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EMPLOYMENT DISCRIMINATION AND THE DOMINO EFFECT

LAURA T. KESSLER*

ABSTRACT

Employment discrimination is a multidimensional problem. In many instances, some combination of employer bias, the organization of work, and employees' responses to these conditions, leads to worker inequality. Title VII does not sufficiently account for these dynamics in two significant respects. First, Title VII's major proof structures divide employment discrimination into discrete categories, for example, disparate treatment, disparate impact, and sexual harassment. This compartmentalization does not account for the fact that protected employees often concurrently experience more than one form of discriminatory exclusion. The various types of exclusion often add up to significant inequalities, even though seemingly insignificant when considered in isolation. Second, Title VII's major theories of liability are premised on the assumption that employee characteristics, such as motivation and work performance, are independent of discrimination. Yet common sense and a significant body of social science research suggest that discrimination has significant effects on employees' work-related decisions and behaviors, such as the decision to apply for a job or promotion, as well as worker motivation and job performance. Applying the insights of sociology and social psychology, this Article examines the fundamental flaws of these assumptions that lie at the heart of Title VII. Race, sex, and other forms of group-based worker inequality result from a dynamic interaction among biased evaluations and decisions, structural features of the workplace, and employees' responses to these forms of discrimination. I label these workplace dynamics the "domino effect." Like an elaborately arranged set of falling dominoes, worker inequality often results from a series of discriminatory conditions or triggers that combine and interact in ways that, over time, may lead to large differences in employee status and pay due to their cumulative and mutually reinforcing nature. I propose and evaluate a set of legal interventions that would help courts and policymakers better address the domino-like dynamics that result in inequality for workers protected by Title VII.

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I. INTRODUCTION

Who is responsible for gender, race, and other stubborn patterns of worker inequality?¹ This question lies at the heart of all of the theories of liability under Title VII.² From disparate treatment to sexual harassment, from affirmative action to disparate impact, the ultimate question is whether worker inequality is due to some unlawful action by employers, for which employers must be held accountable, or due to factors outside employers' responsibility or control. When an employer calls Greg Baker for a job interview rather than Lakisha Jones, is it because Greg's resume suggests he is

1. By "inequality," I refer to institutionalized rather than individual inequality. All workers are inevitably "unequal" relative to their peers as a function of their qualifications, skills, seniority, or even chance events or opportunities. However, I use worker inequality here and throughout this Article to mean structured inequality between categories of workers on the basis of their identities such as race, sex, sexuality, national origin, religion, and disability that are systematically created, reproduced, and legitimated by sets of ideas. See CHARLES E. HURST, *SOCIAL INEQUALITY: FORMS, CAUSES, AND CONSEQUENCES* 3 (8th ed. 2012) (adopting a similar definition of inequality).

2. This Article concerns itself primarily with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012), which prohibits discrimination in employment on the basis of race, color, sex, national origin, and religion. Although not an exclusive remedy for workplace-discrimination, Title VII is the broadest-ranging federal employment nondiscrimination law. For the most part, this Article's analysis should also apply to other federal nondiscrimination laws, such as the Americans with Disabilities Act "regarded" as provision, see 42 U.S.C. § 12102(2)(A)-(C), as well as state employment nondiscrimination laws.

better qualified or because Lakisha's name is African-American-sounding?³ When a casino fires a female bartender after twenty years of service for refusing to wear make-up in compliance with its new grooming policy, is her termination illegal sex discrimination or a legally permissible decision based on male customer preference to have their drinks served by feminine women with sex appeal?⁴ Similarly, if a retailer of teen apparel decides to brand its "Authentic American Clothing"⁵ around the concept of racial and other types of exclusion, is it responsible when it routinely steers Hispanics, Asians, and African Americans to stockroom jobs,⁶ or is this a legitimate profit-related practice?⁷ When an ambitious female junior

3. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991-93 (2004) (studying race in the labor market and finding that identical resumes with white-sounding names receive fifty percent more callbacks for interviews than resumes with black-sounding names and that the racial gap is uniform across occupation, industry, and employer size); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1284 (discussing discrimination on the basis of having an African-American-sounding name).

4. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1105-06 (9th Cir. 2006) (en banc). Anne McGinley has written extensively about dress codes that sexualize women. See, e.g., Anne C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER, L. & POL'Y 257, 259-60 (2007).

5. See ABERCROMBIE & FITCH, <https://www.abercrombie.com/shop/us> (last visited June 5, 2017).

6. See Steven Greenhouse, *Clothing Chain Accused of Discrimination*, N.Y. TIMES, June 17, 2003, at A1. Abercrombie & Fitch ultimately settled a class-action lawsuit based on these facts for \$40 million in 2004 and agreed to alter its image by adding more blacks, Hispanics, and Asians to its marketing materials. See Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. TIMES, Nov. 17, 2004, at A4. However, the company ran into trouble again in 2008 when it refused to hire Samantha Elauf, a seventeen-year-old Muslim woman, because she wore a headscarf, which violated the clothing retailer's "Look Policy." See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015). The EEOC sued on her behalf, and the Supreme Court ultimately decided 8-1 in the plaintiff's favor. *Id.* at 2034.

7. Abercrombie & Fitch explicitly built its reputation around the concept of discrimination and exclusion. As its CEO Mike Jeffries explained in a 2006 *Salon* interview:

In every school there are the cool and popular kids, and then there are the not-so-cool kids Candidly, we go after the cool kids. We go after the attractive all-American kid with a great attitude and a lot of friends. A lot of people don't belong [in our clothes], and they can't belong. Are we exclusionary? Absolutely. Those companies that are in trouble are trying to target everybody: young, old, fat, skinny.

See Benoit Denizet-Lewis, *The Man Behind Abercrombie & Fitch*, SALON (Jan. 24, 2006, 10:16 AM) (alteration in original), <http://www.salon.com/2006/01/24/jeffries/> [<http://perma.cc/85S9-XJUR>]. Its stores sold t-shirts with sexist and racist messages such as "Who Needs a Brain When You Have These?" and "Do I Make You Look Fat?" (women's shirts) and "Wong Brothers Laundry Service — Two Wongs Can Make It White." *Id.* When asked about the controversial shirts, Jeffries responded, "I really don't care what anyone other than our target customer thinks." *Id.* The company refused to carry larger women's sizes. See Ashley Lutz,

investing partner in a Silicon Valley venture capital firm is not promoted, despite her investment successes, is it because she is a woman or because she is perceived as being ungrateful and difficult, and being a likeable “team player” is more important at the firm?⁸ At Wal-Mart, the most profitable retailer in the United States and the largest private employer in the world, women make up only thirty-three percent of management employees despite filling seventy percent of the retailer’s national sales workforce.⁹ Women are also paid less than men in every region.¹⁰ Is this because gender bias suffuses Wal-Mart’s culture? Or can these patterns be explained by a lack of women who are qualified and interested in management positions at Wal-Mart¹¹ and “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria.”¹² If an upscale restaurant has a reputation for not hiring female food servers, and this reputation discourages qualified women from applying for server positions, is this employment discrimination or the result of the women’s personal choices?¹³ If a fire department uses a weightlifting test as its primary physical selection procedure, is the lack of women firefighters due to the fire department’s hiring criteria or because the average man is stronger than the average woman?¹⁴ What if agility, balance, endurance,

Abercrombie & Fitch Refuses to Make Clothes for Large Women (May 23, 2013, 10:36 AM), <http://www.businessinsider.com/abercrombie-wants-thin-customers-2013-5> [<https://perma.cc/N9Q7-UR87>]. It also reportedly incinerated faulty clothing rather than donate it to charity and derided poor people. See Ella Alexander, *Would You Rather Go Naked Than Wear Abercrombie?*, VOGUE (May 16, 2013), <http://www.vogue.co.uk/article/abercrombie-fitch-homeless-campaign-launched-by-greg-karber> [<https://perma.cc/CW6R-PVXR>] (“Abercrombie & Fitch doesn’t want to create the image that just anybody, poor people, can wear their clothing Only people of a certain stature are able to purchase and wear the company name.”). Successful lawsuits, public outcry, and the resulting market tumble eventually led to a total makeover of the company’s brand. See Elizabeth Holmes, *Abercrombie & Fitch Tries on a New Attitude: Friendly*, WALL ST. J. (Oct. 12, 2016), <https://www.wsj.com/articles/abercrombie-fitch-tries-on-a-new-attitude-friendly-1476291100> (discussing the company’s 2013 anti-bullying campaign and quoting a top executive as stating “[w]e are a positive, inclusive brand, with a nice sensibility, very different from what they encountered in the past”).

8. See Brief for Respondent at 3, *Pao v. Kleiner Perkins Caufield & Byers LLC*, (No. CGC-12-520719), 2012 WL 6929868, at *3-4; see also Terry Collins, *Ellen Pao Trial Ends on Plea for Gender Equality in the Tech Industry*, CNET (Mar. 25, 2015, 4:25 PM), <http://www.cnet.com/news/ellen-pao-trial-ends-on-plea-for-gender-equality-in-the-tech-industry/> [<https://perma.cc/PJM4-W3S8>].

9. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 370 (2011) (Ginsburg, J., dissenting).

10. *Id.*

11. *Id.* at 356 (Scalia, J., majority opinion); see also *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 330 (7th Cir. 1988) (adopting a similar “lack of interest” theory of women’s systemic inequality).

12. *Wal-Mart Stores, Inc.*, 564 U.S. at 355.

13. See *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1268 (11th Cir. 2000).

14. See Delia Roberts et al., *Current Considerations Related to Physiological Differences Between the Sexes and Physical Employment Standards*, 41 APPL. PHYSIOL. NUTR.

aerobic capacity, speed, and teamwork are as important to successful firefighter performance as upper-body strength?¹⁵ Should Title VII make a fire department liable for sex discrimination if it emphasizes upper-body strength over these other important qualities in its selection criteria? If a female postal service driver becomes pregnant and her doctor advises her not to lift more than twenty pounds, her employer forces her on unpaid leave, and she loses her medical insurance, is this sex discrimination or simply the employee's unfortunate problem, since she temporarily cannot meet the job's requirements?¹⁶ If an African-American dining services employee at a university is the subject of ongoing racial harassment by a white coworker, is the university vicariously liable for the harassment?¹⁷ Or, rather, is this behavior an unauthorized act of the white employee for which the university is presumptively not responsible unless the victim complains and the university negligently fails to respond?¹⁸ What if, fearing for her job, the victim does not complain at all,¹⁹ or she complains, but to the wrong person (for example, to a mid-level supervisor or a union representative who does not have the authority to discipline or fire the harasser)? Should this create liability or is the matter, again, not the employer's responsibility?²⁰

METAB. S108, S110 (2016) ("Women have approximately 70%-75% of the lower body strength and 40%-60% of the upper body strength than that of men . . .").

15. See Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761, 793-97 (1986).

16. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015); see also Consent Decree, *United States v. Davie*, No. 15-cv-60395 (S.D. Fla. Feb. 25, 2015), <https://www.justice.gov/file/344841/download> [<https://perma.cc/K7DX-GYQ3>] (resolving allegations of pregnancy discrimination arising from denial of light duty to a pregnant firefighter despite her medical and physical needs while routinely granting other non-pregnant firefighters' requests for light duty for non-work-related injuries).

17. See *Vance v. Ball State Univ.*, 570 U.S. 421, 423 (2013).

18. In these circumstances, the university is not vicariously liable, according to a majority of the Supreme Court, because the white coworker did not have power to take tangible employment action against the African-American plaintiff, that is, to hire or fire her. *Id.* For criticisms of the majority's narrow, formalistic definition of vicarious liability, see Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315 (2014); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983 and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 772 (1999); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 89 (1995).

19. See, e.g., *McKinnish v. Brennan*, 630 F. App'x 177, 184 (4th Cir. 2015) (holding that an employer was not liable for sexual harassment, because the plaintiff did not report her supervisor's explicit texts and her subjective fear of retaliation did not excuse her failure to report).

20. See, e.g., *Chaloult v. Interstate Brands Corp.*, 540 F.3d 64, 75-76 (1st Cir. 2008) (holding that the plaintiff must lose her harassment claim even though a supervisor knew about the harassment, because she should have reported it to a higher-level supervisor).

Each of these examples is drawn from a recent, real-world employment discrimination case. As they demonstrate, every instance of alleged employment discrimination can be conceptualized as a choice between an illegal “inside” cause of worker inequality and a legal “outside” cause of worker inequality. Economists and other social scientists describe this divide in terms of “demand side” and “supply side” explanations of worker inequality.²¹ Broadly, demand side explanations of worker inequality focus on discrimination occurring inside workplaces such as intentional discrimination, unconscious biases, and neutral policies and practices that systematically disadvantage workers protected by employment discrimination statutes.²² Supply side theories, in contrast, attribute inequality to workers’ personal preferences, qualifications, and performance.²³ Supply side factors include, for example, the absence of requisite job skills; differences in education, training, or motivation; culture and socialization; and choices that employees make in light of family obligations and other personal circumstances.

The major theories of employer liability under Title VII sharply differentiate between demand side and supply side causes of worker inequality. For example, Title VII disparate treatment claims are premised on the assumption that an adverse employment action is either because of an employer’s illegal consideration of protected characteristics (such as race, sex, or national origin) or for a “legitimate, nondiscriminatory reason.”²⁴ Within this analytical framework, there is no room to consider if discrimination may have negatively impacted the “legitimate, nondiscriminatory” basis for an employer’s decision, such as an employee’s job performance.²⁵ That is, by its very definition, the legal concept of disparate treatment ignores the social structure in which prejudice, bias, and discrimination operate.

21. See Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 248 (1993) (discussing the distinction between supply side and demand side drivers of worker inequality).

22. See, e.g., *id.* (sex segregation).

23. See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* 30-39, 178-79, 219 (1978) (gender socialization); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 269-73 (1992) (sex roles and human capital); DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* 146-64 (2005) (women’s role as family caregivers, lack of mobility, and relational, non-competitive nature); Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S55 (1985) (human capital); Daniel Bell, *On Meritocracy and Equality*, 29 PUB. INT. 29, 37 (1972) (individual talent and achievement).

24. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

25. Indeed, although the burden is light, showing “satisfactory job performance” is commonly incorporated as an element in the prima facie case for plaintiffs alleging disparate treatment in cases involving demotion, promotion, or termination. See, e.g., *Webb v. Level 3 Commc’ns, LLC*, 167 F. App’x 725, 728 (10th Cir. 2006).

To be sure, some aspects of Title VII doctrine acknowledge that demand side and supply side explanations for worker inequality overlap and are difficult to neatly separate from one another. For example, the mixed-motive proof structure suggests that both demand side factors (i.e., discriminatory considerations of protected characteristics) and supply side factors (i.e., legal considerations of employee qualifications or performance) may concurrently play a role in an employment decision, with the ultimate inquiry focusing on which factor predominated the decision.²⁶ Similarly, Title VII's disparate impact theory of liability recognizes that facially neutral employer policies or practices may so systematically and unjustifiably stack the deck against protected employees that liability for discrimination should attach. As such, the disparate impact theory recognizes that structural aspects of the workplace negatively affect individual workers.²⁷ And the hostile work environment theory of liability defines unlawful discrimination to include a work environment severely and pervasively infected with discriminatory, offensive conduct, such as threats, intimidation, and ridicule, even in the absence of any formal personnel action, because of the exclusionary effects of such treatment.

It is easy to point to these examples and conclude that Title VII is at least reasonably sensitive to the interplay between demand side and supply side drivers of worker inequality. However, a close study of Title VII doctrine reveals a decidedly less positive picture. Courts routinely assume a sharp distinction between demand side and supply side explanations of worker inequality when analyzing and applying Title VII. For example, although the mixed-motive theory recognizes that both legal and illegal considerations may factor into an employment decision, the mixed-motive theory still assumes the absence of any causal relationship between the legal considerations (e.g., employee motivation, performance, qualifications) and illegal considerations (e.g., bias on the basis of protected characteristics).²⁸ When considering systemic disparate treatment and disparate impact claims, courts often attribute stark racial and gender disparities in pay and workforce composition to external causes, such as the absence of diversity in the applicant pool,²⁹ with little regard for the powerful role of employers in influencing the labor markets in which

26. See Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-5(g) (2012); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-94 (2003).

27. See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652-62 (2001) (providing a classic account of how Title VII, particularly disparate impact liability, works as an accommodation mandate when it invalidates facially neutral rules that disproportionately burden particular groups of employees).

28. See *infra* Section III.B.1.

29. See *infra* Section III.B.2.

they operate.³⁰ Finally, the Supreme Court has carved out a broad affirmative defense to employer liability for sexual harassment that, in practical effect, requires victims of harassment to report in virtually all circumstances or risk losing their claims.³¹ This doctrine neglects the power dynamics and economic vulnerabilities that lead victims not to report harassment.³² By defining discrimination and employee behavior as mutually exclusive phenomena, sexual harassment law, like Title VII's other theories of liability, ignores the social patterns of discrimination that shape the employees subject to them.

Mirroring the bifurcated approach in Title VII doctrine, much social science research and public discourse on employment discrimination defines and constructs the issue as a question of whether demand side or supply side phenomena are responsible for race, gender, and other identity-based patterns of worker inequality, with little attention to the causal interrelationships between demand side and supply side factors. Consider, for example, the recent public debate between Facebook CEO Sheryl Sandberg and former Princeton Professor Anne-Marie Slaughter about why women cannot rise to the top professionally. In her book, *Lean In*,³³ Sandberg emphasizes the ways that women lower expectations for themselves in the workplace; she

30. Moreover, class-action disparate treatment and disparate impact cases represent only a small portion of the employment discrimination cases filed in any event. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 112 (2009); John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 (1991).

31. See *Vance v. Ball State Univ.*, 570 U.S. 421, 430-31 (2013). *Vance* held that an employer can be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to effect a "significant change in employment status of the victim, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* The practical result is that employees can now only win a harassment case involving all but the most senior managers by proving negligence. *Id.* at 2452, 2448-52. This typically requires the victim to make a formal complaint, ideally immediately; provide all details; agree to cooperate in any investigation; and refrain from asking that the harasser not be disciplined. See L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?* 82 IND. L.J. 711, 733 (2007).

32. See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 312-25 (2001) (discussing studies on the reasons that the vast majority of harassment victims do not report, including fears that they will lose their jobs, that they will not be believed, and that it will not help their situations); Hébert, *supra* note 31, at 724-42 (identifying discomfort and embarrassment; fear of being labeled as a troublemaker; not being believed; threats of termination; fear of retaliation; and concerns about physical safety, among other reasons, for not reporting sexual harassment); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1244-45 (2006) (discussing both that harassers disproportionately target women of color because of their heightened vulnerability in the workforce and that women of color are less likely to report sexual harassment than are white women).

33. See SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013).

urges women to strive for leadership roles despite discriminatory challenges. Her analysis emphasizes individual women's responsibility for overcoming discrimination.³⁴ In contrast, Anne-Marie Slaughter's *Atlantic Monthly* article³⁵ and subsequent book on balancing work and family³⁶ focus on governmental policies and structural features of workplaces that result in inequality for family caregivers (still primarily women in our society).³⁷ Although the differences in Sandberg's and Slaughter's positions are perhaps more a matter of emphasis or degree, which in turn influences what each commentator sees as the appropriate remedy for gender-based economic inequality,³⁸ the media has held up these two prominent influential women as opposing voices.³⁹ There is a similar "either/or" framing in research and public discourse on the gender pay gap, with proponents of wage equity attributing the wage gap to discrimination and wage-gap deniers emphasizing supply side human capital factors, such as education, experience, and individual worker "choices."⁴⁰

As these examples demonstrate, Title VII's major legal doctrines, as well as public debates about employment discrimination, regard the three prevailing explanations of worker inequality—individual employee choices and characteristics, biased decisionmaking, and structural features of the workplace—as distinct and independent phenomena. The result is that our country's most important federal employment discrimination law is oftentimes unable to redress employment discrimination as it actually manifests inside workplaces. Further, by failing to recognize the dynamic, interactive processes generating worker inequality, legal and political discourses on discrimination mask the pervasive and powerful role of institutions in creating inequality.

34. *Id.* at 142-58.

35. See Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC MONTHLY, July/Aug. 2012.

36. See ANNE-MARIE SLAUGHTER, UNFINISHED BUSINESS: WOMEN MEN WORK FAMILY (2015).

37. *Id.* at 119-25.

38. For Sandberg, the solution is women's ambition, confidence, and working harder; for Slaughter, it is changing the way that companies and government benefits work. Compare SANDBERG, *supra* note 33, at 160-72, with SLAUGHTER, *supra* note 36, at 207-08.

39. See, e.g., Jodi Kantor, *A Titan's How-To on Breaking the Glass Ceiling*, N.Y. TIMES (Feb. 21, 2013), <http://www.nytimes.com/2013/02/22/us/sheryl-sandberg-lean-in-author-hopes-to-spur-movement.html>; Patricia Sellers, *Slaughter v. Sandberg: Can Women Have It All?*, FORTUNE (June 25, 2012), <http://fortune.com/2012/06/25/slaughter-vs-sandberg-can-women-have-it-all/> [<https://perma.cc/MB79-SX3W>].

40. See Rachel Greszler & James Sherk, *Equal Pay for Equal Work: Examining the Gender Gap*, HERITAGE FOUND. (May 22, 2014), https://thf_media.s3.amazonaws.com/2014/pdf/IB4227.pdf ("Aggregate differences in pay reflect different choices made by individual men and women.").

Many legal scholars have addressed the stubborn nature of discrimination and the often complex and nuanced ways that it manifests in the workplace. For example, many have discussed the unintentional and unconscious nature of much discrimination, emphasizing the mismatch between this reality and disparate treatment law.⁴¹ Others have examined the organizational context of work as a driver of inequality, focusing, for example, on how organizational practices, such as decentralized, subjective decisionmaking, the creation of non-diverse work groups, and other features of organizational design and culture may influence the occurrence of discrimination.⁴² Still other scholars have documented how employees may respond to discrimination with strategies aimed at dispelling stereotypes that may attach to their identities.⁴³ Taken together, this substantial body of scholarship has led to considerable advances in our understandings of the dynamics of discrimination in the modern workplace. However, few scholars have sought to comprehensively theorize the interrelationships among all three drivers of inequality: bias, structure, and employee responses to these phenomena.

In this Article, I try to juggle all three balls at once, so to speak, that is, to re-theorize Title VII doctrine to account for the interplay between organizational structures and discriminatory bias, on the one hand, while also considering how employees commonly respond to these demand side forms of discriminatory exclusion. This analysis reveals that worker inequality is often the result of the interplay between supply side and demand side processes. That is, in a broader respect than has generally been appreciated, there is a dynamic relationship among individual employee characteristics and preferences, biased decisionmaking, and structural barriers to

41. See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

42. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 104-08, 145-48 (2015) (documenting how discriminatory bias is perpetuated by the structures, practices, and dynamics of workplace organizations and groups); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 650 (2005) (explaining how organizational choices can both facilitate and constrain the development of discriminatory work cultures) [hereinafter Green, *Work Culture*]; Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 L. & CONTEMP. PROBS. 199, 215-20 (2016) (discussing the “extensive literature” demonstrating that implicit bias can be controlled through institutional interventions); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-61 (2001) (describing “second generation” forms of bias as those that result from patterns of interaction, informal norms, networking, mentoring, and evaluation that produce differential access and opportunity).

43. See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2003); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* *passim* (2006).

worker equality. For example, individuals' career aspirations and job performance are shaped by both biased employment decisions and the organization of work. Similarly, organizational arrangements can serve to exacerbate or dampen discriminatory bias. Biased decisionmaking and structural impediments to equality occur simultaneously and combine and interact in dynamic ways that are internalized by individual employees, affecting their "choices" and work performance.⁴⁴ In this view, discrimination is not an act or set of acts (as contemplated by disparate treatment and systemic disparate treatment) or a neutral policy with discriminatory effects (as contemplated by disparate impact). Rather, discrimination is more like a chain reaction involving individual worker behavior, biased decisions, and the organization of work that, through a process of positive feedback, produces and amplifies inequality. I refer to this process as the "domino effect."

In its most literal sense, the domino effect refers to the physics of a row of toppling dominos.⁴⁵ However, the concept has come to be used in a variety of contexts either literally, to refer to an observed series of physical collisions, or metaphorically, to describe causal linkages within systems such as computer networks,⁴⁶ global finance,⁴⁷ or politics.⁴⁸ The metaphorical meanings of the term have varied widely; at the most basic level, the idea denotes that a small event may have unanticipated, far removed effects.⁴⁹ A broader

44. Although beyond the scope of this project, the social supports available to individuals, as well as gendered dynamics of families, also have significant impacts on an individual's labor market position. See Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313, 322-24 (2007).

45. See D.E. Shaw, *Mechanics of a Chain of Dominoes*, 46 AM. J. PHYSICS 640 (1978).

46. See Zhongqiang Chen et al., *Malware Characteristics and Threats on the Internet Ecosystem*, 85 J. SYSTEMS & SOFTWARE 1650, 1659 (2012); Cassandra M. Kirsch, *Science Fiction No More: Cyber Warfare and the United States*, 40 DENV. J. INT'L. L. & POL'Y 620, 645-46 (2012).

47. See THE FINANCIAL CRISIS INQUIRY COMMISSION, *THE FINANCIAL CRISIS INQUIRY REPORT* 301 (2011); Hans Degryse et al., *Domino Effects from Cross-Border Exposures*, in *FINANCIAL CONTAGION: THE VIRAL THREAT TO THE WEALTH OF NATIONS* 311-19 (Robert W. Kolb ed., 2011).

48. For example, after World War II, the idea of the "domino theory" emerged to express the idea that the conversion of a free, noncommunist nation into a communist state would trigger a chain reaction in neighboring countries. See DUNCAN TOWNSON, *A DICTIONARY OF CONTEMPORARY HISTORY* 110 (1999). The domino theory became the basis for U.S. foreign policy in the Vietnam War and has been used to describe the fall of communist regimes in Eastern Europe after 1989. *Id.* For a fuller treatment of the domino theory, see FRANK NINKOVICH, *MODERNITY AND POWER: A HISTORY OF THE DOMINO THEORY IN THE TWENTIETH CENTURY* (1994).

49. This conception of the domino effect is similar to "the butterfly effect," used to describe the phenomenon, originating in chaos theory, whereby a minute localized change in a complex system can have unpredictable, large effects elsewhere. See Edward N. Lorenz, *Deterministic Nonperiodic Flow*, 20 J. ATMOSPHERIC SCI. 130 (1936); Edward N. Lorenz, *Pro-*

conception, which I employ in this Article, is that a seemingly small and insignificant incident can mushroom into a much larger, comprehensive problem. As I will argue, in the employment context, relatively small and insignificant discriminatory acts, policies, or work structures oftentimes initiate a chain reaction resulting in substantial and materially adverse forms of worker inequality, such as unequal pay and status. In addition to highlighting this process, which has been underexplored in legal scholarship, a key contribution of this Article is to examine how employees' responses to discrimination are important to understanding the production of inequality.

It is important to note at the outset that I do not claim to definitively describe or predict workplace domino effects with certainty. Although social scientists have an ever-deepening understanding of the processes of stereotyping, prejudice, and discrimination,⁵⁰ they have not arrived at any definitive theory. The problem of hierarchy and inequality in the workplace is multifaceted. Moreover, the precise character and manifestations of the domino effect are likely to differ across occupational and organizational contexts. Still, as I develop more fully below, social science research employing a wide range of methodologies in a wide range of work settings over a long period of time has consistently and reliably identified institutional and social processes by which inequality is created and maintained by organizations. This extensive body of research demonstrates that demand side and supply side drivers of worker inequality are not independent of one another. My objective is to begin a conversation. How might Title VII's major theories of liability be modified, and what might a larger social policy agenda look like, were we to reject the following two flawed premises of Title VII: First, that inequality is a result *either* of the characteristics and preferences of individual workers *or* biased decisionmaking and organizational-level systems of stratification; and second, that there is no causal relationship among these phenomena?

An immense reform agenda emerges when we consider the implications of the domino effect for Title VII. For example, the assumed independence of an employee's work performance from discriminatory employer actions in disparate treatment law becomes incoherent once we account for the domino effect. This Article

fessor of Meteorology, Predictability; Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?, Address at the American Association for the Advancement of Science, 139th Meeting (Dec. 20, 1972), http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf.

50. Stereotypes are overgeneralized beliefs about individuals based on their group membership. Prejudice has a more affective or emotional component and is defined as biased attitudes. Discrimination is a behavioral response to perceived difference (i.e., unfair treatment). See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel.T. Gilbert et al. eds., 4th ed. 1998).

represents an effort to provide the initial empirical and theoretical groundwork for the larger project. As a concrete starting point, this Article focuses on two related policy contexts: sex-based employment discrimination and worker inequality arising from work and family conflict. These are especially fruitful domains of legal concern to examine the workplace domino effect.

Lack of paid family leave, inflexible and unpredictable work schedules, insufficient paid sick leave, the absence of accommodation for the physical limitations of normal pregnancy,⁵¹ and long work hours are common features of American workplaces that make it difficult for employees who become pregnant or have significant family responsibilities to perform as ideal workers.⁵² At the same time, pregnancy and family care responsibilities can make an employee's sex and gender more salient in the workplace, triggering animus or bias by coworkers and managers. Once either or both of these processes are set in motion, a chain reaction often ensues. In many instances, what may have begun as inconsequential, isolated, or at least surmountable differences in employee availability or energy become the justification for differential treatment, whether it be differences in mentoring, training, and evaluation, for example, or more serious consequences, such as failure to promote or even the decision to terminate an employee. That is, structural barriers, bias, and employee responses to discrimination often combine and reinforce one another so as to produce substantial worker inequality.

Because these discriminatory dynamics are especially acute in the context of work and family conflict, this is a fruitful area of employment discrimination law to illustrate the operation of the domino effect. Specifically, I use this particularized form of gender discrimination as an example to illustrate how discrimination commonly plays out inside work organizations, the effects it has on individuals, and how it might be challenged. However, my extended focus on gender discrimination and work and family conflict is not

51. There is guarded optimism that the Supreme Court's decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), may result in more pregnant workers receiving needed accommodations for common pregnancy-related physical limitations. However, the evidentiary burden is still quite high. See discussion *infra* note 80. There is no right under federal law to receive accommodations for normal pregnancy absent proof of disparate treatment. See Deborah A. Widiss, Gilbert Redux: *The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 964 (2013). For an illuminating history of the struggles for "meaningful, rather than formal, reproductive choice" leading to the passage of the Pregnancy Discrimination Act, see Mary Ziegler, *Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 274 (2015).

52. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 *passim* (2001).

meant to suggest that the domino effect is limited to this form of discriminatory exclusion. For this reason, many of the empirical studies and cases I discuss address race and other types of discrimination, and this Article's analysis should be useful to scholars and advocates working to remedy discrimination across identities and contexts. Its contributions operate on three levels: doctrine, theory, and methodology.

First, at its most basic level, this Article aims to assist plaintiffs' lawyers by distilling complicated processes of discrimination into a simple, familiar, concept that can be used to frame Title VII litigation. Most people—including judges and jurors—have at some point in their lives witnessed the spectacle of dominos toppling in a cascade. The analytical framework introduced in this Article can also, ideally, persuade courts to update and reformulate Title VII doctrine to better account for the dynamics of contemporary discrimination.

Second, on a broader theoretical level, this Article demonstrates that the conceptual bifurcation of the causal mechanisms of worker inequality into supply side or demand side categories is, in and of itself, a political construct disguising the role of institutions and markets in producing inequality. Orthodox economic theory, struggle as it may, provides the basic template for this binary. According to this strain of economics, sustained observed differences in economic outcomes between groups are due to a deficiency in the group experiencing the inferior outcomes.⁵³ Economists refer to the deficiency as one in human capital. Sometimes the deficiency is said to be associated with poor schooling opportunities, other times with culture, socialization, or motivation. But the thrust of the argument is to absolve organizational and market processes of a role in producing the differential outcome; the inherent deficiency is theorized to occur in pre-market or extra-market processes. This framework is woven into the very fabric of Title VII. Every major proof structure under Title VII is built on this template, setting up a conflict between alleged employee deficiencies, on the one hand, and rational employer decisions and efficient work structures, on the other. In this view, the trier of fact only needs to choose between mutually exclusive explanations for bad worker outcomes. As this Article demonstrates, this choice is overly simplistic, as even the most basic forms of discriminatory exclusion, such as individual disparate treatment, involve an interplay of demand side and supply side factors.

53. William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63, 83 (1998).

Finally, this Article offers a methodological innovation. I assert that a fruitful way to contest the pervasive influence of orthodox economic theory on employment discrimination law is to marshal the insights and theories from social sciences that take the “social” part of their mission seriously.⁵⁴ Sociology, social psychology, and sociologically-grounded business management research on work organizations, in particular, are promising fields for challenging neoclassical economic foundations of employment discrimination law, because they focus on organizational and societal-level systems of social stratification. So many of Title VII’s theories of liability and legal doctrines focus on the individual—that is, whether and to what extent the individual employee is to blame for his or her predicament—rather than the interplay between organizational structures and individual agency. Disciplines and methodologies that attend to the social dynamics inside work organizations and the institutional practices that shape employee behavior offer an antidote to the inordinate focus in Title VII doctrine on individual employees’ education, qualifications, training, merit, performance, and personal choices.

Sociological and organizational-level understandings of worker inequality can also serve as an important supplement to scholarly work on unconscious bias in the workplace. In the past fifteen years, the science of implicit cognition has achieved a firm foothold in the legal field of discrimination law.⁵⁵ Specifically, many legal scholars

54. For a longer explication of this strategy, see Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915, 929-30 (2008).

55. See, e.g., Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 477 (2007); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 1-2 (2006); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1893-94 (2009); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1241 (2002); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 945-46 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005); Tanya Katerí Hernández, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 L. & INEQ. 309, 310-11 (2014); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969 (2006); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012) [hereinafter Kang, *Courtroom Bias*]; Kang, *Trojan Horses*, *supra* note 41, at 1490; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1064 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 998-1003 (2006); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007); Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 418 (2000); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1093 (2008); Reshma M. Saujani, *“The Implicit*

find special promise in a particular line of research in cognitive psychology that measures bias with the Implicit Association Test or “IAT.”⁵⁶ The IAT assesses the existence and strength of racial, gender, and other biases by measuring “response latency,” for example, how long it takes to make a stereotype-consistent association, such as “women” and “crochet,” as compared with the time needed to make a stereotype-inconsistent association, such as “women” and “strong.” Scholars who promote the IAT emphasize the central role of unconscious bias in employer decisions.⁵⁷

Unconscious or “implicit” bias refers to prejudiced judgments that may affect our understandings, actions, and decisions.⁵⁸ It is a type of cognitive shortcut that occurs when our brains make quick judgments and assessments of people and situations, informed by our background, cultural environment, and personal experiences. Many legal scholars see this brain science as having the potential to transform how we understand and address discrimination throughout the law, because so much discrimination law requires proof of intent.⁵⁹

Certainly, the science of implicit social cognition has been of some assistance in educating judges and policymakers about the nature and prevalence of bias, with important victories for this intellectual movement.⁶⁰ Still, there are limitations to the utility of this science as a tool for achieving progressive legal change in the employment

Association Test”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 397 (2003); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2064-65 (2002); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005).

56. See *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> [<https://perma.cc/N3XJ-DBF5>]. For a comprehensive history of the development of the field of implicit cognition, and its use in legal projects, see Greenwald & Krieger, *supra* note 55.

57. See sources cited *supra* note 55.

58. For example, a manager who sincerely believes that women and men are equally suited for a particular job may nevertheless unconsciously associate women with the domestic sphere, and this implicit association might lead him to hire equally qualified men over women.

59. See sources cited *supra* note 55. The seminal contribution is Linda Hamilton Krieger’s 1995 law review article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*. See Krieger, *supra* note 41.

60. See, e.g., *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 775-76, 778 (E.D. Wis. 2010) (recognizing and relying on implicit bias cognitive studies in reaching a holding that an employee established a prima facie case of race plus gender discrimination when the employer denied the employee a raise on the basis of highly subjective evaluation criteria); see also Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRd”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1353-54 (2008) (noting the important role of implicit bias in the EEOC’s and several federal courts’ understanding of employment discrimination against family caregivers).

context. Most research in the field focuses on individual-level explanations of worker inequality and, therefore, may lack sufficient power to challenge conservative economic and political theories that similarly locate the cause of worker inequality inside the individual.⁶¹ In addition, deploying implicit bias research in law reform projects has had the unforeseen consequence of perpetuating the misconception that biased decisionmaking cannot be controlled, and consequently, the belief that employers cannot reasonably be held accountable for the resulting discrimination and inequality.⁶² Worse, it risks sending the message that stereotyping is okay, since the theory teaches that everyone has bias. This may make discrimination seem socially acceptable and lessen the motivation to avoid it. Given these risks and limitations, the project of achieving equality in the workplace for protected groups requires a more robust account of the interactions between bias and structural discrimination than advocates of implicit bias research in law sometimes propose.⁶³ Sociology, social psychology, and related fields in law and society, such as new institutionalism and new legal realism, may help here, because these fields contribute to our understandings of how organizational- and societal-level systems of social stratification

61. Moreover, many courts have remained skeptical of implicit bias evidence and have refused to find that discrimination existed without a showing of intent. *Cf.* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011) (rejecting relevance of applied social framework evidence in the context of class action) (“[L]eft to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”); *see also* Krieger & Fiske, *supra* note 55, at 1034 (“Title VII’s operative text prohibits these subtle forms of discrimination, but the science of implicit stereotyping has barely begun to influence federal disparate treatment jurisprudence. Indeed, from a behavioral realist standpoint, in many circuits, judicial conceptions of intergroup bias have actually regressed over the past two decades, even as psychological science has surged toward an increasingly refined understanding of the ways in which implicit prejudices bias the social judgments and choices of even well-meaning people.”); Christopher Cerullo, Note, *Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 *FORDHAM L. REV.* 127, 146-54 (2013) (discussing cases rejecting implicit bias claims).

62. *See* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 *LEWIS & CLARK L. REV.* 919, 940-41 (2016) (suggesting that stereotyping theory may be more useful than implicit bias in framing employment discrimination cases); Selmi, *supra* note 42, at 215-20 (critiquing proponents of implicit bias for assuming that implicit bias is uncontrollable and for failing to acknowledge that repeated behavior, in the face of information that one’s behavior is discriminatory, is not implicit).

63. *See generally* Kessler, *supra* note 44 (discussing a broad array of institutional arrangements and social structures that contribute to worker inequality, including the educational system, gender dynamics in families, welfare law, and tax law); *cf.* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 1 (2008) (concentrating on “the structures our society has and will establish” rather than individuals or defined identity groups, in an effort to move “toward a more substantive vision of equality.”).

facilitate inequality.⁶⁴ To succeed in developing a more integrated account, however, legal scholars must overcome the presumption that unconscious bias and structural contributors to worker inequality are unrelated to one another, thereby reinforcing the very same limiting frameworks reflected in legal doctrine and embraced by courts. Employment discrimination scholarship is roughly divided into two subfields, one concentrating on unconscious bias and the other on the institutional nature of discrimination. It would be beneficial to the field of employment discrimination law to develop an account of the interplay among different processes of discriminatory exclusion in the workplace. Attending to the dynamic interplay among individuals, organizations, and society in producing inequality is likely to lead to a better understanding and reduction of gender-based and other forms of employment discrimination.⁶⁵

Part II of this Article offers an extended fictional hypothetical involving work and family conflict, gender and sexuality discrimination, and sexual harassment to illustrate the workplace domino effect. Through a legal analysis of the factual problem presented, Part II then demonstrates how ill-equipped discrimination law is to identify and remedy the common domino-like processes that cause substantial worker inequalities.

Part III examines the prevailing conceptual frameworks that social scientists and courts use to explain and understand gender-based worker inequality. Specifically, Section III.A. reviews social science research on gender-based employment discrimination. This review demonstrates that social scientists tend to view women's work-related choices, gender bias, and structural features of the workplace as mutually exclusive phenomena. Section III.B. turns to the analytical frameworks that guide how employment discrimination cases are litigated, including disparate treatment, systemic disparate treatment, and disparate impact. It shows how these frameworks also, almost uniformly, assume that employee's choices and behaviors, employer bias, and exclusionary work structures are independent drivers of worker inequality.

Part IV sketches a more accurate, multidimensional account of the dynamic processes by which worker inequality is created and reinforced inside work organizations. This discussion draws from a variety of fields, primarily sociology and social psychology, but also

64. See Barbara F. Reskin & Denise D. Bielby, *A Sociological Perspective on Gender and Career Outcomes*, 19 J. ECON. PERSP. 71, 71 (2005) (explaining how the sociological and economic approaches to research on gender and career outcomes differ).

65. My comments here are not intended as a broad indictment of implicit bias research or its use in discrimination law. However, productive work remains to be done in connecting this research with the organizational literature discussed in this Article.

from business management research on organizations, new institutionalism, feminist legal theory, and critical race theory. The research reviewed in Part IV demonstrates that various processes of discrimination, such as biased decisionmaking and structural impediments to equality, occur simultaneously and combine and interact in ways that amplify discrimination, oftentimes with the aid of a process of psychological internalization of its targets, resulting in tangible harm to employees.

Part V explores a number of interventions that follow from this Article's main empirical and theoretical contributions on the workplace domino effect. Specifically, Section V.A. discusses voluntary measures that employers can adopt to disrupt the feedback loops among processes of discrimination documented in this Article. These voluntary measures are evidence-based and therefore should be effective if there is a commitment to preventing and remedying discrimination. In Section V.B., recognizing that employers' commitment to antidiscrimination is oftentimes lacking without the risk of liability, I explore litigation strategies and logical revisions to several core doctrines in Title VII legal jurisprudence that would allow the law to better address the workplace domino effect.

In formulating solutions, I proceed from two working commitments: First, there is a grave mismatch between what we know from social science about how discrimination operates today and the model we inherited from fifty years ago, which does not account for the dynamic interaction among employee choices, bias, and structural features of the workplace that produce inequality. This mismatch goes well beyond the oft-discussed failure of Title VII to account for the unconscious nature of bias. Second, despite the major setbacks that Title VII has suffered in the past several decades, and plaintiffs' consequent difficulties proving employment discrimination, developing transformational analytic frameworks that can illuminate the social processes of inequality is an important and necessary project for employment scholars.⁶⁶ Disparate

66. Given the limitations of using litigation and employment discrimination law to end worker inequality, legal scholars increasingly are turning to conceptual frameworks that do not turn on proving discrimination on the basis of group membership. For example, policy discussions surrounding work and family conflict have progressed over the past few decades from demands to end sex discrimination and provide maternity leave to a general problem of "family leave," and more recently, to the concept of "work-life balance" for everyone. See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1221 (2011) (discussing this trend). Other scholars have proposed laws modeled on minimum labor standards that do not require proof of discriminatory intent. See, e.g., Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1341 (2012) (proposing increased use of "extra-discrimination" approaches that do not focus on

treatment law, in particular, is a critical component of this work. Although disparate treatment has always served as the practical and conceptual core of Title VII, it is now all the more important to dedicate energy to reinvigorating individual claims, given the Court's apparent hostility to systemic claims of employment discrimination.

II. THE DOMINO EFFECT: A HYPOTHETICAL

In order to illustrate the workplace domino effect and the current failure of employment discrimination law to address it, I offer in this Part a hypothetical. The hypothetical draws from my observations and from stories that I have heard and read in the course of my research on employment discrimination during my years in law teaching. Other information comes from empirical and qualitative studies and fact patterns of cases brought under Title VII. I use the example of an academic workplace because it is what I know best, although the workplace domino effect is likely generalizable to many workplaces.

A. Hypothetical

A talented young scientist takes a full-time position as an assistant pharmacology professor on the tenure track at a major research university. At the beginning of her sixth year, the faculty member will be expected to document her accomplishments, and these are reviewed by faculty at other institutions and at various levels within the university. The review will use the three criteria of research, teaching, and service, with the most important criterion being research.

In her first year on the faculty, while alone in her office working late one evening, an older, tenured male colleague stops by to chat. During this conversation, he suggests they go out for a drink. He makes a point to explain that his wife is out of town. She is uncomfortable, anxious, and not sure how to respond. He is a potential resource for her scholarship and professional advancement, as they work in closely related fields in pharmacology, and he will ultimately vote on her tenure. The combination of his welcome professional support and unwelcome romantic attention presents the

group-based discrimination claims). In a similar vein, some legal scholars have explored procedural approaches to addressing discrimination, such as requiring employers to establish meaningful procedures for responding to requests for flexible work schedules or requiring pay transparency in an effort to improve the ability of employees to negotiate for fair pay. See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 26-27; Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043, 1043 (2012).

unsettling possibility that objecting to the latter may cost her the former.⁶⁷ She smiles and explains that her husband is keeping dinner warm and politely declines. He leaves, and she packs up her bag and immediately goes home, resolving not to work late alone in her office anymore. After this incident, the untenured professor tries to avoid this colleague whenever possible. She is mostly successful in this effort, except for the weekly faculty scholarship lunch, when, on more than one occasion, he stands behind her in the buffet line and places both hands on her shoulders. She does not share these incidents with anyone at work. Although extremely unsettling, she does not believe they are serious enough to report, and she also wonders if perhaps she sent the wrong signals in the beginning by being extremely friendly and seeking out this colleague to discuss their scholarship. Better, she decides, just to stay away.

The faculty member becomes pregnant the following year, after three years on the faculty, and negotiates with her dean to teach an overload in her third trimester in return for a “paid” family leave the following fall.⁶⁸ In the past, the department has authorized reduced teaching loads on an informal basis for other faculty members for various personal and family reasons. For example, one colleague received a light teaching load while he was going through a contentious divorce; another was given a course release for a demanding public service position; a third colleague received a light teaching load while going through treatment for a curable cancer, although there was no formal request for an accommodation by the employee. However, her dean explains that there is no precedent for any faculty member being granted a paid family leave, and therefore, he offers the “compromise” of permitting her to frontload her expected teaching, which she accepts as the best of two less than ideal options—taking a significant reduction in salary or doubling her workload at the end of pregnancy. Pursuant to university policy, she elects to stop her tenure-clock for one academic year.

The professor’s teaching evaluations, which were previously outstanding, decline while she is teaching the overload during the

67. Here, I am paraphrasing Harvard law professor Jeannie Suk Gersen’s description of her reaction to an incident of sexual harassment that she experienced. See Jeannie Suk Gersen, *The Case Against Fox News*, NEW YORKER (Aug. 26, 2016), <http://www.newyorker.com/news/news-desk/the-case-against-fox-news> [https://perma.cc/T244-PVHT].

68. Cf. Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 690 (2006) (finding that twenty-seven percent of the sampled law schools offered no paid family leave, and that among these law schools, a common strategy for wage replacement by legal-academic employees taking family leave is to front-load teaching).

third trimester of her pregnancy.⁶⁹ Some of the evaluations directly comment on her energy level. Other students are upset about her failure to give all reading assignments at the beginning of the semester, even though many of her colleagues regularly release reading assignments in increments without negative consequences. One student complains that the professor, by incorporating her scholarship into the reading assignments, wasted their time on her “pet projects.”

The baby is born without complications in the summer after her fourth year on the faculty. Upon returning from her family leave, she is assigned especially heavy committee responsibilities, which is only fair “because she missed a whole semester.”

Given the recent dip in her teaching evaluations, she dedicates even more time to preparing her classes and making herself available to students. Fearing adverse reactions by students and colleagues to her status as a new mother, the professor also goes out of her way to strategically minimize or hide her family life at work. Unlike many of her colleagues, she avoids displaying pictures of her newborn on her office door or her spouse on her desk, maximizes her time in her office with her door open, attends all faculty meetings, and accepts virtually all requests to attend evening dinners and departmental events. The extra energy dedicated to teaching and performing this “identity work” takes time away from her scholarship. She squeezes in her writing at night, when her family is asleep. Because she has a young child at home, she is limited in her ability to travel to research conferences where networking takes place.

Every morning when the faculty member dresses for work, she carefully considers what she will wear. She wants to be taken seriously, and must therefore juggle the different impressions created by her outfit choices. Formal suits signal authority but come off as stuffy. Dresses and skirts are uncomfortable in her cold lab. Yet she cannot simply wear slacks, a shirt, and a tie, the uniform of the

69. There is considerable research demonstrating that student evaluations of faculty members' teaching are infected with unconscious bias. Both male and female students generally give lower teaching evaluations to women faculty members than to male faculty members, and they give minority faculty members significantly lower evaluations than white professors. See Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities? The Perils of “Doing” Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164-85 (Gutiérrez y Muhs et al. eds., 2012); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 336 (1996); Daniel S. Hamermesh & Amy Parker, *Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369, 373 (2005); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 235-36 (2008).

tenured male faculty, or show up to work in black jeans and a hoodie, like her “cool and talented” junior male colleagues.⁷⁰

The pharmacology professor is ultimately granted tenure, but she is given a rating of very good rather than excellent in scholarship. Some colleagues feel that she should have published more papers than her peers without children, given that she had an extra year on her tenure clock. A male colleague, who had his first child before tenure, opted not to take a family leave. Rather, he canceled two weeks of classes after the birth and scheduled four make-up classes. The students, although inconvenienced, did not hold it against him in his evaluations, which included statements such as, “Give this man tenure.” Although he produced essentially the same quantity and quality of scholarship as the female professor, he receives a rating of “excellent” in scholarship in his tenure review.

Both faculty members are now associate professors. At this point, the female professor works, on average, forty-four hours per week. (Her spouse works in finance. Although they are committed to sharing childcare and housework equally, the pharmacology professor spends more time on domestic tasks than her spouse, because her schedule is more flexible.) Her male colleague with a young child works, on average, about fifty hours per week, because his spouse is a stay-at-home parent and serves as the primary caregiver of their child.

Over time, the male colleague is rewarded with subtle perks and resources that facilitate his research, productivity, and reputation. For example, he is assigned one of the better administrative assistants and top graduate students are steered in his direction to work in his lab. His assigned laboratory space is larger and better equipped. He is typically given a mid-week teaching schedule favorable to traveling to outside conferences. Enrollment caps are placed on his classes, which reduces his class sizes and grading time.⁷¹ His research is featured on the department’s website and in

70. The pressures on women to perform their gender exactly right with clothing in the workplace and other public realms has been discussed by many authors. Two classic statements are Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2547 (1994), and Patricia J. Williams, *Have Pantsuit, Will Travel*, NATION (Aug. 27, 2008), <https://www.thenation.com/article/have-pantsuit-will-travel/> [<https://perma.cc/M45L-Y7S8>].

71. In-group favoritism, whereby individuals value and favor their own membership groups over groups to which they do not belong, is among the most well-established phenomena in social psychology. See Marilyn B. Brewer, *The Importance of Being We: Human Nature and Intergroup Relations*, 62 AM. PSYCHOLOGIST 728, 729 (2007) (reviewing research). Thus, employment discrimination often manifests not as hostility toward the out-group, but as in-group favoritism. See Marilyn B. Brewer, *In-Group Favoritism: The*

external communications. He is appointed as the associate dean for research, a two-year position that involves some additional administrative tasks but which is more than compensated for by its reputational value, permanent bump in salary, and accompanying course release. This service creates a very favorable reaction by the male dean of the department, who views the work as especially generous given the male professor's family commitments.

The female professor is given fewer course releases, a less favorable teaching schedule, and less competitive students to assist with her research (who need more mentoring and support). Because there are relatively few women on the faculty, the female faculty member is asked to serve on more committees—especially committees that represent the department outside the university, such as faculty recruitment. This additional service burden causes her to lose valuable research time, as well as valuable outside consultancies that earn her male colleagues additional income. The female faculty member's scholarship is less promoted in external communications by the department, and she is less noted and applauded internally for her faculty service than are her male colleagues.⁷² When she occasionally misses a faculty meeting, her absence is more likely to be noticed (a few wonder, "Is she home with her kid?"), and when she attends, her contributions carry less weight. She is limited to a relatively narrow personality range. Students and colleagues expect her to be patient and understanding, rather than busy and ambitious.

After ten years on the faculty, male colleagues with children and male and female colleagues without children begin to leapfrog over the woman in receiving promotions to full professor, which comes with additional prestige, an increased research and travel budget, and a higher salary. She has never applied for a promotion to full professor. The custom in her department is for one or more colleagues

Subtle Side of Intergroup Discrimination, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59 (David M. Messick & Anne E. Tenbrunsel eds., 1996).

72. Social psychological research shows that organizational citizenship behaviors such as helping others, courtesy, avoiding complaining even when justified (i.e., "good sportsmanship"), and civic engagement (e.g., attending meetings) is evaluated differently for women than for men. Being helpful is a female stereotype. Therefore, when women do not engage in organizational citizenship behaviors, they are viewed less favorably than identically behaving men. Moreover, when they do engage in organizational citizenship, it is less noted and applauded than when men do. That is, women benefit less from being good citizens, and they are penalized more when they are not. See Tammy D. Allen, *Rewarding Good Citizens: The Relationship Between Citizenship Behavior, Gender, and Organizational Rewards*, 36 J. APPLIED SOC. PSYCHOL. 120, 134 (2006); Madeline E. Heilman & Julie J. Chen, *Same Behavior, Different Consequences: Reactions to Men's and Women's Altruistic Citizenship Behavior*, 90 J. APPLIED PSYCHOL. 431, 440 (2005); see also Deborah L. Kidder & Judi McLean Parks, *The Good Soldier: Who is S(he)?*, 22 J. ORGANIZATIONAL BEHAV. 939 *passim* (2001) (theorizing why organizational citizenship behaviors are affected by gender roles).

who are full professors to encourage or invite associate professors to “apply.”⁷³ As no one has ever encouraged her, she has not felt comfortable asking to be considered for a promotion. In any case, she thinks the effort would be futile. Seven of the ten full professors are men and none has young children. There are no written standards for promotion to full professor; the decision is made after a discussion and simple vote and recommendation of the existing full professors. She is nationally recognized, has made important contributions to her field, and her publication record and grant-funding history are equal or superior to at least half of her colleagues who are full professors. Yet, she decides, it would be better not to push it for now. In the big scheme of things, she should feel lucky, she thinks to herself. As a tenured professor, she has reached the top of the privilege and status hierarchy—by all external measures, she enjoys levels of autonomy, prestige, and economic reward that are unusual compared to the average worker.⁷⁴

73. This tapping process is common in professional workplaces and is illustrated by the controversial remarks of Microsoft CEO Satya Nadella, who, at a 2014 conference intended to celebrate women in computing, suggested that women in technology should not ask for raises but rather “trust that the system would reward them.” See Nick Wingfield, *Microsoft’s Nadella Sets Off a Furor on Women’s Pay*, N.Y. TIMES, Oct. 9, 2014, at B1. “Because that’s good karma,” according to Nadella. *Id.* “It’ll come back because somebody’s going to know that’s the kind of person that I want to trust.” *Id.* Read between the lines, Nadella’s remarks betray an unfavorable view of women who are as pushy as men in asking for raises. The irony, of course, is that when women do not negotiate for raises or promotions, as they so often do not, courts have interpreted their unassertiveness as evidence of their lack of interest, placing them in a classic double bind. See 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 *passim* (1990). See generally LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2007).

74. This rationalization is consistent with research on gender-based differences in job satisfaction. All else being equal, women tend to report higher overall job satisfaction than men, irrespective of whether they face gender barriers or discrimination at work. Therefore, reported job satisfaction is not a reliable measure of a fair or equal workplace. See Andrew E. Clark, *Job Satisfaction and Gender: Why Are Women So Happy at Work?*, 4 LAB. ECON. 341, 365 (1997) (finding that women have higher job satisfaction than men because they have low expectations); William Magee, *Anxiety, Demoralization, and the Gender Difference in Job Satisfaction*, 69 SEX ROLES 308, 318 (2013) (“Women who report symptoms of demoralization [by work] report being more satisfied with their jobs than men who report demoralization.”); P. J. Sloane & H. Williams, *Job Satisfaction, Comparison Earnings, and Gender*, 14 LAB. 473, 496 (2000) (finding that women express themselves as more satisfied with their job than men, despite lower pay); *cf.* A. Sousa-Poza & A. A. Sousa-Poza, *Gender Differences in Job Satisfaction in Great Britain, 1991–2000: Permanent or Transitory?*, 10 APPLIED ECON. LETTERS 691, 694 (2003) (finding that women’s job satisfaction in England halved from 1991–2000 because of increased expectations).

In addition to the “low expectations” hypothesis, there are two alternative explanations for women’s relatively higher levels of job satisfaction despite their experience of discrimination. Some studies suggest that men and women value aspects of a job differently, so objective reward measures (such as pay) may mean less to women than men when compared with measures such as flexibility or the intrinsic returns of work. See Keith A. Bend-

B. Legal Analysis

In the hypothetical scenario presented, the employee has limited rights under the Pregnancy Discrimination Act (PDA), the Family and Medical Leave Act (FMLA), or Title VII. Under Title VII, she has a right to work in an environment free of sex-based unwelcome conduct that is intimidating, hostile, or abusive. However, isolated and sporadic incidents such as those that she endured do not rise to the level of illegality,⁷⁵ even though her colleague's behavior was troubling enough to cause her to avoid him, which interfered with her work and resulted in potentially lost opportunities of support for her development as a young scholar. Moreover, courts generally have not permitted plaintiffs to aggregate sexual harassment evidence with evidence of other "non-sexual" forms of sex discrimination (such as sex-based disparate treatment) to sustain a sexual harassment claim.⁷⁶ Therefore, the generalized conditions that have made it difficult for her to flourish in her position will, as a matter of law, be sliced and diced into smaller, discrete harms that seem relatively trivial when considered out of context. Finally, because the harassing colleague did not have the authority to effect a significant change in the professor's employment status—in the tenure process, he was just one vote on a larger faculty—the professor's claim for sexual harassment against the university would likely be foreclosed in any case.⁷⁷ She did not report the harassment, and most courts would find that this constituted an unreasonable failure to take advantage of

er et al., *Job Satisfaction and Gender Segregation*, 57 OXFORD ECON. PAPERS 479, 481 (2005); Andrew E. Clark, *What Really Matters in a Job? Hedonic Measurement Using Quit Data*, 8 LAB. ECON. 223, 224 (2001). A second theory is that dissatisfied women self-select out of the labor market, a form of selection bias, but studies have refuted this hypothesis. See, e.g., Clark, *Job Satisfaction and Gender*, *supra*, at 343; Alfonso Sousa-Poza & Andrés A. Sousa-Poza, *The Effect of Job Satisfaction on Labor Turnover by Gender: An Analysis for Switzerland*, 36 J. SOCIO-ECON. 895, 910 (2007).

75. Courts have narrowly defined sexual harassment as severe and pervasive conduct that a reasonable person would consider intimidating, hostile, or abusive. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (noting that Title VII was not meant to be "a general civility code for the American workplace."); *Policy Guidance on Current Issues of Sexual Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Mar. 19, 1990), <https://www.eeoc.gov/policy/docs/currentissues.html> [<https://perma.cc/FL6A-ETVW>] ("Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.").

76. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1713-14 (1993) (discussing the disaggregation of sexual harassment from disparate treatment, so that "only overtly sexual conduct counts toward establishing hostile work environment harassment and that nonsexual conduct must be considered—if at all—as a separate form of disparate treatment.").

77. See *Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013) (requiring proof of negligence to sustain a claim of sexual harassment by a coworker).

preventive and corrective opportunities under these circumstances,⁷⁸ even though she responded like most victims in these situations: through avoidance.⁷⁹

Under the PDA, she was entitled to a paid family leave without teaching an overload if the employer provided paid leave to other similarly situated workers. If so, by denying paid leave, the employer was arguably discriminating against her based on pregnancy. However, the employer may interpose a valid reason for the distinction, arguing, for example, that a paid course release was provided to her colleague for a comparably different situation, because his leave during his period of public service was related to his professional work and could ultimately benefit the school's reputation.⁸⁰ If this distinction has a legitimate institutional basis, the PDA claim may be unavailing.

Fortunately, unlike many part-time and low-wage workers, the professor was eligible for job-protected family leave under the FMLA.⁸¹ The birth of her child was a qualifying event,⁸² and she had at least 1,250 hours of service for the university during the twelve months prior to her leave for an employer with fifty or more employees.⁸³ However, the FMLA did not give her the ability to insist on a paid leave.

78. See Hébert, *supra* note 31, at 733 (“Women who use more informal and interpersonal methods of dealing with sexual harassment are often portrayed as ‘doing nothing,’ a characterization that makes it more likely that courts will find their failure to take proactive steps to deal with the harassment unreasonable.” (footnote omitted)).

79. See Beiner, *supra* note 32, at 315-16 (reporting that half of women who are sexually harassed are reluctant to report the harassment because they do not think it is serious enough).

80. Identifying acceptable comparators is an eternal challenge for employment discrimination plaintiffs. This example brings to mind the recent Supreme Court decision of *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). Peggy Young worked as a delivery driver for United Parcel Service (UPS). *Id.* at 1344. When she became pregnant, her doctor advised her not to lift more than twenty pounds during her first twenty weeks of pregnancy and no more than ten pounds thereafter. *Id.* UPS refused to transfer her to a desk job, even though it had provided this accommodation to many men who experienced comparable short-term disabilities, and even to men who had lost their Department of Transportation driving certifications for drunk driving. *Id.* at 1347. UPS maintained the position that these employees held were not appropriate comparators, because their situations were allegedly too different to qualify as “similarly situated.” *Id.* Ultimately, the Court held that these employees could, as a matter of law, serve as appropriate comparators to create an inference of discrimination, but only if the plaintiff can demonstrate that the defendant accommodates a “large percentage” of such workers, while failing to accommodate a “large percentage” of pregnant workers. *Id.* at 1354. For a critique of the judiciary's almost religious devotion to comparators in discrimination law, and the limiting effects of this methodology, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

81. See Kessler, *supra* note 52, at 422-23 (discussing features of the FMLA that limit its coverage primarily to economically privileged workers).

82. See 29 U.S.C. § 2612(a)(1)(A) (2012).

83. See *id.* §§ 2611(2), 2611(4) (2012).

The professor may have a retaliation claim for being given heavy committee work upon return from her family leave. An employer is prohibited from retaliating against an employee for taking FMLA leave,⁸⁴ and the Supreme Court has defined retaliation broadly as any action that a reasonable employee would find materially adverse.⁸⁵ However, courts have often faltered in enforcing the law's goal of achieving equal employment opportunity when retaliation takes on more subtle, less tangible, non-economic forms.⁸⁶ The employer therefore might argue, for example, that in the larger scheme of things, the heavy committee assignment did not constitute a meaningful change in work responsibilities. Alternatively, the employer might argue that her assignments were consistent with the practice of periodically assigning faculty to heavy-workload committees. On a small faculty, it may be difficult to show a gender-based pattern. Moreover, although the law is still developing, a few district courts have held that a claim of retaliation under the FMLA must meet a higher "but-for" causation standard rather than the easier-to-prove "motivating factor" standard.⁸⁷

84. See *id.* § 2615(a)(1) (2012); 29 C.F.R. § 825.220(c) (2012).

85. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006). Although the *Burlington* standard characterized how harmful retaliation must be to fall within Title VII's antiretaliation provision, it has been widely applied to other federal discrimination statutes, including the FMLA. See Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1325-27 (2015).

86. See Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 624 (2003); Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313, 313-15 (2005); Autumn George, Comment, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075, 1107-08 (2009).

87. In a recent decision, the Supreme Court held that the "mixed-motive" proof structure is unavailable to prove retaliation claims under Title VII. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360-61 (2013). As a result, for Title VII retaliation claims, employees are now subject to a much more demanding standard than a protected activity—such as complaining about discrimination, filing a discrimination charge, resisting harassment, or cooperating in a discrimination investigation—was the "but-for cause" of the employer's retaliation against the employee. See *id.* The Court determined Title VII retaliation claims "must be proved according to traditional principles of but-for causation." *Id.* This holding eliminated the less onerous motivating-factor standard of adjudicating Title VII retaliation claims, in which a claimant could show "race, color, religion, sex, or national origin was a motivating factor for—and not necessarily the but-for factor in—the challenged employment action." *Id.* at 2528.

A Department of Labor regulation that predates *Nassar*, section 825.220(c), provides that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." *Id.* The "factor" language makes clear that the "but for" standard should not apply to FMLA retaliation cases. The Second, Third, and Sixth Circuits and several district courts in other circuits have reasoned that the regulation deserves *Chevron* deference, see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and, therefore, have held that the proper causation standard for retaliation claims under the FMLA is mixed-motive, see *Woods v. START*

Beyond the immediate circumstances surrounding her family leave, note also, the FMLA does not provide our professor with a right to a flexible work arrangement or reduced work hours to care for her healthy child after the initial twelve-week leave period.

The professor could also allege intentional “sex-plus” discrimination because of her status as a woman with children. “Sex-plus” discrimination is discrimination based on sex in conjunction with some other characteristic, such as having young children.⁸⁸ Proceeding on this theory, she could argue that she was treated unfairly vis-à-vis her male colleague with a young child who was given a lighter teaching load, better administrative support, the best Ph.D. candidates, superior laboratory space and equipment, greater presence on the department’s website, a more favorable teaching schedule, more course releases, an appointment as the research dean, and, ultimately, promotion to full professor. Under the sex-plus doctrine, the fact that some women without young children were treated favorably or promoted to full professor should not automatically defeat her claim. Moreover, according to the “mixed-motive” rule, she could potentially establish liability simply by showing that gender motivated her employer’s actions,⁸⁹ rather than having to prove that gender was the but-for cause of its actions favoring her male colleague.

Treatment & Recovery Ctrs., Inc., 864 F.3d 158 (2d Cir. 2017); Egan v. Del. River Port Auth., 851 F.3d 263, 274 (3d Cir. 2017); Hunter v. Valley View Local Sch., 579 F.3d 688, 691-92 (6th Cir. 2009); Chase v. U.S. Postal Serv., 149 F. Supp. 3d 195, 210 (D. Mass. 2016), *aff’d on other grounds*, 843 F.3d 553, 559 n.2 (1st Cir. 2016); *cf.* Walters v. Mayo Clinic Health Sys.—Eau Claire Hosp., Inc., 91 F. Supp. 3d 1071, 1080 (W.D. Wis. 2015) (“[T]he FMLA regulation at issue here contains the express language . . . necessary to allow for something other than ‘but for causation.’”). However, a few district courts have reached the opposite conclusion, treating *Nassar* as a controlling precedent for FMLA retaliation claims and therefore applying the but-for causation standard to such claims. *See* Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 183-95 (D. Mass. 2017); Jones v. Allstate Ins. Co., No. 2:14-CV-1640-WMA, 2016 WL 4259753, at *4-6 (N.D. Ala. Aug. 12, 2016); Taylor v. Rite Aid Corp., 993 F. Supp. 2d 551, 567 (D. Md. 2014). Many courts, including the Fifth and Seventh Circuit Courts of Appeal, have simply avoided deciding the question by holding that the plaintiff’s FMLA retaliation claim could survive both the “but for” and “motivating factor” standard, or neither. *See, e.g.*, Castay v. Ochsner Clinic Found., 604 F. App’x 355, 356 n.2 (5th Cir. 2015); Malin v. Hospira, Inc., 762 F.3d 552, 562 n.3 (7th Cir. 2014); Elzeneiny v. District of Columbia, 195 F. Supp. 3d 207, 221 (D.D.C. 2016). The Supreme Court has thus far declined to take up the question, *see* Bartels v. S. Motors of Savannah, Inc., 681 F. App’x 834, 840 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 358 (2017); therefore, uncertainty remains in many circuits about the proper causation standard for FMLA retaliation claims.

88. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

89. With the exception of age discrimination claims, which are subject to a strict “but-for” causation standard, *see* Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), an employee may prevail in one of two ways in a disparate treatment case. First, if the factfinder believes the employer’s decision was motivated exclusively by discriminatory reasons. *See* St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981); McDonnell Douglas Corp. v. Green,

However, even with the benefit of these plaintiff-friendly Title VII doctrines (sex-plus and mixed-motive), success will turn on at least two challenges. First, she will have to prove that the subtle actions “favoring” her male colleague with children were, in effect, adverse employment actions disfavoring her. It will be difficult to demonstrate, for example, that being assigned a less competent administrative assistant or graduate students, not being mentored or featured on the department’s website, or even being assigned inferior lab space,⁹⁰ constitute adverse employment actions,⁹¹ and proving some of these matters would involve challenging satellite determinations of the qualifications and competence of staff and students assigned to work for her. Second, she will need to demonstrate that her performance is comparable to or better than her male colleague’s. This may prove difficult where decisionmaking processes are opaque and guided by subjective factors, as is the case

411 U.S. 792, 802 (1973). Second, she may prevail if she proves that the employer’s decision was motivated by discriminatory and nondiscriminatory reasons, the latter being sufficient to motivate the adverse decision. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-94 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989). In the latter “mixed-motive” situation, according to the Civil Rights Act of 1991, the employer is in violation of Title VII, because it took account of the employee’s protected status in making an employment decision. However, if the employer would have made the same decision in the absence of the discrimination, the plaintiff’s remedy is limited to declaratory and injunctive relief, attorney’s fees, and costs (i.e., no damages, back pay, or reinstatement). Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-5(g) (2012).

90. *See, e.g., Summy-Long v. Pa. State Univ.*, 226 F. Supp. 3d 371, 417-21 (M.D. Pa. 2016) (holding that a female pharmacology professor was not subjected to adverse employment actions by reduction of her laboratory space, delayed placement of her profile on website, or alleged mistreatment by administrative staff); *Mitchell v. Vanderbilt Univ.*, No. 3:01-1578, 2003 WL 24135107, at *9 (M.D. Tenn. Mar. 18, 2003) (holding that reduction of a microbiology professor’s lab space “does not rise to the level of a firing, demotion, or loss of benefits”).

91. The employer’s intent can be established with either direct or indirect evidence. Direct evidence is evidence that directly proves a fact, without an inference—for example, the statement by a supervisor, “I did not promote you because you are a woman.” It is unlikely that the professor will have direct evidence, because most employers have trained their supervisors not to express any discriminatory motives they might harbor. *See Chad Derum & Karen Engle, The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1207 (2003) (noting that as soon as Title VII became law, “no sensible employer would admit that it based a decision on one of the prohibited classifications.”); *see also* Mark Schwartz, et al., Ass’n Corp. Counsel, *Mixed-Motive Cases: What Now After Desert Palace v. Costa*, ACC DOCKET, Mar. 2004, at 58-59 (“[Y]our company should be even more vigilant in educating its supervisors and employees not to tell jokes or use derogatory or stereotypical language in the workplace based on race, national origin, religion, gender, age, or other protected factors. You should review your company’s diversity training and equal employment compliance programs to ensure that they include discussion about jokes and off-color remarks. Although truly isolated jokes or comments still should not be admissible as “stray remarks” or otherwise, the prevalence of such comments may be admissible to establish that the company facilitates prejudices that lead to unlawful discrimination.”).

in many employment contexts. When it comes to subjective evaluations of employee performance, courts have tended to defer to employers' determinations. She could argue that her employer's actions were still to some extent influenced by the seeming incongruity of being a mother with young children and a scientist. Perhaps. But it will be tough to do so without direct evidence, such as hostile statements evidencing a discriminatory motive.

Finally, under the proof structure for intentional disparate treatment, the discriminatory and legitimate, nondiscriminatory "reasons" for an employer's decisions will be viewed as mutually exclusive. She is working "twice as hard" to combat biased teaching evaluations and potential negative perceptions of being a mother, which the employer, in the case of assigning her a teaching overload in her third trimester of pregnancy, did not take measures to combat and may have facilitated. She has also been given a greater volume of service and other assignments that are inconsistent with research. In contrast, her male colleague has flourished under ideal work conditions that included, among other benefits, resources and support that freed up his time for research, as well as grooming for leadership. When sustained over a career, the differential allocation of resources, while seemingly inconsequential in isolation, are likely to accrete, diminishing productivity and other indicia of success. Finally, the job—its hours and requirements—is designed around the assumption that the worker who occupies her position has the benefit of a stay-at-home partner to cover the domestic-side of life. Yet in the legal analysis of her disparate treatment claim under the established disparate treatment proof structure, her performance will be treated as an independent, legitimate, nondiscriminatory basis for the employer's actions. And because she never applied for a promotion, her employer will claim that she is not a full professor because of her apparent lack of interest, rather than any discriminatory motive. As Vicki Schultz's scholarship has thoroughly documented, courts have generally sided with employers when they raise this "lack of interest" argument, even if the apparent lack of interest is a result of the chilling effects of an employer's discriminatory practices.⁹²

Thus, the PDA, the FMLA, and Title VII, as presently configured, are inadequate solutions to gender-based discrimination against family caregivers, or, more generally, to the cascading patterns of discrimination that result in substantial worker inequality. As this example illustrates, although the PDA protects pregnant workers from some forms of differential treatment, it is helpful only in

92. Schultz, *supra* note 73.

situations where comparable non-pregnant employees are treated more favorably. It is completely silent on issues of caregiver discrimination that occur after pregnancy.⁹³ The FMLA does mandate some recognition of the real effects of caregiving, but it does so only in the context of birth or serious illness, ignoring the burdens imposed by the everyday demands of caregiving, which can continue for many years. Finally, and crucially, even the less onerous “mixed-motive” theory of intentional discrimination is generally unable to account for the dynamic interactions among individual employee choices, bias, and discriminatory structures inside the workplace. That is, bias and structural discrimination are mutually reinforcing—and they produce so-called “real differences” that are then accepted in disparate treatment law as nondiscriminatory explanations and justifications for an employer’s adverse employment actions.

Although the domino effect has profound consequences, including the glass ceiling, gender- and race-based job segregation, and tokenism, courts are generally predisposed to attribute such stark patterns of inequality to external factors, such as the gendered division of family labor, minority groups’ lack of education, skills, knowledge, or experience, and the absence of qualified, diverse applicants. In this view, individual employees’ qualifications and ability to perform their jobs preexist any interaction with the workplace, and the employer is not responsible for shaping or even responding to the disadvantages that result from discrimination.

My hypothetical focused primarily on individual disparate treatment, retaliation, and harassment claims, because the great majority of employment discrimination cases involve claims asserted by individual plaintiffs. Although significant in number, these cases do not usually attract as much publicity or attention as large class actions or suits challenging affirmative action plans. However, disparate treatment and other individual claims are of enormous significance to addressing employment discrimination, even though they do not receive as much attention, because they are the largest part of the caseload.⁹⁴

Finally, although there will of course be variation, it is important to highlight that the domino effect illustrated in this hypothetical will be experienced to a greater or lesser extent by any employee who does not conform with the ideal-worker norm. This would include, for

93. See Rachel Arnov-Richman, *Public Law and Private Process: Toward an Organizational Justice Model of Equal Employment Quality for Caregiver*, 2007 UTAH L. REV. 25, 32-33; Kessler, *supra* note 52, at 399 (“[C]ourts . . . have uniformly held that needs or conditions of a child that require a mother’s presence are not within the scope of the PDA.”).

94. See sources cited *supra* note 30.

example, gender-nonconforming men who do significant family caregiving work; employees with serious illnesses or disabilities or employees caring for others with serious illnesses or disabilities, including children, elderly parents, extended family,⁹⁵ and friends;⁹⁶ and perhaps even single employees who are responsible for all of their self-care.⁹⁷ The domino effect is also likely to be set in motion by culturally-grounded dress or grooming practices, as well as primary language differences. Finally, the idea of the domino effect might even be productively applied to understand the dynamics of simple status-based discrimination, given that stereotyping and discrimination often trigger adaptive responses by individuals that may negatively influence their job-related choices, energy, or performance.

III. DOWNPLAYING THE DOMINO EFFECT: SOCIAL SCIENCE RESEARCH AND TITLE VII

In this Part, in an effort to illustrate my larger point about employment discrimination law's inattention to the domino-like dynamics of discrimination in the workplace, I review some of the social science research exploring the reasons for women's compromised labor market position in the United States, as well as the three basic proof structures for litigating employment discrimination cases under Title VII. This analysis demonstrates that a great deal of social science research on gender inequality in the workplace, as well as all of Title VII's major proof structures, tend to ignore or downplay the interrelationships among individual employee choices and characteristics, discriminatory bias, and structural impediments to sex equality. The research I review focuses on the particular problem of workplace gender discrimination. However, the larger insights of this Part are equally applicable to other disadvantaged identities, such as race and sexuality.

A. *Social Science Research*

Women's compromised labor market position in the United States has long drawn scholarly attention from many disciplines, including economics, psychology, sociology, gender studies, social work, law, business, and management studies. Three competing frameworks

95. See generally Peggie Smith, *Elder Care, Work, and Gender: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351 (2004).

96. See generally Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

97. See generally Adam Romero, *Methodological Descriptions: "Feminist" and "Queer" Legal Theories*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 179 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009); Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313 (2002).

have emerged for understanding gendered patterns of inequality in the workplace: individuals' personal choices or preferences, gender bias, and structural barriers to equality attributable to the organization of work itself. This Section summarizes these competing explanations. It also explores some of the reasons researchers fail to integrate them or explore their interrelationships, including the tendency of scholars trained in different disciplines to adopt varying conceptual frameworks.

1. *Choice and Essential Difference*

According to one body of research, gender-based workplace inequity persists because women do not have the same ability and motivation to achieve at work as men. Economists describe this in terms of women's lesser human capital,⁹⁸ rational or "statistical" discrimination,⁹⁹ or the efficiency of sexual divisions of labor.¹⁰⁰ Evolutionary biologists and psychologists explain gender inequity in the workplace in terms of the basic structure of the brain and other physiological phenomena. According to this framework, genetic or hormonal differences could cause women to be less competitive or ambitious at work than men.¹⁰¹ Courts and legal scholars adopting these perspectives assert that legitimate, nondiscriminatory reasons unrelated to an employee's sex—such as lack of availability for full-time work, overtime, or work-related travel; unwillingness to relocate; and risk aversion—explain sex-based inequality in the workplace.¹⁰² These frameworks share the assumption that unequal employment patterns like the glass ceiling, gender-wage gap, and sex segregation are caused by the differences, limitations, choices, or needs of female employees that are exogenous to the workplace.

98. GARY S. BECKER, A TREATISE ON THE FAMILY 43-44 (1991); June O'Neill & Solomon Polachek, *Why the Gender Gap in Wages Narrowed in the 1980s*, 11 J. LAB. ECON. 205, 207 (1993); Alison J. Wellington, *Changes in the Male/Female Wage Gap, 1976-85*, 28 J. HUM. RESOURCES 383, 386 (1993).

99. Kenneth J. Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 3-5 (Orley Ashenfelter & Albert Rees eds., 1973); Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659-661 (1972).

100. Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S36-S39 (1985).

101. SUSAN PINKER, THE SEXUAL PARADOX: EXTREME MEN, GIFTED WOMEN, AND THE REAL GENDER GAP 215-20 (2008); Stephen M. Colarelli et. al., *Women, Power, and Sex Composition in Small Groups: An Evolutionary Perspective*, 27 J. ORGANIZATIONAL BEHAV. 163, 169 (2006).

102. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 348 (7th Cir. 1988); see also *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 862 (5th Cir. 2002); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 836-37, 850-51 (2001).

Economists and other social scientists often refer to these theories as “supply side” explanations.¹⁰³

2. *Bias*

A second body of research identifies gender bias as a major contributor to women’s workplace inequality. From this perspective, stereotypes about women and employees with family responsibilities cause employers to irrationally discriminate on the basis of sex and gender. For example, decades of social science research has repeatedly found that women face distinct social penalties for doing the very things that are expected to lead to success in the workplace.¹⁰⁴

Social science research also tells us that pregnant women and mothers experience a uniquely hostile and pervasive form of gender discrimination, regardless of qualifications or job performance.¹⁰⁵ For example, in laboratory experiments, pregnant applicants are more likely to be assessed as lazy, complainers, and moody compared with non-pregnant applicants, especially when applying for stereotypically male jobs.¹⁰⁶ Similarly, in investigations of discrimination against mothers in the laboratory and the labor market, equally qualified and credentialed women job applicants with children are rated as less competent; less committed; less suitable for hire, promotion, and training; and deserving of lower salaries compared with women applicants who are not parents.¹⁰⁷ Research also finds that mothers

103. See Reskin, *supra* note 21, at 248.

104. Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RES. ORGANIZATIONAL BEHAV. 113 *passim* (2012) (discussing the perceived lack of fit between the attributes expected to succeed in high-level organizational positions—such as being ambitious, task-focused, assertive, decisive, self-reliant, analytical, logical, and objective—and the expected attributes of women—being kind, caring, considerate, warm, friendly, collaborative, obedient, respectful, and intuitive); Julie E. Phelan & Laurie A. Rudman, *Prejudice Toward Female Leaders: Backlash Effects and Women’s Impression Management Dilemma*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS, 807 *passim* (2010) (reviewing research demonstrating the double bind that female leaders face in the workplace, in that that they are required to display agency to overcome the lack of fit between their gender and leadership, yet when they do so, they risk hiring discrimination and prejudice).

105. See Cecilia L. Ridgeway & Shelly J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 697 (2004) (“The biased evaluations and behavioral responses elicited by the status of the mother role are similar in type to those elicited by the status associated with sex itself. But, by our account, the biases evoked by the mother role will be more strongly discriminatory in most workplace settings than those produced by sex status alone because motherhood is seen as more directly indicative of workplace performance than is sex.”).

106. Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complimentary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499, 1508-10 (2007).

107. See, e.g., Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298 (2007). In the laboratory portion of this study, participants evaluated a pair of simulated job applicants who differed only on parental status. *Id.* at 1309. The researchers then submitted similar applications to real

face discrimination in work evaluations, even when there is indisputable evidence that they are competent and committed to paid work.¹⁰⁸ These findings are consistent with studies finding that working women who become mothers “trade perceived competence for perceived warmth.”¹⁰⁹

Working men who become fathers do not make this trade.¹¹⁰ Moreover, when it comes to wages, male employees are not generally penalized, and in fact often experience a wage premium, for being married or a parent.¹¹¹ However, there is some evidence of a threshold effect for men; men who cross the gender line by taking a family leave, for example, suffer many of the same biases that working mothers do.¹¹² For example, in experimental studies, men who were depicted as taking parental leave were less likely to be recommended for work rewards, such as admission to a fast-track executive training program, promotions, salary increases, and the assignment of high-profile projects.¹¹³ Indeed, evidence from human resources suggests that fathers who request flexible work arrangements or go part-time may actually experience greater workplace hostility than mothers who do.¹¹⁴

job openings. *Id.* at 1327-28. The results closely corresponded to those in the laboratory; mothers were called back for interviews about half as often as nonmothers. *Id.* at 1330.

108. Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC’Y 616, 639 (2010).

109. Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 701-05 (2004).

110. *Id.*; see also Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 737-39, 748 (2004).

111. Joni Hersch & Leslie S. Stratton, *Household Specialization and the Male Marriage Wage Premium*, 54 INDUS. & LAB. REL. REV. 78, 93 (2000) (finding a wage premium for married men as compared with unmarried men that is not explained by time spent on domestic tasks); Melissa J. Hodges & Michelle J. Budig, *Who Gets the Daddy Bonus? Organizational Hegemonic Masculinity and the Impact of Fatherhood on Earnings*, 24 GENDER & SOC’Y 717, 740-41 (2010) (finding that the earnings bonus for fatherhood persists after controlling for an array of differences, including human capital, labor supply, family structure, and wives’ employment status, and that married white men with high socioeconomic status receive the largest fatherhood earnings bonus); see also Rebecca Glauber, *Race and Gender in Families and at Work: The Fatherhood Wage Premium*, 22 GENDER & SOC’Y 8, 24-25 (2008) (finding that a positive wage differential for fatherhood persists for married men even after controlling for a host of other relevant factors that include human capital, work hours, and effort, but that black men receive a smaller premium for fatherhood).

112. Tammy D. Allen & Joyce E. A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 185 (1999).

113. *Id.* at 174, 179 & tbl.2, 185.

114. Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, PSYCHOL. WOMEN Q., Sept. 1986, at 252, 252-61; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 101-02 (2003).

Overall, researchers adopting this perspective focus on irrational gender bias as the primary generator of workplace inequality for women and employees with family responsibilities.¹¹⁵

3. *Structural Explanations*

A third body of social science research locates a major cause of gender inequality at work in the mismatch between the needs of employees with family responsibilities and the institutional structure of work.¹¹⁶ According to this research, cultural norms and expectations about the ideal worker who has an adult family member at home on a full-time basis who can take care of family and home responsibilities do not reflect the reality of today's employees.¹¹⁷ These researchers note that most families are no longer structured around the full-time breadwinner and full-time homemaker ideal.¹¹⁸ Yet the workplace and other societal institutions have not kept up with the reality of modern families.¹¹⁹ Researchers adopting this perspective largely frame women's workplace inequality as a problem arising from the gendered structure of work. Lawyers and activists advocating family-friendly workplace policies have drawn on this

115. See, e.g., JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 93 (2010).

116. *Id.* at 43-44.

117. *Id.*

118. As of 2006, sixty-two percent of married-couple families had two earners, while only twenty-four percent depended solely on a husband's income. Stella Potter Cromartie, *Labor Force Status of Families: A Visual Essay*, MONTHLY LAB. REV., July/Aug. 2007, at 35, 38. In addition, single-parent homes, overwhelmingly headed by women, claim a growing proportion of American households. In 2012, twenty-eight percent of all American children lived with only one parent. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012*, at 23 (2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf> [<https://perma.cc/2GXD-6CES>].

119. Notably, this situation applies equally to women and men; most workplaces are still dominated by the assumption that employees do not have any outside obligations. Thus, although, for example, many men in professional occupations express an ideological commitment to an equal division of household labor with their intimate partners, few are able to achieve it, except perhaps a very small number of exhausted "superdads." Marianne Cooper, *Being the "Go-To Guy": Fatherhood, Masculinity, and the Organization of Work in Silicon Valley*, 23 QUALITATIVE SOC. 379, 391 (2000). Gender-nonconforming men who seek time-off or other types of accommodations in order to perform family caregiving work are often punished just as mothers are. WILLIAMS, *supra* note 115, at 56-60 (2010); Allen & Russell, *supra* note 112, at 166-68; Martin H. Malin, *Fathers and Paternal Leave*, 72 TEX. L. REV. 1047, 1049 (1994); Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 3 (2005); see also Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839-44 (2003); Sturm, *supra* note 42, at 459-61.

“demand side” theory. Although progress is uneven, this strategy has resulted in some positive trends in judicial and policy decisions.¹²⁰

4. *Competing Disciplinary Frameworks*

These divergent accounts of the reasons for gender-based worker inequality can be explained, in part, by the distinct conceptual frameworks employed by scholars trained in different disciplines. For example, mainstream economics continues, to a certain extent, to distinguish between those who engage in productive labor and those who do not, with productive labor implicitly defined as goods or services exchanged in a market.¹²¹ Childrearing, cooking, cleaning, and domestic labor more generally are not productive in this view.¹²² Mainstream economics’ focus on markets thus excludes, by definition, unpaid domestic labor and renders it irrelevant to analyses of the workplace.¹²³ Mainstream economics is also more likely to conceptualize employees as self-interested individuals who make decisions based on the rational pursuit of self-interest. This analytical framework tends to confirm supply side theories of gender inequity, locating the “problem” of gender-based workplace inequality outside the workplace.¹²⁴

In contrast, sociological theories of workplace gender inequality emphasize structural forces and cultural influences. Although there is no single definition, structural factors are typically understood as a

120. Among the successes are the federal Family and Medical Leave Act of 1993, a 2007 EEOC enforcement guidance on Family Responsibilities Discrimination (also known as caregiver discrimination), and paid family leave laws in a handful of jurisdictions—California, Rhode Island, Washington, New Jersey, and New York and the District of Columbia. See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, 2611-2619 (2012); Paid Family Leave, CAL. UNEMPLOYMENT INS. CODE § 3300 (West 2013); D.C. MUN. REGS. tit. 6-B, § 1284 (2017); N.J. ADMIN. CODE § 12:21-1.1 (2017); N.Y. COMP. CODES R. & REGS. tit. 12, §§ 355-364 (2017); 42-5 R.I. Code R. § 2:2 (2017); WASH. ADMIN. CODE § 296-130-030 (2017); *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC (2007), <http://www.eeoc.gov/policy/docs/caregiving.html> [<https://perma.cc/9XAZ-Y9HG>].

121. Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, SIGNS, Spring 1991, at 463-69; Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 312, 321 (1999).

122. Folbre, *supra* note 121, at 464-69.

123. *Id.* at 463-66.

124. Feminist economists have challenged the assumptions of mainstream economics through attention to institutional practices, laws and regulations, and systemic power relations. See, e.g., BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 62-86 (1986); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204-05 (2001); Folbre, *supra* note 121, at 463-65; Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 149-53 (1998). However, mainstream economics and public policy continue to marginalize these perspectives.

range of material, objective constraints external to individuals.¹²⁵ Cultural theories of work and family conflict examine external expectations that shape paid and unpaid work. For example, researchers have shown how an intensive parenting culture contributes to some women's decisions to abandon paid employment, in addition to other negative effects.¹²⁶ Similarly, sociologists of work have revealed how workplace culture may present a barrier to reforms that improve work-life balance. For example, a Massachusetts Institute of Technology (MIT) study found that surgical residents actually resisted a reduction of working hours, because long hours are a part of their professional identity.¹²⁷

Given the divergent premises and commitments of researchers across social science disciplines, the three prevailing understandings of gender-based worker inequality—individual employee “supply side” factors, gender stereotyping, and the mismatch between the structure of work and the needs of employees with family responsibilities—are often presented as distinctive, even rival, theoretical frameworks. As such, a great deal of social science research involves unsatisfying efforts to identify the “real” cause of systemic patterns of gender inequality in the workplace or, at best, the relative contribution of each. For example, economic research on the motherhood wage gap has focused on quantifying the relative contribution of supply side human capital factors, such as years of work experience, and discrimination by employers.¹²⁸ Socio-legal scholars interested in progressive workplace reform have also dedicated significant energy to disproving economic supply side theories of workplace gender inequality by emphasizing how workplace structures and stereotyping contribute to work and family conflict.¹²⁹

125. DAVID RUBINSTEIN, CULTURE, STRUCTURE, AND AGENCY: TOWARD A TRULY MULTIDIMENSIONAL SOCIOLOGY 1-6 (2001); Sharon Hays, *Structure and Agency and the Sticky Problem of Culture*, 12 SOC. THEORY 57, 57-72 (1994).

126. See Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1273 (2011); see also MARY BLAIR-LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 74-82 (2003); SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN *passim* (2004); JUDITH WARNER, PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY 115-21, 140-43 (2005); Gill Valentine, 'My Son's a Bit Dizzy.' 'My Wife's a Bit Soft': *Gender, Children and Cultures of Parenting*, 4 GENDER, PLACE & CULTURE 37, 47-49 (1997).

127. See Katherine C. Kellogg et al., *Resistance to Change in Surgical Residency: An Ethnographic Study of Work Hours Reform*, 202 J. AM. C. SURGEONS 630, 633 (2006).

128. See Budig & England, *supra* note 124, at 210-11.

129. See Kessler, *supra* note 44, at 322-30; Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Clueless" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401 *passim* (2003).

B. Title VII

Like a great deal of social science research, Title VII's major theories of liability also, almost uniformly, assume that the three prevailing frameworks for understanding gender-based worker inequality operate independently of one another.

1. Disparate Treatment

Under prevailing Title VII disparate treatment law,¹³⁰ courts must decide sex discrimination claims on the basis of evidence that an employer acted because of gender bias or a "legitimate, nondiscriminatory reason" related to the employee's qualifications or work performance.¹³¹ In the alternative, under a mixed-motive theory, a court can find liability if gender bias was a motivating factor.¹³² Both of these prevailing theories of disparate treatment assume that individual employee characteristics, gender bias, and workplace structures operate mutually exclusively of one another in the workplace. In this sense, the domino effect remains unaddressed by disparate treatment law.

The disparate treatment case, *Warner v. Vance-Cooks*,¹³³ illustrates this failure. Kimberly Warner sued her employer, the federal Government Printing Office (GPO), alleging that it had discriminated against her on the basis of her sex.¹³⁴ She was represented by the Georgetown University Institute for Public Representation,¹³⁵ a public interest law firm and clinical education program founded by Georgetown Law Center.¹³⁶ Warner began her employment with the GPO in 1989 as a payroll technician. She did not have a college degree.¹³⁷ She successfully worked her way up to

130. Title VII is the basic federal statute prohibiting discrimination in employment. Title VII disparate treatment claims can be brought if an employer treats male and female applicants or workers differently. The law has been interpreted to prohibit disparate treatment on the basis of sex "plus" a facially neutral characteristic, such as having young children. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). In addition, Title VII prohibits discrimination on the basis of pregnancy. See 42 U.S.C. § 2000e-2 (2012).

131. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); Krieger, *supra* note 41, at 1178.

132. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989); Krieger, *supra* note 41, at 1172.

133. 956 F. Supp. 2d 129 (D.D.C. 2013).

134. *Id.* at 136.

135. *Id.*; see also GEO. L. INST. FOR PUB. REPRESENTATION, 2007-2008 ANNUAL REPORT 6, <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/IPR/upload/2007-2008ANNUALREPORT.pdf> [<https://perma.cc/L9CM-LHNZ>].

136. See *Institute for Public Representation*, GEO. L., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/IPR/index.cfm> [<https://perma.cc/4PRH-4RAK>].

137. *Warner*, 956 F. Supp. 2d 129, at 137. There is some suggestion that Warner was a racial minority, as the court's decision repeatedly refers to race discrimination. However, her complaint did not allege race discrimination and none of her pleadings referenced her race.

become a graphic processor supervisor, and ultimately, the Chief of the GPO's Digital Print Center (DPC) in 2005.¹³⁸ In this position, she was "in charge of scheduling, assigning work to, training, evaluating, and monitoring employees across three shifts" and "serve[d] as the selecting official for all vacancies within the DPC."¹³⁹ Her job required "expert knowledge in highly technical machinery, computers, and software applications; GPO and DPC procedures, work standards, and workflow; and GPO personnel policies, functions, and operations."¹⁴⁰ In 2001, Warner assumed the responsibilities as head of the DPC when her former supervisor was promoted, but she was not formally promoted into his vacant position.¹⁴¹ She filed an EEOC complaint alleging that she was being paid significantly less than the supervisor she replaced.¹⁴² As a result of this complaint, Warner received a formal promotion and pay increase in 2005 and a lump sum monetary settlement in 2007.¹⁴³

Subsequently, Warner applied for seven positions at a higher pay grade. The GPO placed her on the "best qualified list" for each position; however, management invited her to interview for only one of the positions and hired men for all but one.¹⁴⁴ She eventually sued for not being promoted to one of these positions. The man who received the position had been given the opportunity to fill-in temporarily in the job for three months, allowing him to gain relevant experience in the position and thereby demonstrate his qualifications before he was selected over Warner for the promotion.¹⁴⁵

In addition to differential opportunities to be groomed for advancement, Warner alleged a number of retaliatory and discriminatory conditions. A very loud binding machine unrelated to the work of her department was placed in her work area without her input.¹⁴⁶ The noise created obstacles to her performing her work, which involved dealing with customers and vendors over the telephone and serving walk-up customers.¹⁴⁷ She was denied a private office, despite multiple requests. Dealing with confidential

138. *Id.*

139. *Id.* at 138.

140. *Id.*

141. See Complaint at 2, *Warner*, 956 F. Supp. 2d 129 (D.D.C. 2013) (No. 1:10-cv-01306), ECF No. 1.

142. *Warner*, 956 F. Supp. 2d 129, at 138.

143. *Id.*

144. *Id.* at 141.

145. *Id.*

146. Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Judgment, *Warner*, 956 F. Supp. 2d 129 (D.D.C. 2013) (No. 1:10-cv-01306), ECF No. 24-1, at 36-37.

147. *Warner*, 956 F. Supp. 2d 129, at 142.

supervisory matters was also difficult given the public location of her workspace.¹⁴⁸ All of the other supervisors in the DPC, who were men, had private offices,¹⁴⁹ as did many assistant supervisors below her.¹⁵⁰ Her budget was cut, and the resulting understaffing required her to undertake non-supervisory printing responsibilities.¹⁵¹ Warner was denied cross-training opportunities, despite repeated requests.¹⁵²

She asserted that she was given the title of supervisor but was not treated as one.¹⁵³ For example, male subordinates without experience were assigned to take over her duties, undermining her authority.¹⁵⁴ She was left out of meetings where important decisions were made,¹⁵⁵ such as the closure of one of the DPC's offices and the termination of an employee she supervised.¹⁵⁶ On one occasion, when she did attend a management meeting, another manager engaged in a tirade against Warner.¹⁵⁷ Subsequent to this incident of verbal abuse, Warner stopped attending management meetings altogether, because she did not feel comfortable.¹⁵⁸

The GPO used a performance-based evaluation system.¹⁵⁹ Warner had consistently received the highest possible ratings on her evaluations before she settled her EEOC pay complaint in 2007.¹⁶⁰ Subsequently, she received her lowest ratings of her near twenty-year DPC career.¹⁶¹ Although her performance evaluations were still very good, she never received the highest possible rating again.¹⁶² Warner argued that all of the conditions, as a whole, combined with the biased performance ratings, constituted retaliation for her EEOC complaint and discrimination on the basis of sex.¹⁶³ She alleged that the discrimination caused her to lose sleep and suffer from depression, and that for almost a year, she was not able to get out of

148. *Id.*

149. *Id.*

150. Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Judgment, *supra* note 146, at 37.

151. *Warner*, 956 F. Supp. 2d at 143.

152. *Id.* at 145.

153. Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Judgment, *supra* note 146, ECF No. 24-2, at 2-4.

154. *Id.*

155. *Warner*, 956 F. Supp. 2d at 145-46.

156. *Id.* at 146.

157. *Id.*

158. *Id.*

159. *Id.* at 143-44.

160. *Id.* at 139.

161. See Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion for Summary Judgment, *supra* note 146, ECF No. 24, at 10 & ECF No. 24-1, at 10.

162. *Warner*, 956 F. Supp. 2d at 143-45.

163. *Id.* at 147-48.

bed when not at work, which diminished her ability as a single parent to care for her teenage son.¹⁶⁴

Warner also introduced two other types of evidence: direct evidence of sex discrimination and statistical evidence. Specifically, she presented evidence that the person who made the decision to promote a man rather than Warner had once told her she would just have to “suck it up because that’s how it is with women in the plant”; and that she “would have to work extra hard [to get ahead] and deal with it.”¹⁶⁵ She also introduced statistical evidence demonstrating a classic glass-ceiling pattern of sex discrimination, with only twelve percent of the GPO’s top management consisting of women, despite the fact that more than half of the GPO’s overall professional workforce was female.¹⁶⁶

Despite this mountain of evidence demonstrating sex discrimination and retaliation, the district court granted summary judgment on both claims in favor of the GPO.¹⁶⁷ In doing so, it reasoned that the man who received the promotion rather than Warner was more qualified, because he had more years of experience and exposure in more departments.¹⁶⁸ In making this assessment, the court dismissed Warner’s evidence of irregularities in the GPO’s decisionmaking process, as well as the fact that the successful candidate was rated just a few points more than Warner in a mathematical scoring system for the position. It also neglected to acknowledge that the GPO’s own decision to groom the successful candidate for a promotion, deny her cross-training opportunities,¹⁶⁹ and shut out Warner from leadership contributed to his higher score. The court also diminished all of Warner’s other evidence. It reasoned that the “suck it up” comment was a stray remark unrelated to the decisional process not to promote her;¹⁷⁰ that the statistical evidence was not probative of discrimination, because it did not include an

164. Plaintiff’s Memorandum of Points & Authorities in Opposition to Defendant’s Motion for Summary Judgment, *supra* note 146, ECF No. 24, at 10 & ECF No. 24-1, at 55-63.

165. *Warner*, 956 F. Supp. 2d at 156; *see also* Plaintiff’s Memorandum of Points & Authorities in Opposition to Defendant’s Motion for Summary Judgment, *supra* note 146, ECF No. 24, at 10 & ECF No. 24-1, at 10-11.

166. *Warner*, 956 F. Supp. 2d at 138.

167. *Id.* at 137.

168. *Id.* at 153-54.

169. Vicki Schultz’s observations on the matter of differential training, articulated almost twenty years ago, are as pertinent as ever. She explained, “In nontraditional blue-collar occupations, virtually all training is acquired informally on the job. Thus, a woman’s ability to succeed depends on the willingness of her supervisors and coworkers to teach her the relevant skills. Yet women’s stories of being denied proper training are legion.” *See Schultz, supra* note 73, at 1835.

170. *Warner*, 956 F. Supp. 2d at 155-56.

analysis of applicant flow data;¹⁷¹ that the allegedly biased performance evaluations did not constitute adverse employment actions, because they were still very good;¹⁷² and that Warner's other evidence, such as her exclusion from important meetings and committees and lack of an office, were minor annoyances that did not amount to an adverse employment action.¹⁷³ The court concluded its opinion by observing that Warner was a "dissatisfied, frustrated and unhappy" employee "for years,"¹⁷⁴ language suggesting that the court saw no relation between the discrimination Warner endured and its impact on her.

This type of judicial response to a quite representative individual disparate treatment case illustrates the inadequacy of Title VII as presently conceptualized to address the domino effect. The court disaggregated the evidence into a series of seemingly isolated and trivial incidents and neglected to consider how the plaintiff's behaviors, such as absenting herself from meetings and filing grievances, represented rational and legitimate responses to the pervasive pattern of sex discrimination. It also failed to credit how the many forms of discrimination she suffered negatively affected her qualifications, which then ultimately became the justification for the decision not to promote her.

Inequality often results from the amalgamation of a series of discriminatory acts that combine to result in substantial inequalities. Moreover, discrimination and biased evaluation often impede employees' ability to succeed at work, both by hindering employees' ability to perform their jobs and by signaling that little investment should be made in protected employees' successes. Further, in the face of discrimination, employees often engage in compensatory behaviors, such as avoidance, which may make them appear uncommitted or compromise their ability to do their jobs. Discrimination may also have adverse mental or physical health effects, which further diminish employee performance. As the Warner case illustrates, these dynamics do not occur at one particular moment or in a straight line. Rather, discrimination often results from a chain of events that build and combine in ways that cause significant inequality, through a process of social interaction and reinforcement. If the process of employment discrimination were to be represented graphically, it would be a circle, not a line. Title VII disparate treatment doctrine, as presently conceptualized,

171. *Id.* at 159.

172. *Id.* at 162.

173. *Id.* at 169.

174. *Id.* at 174.

is unable to provide a remedy for this common social process of discriminatory exclusion.

2. *Systemic Disparate Treatment and Disparate Impact*

Although disparate treatment is the main focus of this Article, it is worth noting that the systemic disparate treatment¹⁷⁵ and disparate impact¹⁷⁶ theories of discrimination under Title VII, while better able to capture the ways that systemic bias and discriminatory workplace structures may perpetuate inequality for employees, also generally fail to account for the dynamic interdependent nature of individual employee “choices,” discriminatory bias, and workplace structures.

For example, disparate impact has been used with relatively limited success in challenging structural features of workplaces that exacerbate gender-based inequality, such as long or inflexible work hours, limited sick or personal leave, extended probationary periods, layoff policies that disfavor part-time employees, travel requirements,¹⁷⁷ and restrictive light-duty policies.¹⁷⁸ More generally, the Supreme Court’s disparate impact decisions have gradually increased the plaintiff’s burden of proof in disparate impact cases; neutrality of impact is now measured according to the specific employment criteria, rather than the broader discernable impact on the employer’s workforce. Under this standard, plaintiffs must isolate and identify each discriminatory practice and its mechanism of action; plaintiffs cannot just identify the consequences in the form of statistical disparities in an employer’s workforce and expect the

175. The Title VII systemic disparate treatment theory is used in cases where a widespread pattern or practice of intentional discrimination is proved using statistical evidence in addition to other types of evidence, such as anecdotal evidence of individual instances of discrimination. *See, e.g., Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

176. The Title VII disparate impact theory is used in cases where practices or policies that appear to be gender neutral actually have a negative impact on workers of one sex. In a disparate impact case, a plaintiff need not prove that the employer acted with discriminatory purpose or intent. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). To establish a prima facie case of discrimination, the plaintiff need only show that apparently neutral selection criteria operated to exclude protected class members at a disproportionate rate. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The employer bears the burden of justifying the challenged criteria. The employer’s burden is merely one of “producing evidence of a business justification for his employment practice[s].” *Wards Cove Packing Co.*, 490 U.S. at 659 (1989).

177. *See Kessler, supra* note 52, at 414-15.

178. *See Widiss, supra* note 51, at 1020-21 (noting that pregnant employees who have challenged restrictive light-duty policies under the disparate impact theory have often been unsuccessful).

employer to explain the practice on business grounds.¹⁷⁹ Moreover, plaintiffs can no longer rely on the proportion of minorities in the general population as a baseline for measuring disparate impact. Instead, plaintiffs must calculate the racial composition of “the qualified . . . population in the relevant labor market.”¹⁸⁰ Both of these limitations essentially erase the structural aspects of employment discrimination by disaggregating into isolated events systemic employment practices that produce inequality.¹⁸¹ More generally, a majority of the Supreme Court has signaled its general hostility to the disparate impact theory across contexts.¹⁸²

Additionally, under both the systemic disparate treatment¹⁸³ and disparate impact¹⁸⁴ frameworks, courts have allowed employers to avoid liability for discrimination by arguing that employees protected by Title VII lack interest in highly rewarded jobs.¹⁸⁵ In doing so, courts have failed to recognize the role of workplace structures and

179. *Wards Cove Packing Co.*, 490 U.S. at 657; *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988) (plurality opinion).

180. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977).

181. *See, e.g., Vitug v. Multistate Tax Comm’n*, 88 F.3d 506, 515-16 (7th Cir. 1996) (holding that word-of-mouth recruitment practices resulting in the disproportionate failure to hire Asian or Catholic applicants did not demonstrate a prima facie case of discrimination, because the plaintiff was unable to demonstrate that any particular employment qualification produced a statistical disparity); *cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (holding that statistical evidence of gender disparities combined with a sociologist’s analysis that Wal-Mart’s corporate culture made it vulnerable to gender bias were inadequate to show that members of the putative class had a common claim for purposes of class certification under Fed. R. Civ. P. 23(b)).

182. *See Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (disallowing disparate impact claims where a plaintiff cannot establish a “robust” causal link to a defendant’s actual policies serves to eliminate suits seeking to hold a defendant liable for alleged racial disparities it “did not create.”); *cf. Ricci v. DeStefano*, 557 U.S. 557, 579-80 (2009) (holding that the City of New Haven’s decision to invalidate the results of a promotional exam for firefighters in order to avoid disparate impact of the test on black and Hispanic candidates constituted illegal disparate treatment in violation of Title VII and the Equal Protection Clause, because the City had considered the racial impact of the test in abandoning the results).

183. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).

184. *See, e.g., Wards Cove Packing Co.*, 490 U.S. at 647, 653-54 (holding that in a racially-segregated Alaska salmon cannery, the cannery workforce of mostly Filipinos and Alaska Natives was not the relevant labor market for better-paid, unskilled non-cannery jobs, because the cannery workers did not seek these positions, despite evidence that the employer relied on racially segregated hiring channels, operated segregated housing and dining facilities, and used a number of other employment practices, such as adopting a rehiring preference and not promoting from within, that could explain its segregated workforce at the plant). *But see Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (rejecting a state’s argument that disparate impact should only be assessed with regard to women who actually applied for prison guard jobs and that a weight and height requirement for such jobs did not have a disparate impact on the women who actually applied).

185. Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1080-81 (1992).

gender and race bias in shaping applicants and employees' career aspirations. More recently, the Supreme Court made it more difficult to certify class actions under Rule 23 of the Federal Rules of Civil Procedure,¹⁸⁶ a crucial tool for large-scale litigation seeking structural reform of the workplace, and in doing so, implicitly rejected the systemic disparate treatment and disparate impact theories of employer liability under Title VII.¹⁸⁷ Although these more expansive theories of employer liability represent an improvement on the individual disparate treatment framework in their recognition that discrimination in the workplace is connected to larger social patterns, neither doctrine, as presently constituted, provides an adequate account of how workplaces themselves participate in social patterns of discrimination and shape the employees subject to them.¹⁸⁸

IV. DISCOVERING THE DOMINO EFFECT: ITS INTELLECTUAL AND EMPIRICAL FOUNDATIONS

The imperative of lawyers to fit their clients' facts into existing doctrinal forms, as well as the natural pull of divergent disciplinary perspectives on discrimination, have had unfortunate intellectual consequences. Although few contributors to the fields of employment discrimination or inequality in the labor market personally subscribe to the undertheorized conception of inequality described in Part III, much of the research, public-policy advocacy, and legal doctrine in this area emphasizes the mutually exclusive nature of these theories.

An alternative social scientific perspective, considered in this Part, examines interactions among the three potential understandings of worker inequality. I discuss some of this research, which demonstrates

186. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). In *Wal-Mart*, the Court narrowed the availability of class actions by its interpretation of Rule 23 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 23. Rule 23(a)(2) requires a party seeking class certification to prove that there are "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). To satisfy Rule 23(a)(2), the lawsuit must resolve an issue that all the class members share. In *Wal-Mart*, the issue underlying the claims of all members of the class was whether Wal-Mart's policy of granting local store managers complete and final discretion over pay and promotion decisions constituted a common discriminatory practice making all women employees vulnerable to sex discrimination. *Wal-Mart*, 564 U.S. at 342. The Court held that there was no common question of "law or fact," as the statistical evidence in the record showing pay and promotion disparities between male and female Wal-Mart employees was insufficient to demonstrate a general corporate policy of allowing discrimination. *Id.* at 355. As a result, the class could not be certified because it could not meet the requirements of Rule 23(a).

187. *Wal-Mart*, 564 U.S. at 355.

188. See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2526 (1994) ("The reluctance of courts — across the range of Title VII doctrines — to make explicit the ways that systems of discrimination operate and intersect, or shape the consciousness of the subject, has created a doctrine that is blind to many discriminatory dynamics.").

two dynamics relevant to this analysis. First, organizational arrangements can activate or suppress bias. As such, discriminatory workplace structures and stereotyping by decisionmakers are not independent phenomena; rather, there is an interaction between the two that can amplify or reduce discrimination and worker inequality. Second, as should not be any surprise, employees who are subject to bias are not immune from its affects. They may respond in ways consistent with stereotypical expectations, or they may work to overcome the stereotype by engaging in energy-expending behaviors and strategies to counteract biased expectations. Either way, these responses often produce real costs for the employee, for example, in the form of lowered job productivity, diminished performance, or dampened aspirations. Thus, taking account of these dynamics, discriminatory bias and personal explanations for worker inequality—such as individual employees’ characteristics, motivation, performance, and personal “choices” (that is, factors disparate treatment law classifies as belonging on the supply side of things)—are also not independent of one another. As a whole, the research discussed in this Part demonstrates the domino model of workplace inequality, and it suggests that employers are substantially more complicit in creating inequality than our current law assumes. Indeed, work organizations can be veritable inequality factories under certain conditions.

A. *New Institutionalism*

New institutionalism is a theory that focuses on developing a sociological view of institutions. New institutionalism cannot be simply defined—it has flourished in many disciplines including sociology, economics, political science, business organization theory, and history. As two key founders of this intellectual movement explain, “approaches to institutions rooted in such different soils cannot be expected to converge on a single set of assumptions and goals,”¹⁸⁹ but it is fair to say that the common thread is a “skepticism toward atomistic accounts of social processes” and institutional arrangements.¹⁹⁰

One sub-genre of this research studies how inequality is produced inside institutions and, in particular, how personnel practices in

189. See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 3 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (anthology providing a thorough introduction to the field of new institutionalism).

190. *Id.*; see also Robert L. Nelson, Ellen C. Berrey & Laura Beth Nielsen, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. SOC. SCI. 103, 112-15 (2008) (discussing new institutionalism research and its implications for employment discrimination law).

work organizations shape employee preferences and behaviors.¹⁹¹ This research suggests that gendered work patterns, such as the glass ceiling and sex-segregation, are traceable to the influence of organizational structures on employees' aspirations and behavior. That is, work preferences and commitments evolve in the context of the workplace environment and develop as a result of opportunities and experiences. As legal scholar Vicki Schultz has noted, "these observations seem astonishingly simple. It seems obvious that socialization does not grind to a halt when young women emerge from childhood, but continues behind the office door or factory gate to influence their attitudes and aspirations as adult workers."¹⁹² As sociologist Rosabeth Moss Kanter explained in her classic account of how organizations affect employee's performance:

[T]o a very large degree, organizations make their workers into who they are. Adults change to fit the system. . . . [O]rganizations often act as though it is possible to predict people's job futures from the characteristics they bring with them [to] a recruiting interview. What really happens is that predictions get made on the basis of stereotypes and current notions of who fits where in the present system; people are then "set up" in positions which make the predictions come true.¹⁹³

This theory should not be understood to assume that individuals are automatons without agency. It is simply a recognition that people act strategically within the constraints of their positions in an organization. This insight is consistent with a significant body of feminist scholarship challenging liberal conceptions of autonomy. For example, feminist theorists have offered a number of insights about how women's choices are made under conditions of constraint that may affect choices in a wide range of arenas, including decisions about where to work, walk, and whether and how to speak.¹⁹⁴

B. Stereotype Threat and the Self-Fulfilling Prophecy

Social psychologists have demonstrated how the situational threat of being judged or treated stereotypically can affect the members of a group about whom a negative stereotype exists, adversely affecting

191. Schultz, *supra* note 73, at 1815-32.

192. *Id.* at 1824.

193. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 263 (1977).

194. See, e.g., MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 40-41 (2004); DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 141-70 (1989). See generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Fineman, *supra* note 63; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 739-40 (1997) (describing sexual harassment as a disciplinary practice).

performance and hampering achievement.¹⁹⁵ When individuals feel that a sociocultural group to which they belong is negatively stereotyped in that domain, performance can be hindered. Thus, for example, in Claude Steele and Joshua Aronson's seminal experiments on stereotype threat, African-American students, who are stereotyped to be poor students, underperformed relative to white students when they were told that a test was diagnostic of how smart they are.¹⁹⁶ In the experiment, the investigators gave a difficult verbal test to white and black college students. One group was told that the test measured how smart they were. Another comparable group was told that the same test was just a laboratory exercise. The black students performed as well as the white students when they were told the test was a general lab exercise, controlling for the participants' skills. In contrast, when told that the test was measuring their intelligence, the black students greatly underperformed equally skilled white students.¹⁹⁷

The stereotype threat results have been replicated in experiments involving other identities. For example, in a more recent study, Asian-American women at Harvard University were asked to take a hard math test. Those given a questionnaire before the test with innocuous questions designed to prime their Asian identities performed best, those given a questionnaire with no identity primed came in second, and the group that had its female identity primed ranked last (forty-three percent) on the test.¹⁹⁸ These findings were replicated by Steele and his team at the University of Michigan. Women and men undergraduates with entering math SAT scores in the top fifteen percent of the Michigan student population and who identified math as "very important to their personal and career goals" were given a difficult math test.¹⁹⁹ The female students performed just as well as the male students when the test was presented as one that did not show sex differences, that is, as a test in which women always did as well as men,²⁰⁰ but they performed significantly worse than the male students when they did not receive

195. See generally Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997). Vicki Schultz covered some of this ground more briefly in her article, *Taking Discrimination Seriously*, 91 DENV. L. REV. 995, 1007-08 (2015). I thank her for the foundational insights on which this discussion is based.

196. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995).

197. See *id.*

198. See Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80-81 (1999).

199. Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 379, 380 (2002).

200. *Id.* at 381.

this instruction.²⁰¹ Along the same lines, elderly people perform worse on a memory task if they are primed before the task with a negative stereotype of the elderly than if they are primed with a positive stereotype of the elderly.²⁰² Even typically privileged groups can be made to experience stereotype threat. For example, a study found that white men performed more poorly on a math test when they were told that their performance would be compared with that of Asian-American men,²⁰³ and another found that whites performed more poorly than African Americans on a motor task when it was described to them as measuring their natural athletic ability.²⁰⁴ These studies and others explaining a wide range of performance disparities demonstrate the powerful influence of stereotypes on individual performance,²⁰⁵ even when subtly activated.²⁰⁶

What explains the stereotype threat effects found in these studies? The primary mechanism is likely related to stress. One very comprehensive review posits that activating negative stereotypes about a person's identity creates physiological stress, which directly impairs the ability to process information and causes the person to divert mental energy to monitoring performance and suppressing negative thoughts and emotions.²⁰⁷ These mechanisms combine to

201. *Id.* at 381 fig.1.

202. See Becca Levy, *Improving Memory in Old Age Through Implicit Self-Stereotyping*, 71 J. PERSONALITY & SOC. PSYCHOL. 1092, 1092-101 (1996).

203. See Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL PSYCHOL. 29, 33-34 (1999).

204. See Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCHOL. 1213, 1223 (1999).

205. For additional studies, see Jean-Claude Croizet & Theresa Claire, *Extending the Concept of Stereotype and Threat to Social Class: The Intellectual Underperformance of Students from Low Socioeconomic Backgrounds*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 588, 592-93 figs.1, 2 & 3 (1998) (finding that children with low socioeconomic status perform more poorly than do those with high socioeconomic status when instructions accompanying a test describe it as measuring intellectual ability, but not when the test is presented as nondiagnostic of intellectual ability); Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering a Disruptive Mental Load*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 721, 725 (2004) (finding that psychology students perform more poorly than do science students when told a test measures mathematical and logical reasoning); Patricia M. Gonzales et al., *The Effects of Stereotype Threat and Double-Minority Status on Test Performance of Latino Women*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 659, 667-68 (2002) (finding that when a task is described as diagnostic of intelligence, Latinos and particularly Latinas perform more poorly than do whites).

206. Research suggests that this process may be reversed. For example, social psychologists have found that environmental factors, such as workplace diversity, may diminish automatic stereotyping and that small changes in the context can produce radically different responses by individuals to the same stimuli. See generally Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002).

207. See Croizet & Claire, *supra* note 205, at 592-94; Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 PSYCHOL. REV. 336, 352 (2008).

consume mental resources needed to perform well on cognitive and social tasks.

A related and fascinating phenomenon studied by social psychologists is called the “self-fulfilling prophecy”²⁰⁸ or “behavioral confirmation.”²⁰⁹ Behavioral confirmation occurs when stereotyping or bias by a perceiver influences the perceiver’s treatment of a target, which, in turn, shapes the target’s behavior in a manner consistent with the perceiver’s expectancy.²¹⁰ As explained by Robert Merton, the Columbia University sociologist who developed the classic definition of this theory, “[t]he self-fulfilling prophecy is, in the beginning, a *false* definition of the situation evoking a new behavior which makes the originally false conception come *true*.”²¹¹ For example, a person who holds a stereotype that black people are hostile may behave cautiously and distrusting around a black colleague, in accordance with her belief, and thereby evoke cold and distant behavior from the colleague, confirming the stereotype.²¹² According to social psychologist Susan Fiske, “[b]eing able to make the stereotype true can be convenient for the perceiver because it makes the target predictable and potentially more controllable.”²¹³ The behavioral confirmation then becomes the justification for future treatment consistent with the originally false belief. In Merton’s words, “The specious validity of the self-fulfilling prophecy perpetuates a reign of error. For the prophet will cite the actual course of events as proof that he was right from the very beginning.”²¹⁴

A number of controlled experiments illustrate the behavioral confirmation phenomenon. When an African-American job candidate is treated with great distance and abruptness, he flounders in an interview.²¹⁵ A child whose playmate believes she is younger chooses easier games than a child labeled as older.²¹⁶ The apparent reason is that when one child believes her playmate is younger, she treats the playmate as if she is a younger person, behaving in a more directive and assertive manner, eliciting a response from the playmate that is

208. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 129 (1957).

209. Mark Snyder, *When Belief Creates Reality: The Self-Fulfilling Impact of First Impressions on Social Interaction*, 18 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 247, 250-51 (1984).

210. See MERTON, *supra* note 208, at 422-26.

211. *Id.* at 423.

212. See *id.* at 250-57; Fiske, *supra* note 50, at 382.

213. See Fiske, *supra* note 50, at 382.

214. MERTON, *supra* note 208, at 423.

215. See Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 *J. EXPERIMENTAL SOC. PSYCHOL.* 109, 119-20 (1974).

216. See Lynn M. Musser & William G. Graziano, *Behavioral Confirmation in Children’s Interactions with Peers*, 12 *BASIC & APPLIED SOC. PSYCHOL.* 441, 453 (1991).

consistent with the play of a younger child.²¹⁷ In an experiment simulating police interrogations, mock crime suspects whose interrogators are led to believe they are guilty are more likely to be subject to aggressive interrogation techniques, which in turn evokes more defensive responses by the suspects and leads judges naïve of the experiment conditions to perceive the suspect as more guilty than suspects whose interrogators believe they are innocent.²¹⁸ In simulated job interviews, applicants given the benefit of positive expectations present more positive and less negative information about themselves compared with applicants confronting interviewers holding negative expectations,²¹⁹ and female applicants whose male interviewers are led to believe the female applicants are attracted to them demonstrate significantly more flirtatious behavior than female applicants whose interviewers do not hold this belief.²²⁰

With repeated exposure, the expectancy of being stereotyped can become internalized and thus self-maintaining. As explained by social psychologists Theresa Claire and Susan Fiske:

This is particularly true for certain categories of targets, often those who are easily identified by noticeable physical characteristics. For example, in this society, being African American, physically disabled, or elderly often functions as a “master status” category. Although the person belongs to other categories, perceivers from majority groups accord extreme importance to this one salient feature, and it influences both interpretations of the target’s behavior and behavior toward the target. Thus, stereotypes are . . . pervasively applied in interactions with targets.

From the target’s perspective, the pervasiveness of perceiver stereotypes about one’s group means increased pressure to confirm

217. See *id.*

218. See Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 199-200 (2003).

219. See Dylan M. Smith et al., *Target Complicity in the Confirmation and Disconfirmation of Erroneous Perceiver Expectations: Immediate and Longer Term Implications*, 73 J. PERSONALITY & SOC. PSYCHOL. 974, 983 (1997).

220. See Robert D. Ridge & Jeffrey S. Reber, “*I Think She’s Attracted to Me*”: *The Effect of Men’s Beliefs on Women’s Behavior in a Job Interview Scenario*, 24 BASIC & APPLIED SOC. PSYCHOL. 1, 11 (2002). For older studies finding similar results eliciting gendered behavior, see Berna J. Skrypnik & Mark Snyder, *On the Self-Perpetuating Nature of Stereotypes About Women and Men*, 18 J. EXPERIMENTAL SOC. PSYCHOL. 277, 288 (1982) (finding that when a man expects a female coworker to enjoy stereotypically feminine tasks, after talking to him, she is more likely to choose those very tasks when she and her colleagues negotiate who will do what than when she responds to a man who does not embrace the same sexist expectation); Mark Snyder, Elizabeth Decker Tanke & Ellen Berscheid, *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOL. 656, 663 (1977) (finding that a man talking on the phone to a woman who he perceives to be unattractive does so with such detachment and boredom that her responses in the conversation are also cool and uninterested).

stereotypes because of the sheer number of times the target must face the stereotypic conception.²²¹

Thus, the targets of stereotyping may repeat behavior elicited previously,²²² “thereby making the stereotype ultimately, although not initially, ‘true.’”²²³

In sum, when individuals hold expectations about other people (as targets), they can elicit from these targets behaviors that are consistent with their expectations, even if these expectations are independent of the target’s preexisting characteristics. Research suggests that behavioral confirmation is most likely to occur when a perceiver has power over a dependent target,²²⁴ as is the case when employers have power over job applicants or employees, making the behavioral confirmation phenomenon particularly relevant to the employment context.

Much of the research discovering the phenomenon of behavioral confirmation is derived from controlled laboratory experiments. Of course, work organizations are much more complex than the lab setting, and behavioral confirmation sometimes occurs in ways unanticipated by those who first advanced this sociological theory. For example, targets who are aware of being stereotyped may

221. Theresa Claire & Susan T. Fiske, *A Systemic View of Behavioral Confirmation: Counterpoint to the Individualist View*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 210-11 (Constantine Sedikides et al. eds., 1998) (citations omitted). A “master status” or “master category” refers to a deeply rooted categorization system people use to organize social interaction. As explained by sociologists Cecilia Ridgway and Shelley Correll:

To interact successfully, people need at least some shared cultural systems for categorizing and defining self and other in the situation so that they can anticipate each other’s behavior and act accordingly. Studies of social cognition suggest that a small number of these category systems, usually about two or three, function as primary categories in a society. Primary categories describe things that one must know about a person to render that person sufficiently meaningful that one can relate to her or him. . . . [E]vidence suggests that sex category is always one of a society’s primary category systems—in the United States, race is one as well.

Cecilia L. Ridgeway & Shelley J. Correll, *Limiting Inequality Through Interaction: The End(s) of Gender*, 29 CONTEMP. SOC. 110, 111 (2000).

222. See Russel H. Fazio et al., *Self-Perceptions Following Social Interaction*, 41 J. PERSONALITY & SOC. PSYCHOL. 232, 239-40 (1981); Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148, 157-59 (1978).

223. Fiske, *supra* note 50, at 383; see also Smith et al., *supra* note 219, at 988 (finding in a simulated employment interview, that applicants confronted by interviewers with low expectations in a first interview offered more negative information about themselves and did so as well in a second interview, even when the second interviewer was primed to have high expectations of the applicant).

224. See Claire & Fiske, *supra* note 221, at 215-17; John T. Copeland, *Prophecies of Power: Motivational Implications of Social Power for Behavioral Confirmation*, 67 J. PERSONALITY & SOC. PSYCHOL. 264, 276 (1994).

respond in ways that are incongruent with a perceiver's stereotype to counter erroneous and undesirable expectations,²²⁵ which has its own costs and risks. However, hundreds of experimental studies over several decades suggest that behavioral confirmation is a real phenomenon that occurs in many domains.²²⁶

Field studies of the classroom, the workplace, and the military correlate these findings outside the laboratory. For example, studies have revealed that teachers' low expectations of students depress academic performance, and that this effect is larger for students who are low in power and advantage.²²⁷ Along the same lines, middle-schoolers whose peers have negative expectations of them become increasingly submissive with friends over time,²²⁸ as any parent of a bullied or ostracized child could anecdotally verify. A recent meta-analysis found that managers' expectations have a self-fulfilling effect, with higher expectations leading to higher employee performance.²²⁹ Military trainees of whom instructors expect the least perform the worst.²³⁰ In contrast, high expectations from military

225. See, e.g., Arthur A. Stukas, Jr. & Mark Snyder, *Targets' Awareness of Expectations and Behavioral Confirmation in Ongoing Interactions*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 31, 39 (2002); cf. Mario P. Casa de Calvo & Darcy A. Reich, *Spontaneous Correction in the Behavioral Confirmation Process: The Role of Naturally-Occurring Variations in Self-Regulatory Resources*, 29 BASIC & APPLIED SOC. PSYCHOL. 351, 361-63 (2007) (finding that both interviewer-perceivers and interviewee-targets were able to correct for false but extremely negative expectations of targets in simulated job interviews, but this correcting behavior was more likely to occur when the parties were less tired and overworked). This study helps make sense of the negative performance impacts of stereotype threat, whereby additional mental energy is expended under conditions of being stereotyped. See *supra* note 207 and accompanying text; see also *infra* Section IV.D. (discussing Carbado and Gulati's theory of working identity, whereby minorities engage in "identity work" to combat negative stereotypes).

226. See Mark Snyder & Oliver Klein, *Construing and Constructing Others on the Reality and the Generality of the Behavioral Confirmation Scenario*, 6 INTERACTION STUD. 53, 54 (2005).

227. See Rhona S. Weinstein et al., *Intractable Self-Fulfilling Prophecies, Fifty Years After Brown v. Board of Education*, 59 AM. PSYCHOLOGIST 511, 512, 514 (2004) (summarizing field studies demonstrating the depressed academic performance of stigmatized minority students); Dennis Reynolds, *Restraining Golem and Harnessing Pygmalion in the Classroom: A Laboratory Study of Managerial Expectations and Task Design*, 6 ACAD. MGMT. LEARNING & EDUC. 468, 481 (2007) (finding that even though randomly assigned, business school undergraduate students assigned to sections whose teaching assistants were told they had performed dismally on a pre-test and would expect to do poorly on a related upcoming tests, performed substantially worse on the related test than students whose teaching assistants did not hold negative expectations of performance).

228. See Emily Loeb et al., *The Self-Fulfilling Prophecy of Adolescent Social Expectations*, 40 INT'L J. BEHAV. DEV. 555, 560-61 (2016).

229. See Nicole M. Kierien & Michael A. Gold, *Pygmalion in Work Organizations: A Meta-Analysis*, 21 J. ORGANIZATIONAL BEHAV. 913, 923-26 (2000).

230. See Sasson Oz & Dov Eden, *Restraining the Golem: Boosting Performance by Changing the Interpretation of Low Scores*, 79 J. APPLIED PSYCHOL. 744, 750-51 (1994). Note that for obvious ethical reasons, field studies inducing subjects to perform poorly are uncommon. *Id.* at 744. Thus, in this study, military squad leaders' perceptions were ma-

commanders leads to increases in performance of cadets who are the subject of these beliefs.²³¹ These studies provide further support for the claim that expectations of individuals can have dramatic effects on their performance and that this phenomenon is likely to operate the same way in work organizations as in the lab.

C. Salience

Salience is another helpful concept for understanding the domino effect in the employment context. According to social scientists, anything that focuses observers' attention on a stereotyped category is said to "prime" stereotyping, and this process occurs even without the observer's awareness.²³² Employee behaviors or characteristics associated with their minority status can trigger stereotyping by others. For example, becoming pregnant, taking a family leave, or simply having children tend to make an employee's gender more salient in the workplace, especially women's.²³³ Wearing braids in the workplace may make an African American's race more salient, creating a higher likelihood that she will be subject to negative evaluation.²³⁴ In the context of the classroom, the concept of salience explains why minority and women professors are more likely to be negatively evaluated as politically biased by students when they teach subjects that address identity and inequality.²³⁵ Organizational

nipulated to believe that low scores on a physical fitness test were not indicative of a subordinate's ineptitude, whereas the control condition involved no manipulation. *Id.* at 746-47. Trainees in the control condition made fewer and slower improvements in physical fitness. *Id.* at 748-49. Thus, the behavioral confirmation effects were induced indirectly through measures to prevent low expectations from kicking in, rather than by inducing poor performance.

231. Oranit B. Davidson & Dov Eden, *Remedial Self-Fulfilling Prophecy: Two Field Experiments to Prevent Golem Effects Among Disadvantaged Women*, 85 J. APPLIED PSYCHOL. 386, 396 (2000).

232. Fiske, *supra* note 50, at 366; Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. SOC. BEHAV. PERSONALITY 3, 10 (1995) (discussing contextual salience).

233. Williams & Segal, *supra* note 114, at 90-102 (discussing studies).

234. See Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 PERSONALITY & SOC. PSYCHOL. REV. 383, 388 (2004) (finding that Afrocentric hair makes race salient); Tina R. Opie & Katherine W. Phillips, *Hair Penalties: The Negative Influence of Afrocentric Hair on Ratings of Black Women's Dominance and Professionalism*, 6 FRONTIERS PSYCHOL. 1, 5 (2015) (experimental study finding that employment candidates with Afrocentric hairstyles were rated as less professional and less likely to succeed in corporate America than employment candidates with Eurocentric hairstyles). An interesting finding of the Opie and Phillips study is that although all evaluators were critical of Afrocentric hairstyles, black evaluators were even more critical than white evaluators. *Id.* at 10. The researchers theorized that this "horizontal hostility" manifests because blacks, like whites, are pressured by powerful decisionmakers to adhere to Eurocentric professional standards, and in-group members may impose conformity demands on their peers as a form of self-protection. *Id.*

235. See Lazos, *supra* note 69 (reviewing studies). Lazos describes a few of these studies as follows:

contexts can also make category membership salient. For example, studies show that a highly skewed sex or race composition in a work group is likely to activate stereotypes.²³⁶ Similarly, studies show that being a token—the only African American, gay person, one of only a few women, etc.—is likely to activate bias.²³⁷

Professors Moore and Trahan tested students' attitudes by asking students to rate a syllabus for a proposed sociology of gender course to be taught by a hypothetical woman professor. The students were asked to project what they anticipated the course experience would be like. The majority predicted that the professor would be biased and more than likely would have a political agenda. When the hypothetical teacher was a male professor, students did not believe that he would have an ideological agenda. Another study found similar results with a Racism and Sexism in American Society class when the instructor was African American (as opposed to white). And a third study found this attitudinal bias when a hypothetical Latino professor was proposed to teach a course called Race, Gender, and Inequality.

Id. at 182 (citations omitted).

236. See Galen V. Bodenhausen, C. Neil Macrae & Jennifer Garst, *Stereotypes in Thought and Deed: Social-Cognitive Origins of Intergroup Discrimination*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR, *supra* note 221, at 317; Williams, *supra* note 129, at 418-19 (discussing studies on stereotyping and tokenism).

237. The facts of a Supreme Court case, *Desert Palace v. Costa*, 539 U.S. 90 (2003), vividly illustrate how tokenism may increase the salience of an employee's minority status, as well as the self-fulfilling prophecy phenomenon discussed above. Catharina Costa was employed as a warehouse worker at Caesars Palace Hotel & Casino for almost a decade. See *Costa v. Desert Palace*, 268 F.3d 882, 884 (9th Cir. 2001). Described by the Ninth Circuit Court of Appeals as a "trailblazer," see *Costa v. Desert Palace*, 299 F.3d 838, 844 (9th Cir. 2002), she was the only female employee in the entire warehouse. *Desert Palace*, 539 U.S. at 95. Costa was responsible, along with other members of her union bargaining unit, for operating the forklifts and pallet jacks to retrieve food and beverage orders. *Costa*, 299 F.3d at 844. During her tenure, she was constantly written up for minor infractions that, when committed by male employees, were overlooked or even rewarded. For example, when she came in late for work—on one occasion, even just a minute—she received a written reprimand, but when male employees were late or missed work, their tardiness was disregarded or they were given overtime to make up for lost wages. *Id.* at 845. Costa was regularly assigned less overtime than males, because they "ha[d] . . . famil[y] to support." *Id.* Caesars management singled her out for harsher discipline; for example, she was frequently warned and even suspended for allegedly hazardous use of equipment and for use of profanity, yet men engaged in this conduct "with impunity." *Id.* Costa also suffered from sex-based verbal and physical abuse. For example, a female supervisor referred to her as a "bitch," and a coworker called her a "fucking cunt." *Id.* at 846. One male supervisor followed her around the warehouse, subjecting her to intense scrutiny, described by three witnesses as "intense 'stalking.'" *Id.* at 845. The situation came to a head when a male coworker trapped her in an elevator and shoved her into a wall. *Id.* at 846. Costa was fired for fighting, given her disciplinary history, while her male coworker, who had a relatively clean disciplinary record, was merely suspended for five days. *Id.*

According to the Ninth Circuit, "Costa's work was characterized as 'excellent' and 'good.' As her supervisor explained: 'We knew when she was out there the job would get done.'" *Id.* at 844. Yet, social psychological research suggests this may be why she was targeted. Women in traditionally male occupations may face hostility, because they are viewed as inappropriately masculine. Researchers describe this as an "agency penalty." See, e.g., Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 585 (2002). Moreover, when women perform well

D. Working Identity

Building on these frameworks, as well as sociologist Erving Goffman's influential work on the formation of identity through social encounters in everyday life,²³⁸ critical legal scholars have

in traditionally male jobs, they do so at the cost of being seen as "competent but cold," see Amy J.C. Cuddy et al., *The Dynamics of Warmth and Competence Judgments, and Their Outcomes in Organizations*, 31 RES. ORGANIZATIONAL BEHAV. 73, 85-86 (2011), and they may experience negative reactions in the form of social and economic sanctions, an effect known as "stereotype backlash." See Laurie A. Rudman & Julie E. Phelan, *Backlash Effects for Disconfirming Gender Stereotypes in Organizations*, 28 RES. ORGANIZATIONAL BEHAV. 61, 67 (2008). Furthermore, studies suggest that when women convey anger at work, they are conferred lower status and salary than men who express anger and lower status and salary than women who do not express anger. See Victoria L. Brescoll & Eric Luis Uhlmann, *Can Angry Women Get Ahead? Status Conferral, Gender, and Expressions of Emotion in the Workplace*, 19 PSYCHOL. SCI. 268, 273 (2008). Indeed, men who express anger at work may benefit from a heightened status. *Id.*

Costa's solo status as the only woman in an otherwise all-male unit likely triggered and exacerbated these discriminatory processes by making her sex more salient and a cue to judgment. This could partly explain why, for example, Costa's tardiness and foul language would be noticed, but not male employees'. That Costa displayed some of the behaviors her male-coworkers expected of her also suggests behavioral confirmation. The record showed that management and warehouse coworkers thought of and treated Costa as a "bitch." In response to the bullying and ostracization, Costa may have felt isolated and unhappy and responded in kind by sometimes behaving in an ill-tempered manner. Moreover, losing one's temper, fighting, and cursing were routine behaviors in the warehouse, and witness testimony suggested that she "got along with most people" and had "few arguments." *Costa*, 299 F.3d at 845. The studies discussed above suggest that these displays of anger would have hurt Costa but would have been inconsequential or even respected when men lost their tempers in the warehouse. Ultimately, Caesar's Palace attributed Costa's termination to her inability to get along with others, and Costa conceded that she was "not . . . a model employee," litigating her claim under the mixed-motive theory of proof. *Id.* at 846. Costa won at trial, and the judgment was ultimately affirmed on appeal. The Supreme Court held that, contrary to the Caesars' position, the usual civil litigation standard of the preponderance of the evidence applies in mixed-motive cases, and therefore, it was not a reversible error for the trial court to give a mixed-motive jury instruction even though Costa did not introduce direct evidence of discrimination. *Desert Palace*, 539 U.S. at 101. Still, when viewed through the lens of social psychological research on role incongruity, stereotype backlash, salience, the agency and anger penalty, and behavioral confirmation, the case should not have been conceptualized as a mixed-motive case in the first instance. The pattern of sex-based discriminatory treatment was egregious. Caesars condoned the discrimination by ignoring Costa's complaints or even disciplining her for complaining. *Costa*, 299 F.3d at 845-46. Costa's reaction to this toxic environment, assuming there was some truth to Caesar's assertions about Costa's social skills, was consistent with social psychological understandings of how individuals respond to discrimination. Caesars' asserted "legitimate nondiscriminatory reasons" for firing Costa—that she was not a team player and had a long disciplinary record—are most accurately understood as the product of discrimination, rather than a justification for it.

238. See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). Goffman (1922-1982) was a Canadian-American sociologist working within the sociological field of symbolic interactionism, which looks at everyday behavior and interactions between people to help explain society. Some examples of everyday interaction would be meeting people in a grocery store, workers interacting on the job, or children playing in a park. Within this field, Goffman introduced a vocabulary normally associated

documented how exclusionary institutional cultures and stereotypes may interact to produce specific negative effects for individuals belonging to outsider groups. For example, Devon Carbado and Mitu Gulati have developed the concept of “identity work” to describe the compensatory behaviors that outsider groups may engage in to avoid negative stereotypes in the workplace.²³⁹ According to this perspective, institutional characteristics, such as the “up or out” promotion tracks and “good citizen” cultures of law firms and law school faculties, may interact with group-specific stereotypes so as to influence the kinds of choices employees make in negotiating their identity.²⁴⁰ For example, an Asian employee at risk of being stereotyped as submissive, nonthreatening, and detail oriented—good worker-bee qualities but not generally rainmaker/partner qualities—may choose to do extra identity work such as going out drinking with colleagues, attending workplace-related social events, or participating on sports teams with others at work.²⁴¹ A lesbian employee, in fear of workplace harassment or discrimination, may decide to remain in the closet at work.²⁴² Alternatively, a member of a minority group may engage in “comforting” behaviors aimed at making insiders comfortable about an employee’s minority status, such as denigrating members of her own minority group.²⁴³

with the world of theater based on his theory that “life itself is a dramatically enacted thing.” *Id.* at 72. To this end, he developed a “dramaturgical approach” to understanding human interaction, *id.* at xi, which asserts that a person’s identity is not a stable and independent psychological entity, but rather, is shaped as the person interacts with others, *id.* at 252-53. Goffman’s work suggests that humans are pragmatic actors who continually adjust their performance in response to often unspoken and taken-for-granted subtleties that shape social interaction. Moreover, according to Goffman, these performances tend to become institutionalized as performances conducted in similar settings and by similar actors give rise to “stereotyped expectations” that transcend the particular interaction and setting. *Id.* at 27. Goffman’s theory is useful to researchers who study prejudice, bias, stereotyping, and discrimination, because it provides an account of how the disadvantaged position of disfavored minorities is produced and maintained in institutional domains such as schools and workplaces.

239. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000). A fuller treatment of their theory can be found in ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA. See CARBADO & GULATI, *supra* note 43.

240. See Carbado & Gulati, *supra* note 239, at 1273-76.

241. *Id.* at 1263-66.

242. *Id.* at 1277.

243. *Id.* at 1301-03. Along the same lines, Joan Williams describes the comforting behaviors or roles that women must often engage in so as not to threaten men. She explains:

“In everyday interaction, women are more commonly stereotyped at the level of subtypes, as ‘housewives’ or ‘career women,’ ‘babes’ or ‘lesbians.’” In environments where women experience bias, particularly those where women are outnumbered, sometimes women can succeed only by stepping into one of various roles reassuring to men, including the *mother*, a nurturing consoler who handles the emotion work of a group; the *princess*, who pairs with a male protector;

Kenji Yoshino offers a similar concept in his theory of “covering,” whereby a minority group is permitted to retain and articulate its identity as long as it mutes the difference between itself and the mainstream.²⁴⁴ Covering demands are at issue, for example, when an employer hires gays, but not a lesbian who “flaunts” her homosexuality by formalizing her relationship through marriage²⁴⁵ or when African-American women are pressured to straighten their hair.²⁴⁶

As these critiques highlight, “identity work” often comes with costs and risks, including compromising one’s sense of self, the risk that others will identify the performative element of an outsider’s behavior as strategic and manipulative, and the risk of triggering yet other negative stereotypes.²⁴⁷ Moreover, as legal scholar Gowri Ramachandran has argued, when a person’s identity lies at the intersection of more than one low-status category, conformity demands may be especially acute and costly.²⁴⁸ For example, a black

the *pet*, “a group mascot who applauds male achievements and gains acceptance by being a cute little person”; or *Ms. Efficiency*, a glorified secretary who organizes the group and keeps things on track.

See Williams, *supra* note 129, at 419-20 (footnotes omitted).

244. YOSHINO, *supra* note 43, *passim*.

245. *Cf. id.* at 93-101 (recounting the story of Robin Shahar, whose offer of employment as a staff attorney in Georgia’s Attorney General Office was rescinded after she informed the state on a routine personnel form of her plans to hold a commitment ceremony with her partner, Francine Greenfield). Shahar lost a freedom of intimate association suit based on these facts. See *Shahar v. Bowers*, 114 F. 3d 1097, 1110-11 (11th Cir. 1997) (en banc).

246. See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 415 (2007).

247. Carbado & Gulati, *supra* note 239, at 1280, 1291-92; see also YOSHINO, *supra* note 43, at 145-54 (discussing the double bind that women face, because they are pressured to be masculine enough to be taken seriously while also feminine enough to be an “authentic” woman, and nearly always failing to hit the perfect, sweet spot).

248. See Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 301 (2006). For the purpose of this Article, I discuss Gulati and Carbado’s theory of “working identity,” Yoshino’s “covering,” and Ramachandran’s idea of “intersectionality as catch-22” together, because all three of these conceptualizations of the nature and costs of the performative aspects of identity illustrate my larger argument about how discrimination may influence employees’ behaviors and decisions. Ramachandran, however, carves out a somewhat more narrow position than the others do; she argues that expanding discrimination law to prohibit all conformity demands on minorities runs the risk of essentializing groups around the identity performance in question. *Id.* at 301. She explains, “[E]quating bias against a typical form of identity performance for a group with bias against the group itself may naturalize the identity performance in question, thereby naturalizing and essentializing the ‘differences’ between the group and others, promoting prejudice and pigeonholing.” *Id.* at 301. She also notes that some demands are rational and “normatively good.” *Id.* at 307-08. Given these concerns, she would legally condemn only those conformity demands that

gay man who adopts a masculine gender identity to avoid being stereotyped as an effeminate gay man runs the risk of triggering the racist stereotype that black men are threatening and dangerous.²⁴⁹ Let us say, on the other hand, he tries to avoid being perceived as one of the “bad blacks” by dressing to a T in designer brands, practicing meticulous grooming, and being especially friendly and polite with all of his coworkers. This strategy runs the risk of being perceived as weak and delicate, a “sissy.”²⁵⁰ There is no winning. As these writers also highlight, Title VII reinforces the mandate to “work” one’s identity, to cover, to assimilate into invisibility,²⁵¹ by failing to protect covered employees from discrimination on the basis of the behavioral or cultural aspects of their identities.²⁵²

create a true “catch-22” for an individual, that is, demands that, because of the person’s intersectional identity, are impossible to meet simultaneously. *Id.* at 303-04.

Ramachandran provides the classic example of Ann Hopkins, who was denied partnership at Price Waterhouse mainly because management felt she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). The Supreme Court held that this type of demand constituted illegal sex discrimination because of the impossible position it imposed on Hopkins: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” *Id.* at 251. Ramachandran is somewhat skeptical that Hopkins could not have put on a little make up, put a lid on her potty mouth, and ultimately made partner. Ramachandran, *supra*, at 317. She is hesitant to question Price Waterhouse’s demand that its partners be aggressive, but she ultimately seems to view Hopkins’ situation as a legally unjustifiable demand, or at least coming very close to one. *Id.* at 319-22 (classifying Hopkins’ predicament of having to be both aggressive and not aggressive as an “incoherent situation”); *see also id.* at 339 (noting that Hopkins’ very existence at Price Waterhouse was “something of an incongruity”). Ramachandran’s careful analysis provides a helpful way to think through the complexities of conformity and the tradeoffs of legal recognition, but the research discussed in this Article suggests that her narrow definition of an illegal conformity demand as only one presenting a no-win, absurd choice may be insufficiently sensitive to the structural dimensions of majoritarian norms and their impacts on individuals.

249. Ramachandran, *supra* note 248, at 322.

250. *Id.* Moreover, even if this man were straight, this strategy could backfire to a greater or lesser extent, as colleagues may perceive him as being an “uppity” black. Indeed, there is a long history in the United States of punishing blacks who acted or dressed nicely. In southern states, for example, African Americans were restricted to wearing dressy clothes only in their neighborhoods or on Sundays. Black men were even physically attacked for dressing in ways that southern whites felt was above their station. After World War I, sometimes African-American veterans literally had their uniforms cut off them. *See* SHANE WHITE & GRAHAM WHITE, *STYLIN’: AFRICAN AMERICAN EXPRESSIVE CULTURE FROM ITS BEGINNINGS TO THE ZOOT SUIT* 155 (1998).

251. *See* Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 965-66 (1995) (describing “Latino invisibility” created by English-only rules and other mechanisms of erasure).

252. *See* YOSHINO, *supra* note 43, at 24; Onwuachi-Willig, *supra* note 246, at 1086-87. For other articles on performative aspects of identity and discrimination, see generally Mari J. Matsuda, *Voice of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE. L.J. 1329 (1991); Camille Gear Rich, *Performing*

E. Bias Avoidance

In the work and family context, labor economist Robert Drago and his colleagues developed a similar idea called “bias avoidance.”²⁵³ Bias avoidance occurs when employees respond to biases in the workplace by engaging in avoidance strategies—behaviors designed to escape potential career penalties associated with caregiving commitments.²⁵⁴ These behaviors include strategically minimizing or hiding family commitments.²⁵⁵ For example, employees may delay partnering, marriage, or child rearing. If already a parent, the employee may not take parental leave, not display family photos in her workspace, or not ask for a flexible work arrangement.²⁵⁶ Unsurprisingly, Drago and his colleagues found that bias avoidance behaviors are gendered; women more often than men engage in bias avoidance behaviors, because the division of labor in the home is uneven, and ideal worker and motherhood norms are applied more heavily to women.²⁵⁷

F. Conclusion

This research illustrates how discriminatory bias and structural aspects of the workplace can combine in insidious ways to negatively impact employee energy and productivity, motivation, investments, aspirations, and a whole host of factors widely viewed as individual defects “external” to the workplace. All of this is to suggest what we know intuitively to be true and is not controversial across a wide range of fields that study social processes and organizations—that humans are social beings who respond to their environments—and when an environment is filled with prejudice, bias, and

Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII, 79 N.Y.U. L. Rev. 1134 (2004); Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, 4 TEX. J. WOMEN & L. 171 (1996); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

253. See Robert Drago et al., *The Avoidance of Bias Against Caregiving*, 49 AM. BEHAV. SCIENTIST 1222 *passim* (2006).

254. *Id.*

255. *Id.* at 1223.

256. *Id.*; see also ARLIE HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* 85-88 (1997) (discussing her decision not to display photos of her children at work); WILLIAMS, *supra* note 115 (discussing men’s fear of using parental leave and the hesitation by working-class men to inform managers the real reasons for their absences from work (babysitting breakdowns), even in the face of discipline).

257. Drago et al., *supra* note 253, at 1223, 1240; cf. Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN’S L.J. 1, 9-11 (2004) (discussing studies finding that women’s lower level of workforce participation and avoidance of traditionally-male jobs is a rational response to the expectation of discrimination).

discrimination, individuals' choices, behavior, and performance can be negatively affected. The power of others' beliefs over one's behavior is extremely strong.

The good news is that the processes that give rise to inequality can be disrupted. In the next Part, I survey some of the experimental research discussing voluntary measures that employers can take to minimize the likelihood of bias and stereotyping and their negative effects, as well as several strategic and doctrinal interventions that would encourage employers to take affirmative steps to prevent and halt the domino effect.

V. DISRUPTING THE DOMINO EFFECT

Having attempted to establish the concept of the domino effect in the workplace, I now turn to a set of interventions that might disrupt this discriminatory process. I discuss two potential interventions. In Section V.A., I suggest voluntary measures that employers can adopt to prevent and remedy the processes of discrimination documented in this Article. These measures are evidence-based; they should be effective if an employer is committed to preventing and remedying discrimination. However, recognizing that this commitment is oftentimes lacking without the threat of liability, in Section V.B., I explore litigation strategies and revisions to some core doctrinal rules in Title VII jurisprudence that would allow Title VII to more effectively address the workplace domino effect.

A. Evidence-Based Voluntary Employer Measures

The domino effect is not inevitable. Crucial findings from the fields of sociology and organizational behavior provide guidance on voluntary measures that employers can take to disrupt the social processes that produce inequality inside their workplaces. In particular, social scientists have identified five personnel measures that can serve as a counterweight to the domino effect by minimizing the likelihood of stereotyping and its biasing effects: (1) constructing heterogeneous work groups; (2) creating interdependence among in-group and out-group members; (3) minimizing the salience of minority status in personnel decisions; (4) replacing subjective data with objective data; and (5) holding decisionmakers accountable for nondiscrimination.²⁵⁸ Past research has also found positive effects of egalitarian organizational norms at reducing bias. Each of these measures is briefly explored, in turn.

258. See Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 323 (2000).

Creating heterogeneous work groups with diverse membership tends to “suppress ingroup preference and outgroup derogation, stereotyping, and concomitant bias [in] personnel decisions.”²⁵⁹ This will be especially effective if work is arranged so that employees share “common goal[s] . . . [and] have institutional support for their joint enterprise.”²⁶⁰ Interdependence among employees incentivizes them to work cooperatively toward shared goals and to ascertain accurate, individuating information about out-group members.²⁶¹ Therefore, this type of work arrangement can diminish biases that may lead to discrimination. For example, supervisors who know that their salaries depend on the productivity or evaluations of their subordinates are more likely to provide the support their subordinates need to succeed and judge them more accurately.²⁶²

These measures are based on prominent social psychologist Gordon Allport’s “contact hypothesis,” which posits that intergroup contact reduces intergroup conflict and increases intergroup harmony under certain conditions.²⁶³ According to Allport, for intergroup contact to be beneficial, there must be equal status among majority and minority groups who share a common goal within a context of institutionalized support.²⁶⁴ Allport’s contact hypothesis has proven to be quite durable, despite criticisms by some social scientists as being naïve about the dynamics of group power. It has been validated in a large number of empirical studies since its proposal,²⁶⁵ including in laboratory experiments and real work settings.²⁶⁶

259. *Id.* at 324.

260. *Id.* at 324.

261. *Id.*

262. *Id.* at 324-25.

263. *See* GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 264-67, 281 (1954).

264. *See id.*

265. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L.J.* 1, 23-24 (2000) (citing studies) (“The hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.”).

266. *Id.* at 23-26. Indeed, insights about the contact hypothesis first emerged from one of the largest employers in the United States, the U.S. military. As explained by sociologists Frank Dobbin and Alexandra Kalev:

Evidence that contact between groups can lessen bias first came to light in an unplanned experiment on the European front during World War II. The U.S. army was still segregated, and only whites served in combat roles. High casualties left General Dwight Eisenhower understaffed, and he asked for black volunteers for combat duty. When Harvard sociologist Samuel Stouffer, on leave at the War Department, surveyed troops on their racial attitudes, he found that whites whose companies had been joined by black platoons showed dramatically lower racial animus and greater willingness to work alongside blacks than those whose companies remained segregated. Stouffer concluded that whites fighting alongside blacks came to see them as soldiers like

A second voluntary measure that employers can undertake to protect against the activation of stereotypes is to minimize the salience of minority status dimensions in personnel decisions. Salience is “[a]nything that focuses [the] observers’ attention on a stereotyped category” and thereby “‘primes’ stereotyping.”²⁶⁷ Thus, for example, “[a] highly skewed sex or race composition in a work group is likely to activate stereotypes.”²⁶⁸ This research suggests that a diversified workforce should diminish stereotyping by diminishing the salience of any particular group’s identity.

A third and well-established intervention that has been shown to minimize race and sex bias is replacing subjective data with objective data by developing formalized evaluation systems that rely upon objective measures. This means employers should use “objective, reliable, and timely information that is directly relevant to job performance” when making personnel decisions.²⁶⁹ This may be easier said than done, however.

Substantial research suggests that objective measures, alone, may not minimize bias in personnel decisions, because individuals do not consistently apply objective measures to in-group and out-group members.²⁷⁰ Two recent studies illustrate this phenomenon. In 2009, Joan Williams and Veta Richardson surveyed 694 law firm partners to get a handle on the impact of law firm compensation systems on women.²⁷¹ “A flood of comments stressed that law firm compensation is subjective even when objective factors are considered.”²⁷² Female partners surveyed as part of the study made comments such as, “some factors are ‘important’ if they justify paying a man, especially a

themselves first and foremost. The key, for Stouffer, was that whites and blacks had to be working toward a common goal *as equals*

Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail: And What Works Better*, HARV. BUS. REV., July-Aug. 2016, <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/26HY-A9VE>].

267. Reskin, *supra* note 258, at 325.

268. *Id.*

269. *Id.*

270. See Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL’Y & L. 36, 42-44 (2006) (finding that decisionmakers easily find reasonable, merit-based justifications for selecting whichever job candidate they choose); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475-76 (2005) (finding that when two job candidates were considered for the position of police chief, respondents preferred the male candidate when he had more experience than the female candidate, citing the importance of experience, but still preferred the male candidate when he had more education and less experience than the female candidate, citing the importance of education).

271. See generally Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597 (2011).

272. *Id.* at 648.

man with a family, . . . and other factors are ‘important’ if they will justify paying a woman, especially a single woman, less” and “[a]gain, [it] depends on who is being compensated, especially with respect to whom management favors. A factor that means nothing as [to] one partner can be the reason to compensate another partner, if someone on management wants to protect/cover that person.”²⁷³ In another study, Northwestern’s Kellogg School of Management Professor Laura Rivera spent a year conducting fieldwork in the recruiting department of an elite professional service firm. As part of her research, she sat in on group deliberations where candidates were discussed and ultimately selected.²⁷⁴ She found that the team paid little attention when white men blew a math test, chalking up their poor performance to an “off day,” but paid close attention when women and blacks performed poorly on the same test.²⁷⁵

Given the persistence of bias and discrimination even in evaluation systems employing objective measures, augmenting objective evaluation measures with effective accountability is crucial.²⁷⁶ Accountability is defined as “being answerable to audiences for performing up to certain prescribed standards, thereby fulfilling obligations,

273. *Id.* at 649-50 (first and fourth alteration in original).

274. LAUREN A. RIVERA, PEDIGREE: HOW ELITE STUDENTS GET ELITE JOBS 2 (2015).

275. *Id.* at 229. Courts are also not immune from this tendency. For example, in the Warner case, discussed *supra* notes 133-74, the district court honed in on the fact that the man who was promoted rather than Warner had more years of experience than Warner, even though Warner and the successful candidate scored only a few points apart on a merit-based rating system, *see Warner v. Vance-Cooks*, 956 F. Supp. 2d 129, 153 (D.D.C. 2013), and years of experience was not a listed element in selection system, *see Motion for Summary Judgment, Warner*, 956 F. Supp. 2d 129 (D.D.C. 2013) (No. 1:10-cv-01306), ECF No. 21-8, at 2-4.

276. *See Reskin, supra* note 258, at 325. As sociologist William Bielby explained in his expert report in the recent Wal-Mart litigation challenging the company’s subjective and bias ridden promotion practices:

A written equal employment opportunity (“EEO”) policy that is simply reactive and lacks effective accountability is vulnerable to bias against women and minorities. Often, such a system constitutes what social scientists call symbolic compliance: an exercise in “going through the motions,” with little substantive impact on creating a work environment that is free of bias.

Declaration of William T. Bielby, Ph.D. in Support of Plaintiff’s Motion for Class Certification at ¶ 50, *Dukes et al. v. Wal-Mart Stores, Inc.*, No. C-01-2252 (N.D. Cal. 20042003), 2003 WL 24571701. Bielby was relying in large part on Lauren Edelman and her colleagues’ early work on employers’ responses to civil rights laws, which found that paper policies oftentimes represent symbolic compliance, with little substantive impact on eliminating bias. *See Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 L. & POLY 73 (1991); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC. REV. 497 (1993); Lauren B. Edelman et al., *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RESEARCH IN SOCIAL STRATIFICATION & MOBILITY 107 (1999).

duties, expectations, and other charges.”²⁷⁷ When decisionmakers know that they will be held accountable for the criteria they use to make decisions, the effect of bias on decisions is reduced and decisions are made with more accuracy.²⁷⁸

Research in many contexts consistently shows the positive impact of accountability on reducing bias and increasing diversity. For example, in a recent laboratory study, college-student participants viewed a fictional videotaped interview with an applicant for a university department head position.²⁷⁹ Participants who received information indicating that the applicant was gay rated him less positively, but the discrimination disappeared when participants were told that they would have to justify their ratings.²⁸⁰ That is, in the “accountability condition,” no differences in ratings were seen between the gay and non-gay applicant.²⁸¹ Along the same lines, studies also show that individuals who think their actions are being judged by others demonstrate lower levels of bias.²⁸² MIT School of Management Professor Emilio Castilla’s recent field study of performance-based reward decisions concerning almost 9,000 employees in a large private company nicely illustrates this point. Castilla found that the firm consistently gave African Americans with identical job titles and performance ratings as whites, smaller raises, but when the firm posted each unit’s average performance rating and pay raise by race and gender, the gap in raises all but disappeared.²⁸³

The critical role of accountability in controlling bias brings us to a set of second questions posed by social scientists who study organizational inequality: What practices or policies create meaningful accountability? Here we have some helpful research. True accountability has three features: systemic monitoring of inequality, holding managers accountable for achieving equal opportunity goals, and

277. Barry R. Schlenker et al., *The Triangle Model of Responsibility*, 101 PSYCHOL. REV. 632, 634 (1994).

278. See Reskin, *supra* note 258, at 325; Philip E. Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 RES. ORGANIZATIONAL BEHAV. 297, 310 (1985).

279. Joel T. Nadler et al., *Aversive Discrimination in Employment Interviews: Reducing Effects of Sexual Orientation Bias with Accountability*, 1 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 480, 483 (2014).

280. *Id.* at 485.

281. *Id.*

282. See Selmi, *supra* note 42, at 217 (reviewing studies showing that “[w]hen individuals know their actions will be reviewed, they are far less likely to allow their discriminatory impulses to influence their actions.”); see also Dobbin & Kalev, *supra* note 266, at 58-60 (discussing several studies illustrating the principle that people “need to look good in the eyes of those around us.”).

283. See Emilio J. Castilla, *Accounting for the Gap: A Firm Study Manipulating Organizational Accountability and Transparency in Pay Decisions*, 26 ORGANIZATIONAL SCI. 311, 323 (2015). This study and others like it provide strong support for Gowri Ramachandran’s pay transparency proposal. See Ramachandran, *supra* note 66.

monitoring and analysis of employees' perceptions of discriminatory barriers and career opportunities.²⁸⁴ Consistent with these findings, and based on their study of 829 mid-sized and large firms, sociologists Frank Dobbin and Alexandra Kalev identify transparency, diversity taskforces, and the appointment of diversity managers as examples of three specific measures that successfully create accountability.²⁸⁵

In sum, the persistence of bias frustrates the potential benefits of incorporating objective recruitment and performance standards into the workplace, but it does not doom them. There is a broad consensus that with the added ingredient of accountability, objective evaluation is a very effective tool for eliminating discriminatory bias.²⁸⁶

Finally, past research has found positive effects of organizational norms at reducing bias in personnel decisions.²⁸⁷ How to change corporate culture is a complex subject, but research shows that "[e]mployers' organizational choices can both facilitate and constrain the development of discriminatory work cultures."²⁸⁸

Of course, in order for voluntary accountability measures to be adopted, there must be a normative commitment to equality, which simply does not exist in many workplaces at an organic, voluntary level. The next Part, therefore, explores litigation strategies and legal reforms that would encourage or require employers to undertake measures that are likely to disrupt the organizational processes that produce inequality.

284. See Declaration of William T. Bielby, *supra* note 276, at ¶ 50.

285. Dobbin & Kalev, *supra* note 266, at 58-60.

286. A dramatic example of how accountability can disrupt bias is the finding that checklists in the medical setting can save women's lives. When a critical care physician and his team at Johns Hopkins Hospital, for example, developed a protocol requiring that every physician use a checklist requiring doctors to review the need for every patient to receive special blood clot prevention measures upon admission to the hospital, it discovered systemic gender bias. See Jessica Nordell, *A Fix for Gender Bias in Healthcare? Check*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/opinion/a-fix-for-gender-bias-in-health-care-check.html>. Women trauma patients, apparently, were at significantly greater danger of dying of preventable blood clots than men, because doctors were less likely to provide them with blood clot prevention treatment. *Id.* After introduction of the checklist protocol, the gender disparity completely disappeared. *Id.* The intervention was based on surgeon, writer, and public health researcher Atul Gawande's revolutionary book on the use of checklists in in the business world and medical profession. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009). Gawande's research shows how something as simple as a checklist ensures that best practices are followed; they work by reducing errors and creating accountability in complex or stressful situations. *Id.*

287. Frank Dobbin, Suhann Kim & Alexandra Kalev, *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOC. REV. 386, 395 (2011); see also Lauren A. Rivera, *Diversity Within Reach: Recruitment Versus Hiring in Elite Firms*, 639 ANN. AM. ACAD. POL. & SOC. SCI. 71, 87 (2012) (study of hiring in elite law firms, investment banks, and management consulting firms finding that "widespread cultural beliefs among decision-makers that university prestige is an essential signal of merit but that diversity is an invalid one" inhibits the effectiveness of diversity recruitment programs).

288. See Green, *Work Culture*, *supra* note 42, at 650.

B. Incorporating the Domino Effect into Disparate Treatment Law and Practice

Having attempted to establish the concept of the domino effect in the workplace, and how it might be halted through voluntary measures by employers, I now turn to its implications for Title VII. I touch on a few concrete areas of disparate treatment law and practice, rather than evaluate all of the theory's implications for employment discrimination law, which I will defer to future scholarship. I begin with suggested innovative uses of existing doctrine and culminate with broader reform proposals that can more fundamentally update disparate treatment law to incorporate the insights of the domino effect.

1. Causation

The critical issue in any disparate treatment case is causation, that is, whether an adverse employment action was because of discrimination or a legitimate, nondiscriminatory reason. Assuming the claim is decided on the merits, the plaintiff's qualifications for a position or work performance are more often than not the central issue that is determinative of causation, and ultimately, the outcome of the claim. The emphasis holds true whether the action proceeds under Title VII's burden shifting evidentiary framework for proving intentional disparate treatment established by *McDonnell Douglas Corp. v. Green*²⁸⁹ or the mixed-motive alternative first established in *Price Waterhouse v. Hopkins*.²⁹⁰ Typically, the employer will assert that the legitimate, nondiscriminatory reason for an adverse employment action is that the plaintiff's qualifications or work performance were weaker than another applicant or employee's. As the Warner case discussed in Part III illustrates, courts often take such evidence at face value, dismissing disparate treatment claims on summary judgment. However, the domino effect, and all of the social science research establishing its existence discussed in this Article, demonstrate that employees' qualifications and work performance can be seriously diminished by discriminatory employment actions and work arrangements.

Therefore, in litigating disparate treatment claims, plaintiffs' advocates must build a narrative explaining the domino effect and its ultimate impact on employees, spelling out the common chain reaction that occurs when various types of discriminatory exclusion, even

289. 411 U.S. 792 (1973).

290. 490 U.S. 228, 241-42 (1989); see also Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-5(g) (2012); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93-94 (2003).

if seemingly insignificant in isolation, combine and interact, are internalized by employees, and ultimately cause significant, material inequalities. The domino effect is a chronic discriminatory pattern, yet we have no comprehensive legal theory to prevent it, much less a name for it. By employing the domino effect as the theory of the case, advocates can help judges and juries understand how this systemic behavior can lead to a point at which an employee appears less qualified or underperforming relative to non-protected employees.²⁹¹

If plaintiffs' attorneys do their job in this way, courts may be better able to see how the discrimination alleged by the plaintiff compromised the plaintiff's qualifications or work performance, and, more broadly, how discrimination shapes employees' behaviors and preferences. Under this approach, evidence of an employee's qualification or work performance would still be important in deciding whether discrimination occurred, but it would be interpreted more carefully. Especially where a protected employee can show that she had equal or greater qualifications and experience as her peers when hired, and, over time, without obvious reasons, lost significant ground compared to unprotected employees, courts should recognize that a domino-like process of discrimination may be at play. Of course, not all responsibility for inequality of workers protected by Title VII can be laid at the feet of employers. At the same time, the substantial research establishing the domino effect suggests that this pattern of inequality deserves deeper judicial scrutiny. Employers should not be permitted to hide behind the very discrimination Title VII is intended to eradicate.

Because this approach to causation in disparate treatment actions is consistent with long-established summary judgment principles, it would not require any major doctrinal or legislative revisions. In an employment discrimination action, as in all civil actions, on a motion for summary judgment, if there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the nonmoving party.²⁹² Crediting plaintiffs' assertions about their qualifications and job performance enough to find the plaintiff has created an issue of fact, and evaluating this evidence absent the taint of employers' alleged discrimination, is consistent with these established evidentiary and procedural principles. Even in circuits that employ a form of evidentiary exceptionalism by adopting looser

291. A useful model for developing such a narrative can be found in Joan Williams's and Stephanie Bornstein's scholarship and successful advocacy establishing the doctrine of Family Responsibilities ("FReD") discrimination. *See* Williams & Bornstein, *supra* note 60.

292. *See* United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); *cf.* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-51 (2000); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (noting the Court must review the record "taken as a whole").

summary judgment standards for employment discrimination claims,²⁹³ it is not inconsistent for courts to assess whether the alleged “nondiscriminatory reason” for an adverse employment action is a symptom of illegal disparate treatment.²⁹⁴

Of course, as an evidentiary matter, the assertion that a person would be better qualified or performed better except for the employer’s discrimination may be difficult to determine. Because the domino effect involves dynamics that might evade direct measurement, courts may be hesitant to see the connection between an employer’s allegedly discriminatory actions and an employee’s qualifications or performance. Yet, the difficulty of such determinations is exactly the reason these questions are best left for juries. Judges must avoid the temptation to engage in fact finding when they are skeptical about a case. In turn, plaintiffs’ attorneys can help judges by educating them about the domino effect and by telling a compelling causal story.

2. Adverse Employment Actions

The workplace domino effect also has significant implications for the definition of an adverse employment action under Title VII. Title VII prohibits not only discrimination in hiring and firing; it makes it unlawful to discriminate against an employee with respect to “compensation, terms, conditions, or privileges of employment” or to “limit, segregate, or classify . . . 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.”²⁹⁵ Courts have interpreted this language to require that plaintiffs demonstrate an adverse employment action, generally defined as some material effect on the terms and conditions

293. See Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 689-94 (2014) (identifying the Third, Eighth, Tenth, and Eleventh circuits as those that have adopted a defendant-sympathetic version of summary judgment in employment discrimination cases); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 551-56, 552 n.246 (2008) (identifying the Seventh Circuit, among others, that adopt a “relaxed summary judgment” standard in employment discrimination cases).

294. Many legal scholars have written on the misuse of summary judgment and other procedural mechanisms in employment discrimination cases. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POLY REV. 103, 104 (2009); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 705-706 (2007); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-69 (2001).

295. See Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

of employment.²⁹⁶ Ultimate employment actions—hiring and firing—suffice; however, when it comes to less direct economic effects on employees' lives, courts have been inconsistent.²⁹⁷ Moreover, as the Warner case discussed in Section III.B. illustrates, even in cases that involve ultimate employment decisions, such as the denial of a promotion, federal courts routinely regard ongoing patterns of discrimination as a series of minor, isolated incidents and thereby place a great deal of employment discrimination beyond Title VII's reach. However, as this Article demonstrates, small, seemingly isolated incidents of discrimination often add up to significant changes in an employee's economic status. Therefore, a tangible adverse employment action under Title VII must be understood to encompass the cumulative and total effect of a series of discriminatory actions or circumstances that, together, result in a substantial change in an employee's economic status or working conditions.²⁹⁸

This more expansive definition of an adverse employment action would align disparate treatment doctrine with sexual harassment doctrine, which recognizes that a series of discriminatory acts can rise to the level of illegal discrimination if sufficiently severe or pervasive.²⁹⁹ In determining whether an actionable hostile work environment claim exists, courts look to all the circumstances.³⁰⁰ There is no intellectually coherent justification for distinguishing between disparate treatment and harassment in this regard. Like harassment, disparate treatment is oftentimes perpetuated through repeated, smaller actions, with the same cumulative harmful effects. Moreover, the Supreme Court has held that sexual harassment is simply a variant of illegal sex discrimination; there is no requirement that the harassment occur because of sexual desire.³⁰¹ Nor is there any requirement that the plaintiff have a nervous breakdown to

296. See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 65 (2013).

297. See Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

298. I am not suggesting that actions such as moving an employee's office, imposing a burdensome work schedule, giving a mediocre performance evaluation, or failing to provide a training opportunity that supports an employee's advancement, should always, in isolation, rise to the level of a materially adverse employment action, even if perpetrated because of an employee's protected group membership. In addition to docket pressures, enabling lawsuits over trivial matters risks undermining the legitimacy of employment discrimination complaints. However, these sorts of discriminatory actions, especially if frequent, typically result in tangible harm to a protected employee in the form of unequal pay or job status. The harms caused by the domino effect should, therefore, in many instances, easily meet Title VII's definition of an adverse employment action.

299. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 23 (1993).

300. *Id.*

301. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

prevail in a harassment claim.³⁰² The harassment must simply be unwelcome, objectively and subjectively hostile, and sufficiently severe or pervasive to interfere with an employee's work performance.³⁰³ Given this expansive definition of unlawful harassment, it is hard to discern any fundamental difference between harassment and disparate treatment that would justify allowing aggregate evidence of discrimination to rise to the level of a tangible employment action for one claim but not the other, or for that matter, to disallow such aggregation for any type of disparate treatment claim.

Some may contend that a more expansive definition of an adverse employment action for disparate treatment claims would effectively transform Title VII into a general anti-bullying mandate. But Title VII does not prohibit all exclusionary behavior in the workplace; it is directed only at discrimination against protected classes of employees. In establishing an adverse employment action, the plaintiff would still be required to prove that the actions considered were because of or motivated by race, color, national origin, age, sex, or religion.

3. *Aggregate Disparate Treatment Claims*

Taking this analysis a step further, if it is correct that disparate treatment and hostile work environment claims are not fundamentally different, then plaintiffs should be permitted to aggregate evidence of both forms of discriminatory exclusion to prove disparate treatment. For example, in the hypothetical discussed in Part II of this Article, the pharmacology professor would be permitted to aggregate her evidence of sexual harassment with her evidence of sex-based disparate treatment to prove a violation of Title VII.³⁰⁴ This reasoning should apply to race or other types of discrimination as well. For example, given the broad remedial purposes of Title VII, there is no rational reason that an African-American plaintiff should not be permitted to aggregate evidence demonstrating race-based disparate treatment with evidence of a racially-tinged hostile work environment to support his disparate treatment claim. Aggregation might also be especially useful for employees who concurrently experience gender and sexuality based

302. See *Harris*, 510 U.S. at 22.

303. *Id.* at 21-23.

304. Vicki Schultz proposed something similar many years ago. She argued that courts should consider all of the conduct challenged by the plaintiff, both sexual and nonsexual, in considering sexual harassment claims. See Schultz, *supra* note 76, at 1798.

discrimination, since both forms of discriminatory exclusion are inextricably intertwined³⁰⁵ and often include a component of harassment.

The possibility of aggregating sexual harassment and disparate treatment evidence to support a disparate treatment claim raises many complexities and questions.³⁰⁶ I will leave these for exploration in future work, but the larger point is that the artificial wall between disparate treatment and harassment obscures larger patterns of discriminatory conduct. It is worth considering whether this wall should be torn down.³⁰⁷

More broadly, the workplace domino effect can serve as a conceptual umbrella that invites reconsideration of a whole range of disparate treatment doctrines that disaggregate evidence to the point of incoherence, thereby obscuring the central role of employers in creating inequality. I call these “disaggregation doctrines.” They include, among others, the stray remarks doctrine,³⁰⁸ the “cat’s paw” doctrine,³⁰⁹ the expansive employer defense for sexual harassment,³¹⁰

305. See *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc) (holding that sexual orientation is inherently a sex-based consideration, given that it is a concept that cannot be understood without reference to the sex of an employee).

306. For example, should the employer defense for hostile work environment sexual harassment be available when the plaintiff combines disparate treatment and hostile work environment sexual harassment evidence to support a disparate treatment claim? A preliminary analysis suggests that it should not, at least where there is evidence that the domino effect culminates in an ultimate adverse employment action. The safe harbor provision was established in the sexual harassment context to address the situation where an employee suffers harassment because of her sex but no ultimate adverse employment action; it has no place where a domino-like process of discriminatory exclusion culminates in substantial change in an employees’ status or working conditions because of her protected group membership. A second question is whether a plaintiff should be permitted to aggregate evidence of discrimination based on more than one protected category, so as to fashion a hybrid, intersectional claim. For the seminal articulation of why such intersectional, hybrid claims must be available, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Combining sexual harassment and disparate treatment evidence may also raise complex limitations and damages issues.

307. Other scholars’ thinking is moving in this direction as well. See, e.g., Sandra S. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 *passim* (2015) (discussing the unhelpfulness of rigid conceptual frameworks that courts have developed, because they undermine the broader purposes of Title VII and squeeze out valid claims, and proposing to abandon most of Title VII’s existing frameworks in favor of a simplified, statute-based approach to analyzing employment discrimination cases); see also Eisha Jain, Note, *Realizing the Potential of the Joint Harassment/Retaliation Claim*, 117 YALE L.J. 120, 156-64 (2007) (proposing combined sexual harassment and retaliation claims).

308. See Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 174-89 (2012).

309. See Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat’s Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes*, 60 S.C. L. REV. 383 (2008).

310. See discussion *supra* notes 31-32 and accompanying text.

the “lack of interest” defense,³¹¹ and the rule in some circuits that statistical evidence is generally not probative of disparate treatment.³¹² Social science research demonstrating the domino effect suggests that these disaggregation doctrines unduly restrict the evidence that courts may consider in deciding disparate treatment claims. They are ripe for revision (or elimination) and will be fruitful topics for future analysis in light of this Article’s foundational contributions.

Even if adopted, the litigation strategies and targeted doctrinal interventions explored thus far may not be sufficiently transformative, and so next I consider a more fundamental reconceptualization of Title VII’s basic proof structure.

4. *The Disparate Treatment Proof Structure*

Any workplace that evidences severe patterns of discrimination, such as sex or racially segregated workforces or stark glass ceiling patterns, strongly suggests that discrimination is occurring inside that workplace. When these patterns are evident, Title VII should prohibit judges, as a matter of law, from attributing stark patterns of inequality to supply side factors such as individual employee characteristics, choices, or qualifications.

With this principle in mind, disparate treatment law could be reformed so as to create tiers of potential liability depending on the severity of inequality in a particular workplace. Thus, for example, courts or Congress could create a rebuttable presumption that an adverse employment action was “because of” the protected characteristic within the meaning of Title VII when the plaintiff works in a job setting that is significantly unequal. The presumption would not apply in workplaces demonstrating a high degree of integration and equality, thereby creating an incentive for employers to be proactive in addressing the dynamic nature of discrimination. Richard Ford has proposed a version of this in his concept of a positive “duty of care” to purge employment decisions of the influence of bigotry, which, if demonstrated by an employer in litigation, would create a safe-harbor from liability for employment discrimination.³¹³ Under Ford’s approach, “the law might evolve to require employers to use the best practices currently developed in management science to avoid discriminatory decisions. Doing so would give the employer a

311. See Schultz, *supra* note 73; Schultz & Petterson, *supra* note 185.

312. See *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1089 (11th Cir. 2004); *Van Slyke v. Northrop Grumman Corp.*, 17 F. App’x 154 (4th Cir. 2001); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) (overruled on other grounds).

313. Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1403-15 (2014).

safe harbor from liability; failing to do so would give rise to a strong presumption that challenged decisions were discriminatory.”³¹⁴ I would go one step further. To avoid symbolic compliance,³¹⁵ and to encourage employers to adopt effective measures, the existence of employer nondiscrimination policies without corresponding results should not suffice to eliminate the strong presumption of discrimination.

Imposing legal standards that create presumptions of discrimination may be a scary prospect to some readers, but the risk of false positives could be reduced by limiting the application of the presumption to situations where the workplace reflects stark patterns of inequality or the employer has a record of repeated past violations. Such an approach would also incentivize employers to take positive measures to ensure their workplaces are free of discrimination.

5. *Positive Duties*

Finally, we might take a cue from countries that have demonstrated an earnest commitment to eliminating employment discrimination through implementation of proactive models to achieve worker equality. Such approaches involve the imposition of positive duties on employers “to eliminate discrimination of all types and to foster equality in the workplace.”³¹⁶ The key feature of the positive duties approach is that it is not adversarial or fault-based. Rather, it requires employers to “formulate equality goals, to monitor their workplaces for inequality, and to alter practices and patterns of

314. *Id.* at 1419. Ford is just one of several employment discrimination scholars who have proposed that employer liability under Title VII should rest on negligence principles. *See, e.g.*, David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); *cf.* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 *passim* (2009) (presenting an analysis suggesting that negligence principles should guide disparate treatment liability where there is (1) individual workplace harm caused by membership in a protected class; and (2) employer responsibility for the harm, which includes, but would not be limited to, having notice of the harm and negligently failing to prevent it).

315. Sociological research shows widespread judicial deference to employers when they adopt institutionalized employment structures to address discrimination; judges infer non-discrimination from these structures without scrutinizing them in any meaningful way. For example, in a large-scale study, Lauren Edelman found that judges are increasingly willing to equate unenforced nondiscrimination policies, “decoupled” EEO offices that lack authority, ineffective diversity trainings, and unpublicized, ineffective, or rarely used grievance procedures (due to fears of retaliation) with legal compliance, even in the face of compelling evidence of discrimination. *See* LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS passim* (2016).

316. KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKFORCE* 192 (2004).

conduct that stand in the way of achieving their equality goals.”³¹⁷ For example, employers would be required to conduct periodic reviews of employment practices, including recruitment, training, and promotion, for the purposes of determining whether women, racial minorities, and people with disabilities, for example, are enjoying fair participation in employment.³¹⁸

The aim of the positive duties approach is to shift the focus away from individual victims and to focus instead on institution- and society- level practices and structures that produce inequality. Many countries have adopted this approach in recognition that “there remain deep-seated structural disadvantages which blight the lives of many women, Black and Asian people, and disabled persons,”³¹⁹ as evidenced by “institutionalised racism in the police”³²⁰ and similar barriers in public services and private organizations. These observations are poignantly applicable to the situation of many groups in the United States.

Although at odds with our historical approach to regulating employment discrimination, the positive duties approach may provide a useful model for updating Title VII to reflect the domino effect and other contemporary forms of employment discrimination. At minimum, the positive duties model can inform doctrinal innovations that shift the responsibility for substantial workplace inequality to employers, where it belongs.

VI. CONCLUSION

Title VII has labored too long under the weight of black and white thinking. A significant body of sociological research on how discrimination operates on the ground, inside workplaces, every day is now available to guide courts and policymakers. This research demonstrates that worker inequality often results from a series of

317. *Id.* This approach was summarized in an influential 2000 report, *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*. In preparing the report, the authors surveyed employers in Britain, Northern Ireland, and the United States and heard from many individuals and organizations who have either experienced the effects of discrimination or attempted to counter it.

318. STONE, *supra* note 316, at 71-72. Although still reliant on litigation, Margo Schlanger and Pauline Kim suggest something similar in their call for a greater regulatory role for the EEOC in the implementation of routinized and managerialist responses to employment discrimination. See Margo Schlanger & Pauline Kim, *The Equal Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1526 (2014). They argue that injunctions obtained by the EEOC in systemic cases have had the positive effect of encouraging employers to internalize and institutionalize norms and practices that facilitate equal employment opportunities. *Id.* at 1582.

319. See STONE, *supra* note 316, at 71-72.

320. *Id.*

discriminatory acts or conditions that combine and interact in ways that, over time, lead to large differences in employee status and pay due to their cumulative and mutually reinforcing nature. Unfortunately, the unwillingness to think rigorously about how discrimination occurs has had serious negative consequences. Stubborn patterns of discrimination exist across every industry and workplace setting in America. This situation will not change without a fundamental reconceptualization of Title VII so it may account for the domino effect and other contemporary forms of discriminatory exclusion.