rights Act of 1991.[70] Although Congress approved the basic burden-shifting framework enunciated by the Court, it limited employers' ability to avoid liability entirely through use of the same-decision defense.[71] Instead, "the employer does not escape liability if it proves that it would have made the decision regardless of the protected class. . . . [P]laintiffs receive a declaratory judgment, and may receive costs and attorneys fees, if they can satisfy the first prong of the two-prong mixed-motive test."[72] The employer's "affirmative defense," then, is not a *complete* bar to recovery by the plaintiff: if it is established that discrimination played a motivating role in the employer's decision, the matter becomes *how much* the plaintiff can recover, not *whether* the plaintiff can recover. If employers fail to satisfy their burden on the second prong, they "are subject to back pay, reinstatement, punitive and compensatory damages, as well as costs and fees."[73]

C. Direct vs. Circumstantial Evidence in Mixed-Motive Cases

While the 1991 Act provided important clarification to courts regarding the proper application of the mixed-motive framework and the remedies that could flow from a showing of the use of discriminatory considerations, certain questions were left unanswered. One of these unanswered questions was whether a plaintiff needed direct evidence to proceed under a mixed-motive framework.

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[68] *See* Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 872 (2004).
[69] *Price Waterhouse*, 490 U.S. at 258.
[70] Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 107 (1991).
[71] *Id.* § 107.
[72] Sherwyn & Heise, *supra* note 58, at 914.
[73] *Id.*

In *Price Waterhouse*, a divided Court produced a plurality opinion, two concurrences, and a dissent. The plurality, led by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, established the general mixed-motive framework, holding that if a plaintiff "proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken . . . gender into account."[74] Justice White filed a concurring opinion in which he stated that the burden should shift to the employer only when a plaintiff "show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action."[75] In her own concurring opinion, Justice O'Connor agreed with Justice White that the "substantial factor" test was the appropriate one, and that the burden on the issue of causation would shift to the employer only if "a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion" was involved.[76]

While the 1991 Act provided a definitive answer to one of the disputes between the concurrences and the plurality by codifying the "motivating factor" test, it left unanswered the question of the type of evidence required to proceed under a mixed-motive framework. It was Justice O'Connor's approach—differentiating between direct and circumstantial evidence, and requiring the former for a mixed-motive instruction—that took hold in the circuits.[77] The majority of courts followed the general rule that "when the Supreme Court rules by means of a plurality opinion . . . inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree."[78] Courts found that the "narrowest ground" with respect to the type of evidence required for a mixed-motive instruction was that espoused by Justice O'Connor.

In 2003, the Supreme Court finally took on this evidentiary issue in *Desert Palace, Inc. v. Costa*.[79] In *Costa*, the Ninth Circuit had held—in stark contrast to many courts that had considered the question—that

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[74] 490 U.S. at 258 (emphasis added).

[75] *Id.* at 259 (White, J., concurring).

[76] *Id.* at 276 (O'Connor, J., concurring) (emphasis added).

[77] Davis, *supra* note 68, at 873.

[78] Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999). *See also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (quoting Gregg v. Georgia, 428 U.S. 153, 169 (1976) (internal citations omitted)). Note, however, that not all courts initially embraced Justice O'Connor's narrow interpretation of Title VII. *See, e.g.*, Thomas v. NFL Players Ass'n, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent."); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("The requirement of 'direct evidence' was not . . . adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.").

[79] 539 U.S. 90 (2003).

direct evidence was *not* necessary for the mixed-motive burden-shifting scheme to apply.[80] The Supreme Court unanimously affirmed the Ninth Circuit decision.[81] Justice Thomas felt no need to take sides as to "which of the opinions in *Price Waterhouse* is controlling," because he found the petitioner's argument—that direct evidence was required before a mixed-motive instruction could be given—to be "inconsistent with the text of § 2000e-2(m)."[82] He wrote:

> Our precedents make clear that the starting point for our analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the "judicial inquiry is complete". . . . Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[83]

Because the statute required only that a plaintiff "demonstrate" the use of such a consideration, requiring anything more stringent would be an error.[84] Justice Thomas also pointed to the fact that Congress explicitly defined "demonstrates" in the 1991 Act as to "meet[] the burdens of production and persuasion,"[85] without any caveat requiring a heightened showing.[86] Justice Thomas noted that the lack of such a caveat "is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances."[87]

Leaving the text of the statute, Justice Thomas pointed to additional evidence that suggested a heightened evidence requirement was unwarranted. Justice Thomas cited "the [c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases . . . [which] requires a plaintiff to prove his case 'by a preponderance of the evidence,' using 'direct or circumstantial evidence.'"[88] Moreover, Justice Thomas noted that circumstantial evidence can be *more* persuasive than direct evidence, and that such evidence is deemed to be sufficient in criminal trials—even though criminal trials require proof beyond a reasonable doubt, a higher standard than is required in a Title VII civil case.[89] Finally, Justice Thomas pointed to the use of the term "demonstrates" in other provisions of Title VII—such as § 2000e-2(k)(1)(A)(i) and § 2000e-5(g)(2)(B)—to

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[80] 299 F.3d 838, 855 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).
[81] 539 U.S. 90, 101–02 (2003).
[82] *Id.* at 98.
[83] *Id.* at 98–99 (internal citations omitted).
[84] *Id.* at 99.
[85] 42 U.S.C. § 2000e(m) (2006).
[86] 539 U.S. at 99.
[87] *Id.*
[88] *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)) (internal citations omitted).
[89] *Id.* at 100 (emphasis added).

"show further that § 2000e-2(m) does not incorporate a direct evidence requirement."[90]

IV. THE MIXED-MOTIVE STANDARD AND TITLE VII RETALIATION

Following Congress's amendment of Title VII in 1991 and the Supreme Court's decision in *Desert Palace*, one might have expected Title VII retaliation cases to simply track Title VII discrimination cases. Under this interpretation, the 1991 Amendments established a "limited defense" that employers could use to reduce (but not extinguish) damages if they admitted to using impermissible considerations—in this case, individuals' engagement in protected activity—in taking an adverse employment action. Similarly, the Court's unanimous decision in *Desert Palace* would establish that plaintiffs need not present direct evidence to avail themselves of the mixed-motive framework. However, not all courts were willing to extend the benefits offered by the 1991 Amendments to plaintiffs in the context of Title VII retaliation. The *Desert Palace* decision proved to be somewhat of a more difficult issue for Title VII retaliation than for Title VII discrimination claims.

A. Mixed-Motive Retaliation Cases

An important issue to address at the threshold is whether a plaintiff alleging Title VII retaliation could *ever* utilize the mixed-motive framework first laid out in *Price Waterhouse*. Given the disagreements that eventually materialized regarding the proper element of mixed-motive Title VII retaliation cases, it is perhaps surprising that courts, beginning in the 1990s, have generally accepted the appropriateness of such cases without great discussion. The Tenth Circuit took on the issue in *Kenworthy v. Conoco, Inc.*, in which it affirmed the district court's use of the *Price Waterhouse* standard in a Title VII retaliation case.[91] Interestingly, the court did not differentiate between the type of Title VII discrimination claim that was the subject of *Price Waterhouse* and the

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[90] *Id.* at 100–01.

[91] 979 F.2d 1462, 1471–72 (10th Cir. 1992). Although the Tenth Circuit was *one of* the first circuit courts to address the issue post-*Price Waterhouse*, it was not the first. *See* Wilson v. Univ. of Tex. Health Ctr., 973 F.2d 1263, 1267 (5th Cir. 1992) (finding that because the lower court concluded that the plaintiff "did not prove that her reports of sexual harassment caused her termination and that her misrepresentations did," the plaintiff would have similarly failed under a mixed-motive framework); McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991) (citing *Price Waterhouse* for the proposition that "plaintiff has the ultimate burden of showing pretext by proving that the filing of the discrimination lawsuit was the 'motivating part' in the decision to terminate [plaintiff]"); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989) (finding that a mixed-motive proof structure would be applicable to a Title VII retaliation case if plaintiff had presented direct evidence of discrimination).

Title VII retaliation claim that was at issue in the case. The court merely stated, citing *Price Waterhouse*, that "because the court below found [defendant's] proffered reasons legitimate *and* nevertheless credited [plaintiff's] evidence of retaliation, the retaliation is subject to the mixed-motives analysis applicable to situations involving both valid and invalid reasons for the challenged employment action."[92] The Second Circuit took a similar approach in *Cosgrove v. Sears, Roebuck & Co.*, in which the court reversed the district court's grant of summary judgment to the defendant but approved the application of *Price Waterhouse* to the retaliation issue.[93] Again, the court made no mention whatsoever of the wisdom of extending *Price Waterhouse* to a Title VII claim that alleged retaliation instead of (or at least, in addition to) discrimination.

Given the history of courts' interpretations of the sequence and burdens of proof for retaliation claims, however, it is understandable that the courts generally viewed the extension of *Price Waterhouse*'s framework to retaliation claims as unproblematic. As the Sixth Circuit noted in *Zanders v. National Railroad Passenger Corp.*:

> In a retaliation claim, a plaintiff alleges that she has been mistreated for engaging in protected activity, and that the employer's motivations are therefore illicit. Thus, a retaliation claim is analogous to an intentional discrimination claim, or "disparate treatment" claim, where the employee must demonstrate the employer's discriminatory intent; *the sequence and burden of proof applicable to disparate treatment cases are applicable to retaliation claims.*[94]

Courts may have believed that extending a new framework—one explicitly endorsed by the Supreme Court for discrimination claims—to retaliation claims was the most reasonable course to take because courts had long held that the more traditional frameworks for disparate treatment claims[95] were applicable to retaliation claims and the Supreme Court had issued no opinion to the contrary.[96] Regardless of the reasoning of the various circuits, it is clear that all circuits were, at least at one time, willing to entertain mixed-motive Title VII retaliation

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[92] 979 F. 2d at 1470.

[93] 9 F.3d 1033, 1039–41 (2d Cir. 1993).

[94] 898 F.2d 1127, 1134 (6th Cir. 1990) (emphasis added).

[95] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[96] *See, e.g.*, Ross v. Commc'ns Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) ("The sequence of proof and burdens prescribed by . . . [*McDonnell Douglas* and *Burdine*] . . . are applicable to retaliation cases under § 2000e-3 as well as to discriminatory treatment claims."), *abrogated by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) ("The order and allocation of proof in Title VII suits generally . . . is also applied in cases alleging retaliation for participation in title VII processes.") (collecting cases); Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW 373, 376 ("Although the Supreme Court developed the *McDonnell Douglas* framework for disparate treatment cases, lower courts have almost universally adopted and applied its principles to retaliation cases.").

claims.[97, 98]

B. Effect of 1991 Amendments on Mixed-Motive Retaliation Cases

The 1991 Amendments to Title VII were beneficial to plaintiffs proceeding under the mixed-motive proof structure because attorneys would be more willing to take their cases. Before the amendments, the complete bar to recovery (following *Price Waterhouse*) that would occur if a defendant could establish the "same decision" defense served as a disincentive to plaintiffs' attorneys contemplating taking Title VII cases. By allowing recovery of attorneys' fees *in spite of* a defendant's successful "same decision" defense, mixed-motive Title VII cases began to look more appealing to such attorneys.[99]

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[97] Tanca v. Nordberg, 98 F.3d 680, 684–85 (1st Cir. 1996); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039–41 (2d Cir. 1993); Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993), *cert denied*, 510 U.S. 865 (1993), *overruled on other grounds by* Miller v. CIGNA Corp., 47 F.3d 586, 596 n.8 (3d Cir. 1995); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 553 n.8 (4th Cir. 1999) ("While the Fourth Circuit has never had an occasion to explicitly hold that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § 704 if the plaintiff can establish the evidentiary threshold, our sister circuits have unanimously applied the mixed-motive proof scheme to retaliation claims . . . Because we are unable to fathom any plausible reason for holding otherwise, we expressly join our sister circuits in holding that the mixed-motive proof scheme is available to a Title VII plaintiff in order to prove a retaliation claim under § 704 if the plaintiff can establish the necessary evidentiary threshold.") (citations omitted); Fierros v. Tex. Dep't of Health, 274 F.3d 187, 192 (5th Cir. 2001); Zanders v. Nat'l R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (noting that the sequence and burden of proof applicable to disparate treatment cases are applicable to retaliation claims); Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 892–93 (7th Cir. 1996); Cronquist v. City of Minneapolis, 237 F.3d 920, 925 (8th Cir. 2001) (holding that petitioner's claim that district court erred by not applying mixed-motive framework was without merit, as petitioner failed to present any direct evidence of retaliation); Shea v. Tosco Corp., Nos. 98-35588, 98-35658, 98-36019, 2000 WL 1036071, at *2 (9th Cir. July 27, 2000); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470–71 (10th Cir. 1992) ("[B]ecause the court below found [defendant's] proffered reasons legitimate *and* nevertheless credited [plaintiff's] evidence of retaliation, the retaliation claim is subject to the 'mixed motives' analysis applicable to situations involving both valid and invalid reasons for the challenged employment action."); Burrell v. Bd. of Trs. of Ga. Military Coll., 125 F.3d 1390, 1394–95 (11th Cir. 1997); Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 200 (D.C. Cir. 1997).

[98] Courts also extended the *Price Waterhouse* mixed-motive framework to a variety of anti-discrimination statutes and statutory provisions outside of Title VII. *See, e.g.*, Metoyer v. Chassman, 504 F.3d 919, 931–34 (9th Cir. 2007) (applying *Price Waterhouse* in a retaliation claim brought under 42 U.S.C. § 1981); Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 335 (5th Cir. 2005) (finding that a mixed-motive analysis is proper under the Family and Medical Leave Act); Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 147 (3d Cir. 2004) (applying *Price Waterhouse* in a Family and Medical Leave Act case); Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001) (applying *Price Waterhouse* in a 42 U.S.C. § 1983 case); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000) (collecting cases from six circuit courts applying the *Price Waterhouse* framework to claims of disability discrimination under the Americans with Disabilities Act); Thomas v. Denny's, Inc., 111 F.3d 1506, 1511–12 (10th Cir. 1997) (finding that it was error for the district court to reject a mixed-motive instruction in a § 1981 case); Robert Fuller, Gross v. FBL Financial Services, Inc.: *A Simple Interpretation of Text and Precedent Results in Simplified Claims Under the ADEA*, 61 MERCER L. REV. 995, 1013 n. 151 (2010) (collecting cases in which circuit courts have found that *Price Waterhouse's* burden-shifting framework applies to § 1981 and § 1983 claims).

[99] Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Fin.

But by its terms, § 107 of the 1991 Amendments applies exclusively to claims brought under § 703, which prohibits discrimination based on factors such as race, sex, and national origin.[100] No mention of § 704—the section prohibiting retaliation—is made in § 107. Lending to an interpretation of § 107 that this omission was not merely unintentional, § 704 *is* in fact referenced in other, unrelated parts of the 1991 Amendments.[101]

However, the EEOC officially took the position that the 1991 Amendments do apply to Title VII retaliation cases, and that the limited "same decision" defense provided by the Amendments should overrule the *Price Waterhouse* complete bar on recovery in such cases. The EEOC Compliance Manual states that "[i]f there is credible direct evidence that retaliation was *a* motive for the challenged action, 'cause' should be found. Evidence as to any legitimate motive for the challenged action *would be relevant only to relief, not to liability.*"[102] This is consistent with the more recent of the two frameworks. Under the earlier *Price Waterhouse* standard, evidence of a legitimate motive (or motives) would be relevant to *liability*: If the employer can show that it would have taken the employment action even absent any retaliatory motive, the plaintiff is not entitled to recover anything. Under the 1991 Amendments, however, a successful same-action defense does not absolve the employer of *liability*, but only the obligation to provide certain forms of *relief*.[103] A footnote to the Compliance Manual clarifies:

Servs, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 96 (2010) ("More employees presumably could find lawyers willing to bring more cases with less clear evidence of how the employees would have been treated but for discriminatory bias . . . Plaintiffs' lawyers presumably could realistically threaten to proceed with litigation where they could prove the existence of bias in the employer's decision-making process, as all parties would realize that lawyers could collect attorney's fees based on proof of bias even if the employer could prove that the bias would have made no difference to the lawyers' imperfect clients.").

[100] Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)) ("On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . may grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) . . . ."). Note that the 1991 Amendments added a new subsection, 703(m), in which the mixed-motive proof structure was explicitly approved. *Id.* at § 107(a) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating favor for any employment practice, even though other factors also motivated the practice.").

[101] *Id.* §§ 102, 109. *See also* McNutt v. Bd. of Trs. of Univ. of Ill., 141 F.3d 706, 709 (7th Cir. 1998) ("The full text of the CRA suggests that Congress intentionally limited the protection against mixed-motive discrimination to the types of cases specified in § 2000e-2(m). Retaliation claims receive specific and explicit mention in the 1991 Act. For instance, Section 102 of the CRA . . . authorizes awards of compensatory and punitive damages for actions brought under either § 2000e-2 or § 2000e-3. Moreover, the statutory provision immediately preceding § 2000e-5(g)(2)(B) makes explicit reference to retaliation claims . . . .").

[102] EEOC COMP. MAN., Section 8: Retaliation § 8-16 (May 20, 1998) (emphasis added), *available at* http://www.eeoc.gov/policy/docs/retal.html.

[103] 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006). *See* Harper, *supra* note 99, at 92 (noting that under the 1991 Amendments, "[t]he remedies that are to be excluded by a successful 'same action defense' are 'damages' or 'admission, reinstatement, hiring, promotion, or payment' of back wages. The relief that may be granted regardless of any successful 'same action' defense include 'declaratory relief,

> Some courts have ruled that Section 107 does not apply to retaliation claims. . . . Those courts apply . . . [*Price Waterhouse*], and therefore absolve the employer of liability for proven retaliation if the [sic] establishes that it would have made the same decision in the absence of retaliation. Other courts have applied Section 107 to retaliation claims. . . . The Commission concludes that Section 107 applies to retaliation. Courts have long held that the evidentiary framework for proving employment discrimination based on race, sex, or other protected class status also applies to claims of discrimination based on retaliation. Furthermore, an interpretation of Section 107 that permits proven retaliation to go unpunished undermines the purpose of the anti-retaliation provisions of maintaining unfettered access to the statutory remedial mechanism.[104]

The EEOC, then, takes a more purposeful and historical approach to the amendments. Though language in the text arguably suggests otherwise, both the purpose of the anti-retaliation provisions and the history of retaliation in relation to other provisions of Title VII suggest that extending § 107 to retaliation claims is appropriate.

Despite this explicit endorsement by the EEOC, along with its assertion that some "courts have applied Section 107 to retaliation claims,"[105] the circuit courts nearly unanimously declined to extend § 107 to retaliation claims. Following the 1991 Amendments, courts generally adhered to the text of the statute, implicitly rejecting the EEOC's purposive and historical approach and explicitly refusing to extend the plaintiff-friendly version of the "same decision" defense to Title VII retaliation claims.[106] Instead, plaintiffs were limited to the

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injunctive relief . . . and attorney's fees and costs.'").

[104] EEOC COMP. MAN., *supra* note 102 at § 8 – II.E.1 n. 45.

[105] *Id.* at n. 46. The EEOC points to one circuit court decision, Merritt v. Dillard Paper Co., 120 F.3d 1181, 1191 (11th Cir. 1997) in support of its assertion that courts have applied § 107 to retaliation claims. The portion of the opinion that briefly discusses § 107, titled "Some Closing Thoughts," addresses § 107 in a context different from the way in which most circuits consider the Amendments. *Merritt* explains how plaintiff's remedies are *limited* under § 107, not how plaintiff's remedies are *broader* under § 107 than *Price Waterhouse* (the path that most circuits take). In fact, no mention at all is made in the opinion of *Price Waterhouse*, of mixed-motive, or of the way in which the 1991 Amendments *altered* the law of Title VII retaliation. Although the portion of *Merritt* discussing § 107 has never been expressly overruled, it has been treated negatively by one Tenth Circuit decision—a Northern District of Alabama case. There, the Northern District of Alabama explicitly declined to follow *Merritt*, found the statement regarding § 107 to be "dicta," and instead chose to follow "the four United States Courts of Appeals that have directly considered the issue [and that] have unanimously agreed that, based upon its plain language, § 107 does not apply to Title VII retaliation claims." Lewis v. Young Men's Christian Ass'n, 53 F. Supp. 2d 1253, 1262 (N.D. Ala. 1999). Since the EEOC Compliance Manual's § 8 guidance was published in 1998, the 11th Circuit has conclusively ruled on this issue, finding that § 107 does not apply to retaliation claims. Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001) ("[W]e hold that the [*Price Waterhouse*] mixed-motive defense remains good law . . . with respect to [plaintiff's] Title VII retaliation claim. On this point, we are in agreement with all other circuits that have considered this issue.").

[106] *See, e.g.*, Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Behne v. 3M

analysis provided by *Price Waterhouse*: if defendants could prove that they would have made the same decision even in the absence of retaliatory motives, the fact that retaliation was a "motivating factor" of the decision would be immaterial, and would not entitle plaintiffs to any recovery.

C. Effect of *Desert Palace* on Mixed-Motive Retaliation Cases

Prior to *Desert Palace*,[107] most courts held that to proceed under the *Price Waterhouse* mixed-motive framework in a Title VII retaliation case, plaintiffs needed to produce *direct* evidence of retaliation.[108] When *Desert Palace* was decided in 2003, courts were faced with a difficult interpretive task: Did Justice Thomas' opinion establish the evidentiary requirement for *all* mixed-motive cases, or only for those types of cases that fell under the 1991 Amendments? If the latter, then the evidentiary requirements of Title VII mixed-motive retaliation cases would remain unchanged per each circuit's decision on the issue.[109] In other words,

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Microtouch Sys., Inc., 11 F. App'x 856, 860–61 (9th Cir. 2001); Garner v. Miss. Dep't of Mental Health, 439 F.3d 958, 961 (8th Cir. 2006); Speedy v. Rexnord Corp., 243 F.3d 397, 406–07 (7th Cir. 2001); Marbly v. Rubin, No. 98-1846, 1999 WL 645662, at *2 n.2 (6th Cir. Aug. 13, 1999); Kubicko v. Ogden Logistics Servs, 181 F.3d 544, 552–53 (4th Cir. 1999); Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); Matima v. Celli, 228 F.3d 68, 80–81 (2d Cir. 2000); Tanca v. Nordberg, 98 F.3d 680, 681 (1st Cir. 1996). The Tenth Circuit has explicitly refused to decide this issue on multiple occasions. *See* Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1225 n.5 (10th Cir. 2008) ("[W]e have yet to decide whether these amendments actually apply to retaliation cases, and we decline to do so today . . . ."); Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 n.4 (10th Cir. 1999) (noting defendant's argument that the plain language of 2000e-2(m) does not include retaliation cases, but declining to decide the issue). The D.C. Circuit, similarly, has twice declined to resolve the issue. *See* Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005) ("[A]lthough every circuit to address the issue has held that the mixed motive provisions of the 1991 Act do not apply to retaliation claims, it remains an open question in this circuit."); Borgo v. Goldin, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) ("[W]hile discrimination claims . . . were covered by the 1991 Act, Congress did not expressly include retaliation claims in the provision that modified *Price Waterhouse* . . . This circuit has not addressed that question."). The Fifth Circuit has also expressly refused to decide the issue. *See* Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 403 (5th Cir. 2000) ("[W]e respectfully decline the invitation to address this issue now."); *see also* Earl M. Jones, III, Jason R. Dugas, & Jennifer A. Youpa, *Employment Law*, 59 SMU L. Rev. 1211, 1220 (2006) ("[T]he Fifth Circuit has not expressly addressed the question of whether the amended statute applies in Title VII retaliation cases . . . .").

[107] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[108] *See, e.g.*, Kubicko v. Ogden Logistics Serv., 181 F.3d at 552–53 ("Absent the threshold showing [of direct evidence] necessary to invoke the mixed motive proof scheme . . . a plaintiff must prevail under the less advantageous standard of liability applicable in pretext cases in which the plaintiff always shoulders the burden of persuasion."); Montemayor v. City of San Antonio, 276 F.3d 687, 692 (5th Cir. 2001); Weigel v. Baptist Hosp. of E. Tenn., 302 F.3d 367, 381–82 (6th Cir. 2002) (noting that plaintiff alleging Title VII retaliation may proceed under *Price Waterhouse* only when direct evidence of retaliation has been presented); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997) (stating, after noting that § 107 of the 1991 Amendments does not apply to retaliation claims, that "[n]ot all evidence that is probative of illegitimate motives suffices to entitle a plaintiff to a mixed-motives/*Price Waterhouse* charge. Rather . . . the employee must show '*direct evidence* that an illegitimate criterion was a substantial factor in the decision.'") (quoting *Price Waterhouse*, 490 U.S. at 276).

[109] *See supra* note 97.

Title VII retaliation plaintiffs would still be required to present direct evidence in order to proceed under the *Price Waterhouse* mixed-motive framework, while Title VII *discrimination* plaintiffs could present *either* direct or circumstantial evidence in order to proceed under the statutory mixed-motive framework.

In examining the *Desert Palace* decision itself, support can be found for both interpretations. Justice Thomas rhapsodizes broadly on the benefits of circumstantial evidence, noting that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[110] If circumstantial evidence can, in some situations, be even more reliable and persuasive than direct evidence, why should the presence of circumstantial evidence in a retaliation case categorically bar a plaintiff from proceeding under a potentially beneficial framework? Justice Thomas further notes, "The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required."[111] This statement is especially damning to the *Price Waterhouse* direct evidence requirement: If circumstantial evidence is both reliable and persuasive enough to support convictions that stripping citizens of fundamental liberties, how can such evidence be categorically *insufficient* in civil cases, which invoke a lowered standard of proof? Finally, Justice Thomas notes that "juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'"[112] Justice Thomas then points out that, unsurprisingly, the petitioner and its *amici curiae* were unable to "point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute."[113]

If one only read the above portion of the decision, it would seem reasonable to conclude that, "absent some affirmative directive in a statute," a plaintiff—including a Title VII retaliation plaintiff seeking to proceed under a mixed-motive framework—should not be restricted to direct evidence. However, much of the rest of Justice Thomas' opinion deals directly with the text of the 1991 Amendments, and more specifically, with § 107.[114] At the beginning of the second section of the opinion (where the Court analyzes and applies the applicable law), Justice Thomas presents the issue before the Court as "whether a plaintiff must present direct evidence of discrimination in order to obtain a

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[110] 539 U.S. at 100 (2003) (quoting Rogers v. Mo. Pacific R. Co., 352 U.S. 500, 508 n. 17 (1957)).
[111] *Id.*
[112] *Id.* (quoting 1A K. O'MALLEY, J. GRENIG, & W. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 12.04 (5th ed. 2000)).
[113] *Id.* (referencing Tr. of Oral Arg. 13).
[114] Section 107 is codified in part at 42 U.S.C. § 2000e-2(m).

mixed-motive instruction under 42 U.S.C. § 2000e-2(m)."[115] Thomas immediately turns to the text of the statute, noting:

> Section 2000e-2(m) unambiguously states that a plaintiff need only "demonstrate[e]" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[116]

By focusing on the part of Title VII that, according to most courts, only applies to Title VII *discrimination* claims, the applicability of the holding of *Desert Palace* to Title VII retaliation claims begins to look less obvious. Thomas continues to focus on the language of the 1991 Amendments, pointing out that the definition of the term "demonstrates" (which is present in § 2000e-2(m), but absent in any provision that clearly applies to retaliation) is defined elsewhere in the Act as "to 'mee[t] the burdens of production and persuasion.'"[117] Finally, Justice Thomas' conclusion reinforces the potentially limited scope of his holding:

> In order to obtain an instruction *under § 2000e-2m*, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."[118]

Justice Thomas could have simply written that "in order to obtain a *mixed-motive instruction under Title VII*, a plaintiff need only . . .," but he instead limited his holding to the *statutory* mixed-motive framework. Interestingly, Justice O'Connor's concurring opinion (in which she seems to defend her decision in *Price Waterhouse* to require direct evidence) uses broader language than the majority opinion: "in the Civil Rights Act of 1991, Congress codified a new evidentiary rule *for mixed-motive cases arising under Title VII*."[119] This could suggest not only that Title VII mixed-motive retaliation cases could proceed using the mixed-motive framework, but that, contrary to every circuit that had decided the issue,[120] the 1991 Amendments applied to Title VII mixed-motive retaliation cases.[121]

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[115] Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003).
[116] *Id.* at 91.
[117] *Id.* at 99.
[118] *Id.* at 101 (emphasis added).
[119] *Id.* at 102 (O'Connor, J., concurring) (emphasis added).
[120] *See supra* Part IV(B).
[121] Of course, such a reading would be extremely beneficial to plaintiffs, in that the limitations imposed by the *Price Waterhouse* mixed-motive standard—the broad "same decision" defense that precluded any recovery by plaintiffs if defendants could show that they would have made the same decision even absent the retaliatory animus—would no longer be present. Instead, only the statutory

Courts varied in their interpretations of how *Desert Palace* applied to mixed-motive Title VII retaliation cases. *Vialpando v. Johanns*,[122] a 2008 decision written by District of Colorado Judge Marcia Krieger, is representative of many of the decisions that found that *Desert Palace* had no impact on the evidentiary requirements of mixed-motive Title VII retaliation cases. In the original action the court tasked the jury with deciding whether two actions taken by plaintiff's employer constituted retaliation in violation of Title VII. Upon receiving a limited damage award, the plaintiff moved for a new trial, arguing, *inter alia*, that "the court erred in instructing the jury that she must prove that 'but for' her protected conduct, the Defendant would not have taken an adverse action against her."[123] The court rejected the plaintiff's argument that she was entitled to invoke a mixed-motive analysis. Judge Krieger explained as follows:

> *Desert Palace's* reasoning is predicated on a statutory provision that applies solely to *disparate treatment* claims, not *retaliation* claims. The lynchpin of *Desert Palace's* analysis is 42 U.S.C. § 2000e-2(m), a section newly-added to Title VII . . . as part of the Civil Rights Act of 1991. That section . . . codifies the "motivating factor" test in cases where "race, color, religion, sex, or national origin" are alleged to be the basis of the prohibited discrimination. Conspicuously absent from § 2000e-2(m), however, is any mention of retaliation or reference to "protected activity" being the motivating factor for the challenged employment practice. Whether it be by Congressional design or imprecise draftsmanship, it is readily apparent that § 2000e-2(m) does not purport to apply to retaliation cases under Title VII.[124]

By describing § 2000e-2(m) as the lynchpin of Justice Thomas' decision, the direction the court will take becomes clear: if *Desert Palace* is based primarily on § 2000e-2(m), and that section has no bearing on retaliation claims, *Desert Palace* should have no effect on retaliation claims. Indeed, the court continues:

> Having followed the path all the way to the point where the "mixed-motive" and *McDonnell Douglas* "pretext" analyses merge, we now begin backtracking. Because § 2000e-2(m) does not apply to retaliation cases, such as the one at issue here, the reasoning of *Desert Palace*, which turned entirely on

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same decision defense would be available to defendants, which would still afford plaintiffs' attorneys' fees in the face of a defendant's successful same decision defense.

[122] 619 F. Supp. 2d 1107 (D. Colo. 2008).

[123] *Id.* at 1111.

[124] *Id.* at 1115.

> that statutory section, is not controlling.[125]

The court then reviewed Tenth Circuit precedent on pre-*Desert Palace* mixed-motive cases, and determined that controlling precedent "made clear that 'a mixed motives analysis only applies once a plaintiff has established direct evidence of discrimination.'"[126] The court concluded that because the plaintiff was not entitled to the "assistance of *Desert Palace*," the plaintiff "was entitled to avail herself of the 'mixed-motive' analysis . . . only if she came forward with *direct evidence* that the adverse employment action(s) against her were motivated by her protected conduct."[127]

Kotewa v. Living Independence Network Corp., a 2007 decision written by District of Idaho Judge Edward Lodge, is representative of the decisions finding that the standard of proof set forth in *Desert Palace* applies to retaliation cases.[128] In that case, the defendant argued that the *McDonnell Douglas* standard should apply to the plaintiff's claim, as the plaintiff had "not met her burden of proof of presenting direct evidence" of retaliation.[129] After describing the history of *Price Waterhouse*, the 1991 Amendments, and the Supreme Court's decision in *Desert Palace*, the court tackled the post-*Desert Palace* issue of Title VII retaliation:

> [t]he question in this case is whether the standard of proof set forth in [*Desert Palace*] applies to retaliation cases. One viewpoint is that the 1991 amendments did not affect retaliation cases and so the direct evidence requirement in Justice O'Connor's *Price Waterhouse* opinion still applies to mixed-motive retaliation cases. The other viewpoint is that the Ninth Circuit has historically said the standards of proof are the same for Title VII discrimination and retaliations claims and recently ruled in "any" Title VII action the standard of proof allows for direct or circumstantial evidence to be used by plaintiff.[130]

Note that this inquiry differs from the one undertaken in *Vialpando v. Johanns*. In that case, the court noted that in the Tenth Circuit the requirement of direct evidence in mixed-motive cases was clear.[131] In

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[125] *Id.*

[126] *Id.* (quoting Shorter v. ICG Holdings, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999)).

[127] 619 F. Supp. 2d at 1115–16 (emphasis added). Note that the Tenth Circuit is one of the three circuits that expressly declined to decide whether the 1991 Amendments apply the mixed-motive Title VII retaliation claims. *See supra* note 106. Given the language of Judge Krieger's opinion regarding the lack of any mention of retaliation in § 2000e-2(m), however, it appears to be clear that if direct evidence had been presented, the plaintiff would be entitled only to the *Price Waterhouse* mixed-motive framework, not the statutory mixed-motive framework established by the 1991 Amendments.

[128] Kotewa v. Living Independence Network Corp., No. CV05-426-S-EJL, 2007 WL 433544 (D. Idaho Feb. 2, 2007).

[129] *Id.* at *5.

[130] *Id.* at *7 (citation omitted).

[131] Vialpando v. Johanns, 619 F. Supp. 2d at 1115 (quoting Shorter v. ICG Holdings, 188 F.3d 1204,

Kotewa, however, the court found that the state of the law in the Ninth Circuit regarding evidentiary requirements for Title VII mixed-motive retaliation cases to be decidedly unclear.[132]

The *Kotewa* court pointed to *Stegall v. Citadel Broadcasting Co.*, a Ninth Circuit decision that "did not specifically analyze whether the direct evidence only standard of proof applied for retaliation mixed-motive cases at the summary judgment stage,"[133] but which nevertheless "held that 'the plaintiff in *any* Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played a motivating factor."[134] The court took *Stegall* and the Ninth Circuit's en banc decision in *Desert Palace*[135] (later affirmed by the Supreme Court) to establish that "the Ninth Circuit finds the standard of proof should be the same for all Title VII cases since it did not set forth a different rule for retaliation claims."[136] The court found that this conclusion was "logical," as "trying to figure out the import of the passing reference to 'direct evidence' in Justice O'Connor's concurring opinion in *Price Waterhouse* results in a conundrum."[137]

Finally, Judge Lodge looked to Justice Thomas' opinion in *Desert Palace*, although he interpreted the case differently than did Judge Krieger. Judge Lodge cited *Desert Palace* for the position that "Title VII is silent with respect to the type of evidence required for retaliation cases, so it would be unfair and prejudicial to apply a heightened standard of proof where Title VII is also silent with respect to the type of evidence for discrimination cases."[138] Although this part of the decision gives fairly little attention to *Desert Palace*, it is clear that Judge Lodge believes Justice Thomas' decision supports this reading of the evidentiary requirements, as he writes that "[w]hile other circuits have held there is a direct evidence requirement for mixed-motive retaliation cases which survives due to the *Price Waterhouse* decision, these . . . [decisions] *were issued long before the Supreme Court's ruling in* Desert Palace."[139]

Perhaps not surprisingly, then, courts that felt the direct evidence requirement still applied focused on the language of Justice Thomas' opinion in *Desert Palace* that appeared to limit the applicability of the holding to § 2000e-2(m). These courts found that § 2000e-2(m) was a

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1208 n.4 (10th Cir. 1999)).

[132] *See Kotewa*, 2007 WL 433544 at *5–8 (reviewing 9th Circuit case law).

[133] *Id.* at *7.

[134] *Id.* (quoting Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1068 (9th Cir. 2004) (emphasis added) (internal quotations omitted)).

[135] Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (en banc).

[136] *Kotewa*, 2007 WL 433544, at *7.

[137] *Id.*

[138] *Id.* (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) ("We should not depart from the '[c]onventional rul[e] of civil litigation [that] generally appl[ies] to all Title VII cases.'") (citations omitted)).

[139] *Id.* at 8 (emphasis added).

"lynchpin" of the decision.[140] On the other hand, courts that believed plaintiffs alleging retaliation could proceed under a mixed-motive framework with either direct or circumstantial evidence pointed to Justice Thomas' broader statements in *Desert Palace* regarding "conventional rules" and legal traditions, ignoring or minimizing the language that arguably cabined his holding.[141]

In the end, most circuit courts that decided the issue found that mixed-motive Title VII retaliation claims did not require direct evidence in a post-*Desert Palace* world.[142] However, to say that these courts decided the issue is perhaps being overly generous. Most of these courts made only passing (if any) reference to the impact of *Desert Palace*, and no circuit courts engaged in robust examinations like those found in *Vialpando* and *Kotewa* regarding the scope of the holding of *Desert Palace*.[143] The circuit decision with arguably the most thorough discussion of mixed-motive Title VII retaliation post-*Desert Palace* is *Fye v. Oklahoma Corp. Commission*, which fails to even mention the distinction that can be drawn between Title VII retaliation and Title VII *discrimination* cases, apparently simply assuming that *Desert Palace* applies to mixed-motive retaliation cases.[144] Ironically, the one circuit that was willing to raise the issue in detail—the Fifth Circuit—repeatedly

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[140] *See also* Funai v. Brownlee, 369 F. Supp. 2d 1222, 1227–28 (D. Haw. 2004) (holding that, despite the fact that the Supreme Court in *Desert Palace* held "that direct evidence of discrimination is *not* required to obtain a mixed-motive instruction under Section 2000e-2m," because "2000e-2(m) does not apply to retaliation claims and . . . *Price Waterhouse* continues to provide the relevant standards . . . for mixed-motive retaliation claims," a plaintiff still must introduce "'direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion.'") (quoting Kubicko v. Ogden Logistics Serv., 181 F.3d 544, 552–53 (4th Cir. 1999).

[141] *See also* Dilettoso v. Potter, No. CV 04-0566-PHX-NVW, 2006 WL 197146, at *24–25 (D. Ariz. Jan. 25, 2006). In *Dilettoso*, the court held that "[n]otwithstanding the Court's narrow statutory holding" in *Desert Palace*, the opinion "could shed light on the appropriateness of a heightened evidentiary burden of persuasion in retaliation cases." The court first pointed to the fact that Justice Thomas emphasized that "the text of the 1991 Act did not indicate that any 'special evidentiary showing' was required," and that "[n]either, of course, does Title 42's retaliation provision." Second, the court pointed to Justice Thomas' remarks on "the adequacy of circumstantial evidence in general."

[142] Semsroth v. City of Wichita, 304 F. App'x 707, 720–21 (10th Cir. 2008) (allowing circumstantial evidence to establish retaliation as a motivating factor); Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224-26 (10th Cir. 2008) (same); Culver v. Gorman & Co., 416 F.3d 540, 545–46 (7th Cir. 2005) (same); Spiegla v. Hull, 371 F.3d 928, 941–43 & n.10 (7th Cir. 2004) (applying motivating factor causation standard in First Amendment retaliation case, and noting the causation standard is the same in Title VII retaliation cases); Calmat Co. v. U.S. Dep't of Labor, 364 F.3d 1117, 1123 (9th Cir. 2004) (noting (in dicta) that the Administrative Review Board "erroneously stated that direct evidence of retaliation is necessary to apply the mixed-motive framework"). *But see* Carrington v. Des Moines, 481 F.3d 1046, 1050–53 (8th Cir. 2007) (asserting that "[i]n the absence of direct evidence, the burden-shifting framework of [*McDonnell Douglas*] . . . governs retaliation claims" without mentioning *Desert Palace*).

[143] For example, the courts in *Culver* and *Spiegla* fail to even mention *Desert Palace*.

[144] *Fye*, 516 F.3d at 1226 n.6 ("[Plaintiff] argues that the Supreme Court's decision in *Desert Palace* . . . modified out existing precedent. . . . The Court specifically noted that Title VII is silent "with respect to the type of evidence required in mixed-motive cases" and held that a plaintiff may prove her case using either direct or circumstantial evidence. . . . To the extent that any of our cases hold that direct evidence is required to establish a mixed-motive case, they are no longer good law.") (quoting *Desert Palace*, 539 U.S. at 99) (internal citations omitted).

refused to decide the matter.[145]

D. Conclusion

In the twenty years between *Price Waterhouse* and the Supreme Court's 2009 decision in *Gross v. FBL Financial*, the mixed-motive framework had undergone some significant changes and developments. Most important for Title VII retaliation claims was the fact that every circuit either explicitly or implicitly allowed for mixed-motive Title VII retaliation claims. However, not all of the benefits that mixed-motive Title VII *discrimination* plaintiffs enjoyed extended to Title VII retaliation plaintiffs. After the 1991 Amendments, all of the circuits that decided the issue held that the aspects of the Amendments favorable to plaintiffs—such as eliminating *Price Waterhouse*'s complete "same decision" defense, and replacing it with a modified defense that allowed plaintiffs to recover attorneys' fees despite a defendant's successful "same decision" showing—did not apply in mixed-motive Title VII *retaliation* cases. These courts found that mixed-motive Title VII retaliation plaintiffs still faced the less favorable *Price Waterhouse* complete "same decision" defense.

But not all of the post-*Price Waterhouse* developments excluded mixed-motive retaliation plaintiffs. After *Desert Palace*, most circuit courts that decided the issue found that mixed-motive Title VII retaliation claims did not require direct evidence, something that Justice O'Connor's opinion in *Price Waterhouse* required. This was quite beneficial to retaliation plaintiffs, as a showing of direct evidence of retaliation—or any type of adverse treatment, for that matter—was often difficult for a plaintiff to obtain.

V. THE *GROSS* DECISION

In 2009, the Supreme Court decided an Age Discrimination in Employment Act ("ADEA") case on appeal from the Eighth Circuit. Although certiorari had been granted on a rather narrow issue, the Court instead issued a broad holding that foreclosed an ADEA plaintiff's

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[145] *See, e.g.*, McCullough v. Houston Cnty Tex., 297 F. App'x 282, 288 n.7 (5th Cir. 2008) ("[I]t is now established that in Title VII *discrimination* cases, 'a plaintiff need only meet the 'motivating factor' standard even if the plaintiff is adducing only circumstantial evidence.' . . . This court has not extended the holdings of either *Desert Palace* or *Rachid* so as to apply the mixed-motives analysis to Title VII *retaliation* claims. . . . This is particularly true where, as is the case here, neither party raises the issue, both parties argue pretext, and both parties engage in a but-for analysis." (internal quotations and citations omitted)); Campbell v. England, 234 F. App'x 183, 186 n. 4 (5th Cir. 2007) (introducing the issue with the same language the Fifth Circuit used in *McCullough*, and refusing to decide the issue on the same grounds).

ability to proceed under a mixed-motive framework. Because courts tend to view the proof structures of Title VII retaliation and ADEA cases similarly, this decision could have a profound effect on plaintiffs attempting to use the mixed-motive proof structure for Title VII retaliation claims.

A. The Eighth Circuit Opinion

In *Gross v. FBL Financial Services, Inc.*, the Eighth Circuit reviewed a decision in which Jack Gross, an FBL employee, had successfully sued his employer for allegedly demoting him because of his age, in violation of the ADEA.[146] At trial, the jury awarded Gross $46,945.[147] FBL appealed the decision, arguing that the trial judge incorrectly instructed the jury "concerning the elements of the claim and the burden of proof."[148] The district court had required Gross to show only that his age was a "motivating factor" of FBL's decision to demote him, despite the fact that (as Gross conceded) he had not presented direct evidence of discrimination.[149] Gross contended that there had been no error, as "the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace, Inc. v. Costa* . . . supersede *Price Waterhouse* and . . . [the Eighth Circuit's] precedents applying *Price Waterhouse* to the ADEA."[150] Previously, the Eighth Circuit has held that "[t]he *Price Waterhouse* rule calls for a shift in the burden of persuasion only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision."[151]

The Eighth Circuit reversed the district court and remanded the case for a new trial. The court held that because Gross failed to present direct evidence, "a mixed motive instruction was not warranted under the *Price Waterhouse* rule," and that:

> [the] claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.[152]

Similar to the findings of the circuit courts regarding the applicability of

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[146] 526 F.3d 356 (8th Cir. 2008).
[147] *Id.* at 358.
[148] *Id.*
[149] *Id.* at 360.
[150] *Id.*
[151] *Gross*, 526 F.3d at 360.
[152] *Id.*

the 1991 Amendments to Title VII retaliation,[153] the Eighth Circuit found that "§ 2000e-2(m) does not apply to claims arising under the ADEA." The court focused on the language of § 2000e-2(m), noting that "[by] its terms, the new section applies only to employment practices in which 'race, color, religion, sex, or national origin' was a motivating factor."[154] The court bolstered this *inclusio unius est exclusio alterius*[155] argument by pointing to other provisions of the 1991 Amendments that *did* address the ADEA explicitly,[156] which suggested that the absence of any mention of the ADEA from § 2000e-2(m) was not accidental.

Nor was the court persuaded by Gross's argument that "*Desert Palace* shows that the *Price Waterhouse* analysis no longer should govern his ADEA claim."[157] In an approach similar to Judge Krieger's in *Vialpando*, the court emphasized that *Desert Palace* "focused on the particular text of the 1991 Act . . . ," and noted that "[t]he Court . . . declined to address which opinion in *Price Waterhouse* was controlling . . . or to revisit *Price Waterhouse*'s interpretation of a statute, unadorned by § 2000e-2(m)."[158] Because "the Court did not speak directly to the vitality of [*Price Waterhouse*]," and because Eighth Circuit precedent had long held that it "should follow the *Price Waterhouse* rule in ADEA cases," the court concluded "that the *Price Waterhouse* rule continues to govern mixed motive instructions in an ADEA case."[159]

B. The Supreme Court Opinion

After losing in the Eighth Circuit, Gross petitioned the Supreme Court. The Court granted certiorari to decide "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under [the ADEA]."[160] But the Court never answered that question. Instead, the majority, with Justice Thomas writing, held that the Eighth Circuit had incorrectly decided a threshold question: "whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[161] In other words, the question the Court put before itself was whether a mixed-motive proof structure was ever appropriate under the ADEA. In a move that surprised many employment law

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[153] *See supra* Part IV(B) and note 97.
[154] *Gross*, 526 F.3d.at 361.
[155] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, 831 (9th ed. 2009).
[156] *Gross*, 526 F.3d at 361.
[157] *Id.*
[158] *Id.* at 362.
[159] *Id.*
[160] Gross v. FBL Fin. Servs, Inc., 129 S. Ct. 2343, 2346 (2009).
[161] *Id.* at 2348 (emphasis added).

practitioners and scholars, the Court answered this question in the negative.[162]

After a summary of the Eighth Circuit opinion, the Court began its own investigation of the issue in Part II of the opinion by differentiating between Title VII and the ADEA. Justice Thomas pointed to the *post*-1991 Amendments to Title VII, noting that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §[] 2000e-2(m)."[163] This of course ignores (or at least avoids) the fact that, although Title VII *now* contains text that provides for a mixed-motive proof structure, it lacked such explicit language in 1989 when the Court decided *Price Waterhouse*.

The Court next moved to "the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim."[164] In a move similar to that of the Court twenty years earlier in *Price Waterhouse*, Justice Thomas gives significant attention to the "because of" language in the statute.[165] Interestingly, however, he comes to the *opposite* conclusion reached in *Price Waterhouse*, despite the fact that Title VII's pre-1991 Amendments language and the language found in the current version of the ADEA are strikingly similar.[166] Justice Thomas cited three dictionaries and (somewhat ambiguous) language in three Supreme Court cases to support his conclusion that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[167] Because, according to Justice Thomas, age must be *the* reason, it follows that "[t]o establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[168]

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[162] *See, e.g.*, John A. Beranbaum, *Assessing The Impact of "Gross" on Employment Discrimination Cases*, 244 N.Y. L.J 44, (2010) (noting that "[t]he Court's decision came as something of a shock"); Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the But-For Requirement*, 43 SUFFOLK U. L. REV. 921 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMPL. RTS. & EMP. POL'Y J. 253, 270–71 (2009).

[163] 129 S. Ct. at 2349.

[164] *Id.* at 2350.

[165] *Price Waterhouse*, 490 U.S. at 239–42.

[166] The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (2006) (emphasis added). The version of Title VII from which the Supreme Court drew the conclusion that "because of" meant something other than but-for causation forbade an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or 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 [sex]." 42 U.S.C. §§ 2000e-2(a)(1), (2) (1988) (emphasis added).

[167] *Gross*, 129 S. Ct. at 2345.

[168] *Id.* at 2350.

In Part III of his opinion, Justice Thomas finally addressed (albeit briefly) the potential complications that the *Price Waterhouse* decision presents to his interpretation of the ADEA. He begins his discussion with a surprising statement, though perhaps an understandable one given his apparent dismissal of the decision elsewhere in his opinion:

> Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. *In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.*[169]

Justice Thomas does not further elaborate on his apparent skepticism regarding the doctrinal integrity of *Price Waterhouse*. However, he does note that "even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[170]

Justice Thomas makes a comment in a footnote that is telling of his view of the current status and usefulness of the non-statutory *Price Waterhouse* mixed-motive framework. In footnote five, Thomas responds to Justice Stevens' contention that the Court "must apply *Price Waterhouse* under the reasoning of *Smith v. City of Jackson*," where "the Court applied to the ADEA its pre-1991 interpretation of Title VII with respect to disparate-impact claims despite Congress' 1991 amendment adding disparate-impact claims to Title VII but not the ADEA."[171] Thomas writes that in the 1991 Amendments:

> Congress not only explicitly added "motivating factor" liability to Title VII . . . , but it also partially abrogated *Price Waterhouse*'s holding by eliminating an employer's complete affirmative defense to "motivating factor" claims, see 42 U.S.C. § 2000e-5(g)(2)(B). If such "motivating factor" claims were already part of Title VII, the addition of § 2000e-5(g)(2)(B) alone would have been sufficient. Congress' careful tailoring of the "motivating factor" claim in Title VII, as well as the absence of a provision parallel to § 2000e-2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework to the ADEA.[172]

Justice Thomas appears to make the claim that, if Congress agreed with *Price Waterhouse*'s mixed-motive framework, and disagreed only with that Court's complete affirmative defense, it would have simply added §

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[169] *Id.* at 2351–52 (emphasis added).
[170] *Id.* at 2352.
[171] *Id.* at 2352 n. 5.
[172] *Id.*

2000e-5(g)(2)(B) to Title VII, and would have felt it unnecessary to add § 2000e-2(m).

This is an odd approach. It would mean, essentially, that Congress thought that the Supreme Court in *Price Waterhouse* had *incorrectly* read mixed-motive into Title VII, but that Congress (apparently upon further reflection) thought that mixed-motive *should be* in Title VII and, therefore, added that language to the statute. That would mean that now there *is* a mixed-motive framework because—and only because—of Congress's creation of such a framework in the 1991 Amendments. This would also mean that *Price Waterhouse* was wrongly decided: the Court was reading something into the pre-1991 Amendments to Title VII that was not there.

There seems to be a much simpler explanation for why § 2000e-2(m) exists: Congress was merely codifying the part of *Price Waterhouse* with which it agreed. Many courts had found precisely that in the years between the 1991 Amendments and *Gross*.[173] For Justice Thomas, however, § 2000e-2(m) was a sign that the Supreme Court had gotten it wrong, for if Congress had agreed with the Court's interpretation in *Price Waterhouse*, it would have simply said nothing.

C. The Dissent

Justice Stevens wrote a strongly-worded dissent, characterizing Justice Thomas' opinion as "irresponsible,"[174] "unwise and inconsistent with settled law,"[175] and ultimately showing an "utter disregard of our precedent and Congress' intent."[176] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, noted that what Justice Thomas was actually advocating was the same standard—originally advocated by Justice Kennedy in his dissenting opinion in *Price Waterhouse*—that both the Court in *Price Waterhouse* and Congress in the 1991

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[173] *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (noting that the *Price* Waterhouse Court's statement that "the words 'because of' do not mean 'solely because of'" "was codified by the Civil Rights Act of 1991" (quoting *Price Waterhouse*, 490 U.S. at 241) (citing 42 U.S.C. § 2000e-2(m)); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 n.4 (3d Cir. 1995) (noting that "the Civil Rights Act of 1991 . . . codified *Price Waterhouse*'s 'mixed-motives' standard at 42 U.S.C.A. § 2000e-2(m) . . . ."); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992) (noting that the *Price Waterhouse* Court's "theory has been codified in the Civil Rights Act of 1991," citing 42 U.S.C.A. § 2000e-2(m)); Overall v. Univ. of Pa., No. Civ. A. 02-1628, 2003 WL 23095953 at *6 (E.D. Pa. Dec. 19, 2003) ("The Supreme Court first established the mixed motive test in *Price Waterhouse*, but Congress codified it in the 1991 amendments to the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2003)."); Moreno v. Grand Victoria Casino, 94 F. Supp. 2d 883, 900 (N.D. Ill. 2000) ("The Civil Rights Act of 1991 codified the *Price Waterhouse* interpretation of the 'because of' language."); Reiff v. Interim Personnel, Inc., 906 F. Supp. 1280, 1286 (D. Minn. 1995) ("[T]he *Price Waterhouse* 'mixed-motive' analysis was codified as relating to gender in the 1991 amendments to the civil rights statutes.").

[174] *Gross*,129 S. Ct. at 2353.

[175] *Id.* at 2358.

[176] *Id.* at 2353.

Amendments rejected.[177] Justice Stevens argued that the mere fact

> [t]hat the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[178]

Justice Stevens then examined the two cases on which Justice Thomas principally relies—*Hazen Paper Co.*[179] and *Reeves*,[180] both single-motive ADEA cases—and asserted that they actually support that the ADEA *should be* interpreted consistently with Title VII, as both "followed the standards set forth in non-mixed-motives Title VII cases."[181]

Justice Stevens also took aim at Justice Thomas' characterization of the relationship between *Price Waterhouse* and the 1991 Amendments. In Justice Stevens' opinion, "Congress *ratified Price Waterhouse*'s interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See § 2000e-2(m)."[182] This interpretation stands in stark contrast to Justice Thomas's, which read § 2000e-2(m) as Congress creating a mixed-motive standard that had not previously existed. Because the 1991 Amendments amended only Title VII and not the ADEA, however, Justice Stevens would have found those amendments to apply only to Title VII claims, with "*Price Waterhouse*'s construction of 'because of' remain[ing] the governing law for ADEA claims."[183]

Finally, Justice Stevens provided the answer he would have given to the question for which certiorari was granted. Following *Desert Palace*, Justice Stevens stated that he "would . . . hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motive instruction."[184] Interestingly, and contrary to the widely held interpretation of the circuits, Justice Stevens found Justice White's concurrence—not Justice O'Connor's—to be controlling. Therefore, because Justice White did not require direct evidence, such evidence was never required under *Price Waterhouse*. Also, Justice Stevens noted that "[a]ny questions raised by *Price Waterhouse* as to a direct evidence requirement were settled by this Court's unanimous decision in *Desert Palace*."[185] Justice Stevens took an approach to *Desert Palace* similar to

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[177] *Id.*
[178] *Id.* at 2354 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).
[179] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
[180] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).
[181] *Gross*, 129 S. Ct. at 2355.
[182] *Id.* at 2355–56 (emphasis added).
[183] *Id.* at 2356.
[184] *Id.* at 2357.
[185] *Id.*

that of the lower courts that had considered the issue and found that after *Desert Palace* direct evidence was no longer required for Title VII mixed-motive cases:[186] he focused on the broad language of the decision that suggested that in the face of statutory silence, a heightened proof requirement should not be assumed.[187]

D. Conclusion

Had the Supreme Court answered the question for which certiorari was granted, the circuits may have gotten a relatively clear resolution to the issue discussed in Part IV(C): whether *Desert Palace*'s latitudinous evidentiary requirement for mixed-motive claims applies outside of the 2000e-2(m) context—and, by extension, to mixed-motive Title VII retaliation claims. Instead, Justice Thomas authored an opinion that effectively overruled the interpretations of ten federal circuit courts and well over a decade of jurisprudence.[188] After *Gross*, it was clear that mixed-motive ADEA claims were dead. What was less clear was the impact that this decision would have on the continuing vitality of other types of mixed-motive claims—specifically those brought under statutes (or, in the case of Title VII retaliation claims, *parts* of statutes) to which § 2000e-2(m) did not apply.

VI. THE COURTS RESPOND: EARLY CASES ADDRESSING THE IMPACT OF *GROSS*

After *Gross*, lower courts were tasked with determining the scope of the Supreme Court's holding on anti-discrimination statutes other than the ADEA. Given the long tradition of applying the *Price Waterhouse* mixed-motive framework to a variety of anti-discrimination statutes on the one hand, and Justice Thomas' broad language that potentially abrogates that tradition on the other, it is unsurprising that the decisions that followed closely after *Gross* varied in both their interpretations and their conclusions.

A. The Seventh Circuit: *Fairley* and *Serwatka*

The Seventh Circuit was one of the first circuits to address the

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[186] *See supra* Part IV(C).
[187] *Gross*, 129 S. Ct. at 2358.
[188] *Id.* at 2355 n.5 (citing Smith v. City of Jackson, 544 U.S. 228 (2005)).

impact of *Gross* on anti-discrimination statutes outside of the ADEA context. Although neither of these early cases addressed Title VII retaliation claims, their analysis is potentially important to such claims, and other courts have cited them in examining a variety of anti-discrimination statutes.

Fairley v. Andrews involved a § 1983 action brought by former guards at the Cook County Jail in Chicago.[189] After the plaintiffs expressed their willingness to testify truthfully if subpoenaed regarding instances of inmate abuse, other guards at the jail threatened to kill the plaintiffs and harassed them in a variety of ways.[190] The plaintiffs sought relief under § 1983, contending "that defendants violated their speech rights by assaulting and threatening them for reporting abuse to Jail supervisors and for their willingness to testify truthfully" in a suit by inmates who had suffered abuse.[191]

As to the plaintiff's proof of causation, the Seventh Circuit held that:

> Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats. This means but-for causation. . . . Some decisions . . . [in this circuit] say that a plaintiff just needs to show that his speech was a motivating factor in [the] defendant's decision. These decisions do not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law.[192]

Interestingly, this is the only analysis that *Fairley* gives to the issue, and the court does not engage in an analysis of the language of § 1983 and how that language compares to that found in the 1991 Amendments. Regardless, this decision is important as *Fairley* was the first case in which a circuit court applied *Gross* to a non-ADEA claim brought under an anti-discrimination statute. Additionally, it was the first time in which a circuit court found that the but-for standard was now the sole standard under which a plaintiff could proceed under ADEA.

In *Serwatka v. Rockwell Automation, Inc.*, the jury's mixed-motive finding in an ADA case had led to a grant of declaratory and injunctive relief in favor of the plaintiff, as well as an award of attorneys' fees and costs.[193] The defendant appealed, arguing that "given the provisions of the ADA and the Supreme Court's . . . decision in *Gross*," the jury's mixed-motive finding did not entitle the plaintiff to a judgment

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[189] Fairley v. Andrews, 578 F.3d 518, 518 (7th Cir. 2009).
[190] *Id.* at 520–21.
[191] *Id.* at 521.
[192] *Id.* at 525–26.
[193] 591 F.3d 957, 958–60 (7th Cir. 2010).

in her favor and the relief that the district court had awarded her.[194] The provision of the ADA in question provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[195] The Seventh Circuit agreed with the defendant:

> Like the ADEA, the ADA renders employers liable for employment decisions made "because of" a person's disability, and *Gross* construes "because of" to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII's mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice.[196]

Because the ADA used the "because of" language—the same language that the courts had previously been found to allow for mixed-motive in *Price Waterhouse*, but later, in *Gross*, to *foreclose* mixed-motive—and because no other evidence pointed to the appropriateness of a mixed-motive standard under the ADA, the Seventh Circuit found that "the district court's decision to award Serwatka . . . relief . . . cannot be sustained."[197] The court pointed out that the Seventh Circuit's "prior decisions had held that mixed-motive claims were viable under the ADA."[198] However, after *Gross*, the decisions no longer stated the applicable law in ADA cases in the Seventh Circuit.

B. The Fifth Circuit Responds: *Xerox*

Roughly two months after the Seventh Circuit issued its opinion in *Serwatka*, the Fifth Circuit decided *Smith v. Xerox Corp.*,[199] a Title VII retaliation case. The plaintiff in *Smith*, an Office Solutions Specialist at Xerox, alleged that her manager made negative employment decisions based on her gender and age, then terminated her for filing a discrimination charge against Xerox with the EEOC.[200] Over the defendant's objection, "the district court concluded that the case had been tried as a mixed-motive retaliation case and instructed the jury on a

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[194] *Id.* at 959.
[195] *Id.* at 961 (quoting 42 U.S.C. § 12112(a) (2006) (emphasis added)).
[196] *Id.* at 962.
[197] *Id.* at 963.
[198] *Serwatka*, 591 F.3d at 963 (citing Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033–34 (7th Cir. 1999)).
[199] 602 F.3d 320 (5th Cir. 2010).
[200] *Id.* at 323–24.

mixed-motive theory of causation."[201] The jury awarded Smith $317,500 and the court awarded Smith her attorneys' fees.[202] On appeal, Xerox argued that the court "erroneously instructed the jury on the burden of proof by allowing it to find for Smith on her retaliation claim with only 'motivating factor' rather than 'but for' causation, thereby improperly shifting the ultimate burden of persuasion to Xerox."[203]

The Fifth Circuit engaged in a lengthy analysis of the impact of *Gross* on Title VII retaliation claims. The court first examined the circuit's precedent pre-*Gross*, detailing the different requirements of the *Price Waterhouse* and *McDonnell Douglas* standards and the impact of the 1991 Amendments, which it noted, "codified the [*Price Waterhouse*] holding" with regard to Title VII discrimination claims.[204] The court analyzed the *Gross* decision and how it applied to the case before the court.

The Fifth Circuit's opinion is strikingly honest, in that the court early on "recognize[s] that the *Gross* reasoning could be applied in a similar manner to the instant case."[205] It writes rather extensively on how applying *Gross*'s reasoning to the Title VII retaliation context is intuitively appealing:

> The text of § 2000e-2(m) states only that a plaintiff proves an unlawful employment practice by showing that "race, color, religion, sex, or national origin was a motivating factor." It does not state that *retaliation* may be shown to be a motivating factor. Moreover, although Congress amended Title VII to add § 2000e-2(m) in 1991, it did not include retaliation in that provision. These considerations are, of course, similar to the Supreme Court's reasoning in *Gross,* and Xerox understandably urged at oral argument that *Gross* dictates the same conclusion here, i.e., a Title VII retaliation plaintiff, like an ADEA discrimination plaintiff, may not obtain a motivating factor jury instruction and must instead prove that retaliation was the but-for cause for the adverse employment action.[206]

However, after noting this, the court stated "that such a simplified application of *Gross* is incorrect."[207] The key difference between the two cases, the court found, was that "*Gross* is an ADEA case, not a Title VII case."[208] While the court acknowledged that Title VII *retaliation* cases and Title VII *discrimination* cases are distinct, the fact that the court was

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[201] *Id.* at 325.
[202] *Id.*
[203] *Id.*
[204] *Smith*, 602 F.3d at 327.
[205] *Id.* at 328.
[206] *Id.* (emphasis in original).
[207] *Id.*
[208] *Id.* at 329.

"concerned with construing Title VII, albeit in the retaliation context," meant that Title VII decisions like *Price Waterhouse* and *Desert Palace*, "along with . . . [the Fifth Circuit's] own precedent recognizing the application of mixed-motive analysis in Title VII retaliation cases, are not unimportant."[209]

The court gave special emphasis to what it viewed to be the continuing importance of *Price Waterhouse*, a case which, notwithstanding Justice Thomas' less than enthusiastic opinion of it, the Supreme Court did not overrule. The court acknowledged that in "*Price Waterhouse* . . . [the Court] specifically provided that the 'because of' language in the context of Title VII authorized the mixed-motive framework," while twenty years later in *Gross* the Court "decided that the same language in the context of the ADEA meant 'but-for,' but also refused to incorporate its prior Title VII decisions as part of the analysis."[210] Still, the court found that "under these circumstances, the *Price Waterhouse* holding remains our guiding light."[211]

The Fifth Circuit justified its continuing adherence to *Price Waterhouse* in the face of *Gross* by pointing to the language in *Gross* itself:

> [W]e think that [extending *Gross* into the Title VII context] would be contrary to *Gross's* admonition against intermingling interpretations of the two statutory schemes. . . . It is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases, as that prerogative remains always with the Supreme Court. . . . The Supreme Court recognized that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion." Because the Court recognized this difference but was not presented in *Gross* with the question of how to construe the standard for causation and the shifting burdens in a Title VII retaliation case, we do not believe *Gross* controls our analysis here.[212]

Two important points may be drawn from this analysis. First, as the Court in *Gross* warned, rules that apply to one statutory scheme should not automatically be applied to a different statute—even if two statutes are similar in language and purpose, a court must recognize that the statutes are distinct. Second, despite the difference between Title VII discrimination and Title VII retaliation, the Supreme Court drew a line in *Gross* between Title VII—without distinguishing between discrimination and retaliation under that statute—and the ADEA. The Fifth Circuit appears to be saying that it should not draw a finer distinction between

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[209] *Smith*, 602 F.3d at 329.
[210] *Id.*
[211] *Id.*
[212] *Id.* at 329–30 (internal citation omitted).

two different provisions *within* Title VII than the Court in *Gross* actually drew.[213]

The court also drew justification for its restraint from its own precedents. The court noted that it had "previously recognized that the motivating-factor analysis and burden-shifting scheme of *Price Waterhouse* may be applicable in Title VII mixed-motive retaliation cases."[214] The court found that it was thus bound by its circuit precedent, because in the Fifth Circuit a court may not "overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent."[215] Because "the *Gross* Court made clear that its focus was on ADEA claims," not Title VII retaliation claims, and because Title VII mixed-motive retaliation claims had been allowed in the Fifth Circuit in the past, the court felt compelled "to continue to allow the *Price Waterhouse* burden shifting in such cases unless and until the Supreme Court says otherwise."[216]

After deciding this issue, the court turned to a question that it had previously discussed in more detail than most circuits, yet repeatedly avoided answering: whether direct evidence is required to proceed under a mixed-motive theory in a Title VII retaliation case. [217] The court gave the issue far more consideration than any other circuit had.[218] The majority engaged in an analysis that resembled Judge Lodge's in *Kotewa*,[219] focusing on the broad language of Justice Thomas' opinion in *Desert Palace* suggesting that "Congress has specifically provided for a heightened standard of proof in other statutes and clearly knows how to require such a showing."[220] The Fifth Circuit also referenced Justice Thomas' statements regarding the "long-established rule in civil litigation" that a plaintiff could prove his case using direct or circumstantial evidence.[221] The court noted "that circumstantial evidence may often be more persuasive" than direct evidence, and that circumstantial evidence, alone, can be sufficient even in criminal cases.[222] Notably absent from the majority's decision was a consideration of the possible limitations of the *Desert Palace* holding imposed by §

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[213] The majority addresses this last point again in responding to Judge Jolly's dissenting opinion. Judge Jolly "insists that *Gross* has changed our law because *Gross* explained that the 1991 Amendments to Title VII 'should be read as limiting the mixed motive analysis to the statutory provision under which it was codified—Title VII *discrimination* only.'" *Id.* at 330 n.34 (majority quoting *Smith*, 602 F.3d 320 at 338 (Jolly, J., dissenting) (emphasis in original)). The majority, of course, disagreed, finding that "[t]he *Gross* court made no such broad pronouncement." *Id.* at 330, n.34.

[214] *Smith*, 602 F.3d at 330.

[215] *Id.* (quoting Cain v. Transocean Offshore USA, Inc., 518 F.3d 295, 300 (5th Cir. 2008) (citations omitted) (internal quotations omitted)).

[216] *Id.* at 330.

[217] *See* Vialpando v. Johanns, 619 F. Supp. 1107, 1115 (D. Colo. 2008).

[218] *See supra* Part IV(C).

[219] *See supra* Part IV(C).

[220] *Smith*, 602 F.3d at 331.

[221] *Id.*

[222] *Id.*

2000e-2(m), what Judge Krieger in *Vialpando* had deemed the "lynchpin" of the Supreme Court's decision.[223] Not surprisingly, the Fifth Circuit held that to the extent that direct evidence of retaliation had previously been required in a Title VII mixed-motive retaliation case, its decisions had "been necessarily overruled by *Desert Palace*. Smith therefore was not required to present direct evidence of retaliation in order to receive a mixed-motive jury instruction."[224]

C. The D.C. Intra-Circuit Split: *Beckford*, *Nuskey*, *Beckham*, and *Hayes*

Courts in the D.C. Circuit have considered how *Gross* applies to Title VII mixed-motive retaliation claims more than anywhere else in the country. Since *Gross* was decided in 2009, the D.C. district court has tackled the issue four times, leading to four decisions of varying length and complexity. Perhaps more importantly, in these decisions, D.C. district court judges have come to three different conclusions.

The first two decisions that addressed the impact of *Gross* on Title VII mixed-motive retaliation cases did so in a cursory fashion, but their contrary holdings established an intra-circuit split on this issue. The first decision, *Beckford v. Geithner*, involved a Department of Treasury employee who alleged that she received a negative performance evaluation and discipline in retaliation for filing an Equal Employment Opportunity complaint with the IRS accusing her supervisor of sexual harassment.[225] The plaintiff argued that a jury could infer that retaliation "was among the motivating factors which led to the [negative appraisal]."[226] The court noted that "the reasoning of the Supreme Court in *Gross* . . . appears applicable to the anti-retaliation provision of Title VII, which also prohibits discrimination only 'because' the employee has engaged in a protected act."[227] Under this interpretation of *Gross*, it therefore followed that "the suggestion that retaliation was 'among' the factors motivating Ms. Beckford's review is insufficient as a matter of law to defeat summary judgment."[228]

Nuskey v. Hochberg was the next case decided by the D.C. district court.[229] While *Beckford* was decided in late 2009—at which point no circuit court had engaged in a substantial analysis of the impact of *Gross* on Title VII retaliation claims—*Nuskey* was decided in July 2010, over four months after the Fifth Circuit's decision in *Smith*. In *Nuskey* a

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[223] *Vialpando*, 619 F. Supp. at 1115.
[224] *Smith*, 602 F.3d at 332 (internal citations omitted).
[225] Beckford v. Geithner, 661 F. Supp. 2d 17, 19–21 (D.D.C. 2009).
[226] *Id.* at 25 n.3.
[227] *Id.*
[228] *Id.*
[229] 730 F. Supp. 2d 1 (D.D.C. 2010).

defendant objected to the court's proposed jury instructions, which stated that the "plaintiff need only prove that . . . retaliation was 'a motivating factor' in the [defendant's] decision to fire her."[230] In the court's decision, Judge Friedman, citing Judge Huvelle's opinion in *Beckford*, noted that he was not writing on a blank slate within the circuit.[231] However, Judge Friedman disagreed with Judge Huvelle, and the court thus chose to "align[] itself instead with the analysis of the Fifth Circuit in *Smith v. Xerox Corp.*"[232] The court cited the Fifth Circuit's proposition that "*Price Waterhouse* . . . still remains the touchstone for analysis in a Title VII retaliation case."[233] Although the D.C. Circuit never actually addressed the question of whether the 1991 Amendments or *Price Waterhouse* governs Title VII retaliation claims,[234] Judge Friedman noted that "a number of courts have concluded that retaliation claims are still governed by *Price Waterhouse*," and that "[u]nder *Price Waterhouse*, a mixed motive theory and thus an 'a motivating factor' instruction are available in retaliation cases."[235] Somewhat oddly, the court failed to give any detail as to *why* it found the Fifth Circuit's analysis more compelling than Judge Huvelle's analysis in *Beckford*: it simply stated that it sides with the Fifth Circuit, and then traced out the consequences of that choice to the facts of that case.[236]

Less than two months after *Nuskey*, D.C. district judge Rosemary Collyer decided *Beckham v. National Railroad Passenger Corp.*, the third D.C. district court case to address Title VII mixed-motive retaliation post-*Gross*.[237] In *Beckham*, the plaintiff, an African-American woman, contended that her employer had retaliated against her for her participation in a racial discrimination class-action lawsuit.[238] The court acknowledged "the legal analysis applicable to claims of retaliation under Title VII—specifically mixed-motive retaliation claims—is now a subject of debate among the circuit courts" and D.C. district court judges.[239] The court discussed *Price Waterhouse*, the 1991 Amendments, and *Gross* in some detail, as well as both the majority and dissenting opinions in *Smith v. Xerox Corp.*[240] However, the court then took a turn that set it on a path different from both *Nuskey* and *Beckford*:

> Congress approved the "motivating factor" analysis from *Price Waterhouse* when it amended Title VII in 1991 to adopt that standard explicitly for mixed-motive cases. *See* 42 U.S.C.

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[230] *Id.* at 3.
[231] *Id.* at 5.
[232] *Id.*
[233] *Id.*
[234] *See supra* note 106 (noting that the D.C. Circuit has twice declined to resolve this issue).
[235] *Nuskey*, 730 F. Supp. 2d at 5.
[236] *Id.*
[237] Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130 (D.D.C. 2010).
[238] *Id.*
[239] *Id.* at 142.
[240] *Id.* at 142–44 (internal citation omitted).

> § 2000e-2(m). . . . This Court concludes that § 2000e-2(m) means just what it says: when an impermissible motive animates "*any* employment practice," even though permissible motives were also involved, "an unlawful employment practice is established. There can, therefore, be mixed-motive retaliation cases despite the "because" language in the statute.[241]

Under this approach, if § 2000e-2(m) applied directly to a mixed-motive retaliation claim, the extension of the mixed-motive framework would be uncontroversial. After all, one of the main reasons Justice Thomas refused to extend the mixed-motive structure to ADEA claims was that Congress added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII and "neglected" to similarly amend the ADEA.[242] By finding that § 2000e-2(m) applies to Title VII retaliation, the somewhat more difficult issue of whether *Gross* effectively overruled *Price Waterhouse* becomes moot, as the authority for the mixed-motive structure is found in an unambiguous statutory provision—§ 2000e-2(m)—and not in a Supreme Court opinion of questionable precedential value.

However, this "easy fix" is not unproblematic. The main weakness of Judge Collyer's approach is that every circuit that has decided the issue of whether the 1991 Amendments apply to Title VII retaliation claims has found that they do not.[243] In a footnote, the court recognized that "several" circuits have found this to be the case, but then noted that "[t]he D.C. Circuit, however, has not addressed the question."[244] This is of course true—the D.C. Circuit, the Tenth Circuit, and the Fifth Circuit all declined to resolve the issue, with the D.C. Circuit twice explicitly refusing to do so.[245] But, to resolve an issue in favor of a position that nine circuits have found to be incorrect and that no circuit has actually endorsed would seem to require a fairly substantial justification—or at least a more rigorous analysis than the court provided in *Beckham*, where the issue is "resolved" in just over one-hundred words.[246]

The D.C. district court revisited the issue in *Hayes v. Sebelius*, a case decided by Chief Judge Royce Lamberth.[247] The plaintiff in *Hayes* alleged that the Department of Health and Human Services had retaliated against him in a variety of ways for bringing a discrimination claim. He also contended that "retaliatory animus was a 'motivating factor' in HHS's decision to deny him" a position to which he desired to be promoted.[248] In response, "HHS contend[ed] that Hayes may not, as a

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[241] *Id.* at 144–45.
[242] Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009).
[243] *See supra* Part IV(B) and note 106.
[244] 736 F. Supp. 2d at 145 n.13.
[245] *See supra* note 106.
[246] 736 F. Supp. 2d at 145.
[247] Hayes v. Sebelius, 762 F. Supp. 2d 90 (D.D.C. 2011).
[248] *Id.* at 93.

matter of law, raise a motivating-factor retaliation claim under Title VII."[249]

The court began its analysis with a thorough discussion of *Price Waterhouse* and the 1991 Amendments. It noted that in the D.C. Circuit it is still an "open question whether Title VII plaintiffs may bring mixed-motives retaliation claims under *Price Waterhouse* or motivating-factor retaliation claims under the 1991 Act."[250] But while the D.C. district court in *Beckham* decided that such claims should be brought under the 1991 Act,[251] Judge Lamberth came out differently on the issue, finding that "[t]he Supreme Court's recent decision in *Gross* . . . resolves any doubt: Title VII plaintiffs may bring *neither* mixed-motives retaliation claims under *Price Waterhouse* nor motivating-factor retaliation claims under the 1991 Act."[252]

First, the court analyzed the possibility of Title VII mixed-motive retaliation claims under the *Price Waterhouse* framework post-*Gross*. The court noted that "[t]he Supreme Court's recent decision in *Gross* . . . makes clear that *Price Waterhouse*'s interpretation of 'because of' is flatly incorrect," as the language in the ADEA that the Supreme Court interpreted in *Gross* "is indistinguishable from Title VII's discrimination and retaliation provisions, both of which contain the same 'because of' formulation."[253] The court also pointed to other attacks that Justice Thomas lodged against *Price Waterhouse*, such as the difficulty courts have in applying its burden-shifting framework, and (what Justice Thomas deemed to be) the decision's generally questionable reasoning.[254] As a result of what he believed to be the Supreme Court's unambiguous direction, Judge Lamberth concluded that he would "not apply . . . [*Price Waterhouse*'s] interpretation of 'because of' to Title VII's retaliation provision."[255]

Having dispensed with *Price Waterhouse*, the court moved on to consider "whether the 1991 Act provides an independent basis for a motivating-factor retaliation claim."[256] Judge Lamberth relied on Justice Thomas' statement in *Gross* that "'[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.'"[257] Judge Lamberth noted that:

> In the case currently before the Court, Congress made changes to various parts of Title VII affecting both discrimination and retaliation claims. When it came to crafting the motivating-

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[249] *Id.*

[250] *Id.* at 110–11.

[251] Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 144–45 (D.D.C. 2010).

[252] *Hayes*, 762 F. Supp. 2d at 111 (emphasis added).

[253] *Id.*

[254] *Id.* at 112.

[255] *Id.*

[256] *Id.*

[257] *Hayes*, 762 F. Supp. 2d at 112 (quoting Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009)).

> factor analysis, however, it amended one section of Title VII and was silent *as to another provision of Title VII.* Thus, the inference that Congress considered both provisions and was therefore intentional in its disparate application of the motivating-factor provision applies with even greater force here.[258]

Because Congress amended certain parts of Title VII's retaliation provision in the 1991 Amendments but failed to extend § 2000e-2(m) to retaliation, Congress should be presumed to have *made the choice* to *refuse* to do so—not to have *made a mistake* by *neglecting* to do so. As Judge Lamberth put it, "this Court finds it difficult to believe that the absence of motivating-factor language in Title VII's retaliation provision is the result of accident."[259]

Interestingly, after deciding mixed-motive Title VII retaliation claims were not available under either the *Price Waterhouse* or 1991 Amendments frameworks, the court engaged in a rather extensive examination of the Fifth Circuit's decision in *Smith v. Xerox Corp.* Judge Lamberth wrote, "[t]he Fifth Circuit's reasoning rests almost entirely on one argument . . . that courts 'must be careful not to apply rules applicable under one statute without careful and critical examination' . . . ."[260] The court explained that it believed the Fifth Circuit was mistaken for two reasons. First, the court drew a distinction between rules of law and rules of statutory construction. The court noted that

> [t]here is a critical difference between a rule of law developed under a certain statute and the rules of statutory construction implemented to derive that rule of law. The former is unique to the statute at issue, but the latter by its very nature applies generally.[261]

Gross's admonition, upon which the Fifth Circuit heavily relied, "was limited to the application of *rules of law* developed under one statute to another statute 'without careful and critical examination.'"[262] In other words, that *Gross* involved the ADEA and not Title VII should not prevent a court from following the *rules of statutory construction* developed in *Gross* in a Title VII case. This, in Judge Lamberth's

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[258] *Id.*

[259] *Id.* at 113. The court also points to a number of other reasons leading to its conclusion that the 1991 Amendments do not apply to Title VII retaliation claims, most of which draw from the *Gross* decision. These reasons include Justice Thomas' statements regarding the non-existence of motivating factor claims prior to the 1991 Amendments (conclusion he finds support for in Congress's decision to add section 2000e-2(m), as opposed to just § 2000e-5(g)(2)(B)). The court found that "the only construction that gives meaning both to Section 2000e-5(g)(2)(B) as well as the motivating-factor provision without reading either as surplusage is one that restricts the motivating-factor provision's application to Title VII discrimination claims only." *Id.*

[260] *Id.* at 114 (quoting Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010)).

[261] *Id.*

[262] *Hayes*, 762 F. Supp. 2d at 114 (quoting *Gross*, 129 S. Ct. at 2349).

opinion, was what the court did in finding that *Gross* foreclosed the possibility of mixed-motive Title VII retaliation claims.[263]

Second, Judge Lamberth wrote that "even if *Gross* had never been decided, many of the arguments this Court made above would still apply."[264] Most of the court's analysis here seems to support the court's finding that the 1991 Amendments do not provide for mixed-motive Title VII retaliation claims[265]—which every circuit court that had decided the issue had also found.[266] However, Judge Lamberth also wrote that analysis of Title VII's anti-retaliation provision itself "shows that its text plainly indicates its exclusion of motivating factor retaliation cases under the principle of *inclusio unius est exclusio alterius*."[267] This is a bold statement that stands in stark contrast to the actual history of mixed-motive Title VII retaliation cases, as *every* circuit—including the D.C. Circuit—allowed mixed-motive Title VII retaliation claims of some type before *Gross*.[268] Although the court wrote that "wholly apart from *Gross*, this Court would find that Title VII does not allow motivating-factor retaliation claims," it is not entirely clear that it *could have* done so, as the D.C. Circuit appeared to approve of such claims.[269]

D. Conclusion

Because the Fifth Circuit is the only circuit court to have ruled precisely on the issue of whether *Gross* forecloses mixed-motive Title VII retaliation claims—the Seventh Circuit cases dealt with mixed-motive under § 1983 and the ADA—it is premature to say that there is a true circuit split. However, such a split seems inevitable, especially considering the Seventh Circuit's reliance on *McNutt,* a mixed-motive Title VII retaliation case, in its finding in *Serwatka*. In *Serwatka*, the court found that the mixed-motive proof structure is unavailable to ADA plaintiffs post-*Gross*, and the Seventh Circuit's broad statement in *Fairley* that *Gross* stands for the rule that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all suits under federal law*."[270] It is currently unclear which way the D.C. Circuit will go, with

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[263] *Id.* at 115.

[264] *Id.*

[265] For example, the court notes that *Gross* was not "the first case to hold that court should look to the text of a statute when interpreting it," and that it was also not the "first to recognize that when Congress amends one provision of a statute but not another, it can be interpreted to have signaled its intention not to apply the amendment to the unaffected provision." *Hayes*, 762 F. Supp. 2d at 115.

[266] *See supra* Part IV(B) and note 106.

[267] *Hayes*, 762 F. Supp. 2d at 115.

[268] *See supra* Part IV(A) and note 106.

[269] *See, e.g.*, Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997) (allowing a mixed-motive Title VII retaliation claim against an employee's former employer).

[270] Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (emphasis added).

some judges siding with the Fifth Circuit, and others following the path set out by the Seventh Circuit's ADA and § 1983 cases.

VII. MOVING FORWARD: THE FUTURE OF MIXED-MOTIVE TITLE VII RETALIATION

Mixed-motive Title VII retaliation claims have endured a rather strange evolution. After the Supreme Court decided that the mixed-motive claims were available under Title VII's discrimination provision in *Price Waterhouse*, courts extended this interpretation to Title VII retaliation claims. Indeed, it would have been somewhat difficult to justify if they had failed to do so: the Court held that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them,"[271] and the section of Title VII that prohibits retaliation uses the same "because" formulation.[272] However, when Congress amended Title VII in 1991, the circuits by and large left retaliation behind: while Title VII *discrimination* plaintiffs proceeding under the mixed-motive framework could still recover attorneys' fees and costs even if the employer could prove that it would have made the same decision absent discrimination, Title VII *retaliation* plaintiffs still faced a complete bar to recovery if an employer was successful on its "same decision" defense. Still, the mixed-motive framework was useful to retaliation plaintiffs in that once a plaintiff showed retaliation was *a* factor that motivated an employer's adverse action against an employee, the burden of persuasion would then shift to the employer—a shift that did not take place under single-motive claims.

But not all the benefits that Title VII discrimination plaintiffs received in the post-*Price Waterhouse* developments were withheld from Title VII retaliation plaintiffs. After *Desert Palace* most courts held that Justice Thomas' abolition of the direct-evidence requirement in mixed-motive Title VII discrimination cases also extended to mixed-motive Title VII retaliation claims. This was a significant improvement for retaliation plaintiffs, who could now enjoy the plaintiff-friendly burden-shifting benefits of *Price Waterhouse* without presenting direct evidence of retaliation.

The Supreme Court's decision in *Gross* certainly had the potential to end mixed-motive Title VII retaliation claims entirely. Even the Fifth Circuit—the court that found that such claims *are not* precluded by *Gross*—admitted that "the *Gross* reasoning could be applied in a similar

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[271] Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

[272] 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter . . . .") (emphasis added).

manner" to Title VII retaliation.[273] But the Fifth Circuit's decision in *Smith v. Xerox* shows that courts may yet find life in mixed-motive Title VII retaliation. There are too few decisions on the precise issue to tell which way the majority of courts will go.[274] In light of the Seventh Circuit's strong language in *Fairley*, counseling against a reading of mixed-motive into statutory provisions that do not expressly provide for it, and the Fifth Circuit's clear endorsement in *Smith* of a post-*Gross* mixed-motive Title VII retaliation framework, an irreconcilable circuit split seems inevitable.

A. Was the Fifth Circuit Right? A Critique of *Xerox*

But which reading of *Gross* with respect to mixed-motive Title VII retaliation is correct? The main argument behind the Fifth Circuit's decision in *Smith v. Xerox* appears to be that Title VII—*both* in the retaliation and discrimination contexts—is simply different from the ADEA, and therefore that the rules applicable to the two statutes should not be confused. The problem with this argument is that the "rules applicable" to Title VII retaliation claims and Title VII discrimination claims have *never* been the same since the 1991 Amendments according to the circuit courts, all of which held that mixed-motive Title VII retaliation claims were still stuck with the *Price Waterhouse* framework. The "material[] differen[ce]"[275] between Title VII and the ADEA that Justice Thomas pointed to was not the entirety of Title VII, but rather the part of Title VII to which § 2000e-2(m) applied.[276] When we subtract § 2000e-2(m) from our Title VII analysis and just focus on the unamended retaliation language—"*because* he has opposed any practice . . . or *because* he has made a charge . . ."—the "material[] differen[ce]" all but

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[273] Smith v. Xerox Corp., 602 F.3d 320, 328 (5th Cir. 2010).

[274] For district court cases finding that mixed-motive Title VII retaliation claims survived *Gross*, see Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 145 (D.D.C. 2010) (discussing *Gross* and *Smith* at length and deciding that mixed-motive retaliation cases survive *Gross*); Nuskey v. Hochberg, 730 F. Supp. 2d 1, 5 (D.D.C. 2010) (agreeing explicitly with *Smith*). For district court cases finding that mixed-motive Title VII retaliation claims are no longer viable post-*Gross*, see Hayes v. Sebelius, 762 F. Supp. 2d 90, 111 (D.D.C. 2011) (citing *Gross* for the holding that mixed-motive retaliation claims are not permitted under Title VII); Beckford v. Geithner, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009) (holding that in light of *Gross* an allegation that a prohibited reason was "among" the reasons for the alleged retaliation cannot survive summary judgment); Hayes Awad v. Nat'l City Bank, No. 1:09-CV-00261, 2010 WL 1524411, at *10 n.4 (N.D. Ohio Apr. 15, 2010) (citing both *Serwatka* and *Smith*, and concluding that the plaintiff "is not entitled to a mixed-motive retaliation claim"); Ge Zhang v. Children's Hosp. of Philadelphia, No. 08-5540, 2011 WL 940237, *2 (E.D. Pa. Mar. 14, 2011) ("[T]he Court finds no compelling reason to define 'because,' as used in Title VII's anti-retaliation provision, any differently than the Supreme Court defined the phrase 'because of' in *Gross*. Accordingly, the Court finds that § 2000e-3(a) requires Plaintiff to show that his protected activity was the 'but-for' cause of the employer's adverse action.").

[275] *Gross*, 129 S. Ct. at 2348.

[276] *See id.* 2348–49 (pointing to Congress's addition of 42 U.S.C. § 2000e-3(m) as distinguishing Title VII from the ADEA).

disappears.[277]

A careful analysis of some of the passages of *Smith v. Xerox* illustrates the opinion's flaws. The Fifth Circuit wrote that "[t]he *Gross* Court cautioned that when conducting statutory interpretation, courts 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[278] This is, of course, a correct restatement of *Gross*. However, context is important. Immediately before and after the passage quoted in *Gross*, Justice Thomas focused on the text of § 2000e-2(m), and how this text was absent from the ADEA. The sentences that follow this passage in *Gross* read as follows:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . . [279]

It appears, then, that the "careful and critical examination"[280] to which Justice Thomas referred centers on an examination of the *text* of the statute—what the text of the statute actually says and how that text was amended. Like that of the ADEA, the text of Title VII's anti-retaliation provision does not provide that a plaintiff may establish discrimination by showing that retaliation was "simply a motivating factor"[281] unless we are willing to extend § 2000e-2(m) to retaliation, which, as mentioned numerous times above, most courts have been unwilling to do. Similarly, Congress neglected to add this provision to Title VII's anti-retaliation provision, even though it contemporaneously amended § 2000e-3(a) in other ways.[282]

After quoting Justice Thomas' "careful and critical examination" language, the Fifth Circuit wrote in *Smith*: "[t]he Court's comparison of Title VII with the ADEA, and the textual differences between those two statutory schemes, led it to conclude that Title VII decisions like *Price Waterhouse* and *Desert Palace* did not govern its interpretation of the ADEA."[283] This passage is somewhat misleading. If, as the Fifth Circuit suggests, the *Gross* Court engaged in a comparison between Title VII *in its entirety* and the ADEA, it would seem logical to conclude that perhaps Title VII is "just different," and that the Court's holding in

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[277] 42 U.S.C. § 2000e-3(a) (emphasis added).
[278] *Smith*, 602 F.3d at 329 (quoting *Gross*, 129 S. Ct. at 2349).
[279] *Gross*, 129 S. Ct. at 2349.
[280] *Id.* (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008).
[281] *Id.*
[282] *See supra* note 101.
[283] *Smith*, 602 F.3d at 329.

Gross should not extend to *any* portion of Title VII. But the comparison was *not* between *all* of Title VII and the ADEA—it was between the parts of Title VII to which § 2000e-2(m) applies (Title VII discrimination) and the ADEA.[284]

The Fifth Circuit attempts to remedy this ham-handed conflation in *Smith* by reminding the reader that it knows it is addressing Title VII retaliation, not discrimination: "But we *are* concerned with construing Title VII, albeit in the retaliation context."[285] However, this legerdemain is not enough to cure the problems in the *Smith* analysis. Courts have found that Title VII retaliation and Title VII discrimination are materially different when it comes to their mixed-motive structures.[286] Furthermore, the mixed-motive Title VII framework discussed in *Gross* is, according to the circuits that have decided the issue, exclusive to Title VII discrimination claims.[287] In fact, the court returns to its conflation two paragraphs later, stating that "[t]he Supreme Court recognized that Title VII and the ADEA are 'materially different with respect to the relevant burden of persuasion,'" and uses this statement as evidence that *Gross* does not control in Title VII retaliation cases.[288]

When the language of Title VII's retaliation provision is read properly—that is, entirely without the support of § 2000e-2(m)—the "careful and critical examination" required by *Gross* leads to only one conclusion. In view of the fact that the "because of" language of Title VII retaliation and § 623(a) of the ADEA are so similar, and because neither provision was found to be one to which § 2000e-2(m) applies, *Gross* should apply in the Title VII retaliation context, and the mixed-motive framework is therefore never applicable to Title VII retaliation claims. The Fifth Circuit therefore erred in finding that mixed-motive Title VII retaliation claims are still available post-*Gross*. Judge Jolly, the lone dissenter in *Smith v. Xerox*, captures the court's error nicely:

> The majority would have to *explain*, not gloss over, why these differences between Title VII's retaliation provision and Title VII's discrimination provision—differences that were determinative in *Gross*—are now immaterial in resolving this case involving identical language and the same absence of a proviso authorizing mixed-motive claims. It is only by *avoiding* a "careful and critical examination" that the majority concludes that *Gross* does not control our analysis today.[289]

Simply because the Court in *Gross* and the Fifth Circuit address different provisions of Title VII, does not excuse the court from engaging in the

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[284] *Gross*, 129 S. Ct. at 2349.
[285] *Smith*, 602 F.3d at 329.
[286] *Id.* at 328.
[287] *Id.*
[288] *Id.* at 329–30.
[289] *Id.* at 338 (Jolly, J. dissenting) (emphasis in original).

sort of "careful and critical examination" required by Justice Thomas' opinion.

B. Can Mixed-Motive Title VII Retaliation Claims Be Saved? Two (Leaky) Lifeboats

After *Gross*, there appear to be only two potential avenues for courts to preserve mixed-motive Title VII retaliation claims. First, courts could argue that § 2000e-2(m) *does* apply to Title VII retaliation claims. If so, then there would clearly be a statutory basis for the mixed-motive framework—a requirement after *Gross*.[290] However, all courts that have considered the issue have found that § 2000e-2(m) does *not* apply to § 2000e-3(a).[291] Still, the court could have gone this route in *Smith*, as the Fifth Circuit is one of three circuits that have not decided the issue.[292] However, it did not. The court never explicitly said § 2000e-2(m) does *not* apply, but in two places the court seemed to strongly suggest that it places its reliance elsewhere. The court first conceded that § 2000e-2(m) "does not state that *retaliation* may be shown to be a motivating factor," and that "although Congress amended Title VII to add § 2000e-2(m) in 1991, it did not include retaliation in that provision."[293] Later, in a footnote, the court distinguished the issue before it from the issues the Seventh Circuit was addressing in *Serwatka* and *McNutt*, where "the court was confronted with the effect of the remedy provision of the 1991 amendments to the Civil Rights Act, § 2000e-5(g)(2)(B) . . . ."[294] The court then noted that "irrespective of the remedies available under the 1991 amendments under those circumstances, we feel bound by *Price Waterhouse* on the issue whether in a Title VII retaliation case the motivating factor framework may be submitted to the jury in the first place."[295] Although this passage mentions only § 2000e-5(g)(2)(B), because of the language of § 2000e-5(g)(2)(B), § 2000e-5(g)(2)(B) and § 2000e-2(m) are functionally inseparable: where one is applicable, the other is applicable; where one is inapplicable, the other is inapplicable as well.[296] Because the court found that it was bound by *Price Waterhouse* "irrespective of the remedies available" under § 2000e-5(g)(2)(B), this

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[290] *See Gross*, 129 S. Ct. at 2350.

[291] *See supra* note 106 and accompanying text.

[292] *See supra* note 106.

[293] *Smith*, 602 F.3d at 328.

[294] *Id.* at 329 n.28.

[295] *Id.*

[296] Section 2000e-5(g)(2)(B) states that "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title . . . ." 42 U.S.C. § 2000e-5(g)(2)(B).

must mean that the court felt it was bound by *Price Waterhouse* irrespective of the *statutory support for the mixed-motive framework*—§ 2000e-2(m)—as well.

But could a court still find that § 2000e-2(m) applies to Title VII retaliation after *Gross*? A close reading of *Gross* suggests that this interpretation would have even less support after *Gross*. First, Justice Thomas noted, "Congress has since amended Title VII by explicitly authorizing *discrimination claims* in which an improper consideration was 'a motivating factor' for an adverse employment decision."[297] Justice Thomas' reference to "discrimination claims"—as opposed to simply "claims"—seemed intentional. Second, the tools of statutory interpretation Justice Thomas focused on suggest that one should not make an inference that § 2000e-2(m) applies to claims outside of those explicitly provided for in the provision. Justice Thomas noted, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[298] Additionally, he quoted *Lindh v. Murphy* for the proposition that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'"[299] Both of these propositions seem to suggest that one should not read § 2000e-2(m) as encompassing Title VII retaliation.

However, a court could still make an argument that § 2000e-2(m) does apply to Title VII retaliation claims. One could point to the EEOC Compliance Manual and the purposive and historical arguments the Commission makes for finding that § 2000e-2(m) extends to retaliation.[300] There are also a few district court opinions supporting this proposition.[301] Again, this argument is somewhat weaker after *Gross*, but it could still be argued that because Title VII retaliation is *within* Title VII—albeit in a different statutory provision—the framework added by the 1991 Amendments should reach that provision.

A second way by which courts could preserve mixed-motive Title VII retaliation claims post-*Gross* would be to argue that the language in Title VII's anti-retaliation provision is materially different from the provision of the ADEA discussed in *Gross*. This seems to be a particularly difficult argument to make in the case of Title VII retaliation,

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[297] *Gross*, 129 S. Ct. at 2349 (emphasis added).

[298] *Id.* (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

[299] *Id.* (quoting Lindh v. Murphy, 521 U.S. 320, 330 (1997)).

[300] *See supra* Part IV(B).

[301] *See, e.g.*, Warren v. Terex Corp., 328 F. Supp. 2d 641, 645 (N.D. Miss. 2004) ("[I]t seems likely that § 2000e-2(m) represented an effort by Congress to modify certain aspects of the *Price Waterhouse* decision, rather than a conscious adoption of a more lenient standard of recovery in Title VII discrimination cases as opposed to ADEA and retaliation cases."); Heywood v. Samaritan Health Sys., 902 F. Supp. 1076, 1081 (D. Ariz. 1995) (noting that "the specific language of the amendment, and of the House report, do not include retaliation[,]" but nevertheless finding that "it is certainly reasonable to assume that the Congressional policy articulated in the amendment and in the House report, reaches retaliation as well as the enumerated considerations."); Hall v. City of Brawley, 887 F. Supp. 1333, 1345 (S.D. Cal. 1995) (finding that 42 U.S.C. § 2000e-5(g)(2)(B) applies in a Title VII retaliation case).

as the provision's "because" language is so close to the "because of" language interpreted in *Gross* to mean "but-for."[302] In *Hayes v. Sebelius*, Chief Judge Lamberth went so far as to say that the "because of" language in 29 U.S.C. § 623(a)(1) "is *indistinguishable* from Title VII's . . . retaliation provision."[303] Additionally, while two of the dictionaries Justice Thomas cites for the proposition that "because of" means "but-for" define the *phrase* "because of," Justice Thomas also cites The Random House Dictionary of the English Language's definition of "because" for this proposition, suggesting that Justice Thomas believes that "because of" and "because" are functionally equivalent.[304] While other statutes with language materially different from the "because"/"because of" language might fair better—and already have, in some instances[305]—the similarity of the language in § 623(a)(1) to that found in § 2000e-3(a) appears to make any serious attempt at differentiation between the two a stretch, even by the most creative courts.

C. The End of Mixed-Motive Title VII Retaliation

Despite the various ways lower courts may find around *Gross*, any reading of *Gross* that is truly loyal to the Court's holding and the guidance that the decision provides will find that mixed-motive Title VII retaliation claims are no longer viable. Whether the majority's opinion in *Gross* was a *good* decision—or even an arguably *correct* one—is an entirely different issue, and one beyond the scope of this Article.[306] *Smith v. Xerox*, though artfully composed, appears to be a somewhat inaccurate—possibly even disingenuous—application of the principles

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[302] Hayes v. Sebelius, 762 F. Supp. 2d 90, 111 (D.D.C. 2011).

[303] No. 1:08-cv-0150-RCL, 2011 WL 316043, at *19 (D.D.C. Feb. 2, 2011) (emphasis added).

[304] *Gross*, 129 S. Ct. at 2350 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966)).

[305] *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3d Cir. 2009) (finding that the language in 42 U.S.C. § 1981(a) is broader than the ADEA's "because of" language, and that the continued "use of the *Price Waterhouse* framework makes sense in light section 1981's text"); Hunter v. Valley View Local Schools, 579 F.3d 688, 692 (6th Cir. 2009) (finding that Department of Labor regulations implementing the FMLA "forbid an employer from considering an employee's use of FMLA leave when making an employment decision[,]" and therefore concluding that "the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors[,]" even after *Gross*); Fuller v. Gates, No. 5:06-CV-091, 2010 WL 774965, at *1 (E.D. Tex. March 1, 2010) (finding that mixed-motive claims under § 633a(a) of the ADEA are not prohibited post-*Gross*, as "[u]nlike the 'because of' language in § 623(a), the plain meaning of 'free from any' [in § 633a(a)] is broad enough to embrace a mixed-motive analysis").

[306] Most commentators have argued that *Gross* was wrongly decided. *See, e.g.*, Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!*, 40 U. MEM. L. REV. 681 (2010); Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 264-274 (2009).

established in *Gross*.[307] Still, courts looking to preserve mixed-motive retaliation—and the substantial lines of case law built around its existence—will undoubtedly cite the case, and will therefore require the Supreme Court to address the post-*Gross* mixed-motive Title VII retaliation question squarely. It is also likely that many—quite possibly most—circuits will adopt the approach that the D.C. district court takes in *Hayes v. Sebelius*,[308] and will find that, post-*Gross*, Title VII does not allow for a mixed-motive retaliation claim. Again, no circuit has yet ruled precisely on the issue and found that mixed-motive Title VII retaliation claims are no longer available. However, with most of the heavy theoretical legwork having been completed in *Hayes* roughly two months before this Article was written, it is likely that those decisions are on the horizon. The thorough analysis provided by Chief Judge Lamberth, and subsequent decisions that follow his lead, will likely bring about the end of mixed-motive Title VII retaliation in a number of circuits and for a number of plaintiffs.

Congress could put an end to all of this, of course, if it passes legislation clarifying the appropriate frameworks available for Title VII retaliation claims. The *Gross* decision was met with significant public disapproval,[309] and Congress responded quickly with proposed legislation titled the Protecting Older Workers Against Discrimination Act ("POWADA").[310] POWADA would restore (or preserve, depending on one's interpretation) the mixed-motive framework to any federal employment law "forbidding . . . retaliation against an individual for engaging in, or interfering with, any federally protected activity including the exercise of any right established by Federal law."[311] In other words, mixed-motive Title VII retaliation claims would now have express statutory approval. However, with the recent shifts in power in both the House and Senate, some believe that POWADA stands no more than a slim chance at becoming law.[312] For now, then, courts must decide for themselves how to read *Gross*, and how to apply that decision to the mixed-motive Title VII retaliation context.

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[307] *See supra* Part VI(B).

[308] *See supra* Part IV(C).

[309] *See, e.g.*, Steven Greenhouse, *Democrats Working to Overturn Justices on Age Bias*, N.Y. Times, Oct. 6, 2009, at A20, *available at* http://www.nytimes.com/2009/10/07/us/politics/07older.html.

[310] H.R. 3721, 111th Cong. (1st Sess. 2009); S. 1756, 111th Cong. (1st Sess. 2009).

[311] H.R. 3721, 111th Cong. § 3(g)(5)(3) (1st Sess. 2009).

[312] *See Election results' big impact on law, lawyers*, THE BALTIMORE DAILY RECORD, Nov. 21, 2010, *available at* http://findarticles.com/p/articles/mi_qn4183/is_20101121/ai_n56363638/?tag=content;col1.

Notes

Tender Offer Taking: Using Game Theory to Ensure that Governments Efficiently and Fairly Exercise Eminent Domain

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I. INTRODUCTION

In *Kelo v. City of New London*, the Supreme Court held that the United States Constitution does not prevent the government from exercising its power of eminent domain to take private land for the purpose of economic development.[1] States, uncomfortable with this broad power, have been experimenting with a variety of laws designed to rein in the power of eminent domain,[2] yet none of these experiments have been entirely successful. The difficulty stems from the need to allow eminent domain to solve the holdout problem while, at the same time, preventing eminent domain from introducing new problems, such as economic inefficiency and exploitation of minorities. This Note proposes that all of these goals can be achieved by requiring the government to follow a new process called Tender Offer Taking (TOT) before it can exercise eminent domain.

The TOT process uses game theory to neutralize opportunistic holdouts and prevent communities from being disrupted, unless the cost of disruption will be less than the benefit generated by a new project. The steps of the process, which will be elaborated and justified in greater detail below, are designed to separate opportunistic holdouts from subjective-value holdouts. Opportunistic holdouts are defined as those landowners who will hold out for a higher offer whenever they think they can get one. Subjective-value holdouts, on the other hand, are defined as landowners who reject an offer only because the offer is below their subjective valuation of their land. The TOT, by setting up a species of the one-shot prisoner's dilemma, flushes out opportunistic holdouts by making acceptance of the government's offer the only rational, selfish choice.

Once the subjective-value holdouts have been isolated, their acceptance rate is used as the measure of the true economic efficiency of a project. The government may only exercise eminent domain once a

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[1] Kelo v. City of New London, 545 U.S. 469, 489–90 (2005).

[2] *2006 Eminent Domain Legislation*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/default.aspx?tabid=17593 (last visited May 14, 2011) (listing seven categories of statutes enacted after *Kelo* to limit eminent domain).

certain acceptance threshold is reached. The TOT process is designed so that the more social capital a community has, the harder it will be for the government to reach the acceptance threshold. This allows social capital to protect itself even when landowners do not fully weigh the value of social capital in their calculations of subjective value. Social capital is worth preserving because it allows a community to overcome a wide range of collective action problems, including resisting TOT offers below aggregate subjective value.

This Note proceeds as follows. Part II explains the problem for which eminent domain was designed: holdouts. Part III explains why the traditional exercise of eminent domain disregards subjective value; why disregarding subjective value leads to economic inefficiency; and how eminent domain has been used to target minorities and thereby unbalance the reciprocity of advantage. Part IV explains and critiques some illustrative attempts by academics and legislators to fix eminent domain. Part V defines the novel TOT process; discusses the advantages of the TOT process over current and previously proposed eminent domain laws; discusses potential problems with the TOT process; and explains why these problems will probably not be a serious hindrance. Part VI concludes with a summary and a suggestion for how to turn the TOT process into a legal reality.

II. THE PROBLEM THAT EMINENT DOMAIN WAS DESIGNED TO SOLVE

The most common justification for granting the government the extraordinary power to take land without consent is that eminent domain is necessary to overcome the problem of holdouts.[3] When a government project requires the assembly of many separately-owned parcels of land, every landowner in the project area has the power to veto the project.[4] When landowners realize that they have this power, they may attempt to charge the government an extortionate price. Payment of this extortionate price is problematic because it unfairly appropriates taxpayer money. This Note adopts the Kaldor-Hicks definition of efficiency that a project is efficient if it would increase the welfare of some people, even if those who benefited had to fully compensate everyone for the amount by which the project decreased their welfare.[5]

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[3] Errol Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 49 (1980); *see also* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 93 (2005) ("The only justification for this almost random form of taxation [caused by eminent domain] is the existence of holdout problems. . . .").

[4] *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 972 (2004) ("[E]very individual landowner along that route enjoys monopoly power. . . .").

[5] Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513

The TOT process relies upon the behavioral differences between opportunistic holdouts and subjective-value holdouts. Opportunistic holdouts are defined in this Note as landowners who refuse a government offer solely because they believe that the government needs their land so much that it will pay them a greater price if they holdout. The acceptance behavior of these holdouts is not correlated with how much they subjectively value their land. Subjective-value holdouts are defined as landowners who refuse a government offer because they idiosyncratically derive more value from their land than the average buyer in the market, but the government does not include this subjective value in its offer. Subjective-value holdouts are not necessarily a problem, but they can become a problem if the government begins developing some of the land for a project before realizing that it will not be able to acquire all of the land it needs due to a subjective-value holdout. As will be discussed later, the TOT process sorts these two types of holdouts and turns subjective-value holdouts into a benefit by altering the traditional eminent domain process in two ways. First, the potential for subjective-value holdouts to waste government resources is removed by preventing the government from beginning a project until it knows that it will be able to acquire all necessary land. Second, the behavior of subjective-value holdouts is used to give the government critical information about whether a project will be economically efficient.

III. THE PROBLEMS THAT EMINENT DOMAIN INTRODUCES

A. No Compensation for Subjective Value

The Takings Clause of the United States Constitution requires that "just compensation" be paid to condemnees.[6] On its face, that phrase does not present economic or ethical problems. However, such problems were introduced when the Supreme Court interpreted "just compensation" to mean objective fair market value.[7] The fair market value will not compensate condemnees for a variety of subjective values.[8] Usually, the subjective value will be significantly higher than the

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(1980).

[6] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[7] United States v. 564.54 Acres of Land in Monroe and Pike Counties, Pa., 441 U.S. 506, 511 (1979) ("[W]e have recognized the need for a relatively objective working rule. . . . The Court therefore has employed the concept of fair market value to determine the condemnee's loss.").

[8] *See* Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 915 (1999) ("[G]iven that the destruction of subjective value almost always occurs in eminent domain proceedings, 'just compensation' is hardly ever 'full compensation.'").

market value. The existence of this discrepancy can be deduced simply from the fact that the owner has not sold his land.[9] Subjective value can come from a variety of locality-dependent assets, such as the goodwill that businesses have developed among local customers[10] and the social capital developed between friendly neighbors.[11] Social capital is a valuable asset that will be explored in more detail in the following discussions of economic efficiency. Social capital has not only an emotional value to residents of a cohesive community, but also an economic value, which derives from its ability to solve collective action problems.[12]

B. Inefficiency

The failure to consider subjective value causes not only the perception of unfairness, but also the mistake of using eminent domain even when the value created by a project will be less than the value destroyed. To see this inefficiency, we can look at the following hypothetical.

Imagine that there is a thriving community of deaf homeowners around an airport. The market value of that land is extremely low because most people would suffer a large reduction in welfare due to airplane noise. However, the deaf homeowners are not significantly affected by the noise. The deaf neighbors greatly enjoy being near so many people who can use sign language, and over many years they have formed close social ties. These social ties allow the community to accomplish great things, such as organizing a local crimewatch and ensuring considerate treatment of common areas.

Now imagine that the government considers using eminent domain to acquire the land around the airport in order to build upon it a luxury apartment building. The government may have a reasonably accurate estimate of the economic development of this new building, but it has no information about how much the owners of that land value it. If the

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See also Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) ("[N]o compensation is possible for the subjective value of these lands to the individuals displaced.").

[9] Posner, *supra* note 3, at 93 ("Ordinarily an owner's subjective valuation will exceed market value . . . otherwise he would probably have sold it.").

[10] A minority of states expressly recognize and compensate for goodwill lost to eminent domain. *See* Nicole S. Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 124 (2006) (citing CAL. CIV. PROC. CODE § 1263.510 (West 2005); FLA. STAT. ANN. § 73.071(3) (West 2004); VT. STAT. ANN. tit. 19, § 501(2) (2000); WYO. STAT. ANN. § 1-26-713 (2005)).

[11] *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

[12] *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 184 (1990) ("When individuals have . . . developed shared norms and patterns of reciprocity, they possess social capital with which they can build institutional arrangements for resolving CPR [Common Pool Resource] dilemmas.").

government opts to employ its eminent domain power, it will never know whether the value that it destroys is greater than the value it will create because the government will only be required to pay the landowners what the average buyer on the market would pay. This undercompensation may mislead the government into believing that its project will be economically efficient even though it will actually be transferring the property to those who will value it less. Eminent domain would create a mediocre apartment building while taking from the current landowners a uniquely suitable location and a valuable social arrangement.

While the government is not constitutionally required to compensate for subjective value, theoretically it could restrain itself by cancelling projects that it believes will destroy too much subjective value. However, the government often goes ahead with inefficient projects because undervaluation incentivizes developers, who will gain the entire assembly surplus and bear none of the subjective costs, to lobby for eminent domain.[13]

An important function of compensation is to help the government determine when it will be economically efficient to take land.[14] The assumption that government officials, rather than a voting or market system, can determine how much citizens value their property is a timeworn error that has doomed countless government projects.[15] The solution proposed by this Note enhances the efficiency-signaling function of compensation[16] by using landowner behavior as a gauge for value. The solution will also enhance the risk-reduction function of compensation. The risk of undercompensation dissuades risk-averse investors from investing, even if their project would be more efficient than alternatives.[17]

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[13] Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV 61, 87 (1986).

[14] *See* Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1483 (2008) (arguing that armed with only eminent domain "government has no institution by which to get an accurate appraisal of what an unassembled neighborhood . . . is really worth").

[15] *See, e.g.,* H.B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 217 (1960) (explaining that the Soviet Union made a common mistake by assuming that "the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote"); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 140 (2006) ("Today's fiercely competitive 'market' for economic development strongly suggests that many government actors may well *overestimate* the benefits of condemning property.") (emphasis added).

[16] *See* RICHARD EPSTEIN, BARGAINING WITH THE STATE 84–85 (1993) (arguing that compensation deters the government from taking too much land).

[17] *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis,* 72 CAL. L. REV. 569, 586–88 (1984) (giving a hypothetical in which a risk-averse investor whose project had a higher expected value bids less than a risk-neutral investor).

C. Exploitation of Politically Weak Groups

Even if government officials were able to accurately weigh the subjective value of land, they might still use the power of eminent domain for economically inefficient projects. This could be because they have been captured by politically powerful interest groups or because the majority of voters will be shielded from the full costs of eminent domain. This phenomenon may explain why minority communities have been frequently targeted for inefficient redevelopment that benefits a politically powerful group, such as a corporation or a nearby affluent neighborhood.[18] Empirical studies have charted the extent of the disparity. One study showed that 63% of the people who were displaced by urban renewal between 1949 and 1963, and whose race could be identified, were nonwhite.[19] Daniel Farber acknowledged this risk but maintained that "the takings clause can be defended as a barrier against a serious form of discrimination against politically disfavored groups."[20] However, the "public use" barrier in the takings clause has been effectively nullified by stretching public use to include giving land to private developers.[21] The solution proposed by this Note presents a more effective barrier by giving a veto to groups that are a minority in the wider political unit but a majority in a targeted locality.

The selective targeting of politically weak groups not only violates equal protection, but also undermines one of the fundamental justifications for eminent domain: the reciprocity of advantage.[22] The reciprocity of advantage can justify eminent domain if, in the long run, each target of eminent domain can expect that they will eventually be compensated for their loss by the benefits that accrue to the members of a polity because of that polity's use of eminent domain.[23] Members of minority communities are unlikely to receive a reciprocal advantage if they are forced to shoulder a disproportionate share of the costs of

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[18] *See* Charles Cohen, *Eminent Domain after Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491, 547–48 (2006) (pointing out that the urban renewal projects of the early 20th century, which largely targeted African American communities, are now considered to have been mistakes).

[19] BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28 (1989).

[20] Daniel A. Farber, *Economic Analysis and Just Compensation,* 12 INT'L REV. L. & ECON. 125, 137 (1992).

[21] *See Kelo*, 545 U.S. 469, 484 (2005) (holding that the economic growth caused by private development counts as public use). *See also id.* at 506 (Thomas, J., dissenting) ("If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution . . . .").

[22] Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999) (asserting that "reciprocity of advantage should be regarded as an important component of takings jurisprudence since it allows the incorporation of the value of social responsibility into the legal doctrine.").

[23] *See id.* (explaining that eminent domain is only justified so long as targeted landowners receive in the long run proportional advantages by virtue of their membership in a community that uses eminent domain).

eminent domain.

IV. PREVIOUSLY PROPOSED SOLUTIONS

The serious deficiencies of eminent domain jurisprudence have spurred numerous scholars and legislators to suggest solutions. In the two years after *Kelo v. City of New London* was decided, 34 states passed a responsive statute or constitutional amendment.[24] Despite this flurry of activity, no solution has managed to fix both the problems for which the eminent domain power was created and the problems that eminent domain causes. There have been so many proposed solutions that this Note can only sample a few of the most instructive. These solutions can be roughly divided into those that limit the purpose, the target, the recipient, and the process of condemnation.

A. Limiting the Purpose: Banning Taking for the Purpose of Economic Development

Some states responded to *Kelo* by banning any taking for the purpose of economic development.[25] This type of limitation is not an ideal solution because it thwarts many economically efficient projects and will almost always leave loopholes open. For example, if "economic development" is defined as "any activity performed to increase tax revenue, tax base, employment rates, or general economic health,"[26] then the government can sidestep the ban by claiming that its purpose is actually to improve the aesthetics of an area.

B. Limiting the Target: Disallowing Eminent Domain for Anything but Blight

Some states limited the power of eminent domain so that it could only target blighted areas. The first problem with this approach is that the criteria for blight are so flexible that blight can be found in whatever area the government desires.[27] The second problem is that this method

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[24] Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 659 (2007).

[25] *See, e.g.*, 2007 ND S.B. 2214 (NS) (removing economic development from the definition of "public use" for eminent domain purposes).

[26] *Id.*

[27] *See* Heller & Hills, *supra* note 14, at 1509 ("[N]eighborhoods are condemned as blighted even when their quality is not noticeably lower than the quality of an average city block."). *See also*

exacerbates the tendency to wield eminent domain against ethnic minorities[28] and the poor,[29] who live in areas most likely to be labeled "blighted."

C. Limiting the Recipient: Requiring the Recipient to Be a Not-for-Profit Entity

Charles Cohen has proposed a constitutional amendment that would limit the category of potential recipients of land taken by eminent domain to not-for-profit entities.[30] This has the advantage of preventing wealthy for-profit corporations from aggressively lobbying the government for a particular use of eminent domain. The risk of such lobbying can be seen in the pressure that General Motors exerted on the city of Detroit, which resulted in the summary destruction of vast swaths of Poletown without the benefits that had been promised.[31] While not-for-profit entities would not pressure the government out of monetary greed, they might do so in furtherance of their institutional mission without regard for all of the costs, as was arguably the case when Columbia University convinced the state of New York to use eminent domain to obtain land for expansion in Harlem.[32] The tendency of not-for-profit organizations to ignore wider economic effects in the single-minded pursuit of their mission has been well-documented.[33] For example, environmental agencies tend to "discount the potential effects of their actions on the performance of the economy."[34]

The problem of government capture that Cohen's proposal struggled to solve is a significant cause of inefficient eminent domain. To see why capture of the eminent domain power is so prevalent, we can

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Matter of Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 256 ("[B]light is an elastic concept. . . .").

[28] Blais, *supra* note 24, at 678 (arguing that the blight exceptions in legislative responses to *Kelo* push government towards the type of urban renewal programs in which "large numbers of poor minority residents [are] displaced" without achieving the promised benefit).

[29] David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365, 379 (2007) (explaining that, given the tendency for limits on eminent domain to allow an exception for blight without addressing the need for affordable housing, "it is hard to understand any of the contours of Kelo-inspired reform as shaped by concern for the needs of the poor and poor neighborhoods").

[30] Cohen, *supra* note 18, at 566–67.

[31] *See* Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 658 (1981) (Ryan, J., dissenting) ("[T]he city chose to march in fast lock-step with General Motors."). *See also* Cohen, *supra* note 18, at 545 ("[T]he actual benefits provided by the General Motors plan fell far short of the 6,150 jobs projected. Seven years after displacing 4,000 residents, destroying 1,400 homes and between 140 and 600 businesses, the plant employed only about 2,500 people.").

[32] *See generally* Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721 (N.Y. 2010).

[33] *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 78 (1995) (arguing that relaxing the duty of an agency to consider policy in statutes besides the organic statute will reinforce the "tendency of single-mission agencies to use tunnel vision").

[34] *Id.* at 78–79.

look at the work of James Q. Wilson on the effect of the distribution of costs and benefits. Wilson explained that government capture is most likely in "client politics," which occurs when the benefits are narrowly concentrated and costs are widely distributed.[35] Eminent domain for private economic developers is client politics because a narrow group of people get most of the benefit while the cost of an inefficient project is spread out amongst all taxpayers. Each taxpayer is rationally apathetic about the loss of a few cents while a developer will expend vast resources to influence the government because it may stand to gain millions of dollars. The TOT system may ameliorate this capture problem by shrinking the "voter" pool to those who have the most to lose, thus shifting from "client politics" to a more balanced "interest group" politics.

D. Limiting the Process: Land Assembly Districts

Land Assembly Districts (LADs), first proposed by Michael Heller and Rick Hills, would substitute a new local governance process for the eminent domain process whenever land is desired not for its uniqueness, but for its greater value once assembled.[36] This requirement to distinguish between different purposes of eminent domain is the first problem with LADs, because it will be difficult to draw this distinction given that all land is to some degree unique.

A LAD would be created by the approval of the government and the owners of a majority of the value or square-footage of land in that area. Members of the LAD would then evaluate proposals by developers and determine by a majority vote whether or not to sell the entire district to the developer. This vote is binding on all owners within the LAD, except for the largely symbolic exit option of demanding fair market value under normal eminent domain rules.[37] If the majority of a LAD votes not to sell, then no one has the power to force a sale through eminent domain.

While the LAD system's ability to consider subjective value and democratic preference is an advantage over the current eminent domain process, it does not adequately protect minorities or distinguish opportunistic holdouts from subjective-value holdouts.

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[35] JAMES Q. WILSON, THE POLITICS OF REGULATION 369 (1980).
[36] Heller & Hills, *supra* note 14, at 1470.
[37] *Id.* at 1496–97.

V. NEW SOLUTION: TENDER OFFER TAKING

A. Description of TOT

Tender Offer Taking (TOT) is the optimal way to overcome the problems of holdouts, economic inefficiency, and exploitation of minorities. Tender Offer Takings are so named because of their similarity to tender offers for securities of publicly traded companies. A tender offer for securities is a public offer to buy a certain number of shares of a corporation at the same above-market-price for each share.[38] "[T]he tender offer is an innovation in corporate law designed to overcome the holdout problem. . . ."[39] The strategies and regulations for tender offers for securities can illuminate the advantages of TOT.

The TOT process operates when the government has bound itself by statute or constitutional amendment to follow a specific process before resorting to eminent domain. The required process is that the government must move sequentially through the following steps: (1) draw the boundaries of an area of land that it requires for a specific project; (2) simultaneously offer every landowner within that boundary the same percentage above market price for their land;[40] (3) confidentially collect acceptances during a 20 business-day period;[41] (4) publicly announce at the end of the period whether the threshold has been met without revealing the percentage of acceptances; (5) if the threshold has been met, then pay the premium price to every landowner

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[38] *See* 15 U.S.C. § 78n(d)(7) (2006) ("Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder . . . .").

[39] Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 88 (1998).

[40] For example, if the government decides to offer a 10% premium then it would have to offer $1,100,000 to the owner of land with a market value of $1,000,000 and $11,000 to the owner of land with a market value of $10,000. By binding itself to pay the same percentage to every landowner, the government prevents any one landowner from trying to extract a disproportionate share of the premium. As a side note, this offer could conceivably be in the form of shares of the project rather than cash. Offering shares has been proposed as a way of allowing condemnees to share in the surplus created by assembly. Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1707 (2007). Offering shares could also serve as a way to let a market rather than government officials decide the value of an assembly project. However, homeowners will not usually be as capable of assessing the value of a project as they will be capable of assessing the value of their own homes.

[41] The 20 day period is borrowed from the 20 days that a tender offer must remain open according to the Williams Act. *See* STEVEN EMANUEL & LAZAR EMANUEL, CORPORATIONS 454 (6th ed. 2009) ("[A] tender offer must be kept open for at least 20 business days. . . . [The rationale being that this] ensures stockholders of enough time to carefully consider whether they want to tender."). If stockholders can fully assess the value of a corporation in 20 days then, in that same period of time, homeowners should be able to assess the value of their own land, an asset about which they should be uniquely knowledgeable. However, states may want to experiment with longer time periods because decisions about land may be more emotionally complex.

who accepted and use eminent domain to pay market value to every landowner who had not accepted by the 20th business day; or (6) if the threshold has not been met, then either end the TOT process or repeat the process by restarting at step two with a higher offer.

B. Advantages of TOT

By binding itself to follow the TOT process, the government enhances its bargaining position while at the same time preventing economic inefficiency and the oppression of minorities. While it might seem counterproductive for the government to remove some of its options for dealing with holdouts, "precommitments are often used strategically to control others."[42] One example of this strategy would be removing the incentive for criminals to take hostages by passing a law that prohibits law enforcement from considering hostages when formulating arrest plans or trading any benefit for hostages.

1. Economic Advantages

TOT enhances the bargaining position of the government because it protects the government against opportunistic holdouts. One way to see how this protection would work is to look at the way that tender offers for securities that deny a premium to latecomers successfully induce potential holdouts to accept quickly rather than risk stalling for a higher offer.[43] Given that acceptances of a TOT are kept confidential, a landowner contemplating holding out for a higher offer regardless of his subjective valuation would have to fear that his neighbors had already accepted the premium and that he would be stuck in the small group of latecomers who will receive only market value. This confidentiality will also defeat attempts to organize a voting bloc for holdout purposes because the optimal strategy of every rational owner seeking only to maximize his own wealth would be to publicly claim that he will not accept while secretly accepting in case the threshold is reached. This is an advantage over the LAD process, because it would be rational for opportunistic holdouts to organize a voting bloc within a LAD and then personally vote against offers until they feel that they cannot extract any

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[42] John A. Robertson, *"Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729, 1731 (2003).

[43] *See* Nathaniel B. Smith, *Defining 'Tender Offer' Under the Williams Act*, 53 BROOK. L. REV. 189, 193 (1987) (explaining that tender offers that denied a premium to late acceptors were effective because they caused shareholders to stampede to avoid being left without a premium and under the power of a controlling shareholder).

more rent.

The tendency to defect will be particularly strong because of the one-shot nature of TOT transactions; the only time that a betrayal will come to light is when the neighborhood is sold and neighbors will never again have to cooperate.[44] The threat of defection and lower compensation will create a stampede effect among opportunistic holdouts. In the stock market context, legislators and courts have created rules that mitigate the stampede effect in order to protect average shareholders from powerful corporate raiders. However, the stampede effect should be encouraged not mitigated in the land assembly context in order to protect the taxpayers against opportunistic holdouts.[45]

The holdout protection TOT supplies is superior to the protection supplied by LADs because while LADs merely require holdouts to equally share the rents they extract, LADs do nothing to prevent opportunistic holdout behavior. LADs contain no threat of being left without a premium, so opportunistic holdouts can vote with impunity to hold land hostage.

The government's position is also enhanced by the all-or-nothing nature of TOT. The government will not find itself in the unfortunate position of having purchased a large number of lots only to belatedly discover that it will not be able to purchase the rest of the lots necessary for the project at an acceptable price.

Another advantage of the TOT process is that it separates the opportunistic holdouts from the subjective-value holdouts. This sorting facilitates the formulation of project plans because "it is exceedingly difficult to distinguish a landowner's opportunistic holdout behavior, against which policy measures may be justified, from legitimate bargaining."[46] Opportunistic holdouts will likely accept any TOT offer above market value because some profit is better than none. Subjective-value holdouts, on the other hand, will likely refuse a TOT offer that is below their subjective value, especially if they believe that their neighbors share their valuation and if there is enough social capital to prevent defections. Therefore, the government will be able to use the TOT process to accurately gauge the amount of subjective value that will be destroyed by its project. This gauge function is essential because subjective value cannot be accurately determined by asking owners who

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[44] *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 12–14 (1984) (explaining that cooperation emerges from repeat-play dilemmas).

[45] One protective legislative rule is the Williams Act requirement that if there are more willing sellers than the offeror wanted, all sellers must be give a pro rata share. 15 U.S.C. § 78n(d)(6) (2010). One protective judicial rule is that corporations can take defensive measures to protect their shareholders when faced with a front-loaded, two-tier tender offer, meaning that the second tier offers latecomers a less liquid asset, such as junk bonds. *See* In re Pure Res. S'holders Litig., 808 A.2d 421 (2002). The existence of these protections is evidence of the power of tender offers to deprive latecomers of a premium.

[46] Lehavi & Licht, *supra* note 40, at 1732.

know that their answers will influence the offer price.[47]

These assumptions about behavior could be challenged on the ground that even subjective-value holdouts will accept an offer below subjective value out of fear that they will be stuck with an even lower compensation. However, scholars have "repeatedly demonstrate[d] the ability of close-knit groups to prevent individual members from acting strategically and to encourage them to act instead in a way that maximizes group welfare."[48] Social capital can help solve collective action problems,[49] and resisting a TOT offer below subjective value is a collective action problem. Therefore, the more social capital that a community has the more likely it will be to resist inefficient offers. This correlation serves the TOT system well because it allows a valuable asset to protect itself.

Let us briefly sketch one hypothetical operation of social capital in the TOT system to illustrate how social capital can serve as both a means and an end. Neighborhood One is primarily composed of warehouses and young professionals who move so often that they have not formed strong social bonds. Neighborhood Two is primarily composed of neighbors with strong social ties. They are able to solve many collective action problems using the strength of those ties, such as getting neighbors to refrain from littering or from using excessively noisy leaf-blowers. Neighborhood Two uses those same social ties to prevent its members from accepting offers that are above market value but do not include the value of the social ties. Neighborhood One is easily acquired by any TOT offer over market value because the social ties in Neighborhood One are not strong enough to prevent every landowner from selfishly accepting. These outcomes are both emotionally and economically desirable.

The precise percentage of acceptances needed for a TOT to consummate may require calibration as states learn by trial and error, but a promising initial percentage can be extrapolated from game theory studies of the prisoner's dilemma. The one-shot version of the prisoner's dilemma presents participants with choices and reward structures similar to those faced by landowners considering a TOT. In the one-shot prisoner's dilemma, two participants secretly indicate whether they will defect or cooperate. If both cooperate, then the aggregate reward will be maximized but each cooperator will receive less than he would have if he

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[47] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence,* 92 CORNELL L. REV. 1, 26 (2006) ("[Subjective] values are difficult to quantify . . . [because] existing owners have an incentive to inflate their selling prices. . . .").

[48] Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 109 (2004).

[49] Richard Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2061 (1995) (describing scholarship that has brought to light "the dependence of effective collective action on norms of cooperation").

had defected when the other participant cooperated. The lowest aggregate and personal reward occurs when both participants defect.

Because defection in a one-shot dilemma incurs no risk of retribution, since the participants will never interact again, the rational, selfish choice is to defect because the highest individual reward goes to the person who defects while his partner chooses cooperation.[50] Not every participant is both rational and selfish, so the average percentage of cooperators is approximately 58%.[51] This Note uses that prisoner's dilemma percentage to assume that 58% of landowners will cooperate with the neighborhood by not sending in acceptances for a TOT when the offer is above market value but below subjective value. The behavior of the other 42% tells the government nothing about how much subjective value will be destroyed by an assembly since landowners in that 42% will send in an acceptance for any offer above market value, regardless of how much they subjectively value their land. Since their behavior does not serve any useful gauge function, they should be excluded from the percentage calculation. Therefore, a TOT should not go forward if rejected by a majority of landowners who are bargaining in good faith based on subjective value, a majority being more than 29% of the total landowners. This means that we should set the acceptance threshold at 71%.[52] If 71% of landowners accept an offer, it is probable that the project is efficient even when considering lost subjective value.

It is true that the percentage of cooperators will increase with the strength of the social capital of a neighborhood, just as the percentage of cooperators increased when participants in the prisoner's dilemma were taught about ethics before participating.[53] However, this distortion of the game theory calculations is desirable because we want to give greater protection to the neighborhoods with the most social capital. There will be situations in which landowners do not realize the true value of the social capital they share, and the distortion will serve to protect that value even if some landowners fail to include it in their calculation of subjective value.

To summarize, the inclusion of subjective value in the assessment of whether assembly is worth the cost will prevent the power of eminent

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[50] *See* Harvey James, Jr. & Jeffrey Cohen, *Does Ethics Training Neutralize the Incentives of the Prisoner's Dilemma? Evidence from a Classroom Experiment*, 50 J. OF BUS. ETHICS 53, 53–56 (2004) (describing the one-shot prisoner's dilemma and the rational selfish strategy).

[51] *Id.* at 59 (reporting that 58% of subjects chose to cooperate in a one-shot prisoner's dilemma). This percentage is consistent with other game theory studies. *See* Chen-Bo Zhong, Jeffrey Loewenstein, & J. Keith Murnighan, *Speaking the Same Language: The Cooperative Effects of Labeling in the Prisoner's Dilemma,* 51 J. OF CONFLICT RESOL., 431, 432 (2007) ("[R]eviews of PD and social dilemma research note that a baseline expectation for cooperation rates among anonymous strangers should be . . . around 50 percent.").

[52] As discussed in the Conclusion of this Note, this number may need to be adjusted after further experimentation.

[53] James, *supra* note 50, at 59 (observing that participants given an ethics lesson cooperated at the higher rate of 78%).

domain from being used for economically wasteful projects.[54] This advantage of TOT is absent in many academic proposals. For example, Lehavi and Licht "call for separating the two phases of eminent domain—namely, taking and just compensation."[55] While their idea of using the market mechanism of a Special-Purpose Development Corporation to better calibrate compensation to true value may achieve that purpose, it will not achieve the larger purpose of using compensation to determine when an assembly would be efficient.

2. Justice Advantages

TOT allows groups that are politically weak to veto discriminatory projects. The precise mechanism by which this veto operates will depend on the voting system chosen for TOT, a problem discussed in a later section. Nonetheless, all of the viable voting systems would hamper attempts to target weak groups. The Supreme Court has acknowledged the possible need for special constitutional protection for "discrete and insular minorities."[56] When one neighborhood is targeted for eminent domain, the inhabitants of that neighborhood are a discrete and insular minority within the larger political unit. This problem is exacerbated by the fact that ethnic minorities tend to live in segregated communities.[57] When the costs of a project are tied to land, as is the case with eminent domain, spatial segregation allows voters of a majority ethnic group to impose a disproportionate share of the costs of a project on members of a minority group. A similar segregation and discrimination targets the poor, who, if they do not lack numbers, often lack political strength.

Under the TOT system, ethnic and socio-economic segregation strengthens the voting power of minority groups. Even groups that form a small percentage of overall voters can comprise the majority of voters in neighborhoods where they congregate.

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[54] *But see* Nicole Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 140 (2006) ("Takers tend to respond to political incentives rather than economic ones."). If Garnett's assertion is true, then the TOT system would fail to prevent a project even when it forces the government to pay more than the government believes that the project is worth. However, at some point, economic incentives surely turn into political incentives such as the incentive to avoid a backlash from raising taxes.

[55] Lehavi & Licht, *supra* note 40, at 1732.

[56] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[57] *See generally* Rajiv Sethi & Rohini Somanathan, *Inequality and Segregation*, 112 J. OF POL. ECON. 1296 (2004) (developing theories to explain the persistence of racial segregation).

C. Potential Problems with TOT

1. Method of Calculating Acceptance Percentage

The most feasible way to calculate the acceptance percentage is to focus on an objective, easily assessable measurement such as (1) the number of landowners who accept, (2) market value of the land of the landowners who accept, or (3) square footage of the land of the landowners who accept. Heller and Hills argue that the goal of overcoming the collective action problems of assembly "suggests allocating voting rights in proportion to the owner's share of land."[58] However, there are both economic and legal reasons why proportional voting might not work.

The economic problem with apportioning votes by land value is that this will give too much weight to the votes of those with no subjective value. For example, the owner of a widget factory might get as many votes as dozens of families in the same neighborhood even though the factory owner does not care more about his location than the average buyer on the market, and the families care deeply about living in that community. Perhaps the reason that Heller and Hills assume that votes should be correlated with value is that in most situations, the more economic interest you have on the line, the more informed you become. However, for most landowners, their land is their most valuable asset so they will become as informed as possible about decisions that will affect their land.[59]

The legal problem with apportioning votes in any way besides one-person-one-vote stems from the equal protection clause of the Fourteenth Amendment. Courts have been strict with laws that disenfranchise voters based on land ownership; this strictness can be seen in cases such as Kramer v. Union Free School District.[60] Heller and Hills argue that because LADs have a very narrow power, courts would allow them to apportion votes by land ownership, just as "the plurality in Ball v. James permitted Arizona to allocate votes for control over an agricultural improvement district based on each landowner's share of acreage within the district, on the theory that the district had the narrow task of distributing water . . . in proportion to their share of the district's

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[58] Heller & Hills, *supra* note 14, at 1503.

[59] *See generally* WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (arguing that because homeowners cannot diversify to reduce their investment in homes, and because homes are their largest asset, they actively participate in political decisions that could affect the value of their homes).

[60] 395 U.S. 621, 632 (1969) (invalidating a statute that conditioned the right to vote in a school district on ownership of taxable land in the district because the ownership of land was not tailored to encompass all those primarily interested).

acreage."[61] However, TOT and LADs are more similar to the situation faced by the court in *Kramer* than the court in *Ball* because the connection between acreage and water requirements is stronger than the connection between the market value and subjective value of land owned. While this legal obstacle is not insurmountable, combined with the economic problem, it makes the number of landowners the preferred measurement of acceptance.

There remains the difficult question of how, if at all, leasehold interests should count towards the acceptance percentage. The answer may follow from two observations: first, one of the main reasons to lease instead of buy is to preserve mobility; and second, one of the main risks of renting is that renters can be displaced at any time. This suggests that renters value their ties to the community less, meaning their subjective value will not be significantly above market value, and therefore their input on whether the land on which they rent should be sold will not help determine when a project is economically efficient. An additional problem with counting renter acceptances is that renters would always be incentivized to refuse to accept any offer unless the system is changed to give renters a share of the sale price.

2. Violation of Nondelegation Doctrine

Regardless of which method is chosen for calculating acceptance, courts might invalidate TOT laws as an impermissible delegation of legislative power to private parties. The ability to force neighbors to sell and to direct the use of eminent domain is surely a tremendous legislative power. The Supreme Court showed the teeth of the nondelegation doctrine when it invalidated a statute giving private leaders of industry the nearly unfettered power to formulate binding rules to regulate their industries.[62] However, those teeth may have been dentures as the Court seems to have put them aside in the intervening decades. The current permissive rule is that "there is no forbidden delegation of legislative power 'if Congress shall lay down by legislative act an intelligible principle' to which the official or agency must conform."[63] The power of private landowners to assemble each other's land can be narrowly circumscribed by intelligible principles. The law creating the TOT process should set in stone the way acceptance is calculated and the way land owners share the profits from a sale. The law's main objective, the promotion of economic efficiency, is much easier to monitor than the

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[61] Heller & Hills, *supra* note 14, at 1504 (citing Ball v. James, 451 U.S. 355(1981)).

[62] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[63] Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 746 (1971) (citing Hampton v. United States, 276 U.S. 394, 409 (1928)).

objective of the law struck down in Schechter Poultry Corp. v. United States, which was to foster "fair competition."[64] Therefore, the courts will easily be able to monitor whether the TOT is operating according to the will of the legislature. While it is impossible to say with certainty how the nondelegation doctrine will apply to the TOT system, the novelty of TOT is not necessarily an impediment because "the fact that a delegation of zoning power to a non-elected local body has not previously been made does not mean that such a delegation is unconstitutional."[65] For these reasons, the nondelegation doctrine is unlikely to hinder the spread of the TOT system.

3. Gerrymandering

There are some potential problems with the way the government can draw the boundaries of a TOT area and with the way that developers can infiltrate an area to manipulate a vote. The drawing of the boundary is the one step in the TOT process where judicial review may be required with any frequency. Without the threat of review, the government might be tempted to define a boundary that includes some land, not because it is necessary for a project, but because it is necessary to reach the acceptance threshold. For example, the boundary could be purposefully stretched beyond the residential neighborhood actually used for the project in order to encompass a cluster of factories that would gladly sell at anything above market price. One solution to this problem may lie in adoption of the means-end scrutiny proposed by Nicole Garnett.[66] Means-end scrutiny would require the government to show that the land it seeks to take is "related both in nature and extent" to the proposed assembly project.[67]

The ability of developers to manipulate the acceptance rate will be constrained by the confidentiality of acceptances and the calculation method chosen. Because the developer cannot know how many more acceptances are needed to consummate the TOT, it will not be able to figure out how much land it needs to buy to tip the scales. To prevent the developer from estimating based on previous offer periods, the government will announce only whether or not the acceptance threshold was met at the end of each offer period, not the percentage of acceptances. This problem would disappear in states that choose the one-

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[64] 295 U.S. at 523.

[65] Bailey v. Shelby Cnty., 507 So. 2d 438, 443 (1987) (upholding the delegation of zoning authority to private citizens because the delegation imposed adequate procedures and safeguards against arbitrary action).

[66] Nicole Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 939 (2003).

[67] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

person-one-vote calculation as recommended because one developer would not be able to increase his influence by purchasing more land. Heller and Hills recognized this flaw in the proportional voting methods they recommended, but suggested that it could be overcome by rules such as limiting the percentage of votes that can be controlled by any one owner.[68]

4. Failure to Obtain Unique and Necessary Land

The existence of an inflexible acceptance threshold means that, inevitably, there will be some situations when the government will be unable to acquire land that it desires for a project. When the desired land is merely the best of many viable locations, it is easy to see how it might be worth choosing an alternative location to preserve subjective value. However, critics might argue that the TOT process malfunctions if it allows a community to resist eminent domain at any affordable price when their land is the only land suitable for a project—for example, because it is the only earthquake-safe ground on which to build a nuclear reactor. One response to these critics is that project-fatal refusals to sell will be extremely rare,[69] and that a community of such rare cohesion is a community that very well might be more important than a government project. Even if this is not always the case, the possibility that a project idea will occasionally have to be abandoned when it would have been desirable does not outweigh the many advantages of the TOT process over the way that eminent domain has traditionally been employed.[70]

VI. CONCLUSION

The last topic to discuss is the ideal means of legal implementation. Because of the delicate balance of interests in the TOT process, the ideal implementation might require states to pass both a constitutional amendment and a statute. A constitutional amendment is necessary to deprive opportunistic holdouts of any incentive to reject an offer above market price. If opportunistic holdouts believe that the TOT requirements can be dispensed with by a simple majority vote in the legislature, then

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[68] *See* Heller & Hills, *supra* note 14, at 1502 (suggesting that the law "bar any landowner from voting more than 30% of the property within a LAD").

[69] *See* Cohen, *supra* note 18, at 568 (asserting that alternatives to eminent domain "in most cases, provide solutions to the holdout problem" and that while it is conceivable that some projects cannot be modified to work around holdouts, "such projects would be rare").

[70] *See id.* ("Risking the infrequent derailment of an economic development project in order to eliminate the injustice and inefficiency herein described seems to be not only a smart choice, but a necessary one.")

they may be tempted to stall and lobby for such a vote. While the steps of the TOT process should be made relatively indelible through inclusion in the constitution, the precise acceptance threshold should be set in a statute because it may require fine-tuning. Actual experience with TOT may reveal that the recommended threshold, derived from artificial experiments, does not achieve the best result in practice. However, to prevent quantitative modifications from qualitatively changing the nature of the TOT process, the constitutional amendment ought to contain a provision preventing the threshold from falling below 50%. If TOT is a success in the majority of states, then the federal government may want to implement its own statute and constitutional amendment.

The TOT process ensures that the power of eminent domain will not be used to facilitate inefficient projects or to target vulnerable minorities. At the same time, it preserves the most important function of eminent domain, which is to deprive opportunistic holdouts of the ability to hold land hostage. The TOT process utilizes game theory to separate opportunistic holdouts from subjective-value holdouts, and it appropriately weighs the interests of subjective-value holdouts who refrain from accepting because of the strong social ties in their community. For these reasons, the TOT process is superior to the process by which eminent domain is currently exercised.

Different but Equal? Inequalities in the Workplace, the Nature-Based Narrative, and the Title VII Prohibition on the Masculinization of the "Ideal Worker"

Kristin Housh*

I. INTRODUCTION

Many of the barriers that traditionally excluded women from educational and occupational attainment have vanished. Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") provides women with the legal ammunition necessary to sue employers who refuse to hire them

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or who otherwise treat them differently because of their sex.[1] Similarly, the Equal Pay Act of 1963[2] and the Pregnancy Discrimination Act of 1978[3] prohibit discriminatory practices in the workplace that have traditionally impeded women's ability to achieve occupational parity with their male coworkers. The enactment of these laws, along with others, served to overturn de jure obstacles to equality, while the Women's Liberation Movement of the 1980s took aim at de facto inequalities caused by societal prejudices.

Labor statistics evidence a changed landscape for the American woman. Women's labor force participation increased from 43.3% in 1970 to 59.2% in 2010.[4] Furthermore, the percentage of employed women who either entered or graduated from college has tripled from 1970 to 2010.[5] In fact, today, women receive both bachelor's degrees and master's degrees at a rate surpassing that of men.[6]

With the vast improvement in women's educational attainment, there should be a corresponding improvement in workplace equality between the sexes. Surprisingly, however, many aspects of the American workforce remain unchanged. Employment industries are, on average, still sex-segregated. Inequalities between men and women in terms of wages and rank continue to persist, especially in male-dominated occupations, which tend to be those that are the highest paying and most prestigious.[7] Across all occupations in 2010, women earned, on average, 81.2% of what men earned.[8] Furthermore, the women-to-men earnings ratios reported for the higher paying and more prestigious occupations were much lower than the average total earnings ratio. The lowest earnings ratio was found among personal financial advisors, with women making 58.4% of what men made in 2010.[9] But, in the lowest paying and least prestigious occupations, which continue to be female-dominated,

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[1] Title VII of the Civil Rights Act of 1964, 7 U.S.C § 2000e-2(a)(I) (2006) (making it unlawful for an employer "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.").

[2] 29 U.S.C. § 206(d) (2006).

[3] 42 U.S.C. § 2000e(k) (2006).

[4] BUREAU OF LABOR STATISTICS, WOMEN AT WORK 13 (2011), *available at* http://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf.

[5] In 1970, only 22.1% of women, ages 25 to 64, in the civilian labor force had either entered or graduated from college. By 2010, this percentage had increased to 66.7%. *Id.* at 14.

[6] In 1975, 25.2% of men ages 25 to 29 had obtained a bachelor's degree, while only 18.7% of women ages 25 to 29 had done so. By 2010, the percentages had changed to 27.8% and 35.7%, respectively. Furthermore, by 2010 8.5% of women ages 25 to 29 had received a master's degree, whereas only 5.2% of men ages 25 to 29 had done so. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 230 (2011), *available at* http://nces.ed.gov/pubs2011/2011033.pdf.

[7] The three occupations with the highest usual median weekly earnings (including pharmacists, lawyers and computer software engineers in descending order) employed some of the lowest numbers of women. BUREAU OF LABOR STATISTICS, *supra* note 4, at 9.

[8] *Id.* at 7 (discussing average earnings total).

[9] *Id.* Occupations that reported the lowest women-to-men earnings ratio in 2010 included postsecondary teachers, lawyers, insurance sales agents, real estate managers, retail salespersons, and personal financial advisors. *Id.*

the women-to-men earnings ratios exceeded the average total earnings ratio.[10] Nonetheless, on average, women still earned less than men in these occupations.[11]

Furthermore, sex segregation by employment industry continues. The low number of women in both blue-collar jobs and government jobs has remained approximately the same since 1964.[12] In fact, in 2009, only 0.9% of employed women worked in certain "blue-collar" industries, including the natural resources, construction, and maintenance industries.[13] The education and health services industries, as well as the trade, transportation, and utilities industries have remained the largest employers of women since 1964.[14] In fact, in 2009, women continued to make up the vast majority of employees in certain traditionally female-dominated occupations, including registered nurses (92%), elementary and middle school teachers (81.9%), and childcare workers (95.1%).[15]

If the educational attainment of men and women has become more or less equal and traditional barriers to occupational attainment have been razed through legislative action, why do workplace inequalities between the sexes persist? In this Note, I will argue that the answer lies in an unchanged societal psyche, mired in generations of prejudices that have served to subordinate and marginalize women. Although the overt sexism of past generations has diminished, its substantive underpinnings persist. Society has told similar stories about the differences between men and women for generations.

One popular assumption is that workplace gender gaps in both status and pay, as well as sex segregation in employment industries, are manifestations of the natural differences between women and men. This assumption is buttressed by scientists who purport to have discovered structural differences between the male and female brain, which they conclude cause men and women to exhibit divergent behavioral traits. For example, Cambridge University psychologist Simon Baron-Cohen explains in his 2003 book, *The Essential Difference*, that gender differences are the natural result of a predetermined biological schema: "The female brain is predominantly hard-wired for empathy. The male is predominantly hard-wired for understanding and building systems."[16] Baron-Cohen explains further that the divergence in male and female

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[10] Occupations which reported the highest women-to-men earnings ratio in 2010 included food preparation and serving workers, bill and account collectors, stock clerks, postal service workers, and social workers. In fact, women earned more than men in the first three occupations mentioned. *Id.*

[11] For example, women made 86.5% of what men made as registered nurses. *Id.*

[12] WOMEN AT WORK, *supra* note 4, at 11.

[13] WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, WOMEN IN THE LABOR FORCE IN 2009 1 (2009), *available at* http://www.dol.gov/wb/factsheets/Qf-laborforce-09.htm.

[14] WOMEN AT WORK, *supra* note 4, at 11.

[15] WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN (2009), *available at* http://www.dol.gov/wb/factsheets/20lead2009.htm.

[16] SIMON BARON-COHEN, THE ESSENTIAL DIFFERENCE: THE TRUTH ABOUT THE MALE AND FEMALE BRAIN 1 (2003).

brain structures causes the sexes to pursue distinctive life and career paths: "People with the female brain make the most wonderful counselors, primary-school teachers, nurses, careers, therapists, social workers, mediators, group facilitators, or personnel staff."[17] Such scientific explanations fuel popular media lore, which results in the production of hyperbolic accounts such as *Men are from Mars, Women are from Venus*.[18]

This view purports that sex discrimination cannot explain the statistical differences between the sexes in the workplace because it no longer exists.[19] Without sex discrimination, women are provided with the opportunity to achieve occupational parity with their male counterparts. Therefore, proponents of this view go on to argue, any statistical differences must be attributed to the biological differences between the sexes, which in turn inform men and women's divergent life and career choices. This story is the most recent addition to a genre of cultural stories, which I call the "nature-based narrative."

The nature-based narrative is a collection of stories that have been told to justify observed inequalities by appealing to the concept of what is natural and therefore what is normal. This narrative, as it is used today to explain workplace inequalities, is a wolf in sheep's clothing. The narrative is comprised of the same stories that were used to justify female inferiority and subordination since long before the tenets of American equality were dreamt up.[20] Today, our enlightened society no longer explains sex differences as an extension of the natural inferiority of women, but rather does so through the politically correct view that women and men are different but equal.[21] However, history informs us that "difference entails inequality . . . and even multiple differences devolve to two: dominant and subordinate."[22]

In this Note, I argue that workplace inequalities are the result of society's continuous adherence to the millennia-old nature-based narrative. The most recent addition to this narrative is informed by the work of scientists who claim that there are inherent neurological differences between the sexes that account for men and women's respective behavioral traits and choices. This "neurosexism" is the new

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[17] *Id.* at 185.

[18] *See* JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (2003) (arguing that couples must acknowledge and accept the existence of pervasive gender differences in order to develop better relationships).

[19] *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION 271 (1992) (arguing that the biology of differences between the sexes informs virtually every aspect of human conduct).

[20] For example: "[O]ther studies, pursuits, and occupations assigned chiefly or entirely to men, demand the efforts of a mind endued with the powers of close and comprehensive reasoning..." THOMAS GISBORNE, AN ENQUIRY INTO THE DUTIES OF THE FEMALE SEX 21 (1797).

[21] Here I analogize to the "separate-but-equal" doctrine that was used by courts to justify racial segregation. *See* Plessy v. Ferguson,163 U.S. 537, 544 (1896) (upholding laws that permitted, or even required, separation of whites and blacks).

[22] SALLY L. KITCH, THE SPECTER OF SEX: GENDERED FOUNDATIONS OF RACIAL FORMATION IN THE UNITED STATES 22 (2009).

vogue in the modern nature-based narrative.[23] Like the science of the past, it perpetuates inequality by providing a scientific justification for the status quo. However, many scientific studies that add to this narrative fail to recognize that social conditioning itself can have a dramatic effect on brain function. I argue that a woman's choices are not predetermined by a fixed brain structure, but rather that they are the result of brain functioning in constant flux depending on the environment. The contemporary landscape is one that socializes children into a gender dichotomy that is laden with the pressures of stereotype threat and that demands observance of strictly defined gender roles. Choices that are made within this environment are not the result of a predetermined biological impetus, but rather are the function of a society confined within the fictions of the nature-based narrative. Thus, the modern nature-based narrative is comprised of an untrue syllogism. The syllogistic reasoning goes as follows: (1) From birth, males and females are neurologically dissimilar, (2) which causes women and men to exhibit divergent behavioral traits and to make different choices, and (3) therefore, workplace inequalities are caused by inherent gender difference, and not by sex discrimination. In this Note, I argue that both of the premises are flawed. However, neurosexism is so deeply engrained into the American psyche that it might be exceedingly difficult to divest society of these beliefs. Therefore, activists should challenge the conclusion by asserting that natural gender differences do not inevitably cause the workplace gender gap. It is entirely possible to narrow the gender gap while remaining within the confines of the premises.

Part II of this Note examines the roots of the nature-based narrative and discusses how it is used today to justify sex inequality in the workplace. Part III analogizes the nature-based narrative as it is used to justify sex discrimination to nature-based narratives that have been used by past generations to justify racial subordination and slavery. Part IV questions the first premise of the nature-based narrative—that there are inherent neurological differences between the sexes. Part V examines the second premise of the nature-based narrative and questions studies that purport to establish a causal link between brain structure and behavior. Part VI argues that the conclusion of the nature-based narrative is flawed regardless of whether or not one accepts the truth of its premises. Ultimately, the Note argues that workplace inequalities may be remedied under either paradigm if employers commit to a revaluation of feminine traits and broaden job descriptions, and if courts are willing to find that the masculinization of the ideal worker is unlawful sex discrimination under Title VII.

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[23] British psychologist Cordelia Fine coined the term neurosexism in her 2010 book *Delusions of Gender*. Neurosexism refers to the widespread belief that the brains of women and men are structurally different, which in turn justifies the inequalities between the sexes as natural and unalterable. *See* CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE (2010).

II. THE NATURE-BASED NARRATIVE: HOW OUR GENDERED CULTURE COLLIDES WITH SCIENCE TO JUSTIFY SEX INEQUALITY IN THE WORKPLACE

Claims that females are the naturally inferior sex can be traced back to the beginnings of the written word.[24] For millennia, learned men purported to find evidence of women's inferiority in their distinctive physical traits, which, they argued, must be the cause of their inferior behaviors and temperament. For example, Aristotle argued that the lack of heat in a woman's body was capable of thwarting embryonic development and causing a female embryo to form instead of a male embryo.[25] Furthermore, he argued that this lack of heat caused defective traits in women.[26] Then scientific reasoning, as opposed to logical reasoning, became the proof *du jour* of the natural inferiority of women. In 1871, Darwin used his newly developed theory of natural selection to explain the biological inferiority of women: "In short, women are less evolved. Men reach a 'higher eminence' in any field . . . because they have on average greater mental capacity, a product of their age-old struggle for the females."[27] The modern nature-based narrative was born from historical misconceptions of inherent female inferiority.

The modern nature-based narrative is a syllogism: (1) Men and women differ neurologically; (2) these inherent differences cause the sexes to exhibit divergent behaviors and to make different choices, and (3) therefore, perceived inequalities between men and women are merely a result of such natural behaviors and choices, rather than a result of sex discrimination. Societal assumptions about the biological differences between men and women are no longer used to conclude that women are inferior. Instead, feminine and masculine traits are considered different but equal. In this view, a woman's biologically determined traits include "expressive, warm, and submissive," whereas a man's biologically determined traits include, "instrumental, rational, and dominant."[28] According to proponents of the nature-based narrative, it just so happens that the natural traits of men are best suited for employment in the highest paying and most prestigious occupations. On the other hand, the natural traits in women make them great housewives, mothers, and part-time employees. It seems that the modern different-but-equal paradigm is effectively identical to the inferior-female paradigm of the past. All that

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[24] According to the Book of Genesis, Eve was responsible for original sin through succumbing to her temptation—a direct result of her feminine weak-mindedness. *See* Genesis 3:1-24. The Book of Genesis dates back to the 15th Century B.C.E. KITCH, *supra* note 22, at 19.

[25] KITCH, *supra* note 22, at 19.

[26] *Id.*

[27] James Moore & Adrian Desmond, *Introduction to* CHARLES DARWIN, THE DESCENT OF MAN, at xlviii (Penguin Classics 2004) (1871) (describing Darwin's theory of male superiority in terms of natural selection).

[28] Jan E. Stets & Peter J. Burke, *Femininity/Masculinity*, *in* ENCYCLOPEDIA OF SOCIOLOGY 997, 998 (Rev. ed. 2000).

has changed is that society's belief in female inferiority has been masked by the veneer of twenty-first century tact. Society continues to devalue feminine traits, as evidenced by the fact that such traits are not worth as much on the market.

The science-based sexism that persists today is not as pronounced as that of the past, but it is just as harmful to women since it is now concealed by the perceived authoritativeness of neuroscience.[29] Today, as in the past, the general public regards scientific theories as unquestionably reliable, which is a dangerous notion when combined with its apparent malleability. Scientists have consistently set out on self-fulfilling prophetic quests to discover evidence of the natural differences between the sexes. As scientific theories of female inferiority have been debunked throughout the ages, new theories have popped up in their place.[30] In the past, measuring skulls and weighing brains (now regarded as crude forms of science) were the scientific methods *du jour* by which scientists found proof of the natural differences between the sexes.[31] Today, the methods used are fMRIs, PET scans and human genetic analysis.[32] Modern scientists involved in such quests often ignore alternative explanations and conclusions, extrapolate too readily from studies of animals to human behavior, and seek out difference rather than similarity. Scientists do not exist in a separate world of white lab coats; they are very much a part of our gendered culture, and therefore, their subjective prejudices and gendered expectations might seep into their "objective" studies. Cordelia Fine sums up this subset of scientific study in the term neurosexism: "Neurosexism reflects and reinforces cultural beliefs about gender—and it may do so in a particularly powerful way. Dubious 'brain facts' about the sexes become part of the cultural lore."[33]

A clear example of neurosexism at work is psychologist Simon Baron-Cohen's 2003 book *The Essential Difference*.[34] Baron-Cohen adopts a Darwinian approach to sex difference and argues that there are clear survival and reproductive advantages to a female brain being a high empathizer but low systemizer, and the male brain being a low empathizer but high systemizer.[35] He argues that the advantages of the empathetic female brain cause women to be great at making friends, mothering, gossip, social mobility, and reading their partners facial

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[29] "[N]euroscience easily outranks psychology in the implicit hierarchy of 'scientificness.' Neuroscience, after all, involves expensive, complex machinery." FINE, *supra* note 23, at 169.

[30] "Some scientists from the 19th century were convinced that intelligence was located in the frontal lobe of the brain, and therefore believed that women should have smaller frontal lobes. . . . It was soon found, however, that the frontal lobes in women were generally larger than those of men, and therefore male scientists concluded that not the frontal lobe but the parietal lobe of the brain should be the seat of intelligence." BRYAN BUNCH & ALEXANDER HELLEMANS, THE HISTORY OF SCIENCE AND TECHNOLOGY: A BROWSER'S GUIDE TO THE GREAT DISCOVERIES, INVENTIONS, AND THE PEOPLE WHO MADE THEM, FROM THE DAWN OF TIME TO TODAY 419 (2004).

[31] *See* FINE, *supra* note 23, at xxiv–xxv.

[32] *See id.* at 134–35.

[33] *Id.* at xxviii.

[34] BARON-COHEN, *supra* note 16.

[35] *Id.* at 117–31.

expressions.[36] According to Baron-Cohen, a person that is a good systemizer is good at "understanding, using, and constructing tools" and "understanding and exploiting natural resources."[37] Furthermore, the natural "drive to systemize is essentially the drive to control or understand a system to the highest level," which makes high systemizers great candidates for power and control positions in society.[38] Unlike the male brain, the female brain is, on average, not as evolved for systemizing.[39] In keeping with his overarching argument that male and female brains are different but equal in the advantages that they confer, Baron-Cohen struggles to explain why having a low-systemizer brain might not be a maladaptive trait in women. He settles on the weak argument that although "a low systemizer would find it difficult to use tools or fix things," her ability to empathize meant, "when a system needed fixing ... [low systemizers] had all the social skills to persuade a good systemizer to come and help them sort it out."[40]

Scientists are only one of the constituencies engaged in the modern nature-based narrative discourse. The judiciary, appurtenant to the surrounding cultural environment, has also long been engaged in such discourse.[41] And judges have the uncanny ability, like scientists, to spin the tenets of the nature-based narrative into a shared reality. Recently, courts have used choice rhetoric to justify the status quo, which focuses on the behavioral result of biological differences between the sexes, rather than on the entire causal relationship between neurological and behavioral attributes (a task usually left to the scientific realm). To the general public, and apparently also to the courts, the fact that women and men differ neurologically is an unquestioned reality. For example, in *EEOC v. Sears, Roebuck & Co.*, the district court justified the statistical disparities between male and female employees as merely a result of their differing occupational preferences.[42] The court seemingly adhered to the implicit principle that these choices were the result of fixed biological differences and were therefore natural and normal. It found that there was not any sex discrimination to remedy.

The district court in *Sears* held that the Equal Employment Opportunity Commission (EEOC) failed to prove its Title VII claim that "Sears engaged in a nationwide pattern or practice of sex discrimination . . . by failing to hire female applicants for commission selling on the same

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[36] *Id.* at 126–30.

[37] *Id.* at 118.

[38] *Id.* at 123.

[39] *See* BARON-COHEN, *supra* note 16, at 126–30.

[40] *Id.* at 130.

[41] *See e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding state protective labor legislation that restricted the number of hours a woman could work in a day due to the inherent physical limitations of the female body).

[42] *See* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1315 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (accepting defendant's evidence that a disparity between men and women in commission sales positions reflected the preferences of women applicants for noncommission positions).

basis as male applicants, and by failing to promote female noncommission salespersons into commission sales on the same basis as it promoted male[s]."[43] During the time period in question, Sears hired both commission and noncommission salespersons.[44] Commission salespeople earned "substantially more" than noncommission salespeople.[45] During interviews for commission salespeople, "managers looked for a number of important qualities, including aggressiveness or assertiveness, competitiveness . . . personal dominance, [and] a strong desire to earn a substantial income . . . ."[46]

The EEOC based its Title VII sex discrimination claim on statistical evidence, which showed that women constituted a disproportionately small percentage of the commission salespeople.[47] However, the district court found that these statistics were not persuasive because they were based on the faulty assumption that "all male and female sales applicants [were] equally likely to accept a job offer for all commission sales positions at Sears."[48] Instead, the court adopted Sears's explanation for the EEOC's statistics, concluding that the evidence did not prove that Sears had engaged in sex discrimination, and confirming that men and women make different choices depending on their divergent interests and goals.[49] The court was convinced by Sears's argument that it tried to remedy the statistical disparities, but women employees were just not interested in the commission jobs: "[S]pecific surveys of the interests of Sears employees reveal that far more men than women are interested in commission sales."[50] The court found that the women employees, on average, made a choice to work in the departments which sold "soft lines of merchandise," which happened to be the departments that did not offer a commission-based salary.[51] Thus, the court held that Sears had proved its point "that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in commission sales jobs."[52] However, the only substantive (or non-self-reported) testimony that Sears produced to this effect was testimony from Dr. Rosalind Rosenberg, an American historian, who opined that "it is not surprising that men and women differ in their expectations concerning work [and] in their interests as to the types of jobs they prefer or the types of

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[43] *Id.* at 1278.

[44] *Id.* at 1289.

[45] *Id.*

[46] *Id.* at 1290.

[47] The EEOC presented evidence that "while women were over 60% of full-time sales applicants . . . women only comprised 1.7% of full-time commission sales hires in 1973 and between 10.5 % and 5.3 % thereafter." *Sears*, 839 F.2d at 321.

[48] *Sears*, 628 F. Supp. at 1305 (numbers omitted).

[49] *See id.* ("Sears has proven, with many forms of evidence, that men and women tend to have different interests and aspirations regarding work, and that these differences explain in large part the lower percentage of women in commission sales jobs in general at Sears . . . .").

[50] *Id.* at 1309.

[51] *Id.* at 1306. The "soft lines of merchandise" included clothing, jewelry, and cosmetics. *Id.*

[52] *Id.* at 1305.

products they prefer to sell . . . . It is naïve to believe that the natural effect of these differences is evidence of discrimination by Sears."[53] None of the evidence explains or backs up this conclusory analysis. Both Sears and the court fed into the nature-based narrative by making the implicit assumption that there are natural differences between the sexes, which in turn inform their occupational choices. According to Vicki Schulz's account of the Sears case, "[t]he judge credited various explanations for women's 'lack of interest' in commission sales, all of which rested on conventional images of women as 'feminine' and nurturing, unsuited for the vicious competition in the male-dominated world of commission selling."[54] The court fails to question whether perhaps these choices were not a result of nature, but rather were a result of the way Sears was internally structured and managed.[55]

III. WHAT WERE THEY THINKING?: THE NATURE-BASED NARRATIVE AS IT WAS USED TO JUSTIFY THE SUBORDINATION OF AFRICAN-AMERICANS

In 1861, just weeks after the secession of a number of southern states, confederate Vice President Alexander Stephens made his Cornerstone Speech. In the speech, Stephens justified the subordination of African-American slaves by appealing to nature: "Our new Government is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his *natural* and moral condition."[56]

In order to justify slavery, pre-emancipation southerners often invoked the nature-based narrative in arguing that African Americans' natural condition was one of enslavement, and that they were therefore happiest in that condition: "We are often told that the condition of the slave is a happy one; preferable to that of the laboring whites in the North."[57]

Additionally, past generations used science to explain and justify

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[53] Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, ¶ 24, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4273), *reprinted in* 11 SIGNS 757, 766 (1986).

[54] Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1753 (1990).

[55] *See infra* Part VI for an analysis of Sears's working environment as one structured to masculinize the "ideal worker."

[56] Alexander H. Stephens, Cornerstone Address (Mar. 21, 1861), *in* 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS WITH DOCUMENTS, NARRATIVES, ILLUSTRATIVE INCIDENTS, POETRY, ETC., 44, 46 (Frank Moore ed. 1861) (emphasis added).

[57] William J. Snelling, Speech Before the New England Anti-Slavery Society, *in* THE ABOLITIONIST, Mar. 1833, at 35, 36 (1833); *see generally* HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (Bantam Classics 1982) (1852) ("Sambo" was a caricature of the "happy slave.").

racial difference and inferiority. For example, in an 1858 article, Dr. Samuel Cartwright wrote: "Africans are endowed with a will so weak, passions so easily subdued, and dispositions so gentle and affectionate that they have an instinctive feeling of obedience to the stronger will of the white man."[58] Cartwright posited that African Americans were afflicted with the disease *Dysaethesia Aethipica*, which was characterized by a partial insensitivity to pain and diminished intellectual capacity.[59] He argued that this disease caused African Americans to "slight their work" and to "raise disturbances with the overseers."[60] Even the courts partook in this dialogue by upholding the constitutionality of state anti-miscegenation laws, which aimed to prohibit interracial relations, based on the belief that races belonged to different species.[61]

Cartwright's rhetoric is quite similar to that historically used to justify the subordination of women. Cartwright's conclusion that the disease *Dysaethesia Aethipica* caused African Americans' inferior behavioral traits is comparable to Jean-Jacques Rousseau's reasoning that "women's disorder" was "found in the female body's natural cycles," and caused "women's inherent untrustworthiness."[62] Cartwright and Rousseau both concluded that the targeted "inferior" group was afflicted with a disease or disorder, which caused members of that group to exhibit physical and behavioral maladies.[63] The nature-based narrative, as it was used in the context of both race and sex, maintained that the very biological nature of the "inferior" group caused their behavioral traits, which resulted in the belief that women and African Americans were suited to fulfill particular roles in society. In her book on gender ideology, Sally Kitch observes that men considered both women and African Americans "subordinate because of their inherent—not imposed—characters, behavior, and qualities."[64]

After centuries of racist theories rooted in nature and science, the conception that there are marked biological differences between the races has been put to rest. Today, if someone were to remark that a particular

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[58] William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1058 (1993) (quoting Samuel Carter, *On the Caucasians and the Africans*, 25 DEBOW'S REV. 45 (1858)).

[59] *Diseases of American Negroes*, THE LANCET, Vol. 1, No. 1 at 103 (1857), *available at* http://books.google.com/books?id=3g0CAAAAYAAJ&lpg=PA103&ots=IpQ523uvJC&dq=%22diseases%20of%20american%20negroes%22%20lancet&pg=PA441#v=onepage&q=%22diseases%20of%20american%20negroes%22%20lancet&f=false.

[60] *Id.*

[61] Anti-miscegenation laws made it illegal for people of different races to marry, cohabit or engage in sexual relations. *See, e.g.*, Pace v. State, 69 Ala. 231, 233 (1881) (holding that the government had an interest in preventing interracial relations because "[i]ts result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization."), *aff'd*, 106 U.S. 583, 585 (1883), *overruled by* McLaughlin v. Florida, 379 U.S. 184, 190 (1964).

[62] KITCH, *supra* note 22, at 24.

[63] *See Diseases of American Negroes*, *supra* note 59, at 556 (claiming blacks suffered from a disease that caused laziness and a lack of pain); *cf.* KITCH, *supra* note 22, at 24 (claiming Rousseau believed that women suffered from political incapacity based in part on an observation about women's natural cycles).

[64] KITCH, *supra* note 22, at 22.

racial group was biologically different and as a result had distinctive behavioral traits, he or she would most likely be labeled a racist and ridiculed. Studies now show that racial categories are malleable, and are a product of sociopolitical contexts rather than genetics.[65] In 2008, a multidisciplinary group of Stanford faculty "caution[ed] against making the naïve leap to a genetic explanation for group differences in a complex behavioral trait, where environmental and social factors clearly can and do play major roles."[66]

Unfortunately, the use of science to justify sex inequalities is still very much a part of our society. Thus, the belief in inherent differences between the sexes continues to be deeply engrained. A comparison of *EEOC v. Sears*[67] and *International Brotherhood of Teamsters v. United States* provides evidence of this reality.[68] In *Sears*, the court relied heavily on Sears's argument that women employees were not interested in the higher-paying, male-dominated commission sales jobs.[69] Therefore, even though the court was presented with significant statistical evidence that showed a vast disparity between men and women employees in the commission versus the non-commission sales jobs, the court held that Sears had not discriminated against women because of their sex in violation of Title VII.[70] In *Teamsters*, minority truck drivers claimed that "the company had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers."[71] Statistics showed that minorities were mostly employed in the less desirable, lower-paying jobs such as servicemen or local city drivers, and were underrepresented in the higher-paying line driver jobs.[72] The Court, unlike the *Sears* court, had no problem with using the existence of a significant statistical disparity between white and minority line drivers to find that the company had committed racial discrimination in violation of Title VII.[73] There was no mention of choice or job interest in the entire case.[74] If the Court had denied Title VII protection based on finding that the minority employees were just not as interested in the higher-paying line driver jobs as their white counterparts, the opinion would have been considered ridiculous. However, that is exactly what the *Sears* court did when the case involved a sex discrimination claim.

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[65] *See* Sandra SJ Lee et al., *The Ethics of Characterizing Difference: Guiding Principles on Using Racial Categories in Human Genetics*, 9 GENOME BIOLOGY 404 (2008), *available at* http://genomebiology.com/2008/9/7/404.

[66] *Id.*

[67] *Sears*, 628 F. Supp. at 1264; *see also supra* Part II for a full analysis.

[68] 431 U.S. 324 (1977).

[69] *See Sears*, 628 F. Supp. at 1302–12.

[70] *See generally id.*

[71] *Teamsters*, 431 U.S. at 329.

[72] *Id.* at 337–38.

[73] *See id.* at 337.

[74] *See generally id.*

IV. ARE THERE INHERENT NEUROLOGICAL DIFFERENCES BETWEEN THE SEXES?

The first premise of the modern nature-based narrative is that men and women, from the point of conception, develop inherently different brain structures. Contemporary neuroscientists such as Norman Geschwind have posited that structural brain differences are the result of prenatal exposure to testosterone. Geschwind theorized that the massive influx of fetal testosterone that male fetuses encounter leads to the quick embryonic development of the right hemisphere of the brain as compared with the left hemisphere.[75] Simon Baron-Cohen supports Gerschwind's theory citing evidence suggesting that males tend to have superior right-hemisphere skills while females tend to have superior left-hemisphere skills.[76] He bases this assertion on a study he cites to in which pregnant rhesus monkeys were injected with testosterone.[77] The monkeys gave birth to genetically female offspring (with two X chromosomes) that developed male genitalia and engaged in more of the observed behavior "play-fighting," which Baron-Cohen theorized was a sign of lower empathy (a "left brain" skill).[78] Thus, Baron-Cohen posited that this study proves that fetal testosterone exposure causes rapid right brain development, which in turn leads to certain right brain behavioral traits.

The methodological problem with Baron-Cohen's study and conclusion is that he uses a post-natal behavioral study of rhesus monkeys to prove the truth of a theory about the cause of pre-natal brain formation in humans. It is never proper scientific methodology to start with a conclusion (Gerschwind's theory), and then to ex post seek evidence to prove the truth of that conclusion. The problem with using a post-natal fact to reach back and prove the truth of a conclusion about pre-natal brain structure is that the post-natal fact could very well have been caused by intervening factors, such as those found in the environment. At most, Baron-Cohen has proven a correlation, as opposed to causation, between "play-fighting" and fetal testosterone exposure in rhesus monkeys. Furthermore, even assuming that the introduction of pre-natal testosterone was the cause of the increased "play-fighting" among the genetically female rhesus monkeys, it does not prove that the influx of pre-natal testosterone in humans also causes such right brain behavior.[79] Using animal studies as evidence of human behavior is dangerous because we tend to "assume that animals have attributes just like ours,"[80] and because we fail to take into account the differences in our respective levels of complex brain functioning. Assuming that fetal

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[75] BARON-COHEN, *supra* note 16, at 99.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] One also must assume that "play-fighting" is properly labeled a "right brain" behavior.
[80] BARON-COHEN, *supra* note 16, at 95. This tendency is called "anthropocentrism."

testosterone exposure is greater in male embryos, and that the rhesus monkey study provided evidence that human boys are more likely to engage in "play-fighting," that still does not prove Gerschwind's theory that fetal testosterone *causes* the right brain to be more developed in boys. Baron-Cohen has failed to prove a connection between observed behaviors and a more developed right hemisphere brain.

Baron-Cohen also performed a study in which he measured the levels of fetal testosterone in amniotic fluid, and then observed toddlers whose mothers had provided these samples.[81] He found that the toddlers who had been "identified as having lower fetal testosterone, now had higher levels of eye contact and a larger vocabulary."[82] Baron-Cohen argues that this is proof that a higher level of fetal testosterone causes lower empathizing skills and increased systemizing abilities (proof of a more developed right hemisphere brain).[83]

There are several problems with this study and its conclusion. First, it is very difficult to accurately measure levels of eye contact and vocabulary. For example, how long did the toddler have to maintain eye contact, who did the toddler have to look at, and was each toddler subjected to the same type of environment? Baron-Cohen does not account for any of these factors, which would likely cause an introduction of methodological bias. Second, Baron-Cohen does not take into account environmental factors that might have caused the varying levels of eye contact and vocabulary; after all, these toddlers had been out of the womb and in our gendered society from between twelve to twenty-four months.[84] Third, he does not explain why lower levels of eye contact and vocabulary are evidence of a more developed right hemisphere of the brain. The only conclusion one can draw from this study is that there are varying levels of fetal testosterone in amniotic fluid. Baron-Cohen has proved neither that the level of fetal testosterone contributes to brain structure, nor that it causes certain behavioral traits.

Not all scientists agree with Baron-Cohen's conclusion. Dr. Lise Eliot, an Associate Professor in the Department of Neuroscience at the University of Chicago Medical School, explains:

> The [fetal testosterone] surge begins just six weeks after conception and finishes before the end of the second trimester. By birth, there is little difference in boys' and girls' testosterone. . . . Nonetheless, the brief four-month window of testosterone exposure before birth is enough to masculinize male babies down between the legs and—to some degree—up in their developing brains.[85]

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[81] *Id.* at 100.
[82] *Id.*
[83] *Id.* at 100–101.
[84] *Id.* at 100.
[85] LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME

A baby's sex is decided at the moment of conception based on whether the sperm is carrying an X or a Y chromosome, but "[s]exual differentiation begins about midway through the first trimester."[86] Despite these early determinations, "[f]etuses take their time before presenting themselves as clearly male or female on the outside."[87] Furthermore, sex differentiation inside the brain is even slower than the physical manifestations attributed to an X or Y chromosome.[88] In male fetuses, the "sex-determining region of the Y chromosome," or the SRY, causes testes to form, which in turn are responsible for the prenatal testosterone surge.[89] The surge of testosterone in male fetuses causes them to "grow more quickly than girls from early on in gestation" and as a result, "boys are larger, heavier, and physically sturdier than girls at birth, with thicker skulls, and, yes, bigger brains."[90] Conversely, "girls' bodies mature faster physiologically, adding up to a clear advantage for females by the end of gestation."[91]

Besides creating physical differences between boy and girl fetuses, what effect does the prenatal testosterone surge, or lack thereof, have on developing brains? According, to Eliot, scientists presume that the prenatal testosterone "begins shaping circuits for later male behavior," but that "the evidence is still largely lacking."[92] She argues that whatever prenatal structural brain differences are in fact present at birth, "when these small, immature brains meet our inexorably gender-divided culture . . . sex differences become quickly magnified."[93]

V. DOES BIOLOGY EXPLAIN BEHAVIORAL DIFFERENCES BETWEEN THE SEXES?

Many scientists have studied the effects of prenatal testosterone on young rats and monkeys in order to find a causal link between prenatal testosterone exposure and subsequent behavioral differences among human children.[94] At birth, rats are much less developed than humans; they "are still in the midst of their testosterone surge" and their brains are "uniquely open to sexual differentiation during just a brief period in early

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[86] *Id.* at 20.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 25.

[90] ELIOT, *supra* note 85, at 45–46.

[91] *Id.* at 46. Some people believe that because men have, on average, 9% larger brains than women do, that this indicates that men have greater cognitive abilities. However, as Eliot points out, "it is not clear how this relates to the different mental abilities of the two sexes." *Id.* at 57.

[92] *Id.* at 53.

[93] *Id.* at 54.

[94] *See* ELIOT, *supra* note 85, at 30–38.

development."[95] Thus, researchers can easily manipulate the testosterone level in young rats to test how it affects behavior. However, Eliot explains that we cannot extrapolate rodent data to human behavior because "the critical period for testosterone action on the human brain takes place exclusively *before* birth."[96] In monkeys, to which humans are far more developmentally similar than rats, "sex hormones exert very little effect after birth on either male or female monkeys' behavior."[97] In fact, "exposing females to high levels of testosterone prenatally does not make them start pouncing on their peers . . . [n]or does [it] lessen females' interest in babies or increase their tendency to mount other monkeys, two other traits that differ dramatically between young male and female monkeys."[98] Eliot explains that prenatal hormones have very little impact on monkeys, as compared to rats, because "[t]he bigger the brain, the less instinctive the behavior, and the more the brain's abilities are influenced by learning."[99] Furthermore, the human brain is even larger and more complex than that of monkeys, and therefore, presumably, prenatal hormones would have even less of an impact.

The only way to discover if and how hormones shape behavioral differences between the sexes is by studying humans.[100] Due to rare medical conditions, some "children have been raised as the opposite sex of what their chromosomes (or prenatal hormone exposure) would have dictated."[101] For example, children with androgen insensitivity syndrome lack the receptors for testosterone, but are genetically male (they have one X and one Y chromosome).[102] Children with this condition look like normal girls, are raised as females, and do not have issues with female identity or heterosexuality.[103] This shows that the presence of male genes alone does not seem to cause stereotypically masculine behavioral traits. However, it does not show what effect the presence of prenatal testosterone has on the brain and behavior. Dr. Heinz Meyer-Bahlburg conducted a 2005 study of 77 people who were genetically male, but who had been raised as females for a variety of medical reasons.[104] He found that only 17 had chosen to revert back to the role determined by their genetic sex and away from the role into which they were socialized.[105] Meyer-Bahlburg concluded that "[t]hese data do not support a theory of full biological determination of gender identity development by prenatal hormones and/or genetic factors, and one must conclude that gender assignment and the concomitant social factors have

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[95] *Id.* at 30–31.
[96] *Id.* at 32.
[97] *Id.*
[98] *Id.*
[99] ELIOT, *supra* note 85, at 32–33.
[100] *Id.* at 33.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] ELIOT, *supra* note 85, at 35.
[105] *Id.*

a major influence on gender outcome."[106] Eliot suggests that the age at which a genetically male child is reassigned to a female identity is critically important to whether the person will accept this reassignment or will later revert back to the genetically dictated role.[107] If the reassignment occurs very close to birth, then it is more likely that the reassignment to a female role will stick: "[B]abies . . . already know a great deal about the difference between male and female, already prefer gender-appropriate toys, and are often already consciously aware of their own sex."[108]

From the abovementioned studies and theories, it is unclear to what degree prenatal testosterone, or lack thereof, has a significant effect on boy-girl behavioral traits in terms of types of play and toy preferences among children.[109] But the most important question remains: do prenatal hormones dictate fixed behavioral traits and cognitive abilities among adults? If the answer is yes, then the nature-based narrative may be correct in its assumption that biological sex differences cause men and women, on average, to have divergent abilities and occupational aspirations. Scientists have studied opposite-sex twins to provide the answer. Girls who share the womb with a male fetus will be exposed to androgens, and may or may not be exposed to higher-than-normal levels of testosterone.[110] Additionally, while there is some "evidence for the slight masculinization of certain anatomical and physiological traits" among girls with twin brothers, "most research has been unable to identify reliable differences in the behavior and mental skills of girls with twin brothers compared with those with twin sisters."[111] A few studies of behavior and cognitive skills in girls with twin brothers found that they "are more prone to aggression and risk taking or are better at spatial skills than girls with female twins."[112] However, it seems unlikely that these studies would be able to rule out the "possibility that girls with boy twins act or think a little more like boys because of the time they spend with their twin brothers *after* birth."[113] In fact, Brenda Henderson and Sheri Berenbaum introduced a comparative group of non-twin girls with older brothers into such a study, and found that "[o]lder brothers of girls . . . do not share their prenatal testosterone with their sisters, and yet apparently they encourage an even stronger shift toward toy trucks, balls, and sports than the twin brothers do."[114] Furthermore, as Eliot reports, "the bulk of such research has found no significant difference: girls with

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[106] *Id.* at 35.

[107] *See id.* at 34–35 (comparing two boys who underwent gender reassignment, one at two months and the at two years, and observing that the boy whose gender was reassigned earlier more effectively accepted the reassigned gender).

[108] *Id.* at 34.

[109] ELIOT, *supra* note 85, at 35.

[110] *Id.* at 38.

[111] *Id.* at 39.

[112] *Id.* at 40.

[113] *Id.*

[114] ELIOT, *supra* note 85, at 41.

male twins . . . score no higher on math and other male-type cognitive skills than girls with female twins."[115]

Researchers—including Baron-Cohen, Steven Pinker, and Louann Brizendine—have studied "babies' abilities to recognize or discriminate facial expression in others" and have concluded that female infants consistently outperform male infants in this regard.[116] They claim that these studies prove that "the female brain is predominantly hard-wired for empathy," which is why a large proportion of women find themselves in "more interpersonally sensitive careers."[117] However, these conclusions are flawed because these scientists presumed a causal link between pre-birth neurological differences and post-birth behavioral traits. Furthermore, they presumed that observed differences in adulthood are the result of the same biological factors that caused such differences at infancy—this ignores the many years of life experienced in a highly gendered culture. Psychologist Erin McClure argues with this conclusion, and explains "that girls are indeed more capable of detecting others' emotions in infancy, but their advantage is mostly a matter of neurological maturation. . . . [and] [w]ith time, and experience with other people, the gap closes, and boys and girls are not so different in their sensitivity to others' feelings during the rest of childhood."[118]

Therefore, research shows that inherent biological differences, such as prenatal testosterone exposure in male but not in female fetuses, cause physiological differences, and may cause slight behavioral differences among children in terms of type of play and toy preference. However, the majority of the research remains inconclusive about whether these biological differences are truly the causal force behind the observed differences in behavioral traits and cognitive abilities into adulthood. In fact, studies have reported small behavioral anomalies where a sex-determined biological factor had been altered in male and female fetuses, but concluded that environmental factors were far more likely to have affected the subsequent behavior.

What causes workplace inequalities between men and women if they are not the result of inherent biological factors? In *Delusions of Gender*, Cordelia Fine provides evidence that our gendered culture is a far more likely culprit.[119] Fine cites social psychology studies that found that the implicit mind automatically associates "communal words," such as "connected and supportive," with female names, and associates "agentic words," such as "individualistic and competitive," with male names.[120] Other such studies have shown that "men, more than women,

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[115] *Id.* at 40.
[116] *Id.* at 77.
[117] *Id.*
[118] *Id.* at 77.
[119] *See* FINE, *supra* note 23.
[120] *Id.* at 5. An implicit association test measures a person's particular implicit bias by measuring the time it takes him or her to accurately pair the words or categories as instructed: "The small but significant difference in reaction time this creates is taken as a measure of the stronger automatic and

are implicitly associated with science, math, career, hierarchy, and high authority."[121] Conversely, "women, more than men, are implicitly associated with the liberal arts, family and domesticity, egalitarianism, and low authority."[122] These implicit associations are the result of our gendered environment—every brain "picks up and responds to cultural patterns in society, media, and advertising."[123] We all have a certain level of implicit bias in the traits and roles that we typically associate with women as opposed to those we associate with men. As a result, our brains assign a sense of normalcy to the status quo. If the status quo seems ordinary, we are more apt to believe that it is a result of nature, and is therefore incapable of change.

Someone who adheres to the nature-based narrative might argue that these implicit biases are simply a result of the natural order; we form associations based on the status quo, which is merely the result of biological inevitabilities. However, studies have shown that by making small changes in the environment, stereotypical attributes of men and women that are described by the nature-based narrative as "natural" and "fixed" are capable of drastic change. An implicit bias is bolstered by its own creation of self-fulfilling prophecy; a person will behave how the implicit bias expects them to behave, thus feeding back into the implicit bias loop. Women's actions and behavioral traits are influenced by their own implicit biases about themselves as women. Psychologist Stacey Sinclair has shown through a "string of experiments that people socially 'tune' their self-evaluations to blend with the opinion of the self held by others," and therefore, when one comes into contact with a person who holds a stereotypical view of them, their "self-conception adjusts to create a shared reality."[124] In one experiment, women tended to socially tune themselves differently depending on the description of the type of man that they were told they were about to spend time with.[125] One group of women were told they were about to spend some time with "a charmingly sexist man" and the other group were told they were going to "interact with a man with a more modern view of their sex."[126] The former group subsequently "regarded themselves as more stereotypically feminine" compared with the latter group. Sinclair called this phenomenon a "shift in self-concept."[127]

A shift in self-concept can also lead to changes in skill level upon manipulation of the environment. For example, Fine cites to a mental rotation test used to test visuospatial skills. Performance on this test is significantly stratified along gender lines: "In a typical sample, about 75

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unintended associations between women and communality, and men and agency." *Id.*

[121] *Id.* at 5–6.

[122] *Id.* at 6.

[123] FINE, *supra* note 23, at 6.

[124] *Id.* at 10.

[125] *Id.*

[126] *Id,* at 10–11.

[127] *Id.* at 11.

percent of people who score above average are male."[128] Male superiority in this domain has been used to explain "males' better representation in science, engineering, and math."[129] However, studies have shown that mental rotation ability is malleable. In one such study, one group of participants were primed to believe that performance on the mental rotation test is "probably linked with success on such tasks as 'in-flight and carrier-based aviation engineering . . . nuclear propulsion engineering, undersea approach and evasion, [and] navigation.'"[130] Not surprisingly, men outperformed women on this test.[131] However, the gender gap was reduced to an insignificant difference when the test was administered to another group that was primed to believe the test measured abilities in "clothing and dress design, interior decoration and interior design . . . decorative creative needlepoint, creative sewing and knitting, crocheting [and] flower arrangement."[132] Many other studies have reported similar findings.[133] Social psychologist Claude Steele and his colleagues argue that women's poorer performance on certain tests is a result of "stereotype threat" or the "real-time threat of being judged and treated poorly in settings where a negative stereotype about one's group applies."[134]

Furthermore, the same reduction in stereotype threat has proved to increase women's interest in typically male-dominated occupational fields. Women, on average, tend to find such jobs off-putting, as they feel like they do not belong. Research has shown that a simple repackaging of job descriptions into more gender-neutral or feminine terms, and away from masculinized terms, is an effective way of drawing more women into these fields.[135] For example, computer programming used to be "a job done principally by women and was regarded as an activity to which feminine talents were particularly well suited."[136] Indeed, "[i]t was not until the 1980s that individual heroes in computer science, such as Bill Gates and Steve Jobs came to the scene, and the term 'geek' became associated with being technically minded."[137]

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[128] FINE, *supra* note 23, at 27.

[129] *Id.*

[130] *Id.* at 28 (quoting Matthew J. Sharps, Jana L. Price & John K. Williams, *Spatial Cognition and Gender: Instructional and Stimulus Influences on Mental Image Rotation Performance*, 18 PSYCHOLOGY OF WOMEN QUARTERLY 413, 424–25 (1994)).

[131] FINE, *supra* note 23, at 28.

[132] *Id.* (internal quotations omitted) (quoting Sharps, *supra* note 130, at 424–25).

[133] *See* FINE, *supra* note 23, at 28–29 (referencing studies by Matthew McGlone, Joshua Aronson, and Angelica Moe).

[134] *Id.* at 30 (internal quotations omitted) (quoting Claude M. Steele, Steven J. Spencer & Joshua Aronson, *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 379, 385 (2002)). In one study, researchers administered a math test to two groups, one of which was placed under a stereotype threat. In the group in which the stereotype threat had been removed, the women outperformed the men in both the stereotype threat and non-stereotype threat groups. FINE, *supra* note 23, at 30.

[135] *Id.* at 45–46.

[136] *Id.* at 45.

[137] *Id.* (citing interview with Sapna Cheryan, psychologist, Washington University, November 25,

Occupational aspirations and choices may very well be a product of which gendered terms society has associated with a particular industry. Such choices, therefore, are not a product of biological nature, but rather are the result of societal indoctrination.

Based on the abovementioned studies (and others found in Fine's book, *Delusions of Gender*), which provide evidence that the gender gap in cognitive abilities and occupational goals can be reduced through small changes in the environment, Fine concludes:

> As the arguments that women lack the necessary intrinsic talent to succeed in male-dominated occupations become less and less convincing, the argument that women are just less interested has grown and flourished. . . . It is remarkably easy to adjust the shine of a career path for one sex. A few words to the effect that a Y chromosome will serve in your favor, or a sprucing up of the interior design, is all that it takes to bring about surprisingly substantial changes in career interest.[138]

It seems, therefore, that the modern-day gender gap is not a product of inherent biological differences between the sexes. The gender gap is a malleable aspect of social reality that closely corresponds with the ebb and flow of societal beliefs.

VI. MEN ARE FROM MARS, WOMEN ARE FROM VENUS: SO WHAT?

The conclusion that the workplace gender gap is the result of inherent biological differences between men and women emerges from the aggregation of the two premises of the modern nature-based narrative. In this view, because modern society affords women equal educational and occupational opportunities to men, any remaining workplace inequalities cannot be attributed to supposed enduring remnants of sex discrimination, but rather must be the result of differing abilities and choices. However, this conclusion is incorrect whether or not one accepts the premises of the modern nature-based narrative as true.

As explained in Parts IV and V, the premises of the modern nature-based narrative are fallacious, and therefore its conclusion cannot stand. Furthermore, there is a superior alternative conclusion in that the gender gap can be explained by our gendered culture and its complementary discriminatory practices and beliefs. The nature-based narrative has evolved over time and closely follows the contemporaneous conception of gender roles. This reality points to the fact that the nature-based narrative is not grounded in ultimate truth, but is the function of a

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[138] *Id.* at 52.

continuous cross-generational effort to justify the status quo. For example, in the 1870s women were seen as unfit to practice law.[139] Additionally, in the 1970s there was a pervasive belief that women were naturally unfit for military service.[140] Today, neither of these assertions appears natural. Social realities morph across time and therefore cannot be a function of certain fixed biological truths. This phenomenon serves to debunk the reasoning that gives credence to the nature-based narrative.

However, even if society continues to cleave to the truth of the premises of the nature-based narrative, these premises do not necessarily lead to the conclusion that the status quo is natural and does not need to be remedied. If proponents of the nature-based narrative claim that men and women are neurologically different, which causes them to exhibit divergent behavioral traits and skills, the current gender gap in both position and pay is not the necessary result. A proponent of the modern nature-based narrative, who believes that men and women are different-but-equal, can simultaneously believe that the gender gap can be remedied by valuing feminine traits in the workplace. Indeed, even if we accept that men and women differ in terms of strengths and weaknesses along gender lines, why should the conclusion be that only masculine traits are those fit for the highest-paying and most prestigious occupations?[141] If the natural traits traditionally attributed to men and women are equal in value, then why does the marketplace literally place less value on feminine traits by paying women a fraction of what men are paid across nearly all occupations?[142] The nature-based narrative ignores the alternative conclusion that can also flow from its own premises—that sex discrimination continues to play a role in maintaining workplace inequalities despite the supposed existence of inherent biological differences. Society can remedy the gender gap by valuing feminine traits in employees across occupations and by de-masculinizing employers' conception of the "ideal worker." This is a good place for activists and courts alike to begin breaking down the harmful effects of the nature-based narrative. Through showing that the gender gap is

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[139] In 1869, Myra Colby Bradwell was denied admission to the Illinois bar because she was a woman. Gwenn Hoerr Jordan, *"Horror of a Woman": Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence*, 42 AKRON L. REV. 1201, 1201 (2009). The Supreme Court of the United States affirmed the denial of her bar application. *See* Bradwell v. State, 83 U.S. 130, 139 (1872). Justice Bradley, in his concurring opinion, wrote: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

[140] Women were largely excluded from most military positions, besides nominal roles as nurses and administrators, until the advent of a handful of policy and legislative changes in the 1970s. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 96–97 (2008). However, it was not until the early 1990s that "Congress repealed the last statutory prohibition on women holding combat positions in 1993, and the military has opened a wide range of combat roles to women." *Id.* at 97. The prohibition was based largely on the belief that women were naturally unfit for military service: "Underlying this regime of separate status was a pervasive belief that women's true responsibilities were domestic and precluded full participation in public life, including military service." *Id.* at 96.

[141] *See supra* Part I.

[142] *See supra* Part I.

capable of remedy while remaining within the premises of the nature-based narrative, society is not required to immediately throw aside their closely held belief in the inherent difference between men and women. Thus, people are more likely to be receptive to this gradual change.

Even researchers like Simon Baron-Cohen, who are deeply ingrained in the nature-based narrative discourse, agree that masculine and feminine traits exist on a continuum.[143] Each person is uniquely structured with a variety of traits: "[N]ot all men have the male brain, and not all women have the female brain. In fact, some women have the male brain, and some men have the female brain."[144] However, Baron-Cohen argues that on average, women inherently retain a greater number of feminine traits whereas men inherently retain a greater number of masculine traits.[145] This Note seeks to disprove this assertion by maintaining that even if a correlation between a person's biological sex and gender-based traits exists, the two are not causally linked. Rather, the existence of one set of traits or the other is more likely explained by our highly gendered society. However, in order to remedy the gender gap within a society that adheres strictly to the tenets of the nature-based narrative, it may be beneficial to argue that, for now, society can maintain a tight link between biological sex and corresponding gender traits while also challenging existent inequalities.

In order to challenge workplace inequalities and begin exacting change from within our gendered culture, employers need to commit to a revaluation of masculine and feminine traits in the workplace. Currently, feminine traits are valued solely in the lower paying and less prestigious occupations traditionally delegated to women. Across most occupations and industries, employers have effectively masculinized their conception of the "ideal worker."[146]

The *Sears*[147] case provides an example of an employer that masculinized the "ideal worker." Men overwhelmingly dominated the departments that paid on a commission basis, and consequently men far out-earned their female coworkers. The selection criteria for the commission jobs was obviously written with a mind towards hiring men: "Illustrative questions asked if the applicant spoke in a low-pitched voice and participated in hunting, football, boxing, or wrestling."[148] Furthermore, the departments that paid on commission were those geared toward traditionally male interests (e.g. the hard lines of merchandise, including "hardware, automotive, sporting goods").[149] This division

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[143] *See* BARON-COHEN, *supra* note 16, at 2–3.
[144] *Id.* at 8.
[145] *Id.*
[146] *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001) (coining the term "ideal worker").
[147] EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). *See supra* Part II for a full analysis.
[148] WILLIAMS, *supra* note 146, at 14.
[149] *Sears*, 628 F. Supp. at 1306.

deterred women from choosing to work in these departments. Sears could have included more traditionally feminine traits that are still associated with successful salespeople—such as being communicative, helpful, and understanding of the customer's needs—in their hiring criteria for commission employees. Additionally, Sears could have offered a commissioned salary to employees in a wider variety of its departments.[150] Each of these actions would have diminished the statistical disparities between male and female employees at Sears, while also maintaining a link between women and femininity and men and masculinity. Thus, both proponents and opponents of the nature-based narrative could get on board with a similar restructuring of all workplaces.

Another example of masculinization of the "ideal worker" is found in the merits of the *Dukes v. Wal-Mart* case, in which a group of female employees filed a class action employment discrimination lawsuit against Wal-Mart in 2003.[151] In the plaintiffs' motion for class certification, the plaintiffs alleged that "[f]emale employees receive far fewer promotions to management than do male employees."[152] Furthermore, they alleged that Wal-Mart's lax policies afford unreasonably broad discretion to managers who are charged with making decisions on whom to promote. The "tap on the shoulder" promotion policy allows management's implicit biases to effectively masculinize the "ideal worker." For example, evidence shows that women employees were denied promotions due to the fact that they were not "masculine" enough. In one employee's deposition, she testified that a store manager gave a sporting good department manager position to a male because he "needed a man in the job."[153] Another employee testified in her deposition that she was denied a position as an Electronics Department Manager and was told that "it was a man's job that carried a lot of responsibility."[154] A second example is that the few women who held Wal-Mart management positions felt that the environment was "inhospitable" and "very closed" to female managers. Regularly scheduled management social events were hyper-masculinized; they included activities such as quail hunting and going to strip clubs.[155] The last example is that Wal-Mart employees had to be willing to relocate in order to be considered for a promotion into a management position.[156] The ability to relocate is a "masculine"

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[150] For example, it did not make sense for Sears to offer commission to sales employees working in the men's apparel and sporting goods departments, but not those working in the women's apparel and cosmetics departments. *See id.* (describing commission sales as including men's clothing and sporting goods but not including fashion, cosmetics, linens, women's clothing, or children's clothing).

[151] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

[152] Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities at 1, *Dukes*, 222 F.R.D. 137 (No. C 01-02252 MJJ).

[153] *Id.* at 7 n.5 (internal quotations omitted).

[154] *Id.*

[155] *Id.* at 13–14.

[156] *Id.* at 22.

trait. This requirement impacts a disproportionate number of women, who are more likely to be tied to the domestic sphere than are men.[157] The male-dominated management team systematically undervalued feminine traits by finding that overall women employees were unfit for management positions either because they had family obligations or because they did not need the job as much as men who were expected to support their families.[158]

A small tweak to a job description is sufficient to enhance the value of feminine traits and thereby de-masculinize the conception of the "ideal worker." Socially determined "feminine" traits are not exclusively useful in traditional domestic roles, such as mother, caretaker, or volunteer. Such "left-brain" behavioral skills attributed to women by the nature-based narrative include: empathy, communication, creativity, attention to detail, and command of language. These traits are extremely valuable across industries. In fact, Baron-Cohen wrote that one of the traits attributed to the female brain is the uncanny ability to read people's facial expressions.[159] Such a skill, if it exists, would be enormously valuable at any corporate negotiating table. Society can continue to view women as feminine and men as masculine, while also appreciating that an employer can extract great value from a workforce with a diverse set of skills.[160] Usually, a job will require a mixture of socially constructed masculine and feminine traits. For example, construction workers might be described as team-oriented and communicative (traditionally feminine traits), or they might be described as being physically strong (a traditionally masculine trait). However, the problem is that, many times, employers cast jobs in either purely masculine or feminine terms depending on which gender is supposed to fill the particular position. A more expansive definition of the ideal worker for a particular job, taking into account all of the necessary and valuable skills for that role, will lead to a narrowing of the occupational gender gap.

If employers continue to only value traits that are disproportionately associated with men, the result will be higher pay and an increased number of promotions for male workers to the detriment of female workers. In order for a revaluation of feminine traits in the workplace to actually occur, employers need to be deterred from masculinizing the ideal worker via the threat of Title VII liability.

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[157] *See* Reply Brief of Appellees and Cross-Appellants in Support of Cross-Appeal at 19, *Dukes*, 222 F.R.D. 137 (Nos. 04-16688, 1416720) ("The company's practice of requiring relocation across stores for salaried managers . . . creates a greater burden for women") (internal quotations omitted); *see also* WILLIAMS, *supra* note 146, at 20 (explaining that employers demand "an ideal worker with immunity from family work").

[158] Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities, *supra* note 152, at 16 n.9.

[159] *See* BARON-COHEN, *supra* note 16, at 32.

[160] *See* Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998) (arguing that a diverse workforce will "enhance creative problem solving, the invention of enterprising innovations, and the leveraging of different viewpoints and employee backgrounds").

Accordingly, the courts must be willing to find employers who engage in such conduct liable for unlawful employment discrimination under the auspices of Title VII's disparate impact theory. Because employers are unlikely to view women workers as exhibiting the requisite masculine traits of the ideal worker, a disproportionate number of women will likely be barred from entering certain fields and will fail to be promoted into management positions. In cases with similar fact patterns to those found in both *Sears* and *Dukes*, the courts can and should find employers liable for policies and practices that serve to masculinize the ideal worker because they have a disparate detrimental impact on women. Once employers and society are effectively told by the courts that these practices are "wrong," the socially determined value of masculine and feminine traits will begin to shift away from the prejudicial and discriminatory confines of the nature-based narrative.

VII. CONCLUSION

The nature-based narrative is a collection of cultural fictions whose pages have accumulated stories since the beginning of the human race. It is human nature to tell stories that create dichotomies and assign values to their parts—good or evil, superior or inferior. This is the method by which one group maintains and justifies dominance over another. This Note suggests a way to break down the nature-based narrative by exposing its stories for what they are: not grounded in nature, but rather grounded in socially constructed fictions. Thus, the current occupational gender gap is not fixed, but can be narrowed within a new paradigm.

I envision a future society free from the cyclical confines of the nature-based narrative—one in which the socially determined qualities of masculinity and femininity have become entirely unhinged from their corresponding biological sex. It is a society in which it is normal for women to rule the upper echelons of the corporate ladder, for fathers to stay at home with their children, and for parents to encourage their sons to go to ballet class and their daughters to play little league baseball. To reach this ideal state, we must strive to discard the strict masculine and feminine dichotomy and set the traits free that have been so neatly divided and compartmentalized within these social constructs.