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## Beyond Equality? Against the Universal Turn in Workplace Protection

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# Beyond Equality? Against the Universal Turn in Workplace Protections<sup>†</sup>

JESSICA A. CLARKE\*

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*Sexual harassment law and family leave policy originated as feminist reform projects designed to protect women in the workplace. But many academics now ask whether harassment and leave policies have outgrown their gendered roots. The anti-bullying movement advocates taking the “sexual” out of harassment law to prohibit all forms of on-the-job mistreatment. Likewise, the work-life balance movement advocates taking the “family” out of leave policy to require employers to accommodate all types of life pursuits. These proposals are in line with recent cases and scholarship on civil rights that reframe problems once seen as issues of inequality as deprivations of liberty or dignity. I refer to this trend as the universal turn in workplace protections.*

*This Article urges caution with respect to the universal turn. Drawing on feminist legal and political theory, it provides a set of questions to ask in evaluating proposals to universalize protections. It concludes that anti-bullying and work-life proposals are likely to dilute feminist workplace gains and mask inequality. If the universal rule swallows the antidiscrimination rule, the transformative potential of requiring employers and the public to scrutinize the workplace for gender*

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*discrimination is lost. Sexual harassment is seen as no worse than personality conflicts, and recreational pursuits are supported to the same extent as caretaking responsibilities. The benefits of sexual harassment law and leave policy are likely to be diluted.*

*I therefore oppose universal approaches to harassment and work-life conflicts that would simply expand civil rights protections to cover harms other than discrimination. Instead of the universal turn, this Article proposes a hybrid approach focused on inclusivity that would expand protections incrementally without abandoning equality.*

#### INTRODUCTION

There is no “general civility code for the American workplace.”<sup>1</sup> If you are barraged with vicious insults on the job or you are so overworked that you cannot maintain your sanity, chances are, you have no legal remedy. Legal protections attach only if the poor treatment was based on sex or another protected characteristic. Sexual harassment law and family leave originated as policies to redress injuries to women. The paradigmatic cases: a woman suffers hostile sexual advances from a male supervisor,<sup>2</sup> or is fired for taking time off to have a child.<sup>3</sup> As required by the principle of formal equality, men too could bring sexual harassment cases<sup>4</sup> or take time off for children.<sup>5</sup> In many workplaces, the prevailing idea of sexual harassment has further expanded to include almost all forms of on-the-job sexual expression,<sup>6</sup> and the concept of family responsibilities has further expanded to include new forms of caretaking, such as care for elderly parents.<sup>7</sup> But these workplace protections remain moored to gender, sex, and family.

A trend is now emerging to abandon these moorings. Many scholars propose expanding actionable forms of harassment beyond the sexual, to nonsexual workplace bullying.<sup>8</sup> Likewise, scholars propose expanding leave policy beyond

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

2. *See, e.g., Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 60 (1986).

3. *See, e.g., Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 278 (1987).

4. *See generally* Aimee L. Widor, Comment, *Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace*, 58 U. PITT. L. REV. 225 (1996) (discussing sexual harassment cases involving male victims and female perpetrators).

5. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731, 734 (2003) (stating that the Family and Medical Leave Act, which allows men and women to take job-protected, unpaid family leave, was justified as remedial legislation because the states had “differential leave policies” for men and women “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work”).

6. *See Vicki Schultz, The Sanitized Workplace*, 112 YALE L.J. 2061, 2107 (2003) (explaining how managers have translated Title VII into a ban on any expression of sexuality in the workplace).

7. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRoD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1320–21 (2008).

8. *See, e.g., Susan Harthill, The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and*

family responsibilities, to allow all workers flexibility to manage their various life pursuits.<sup>9</sup> On this view, policies originally intended for women would become universalized, changing dominant norms not just for women but for all workers. Some scholars envision universal protections as the end goal in the evolution of sexual harassment law and maternity leave to a “general civility code for the American workplace.”<sup>10</sup> The European workplace is often held out as the ideal, with its more capacious concept of harassment (there referred to as “mobbing”) and more generous support for nonwork activities.

These proposals are part of a larger trend—which I refer to as the “universal turn”—of expanding civil rights protections beyond rules that prohibit discrimination to rules of universal applicability.<sup>11</sup> Antidiscrimination scholars

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*Health Act*, 78 U. CIN. L. REV. 1250 (2010); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL’Y J. 251 (2010); Brady Coleman, *Shame, Rage and Freedom of Speech: Should the United States Adopt European “Mobbing” Laws?*, 35 GA. J. INT’L & COMP. L. 53 (2006); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91 (2003); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999).

9. See, e.g., Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–09 (2010); Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, in WORK-LIFE POLICIES 251, 270 (Ann C. Crouter & Alan Booth eds., 2009); ARIANE HEGEWISCH & JANET C. GORNICK, INST. FOR WOMEN’S POLICY RESEARCH, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE (2008), available at [http://www.iwpr.org/publications/pubs/statutory-routes-to-workplace-flexibility-in-cross-national-perspective-b258/at\\_download/file](http://www.iwpr.org/publications/pubs/statutory-routes-to-workplace-flexibility-in-cross-national-perspective-b258/at_download/file); Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 835 (2002); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

10. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); see *infra* Parts I.A.3 & I.B.3.

11. For purposes of this Article, I define “universal rules” as the standards that result when civil rights laws are expanded beyond enumerated bases for prohibiting discrimination or requiring accommodation. The universal approach can be contrasted to the enumerative approach of protection on grounds such as sex, race, and sexual orientation, or the targeted approach of protecting or prohibiting certain forms of behavior due to links to discrimination or subordination on these enumerated grounds. I do not define universal rules simply as rules that apply equally to men and women. As discussed above, *supra* notes 4–5, many traditional antidiscrimination protections have always provided symmetrical protections to men and women. The universal turn goes further to provide a floor of protection regardless of discrimination. Nor do I refer to traditional labor standards (i.e., the minimum wage as opposed to equal pay) that do not find antecedents in antidiscrimination laws. I am interested specifically in the “turn” away from targeted protections toward universal ones, and whether it can fulfill antidiscrimination goals. I also note that advocates of universalizing rules may or may not prioritize antidiscrimination goals. Compare Yamada, *supra* note 8 (arguing for anti-bullying rules to ensure worker dignity), with Schultz, *supra* note 9 (arguing for reduced work hours to loosen the gendered division of labor).

have embraced universal approaches with lofty rhetoric. For example, Kenji Yoshino is sympathetic to judicial efforts to frame cases not as rights to equality, “but as cases touching on rights that, like a rising tide, will lift the boat of every person in America.”<sup>12</sup> The shift to universal protection has two potential virtues. First, it accords with critical theories of identity in that it changes the focus from protected status characteristics to protected or prohibited activities. This is connected to the insights of antidiscrimination theorists that the new generation of sex discrimination is based not on the belief in women’s inferiority, but on gendered norms of behavior<sup>13</sup> or stereotypes about family responsibilities for both women and men.<sup>14</sup> Second, universalism seems to sidestep the equal versus special rights debate. Unlike projects perceived as redistributing resources based on group differences, universal policies may not have stigmatizing effects on members of the

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12. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 192 (2006). Two cases representative of this shift are *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court struck down a Texas law criminalizing sodomy not on the ground that it discriminated on the basis of sexual orientation, but rather on the ground that it violated the liberty interest in sexual intimacy, and *Tennessee v. Lane*, 541 U.S. 509 (2004), in which the Court recognized a constitutional claim when a courthouse was not wheelchair accessible, not on the ground that it discriminated on the basis of disability, but on the ground that it violated the universal right of access to courts. YOSHINO, *supra*, at 187–88; *see also* Kenji Yoshino, *The New Equal Protection*, 12 HARV. L. REV. 747, 749 (2011) (refining this argument to provisionally advocate a shift in equal protection jurisprudence by the Court towards acknowledgement of the “links between liberty and equality,” with an emphasis on liberty); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 21 (2008) (“Because the shared, universal nature of vulnerability draws the whole of society—not just a defined minority—under scrutiny, the vulnerability approach might be deemed a ‘post-identity’ analysis of what sort of protection society owes its members.”); Fisk, *supra* note 8, at 95 (“The development of a jurisprudence of workplace respect for all persons is the unfinished business of the project of feminist jurisprudence.”); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 133 (Judy Fudge & Rosemary Owens eds., 2006) (arguing that the advantages of a shortened workweek demonstrate that “equality for women can best be achieved through universal measures that benefit all workers”).

13. *See* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106, 1112 (9th Cir. 2006) (en banc) (holding that the requirement that women, but not men, wear makeup at work was not impermissible sex stereotyping under Title VII); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 396–97 (2008).

14. *See* *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125 n.16 (2d Cir. 2004) (holding that because of “‘cognitive biases,’ which cause people to ignore or exclude information that is inconsistent with a stereotype . . . [e]ven a subtle reversal in evaluations [of an employee] that is consistent with stereotypical views about mothers, . . . (for example, that an employee no longer seems dedicated to her work, or is no longer able to work efficiently or complete her work in a timely fashion) suggests pretext [for discrimination]”); *Enforcement Guidance, Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, No. 915.002, EEOC (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.html>.

disadvantaged group.<sup>15</sup> Thus, universalism would seem to be the best route to undermining the gendered division of labor to give all people more meaningful choices in configuring work and life.<sup>16</sup>

But is the universalist story of gradually expanding protection really one of progress? Will policies that embody universalist thinking avoid essentialist notions of identity and allow contestation of stereotypes? Will they avoid the destructive backlash and identity politics that sometimes result from civil rights rules? Or will the new universalism create new problems of inequality, by requiring all workers to assimilate to biased norms masquerading as neutral rules, and by diluting protections for those who need them most? This Article takes up these questions in two specific policy contexts: workplace anti-bullying rules and work-life accommodations. It contributes to the debate over universalism by arguing that these examples demonstrate a paradox: gender issues may point to larger problems with the structure of the workplace, but universal solutions may create new gender issues.

Proponents of universalism seek to avoid “essentialism,” or entrenching certain fixed notions of gender and other aspects of identity in the law. To do so, universalists move away from equality-based justifications toward norms such as civility, dignity, liberty, and citizenship. Yet values like dignity could take on gendered dimensions, becoming tools of social conservatism or sexual repression,<sup>17</sup> and policies based on liberty risk reinforcing the fiction that workers are radically free to make choices, rather than constrained by a set of choices constructed by legal regimes, economic circumstances, and social expectations.<sup>18</sup> For example, the focus on bullying may be a welcome departure from old stereotypes about female victims and male aggressors in sexual harassment cases, but it also opens opportunities for new scapegoats, such as the demanding female boss labeled a bully for defying traditional gender roles. And the shifting nomenclature from work-family to work-life does not necessarily correspond with any shifting social meaning. If only motherhood is culturally supported as an extracurricular activity, the transition in labels from “maternity leave” to “family leave” to “caretaker leave” to “work-life balance” reflects no more than a gesture toward political correctness. Even worse, work-life accommodations inevitably involve managers in making judgments about whose “life” is more worthy of accommodation, allowing enforcement of class, race, and gender biases.

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15. See NANCY FRASER, *JUSTICE INTERRUPTUS* 25 (1997) (arguing that policy premised on group differences “tends to set in motion a . . . stigmatizing . . . recognition dynamic, which contradicts its official commitment to universalism”).

16. For an argument against the gendered division of labor, see Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1206 (2010) (“When some people (historically, disproportionately women) find it difficult to participate meaningfully in paid work and other people (historically, disproportionately men) find it difficult to participate meaningfully in family life, basic principles of gender equality are violated.”).

17. See *infra* notes 228–29 and accompanying text.

18. Cf. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1419 (2004) (arguing that the “orientation-blindness” of the same-sex marriage as private liberty project masks its core heteronormativity: homosexual relationships are recognized only to the extent they mimic heterosexual relationships).

Universal solutions are also thought to avoid backlash, in other words, the counterproductive effects of identity politics, including stigmatization of the identity group seeking recognition and polarization of discussion that undermines efforts to transform institutions to achieve inclusivity. Backlash is dangerous in terms of equality because it may transfer the costs of the new policy to the disadvantaged group. But enacting *more* expansive workplace rules may not diffuse the backlash, particularly if the new rules are individualistic policies that pit the interests of certain workers against others—for example, “bullies” versus “victims,” or workers who want time off for volunteering versus parents who want time off for caretaking.

Universal policies may also have disadvantages in terms of worsening the gendered division of labor. I refer to these disadvantages as the risks of “assimilation” and “dilution.” As feminist legal theorists have long argued, universal protections may only or primarily assist workers who assimilate to dominant norms tailored to “model” workers who are typically young, married, white, heterosexual, affluent, and male.<sup>19</sup> For example, flexible work arrangements may be most helpful to married men who use the advantages of flexibility to engage in more paid labor rather than housework.<sup>20</sup> Women are more likely to have caretaking duties, and therefore to be unable to assimilate to this model. Notions of race, class, gender, and sexuality will also play into whether a court recognizes an indignity as bullying.

Assimilation is a risk not just for individuals but also for equality-based social movements. If the focus of harassment law shifts from discrimination to dignity, we may lose sight of how harassment can be part of a project of maintaining the workplace as a site of male privilege. Feminist movements might be assimilated into broader movements for workers’ rights. Universalizing projects lend credence to the zeitgeist of “post-gender idealism.”<sup>21</sup> The race between Barack Obama and Hillary Clinton for the 2008 Democratic nomination for president caused many to ask whether the United States has moved beyond equality.<sup>22</sup> Yet discrimination has

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19. See Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250, 267 (1989) (maintaining that “rights and rules that are universally formulated and thus blind to differences of race, culture, gender, age, or disability, perpetuate rather than undermine oppression”).

20. See *infra* note 378–80 and accompanying text.

21. Courtney E. Martin, *Transcending 9 to 5: How American Women and Men Are Reworking Our Country*, in *THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING* 383, 387 (Heather Boushey & Ann O’Leary eds., 2009), available at [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf) [hereinafter *THE SHRIVER REPORT*].

22. See ANNE E. KORNBLUT, *NOTES FROM THE CRACKED CEILING: HILLARY CLINTON, SARAH PALIN, AND WHAT IT WILL TAKE FOR A WOMAN TO WIN* 82 (2009) (describing “postfeminist[.]” voters); Sumi Cho, *Post-Racialism*, 94 *IOWA L. REV.* 1589, 1599 (2009) (arguing that an Obama-era ideology of “post-racialism . . . [does] the ideological work of colorblindness without so much of its retro-regressive baggage”); John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 *DENV. U. L. REV.* 785, 789 (2009) (“To post-racialists, white Americans’ support of President Obama is proof positive that we are in, or rapidly approaching, a new, post-racial era.”).

not disappeared;<sup>23</sup> rather, it has morphed into new forms including implicit bias,<sup>24</sup> institutional patterns of exclusion,<sup>25</sup> and subtle demands to conform.<sup>26</sup>

Another problem is dilution: universalized rules may dilute civil rights protections by reducing the resources available to protect those most disadvantaged. The result of gender-neutral universalism may not be a norm that works for everyone. Rather, universal policies risk diluting protections by failing to go far enough to level the playing field for disadvantaged groups. Additionally, a universal turn in harassment law and leave policy risks trivializing the harms of discrimination. Due to scarce resources, if employers must expand their harassment and leave policies to address a broader array of circumstances, they may be less able to implement and enforce generous protections.

As a general theoretical matter, those concerned about discrimination should approach the universal turn with caution. The problems of workplace inequality cannot be resolved in a few broad strokes without attention to hierarchies built on axes of identity. Prohibited bases for discrimination, like race, gender, and sexual orientation, should be enumerated. Battles for political recognition must be fought, and difficult economic choices must be made. I recommend that goals be reframed in terms of increasing inclusiveness, rather than achieving absolute equality or universality. Inclusiveness would require constant reconsideration of how legal rules and workplace structures exclude certain workers. While this analysis is developed in the context of workplace reform projects designed to reduce sex discrimination, it is also pertinent to other debates over expanding the meaning of civil rights rules.<sup>27</sup>

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23. Female workers earn only seventy-seven cents per dollar earned by male workers. Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT, *supra* note 21, at 31, 32. Even in the same occupations, women with substantially similar resumes and backgrounds earn five percent less than men in the first year out of college. *Id.* at 59.

24. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 982 (2006).

25. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–69 (2001) (contrasting “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups” with “deliberate exclusion or subordination based on race or gender”).

26. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (arguing that members of outsider groups “are often likely to perceive themselves as subject to negative stereotypes,” and therefore “likely to feel the need to do significant amounts of ‘extra’ identity work to counter those stereotypes”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (discussing “covering” as a form of discrimination resulting from explicit or implicit pressure to downplay identity).

27. For other debates over universal solutions to problems of inequality, see, for example, Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1694–99 (2010) (critiquing the focus on “sex trafficking” rather than “human trafficking”); Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007) (arguing that a universal rule only allowing terminations of employees “for cause” would not protect minorities better than antidiscrimination law).



This Article proceeds in four parts. Part I sketches out the case for expansion of sexual harassment law and leave policy. Part II identifies and describes the “universal turn” in antidiscrimination theory and proposes a set of questions for assessing universalizing policy initiatives from an antidiscrimination perspective. Part III addresses these questions by analyzing reform projects aimed at taking the “sexual” out of harassment law and the “family” out of leave policy, drawing on social science and comparative legal research. It concludes that without attention to gender, universal proposals are likely to result in increased inequality. Part IV concludes that reformers should focus on the more modest goal of increasing inclusiveness, rather than universalism, and suggests ways that law can move beyond gender while still maintaining attention to gender discrimination. Rather than addressing universal harms with civil rights laws, this Part suggests more flexible and cautious approaches to resolving universal problems.

### I. BEYOND SEX, GENDER, AND FAMILY

This Part summarizes the criticisms of the targeted approach to harassment law and leave policy. It explains the limitations of sexual harassment and family leave doctrines that have led to calls for universalized protections in the forms of anti-bullying laws and work-life accommodations.

#### A. Expanding Sexual Harassment

##### 1. Extending Sexual Harassment Law from Women to Men

In the 1970s, feminist lawyers and activists such as Catharine MacKinnon popularized the concept of sexual harassment, arguing successfully that it was a form of discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964.<sup>28</sup> MacKinnon theorized that sexual harassment is the convergence of “men’s control over women’s sexuality and capital’s control over employees’ work lives.”<sup>29</sup> But in the first federal appellate case to recognize sexual harassment as a form of discrimination, the D.C. Circuit held that the doctrine applied to “a male subordinate” harassed “by a heterosexual female superior,” or “a subordinate of either gender” harassed “by a homosexual superior of the same gender.”<sup>30</sup> In the 1998 decision, *Oncale v. Sundowner*, the Supreme Court held that harassment by an aggressor of the same gender as the plaintiff would violate Title VII “if there were credible evidence that the harasser was homosexual.”<sup>31</sup>

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28. 42 U.S.C. § 2000e-2(a)(1) (2006) (creating a cause of action for discrimination “because of . . . race, color, religion, sex, or national origin”).

29. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 174–75 (1979).

30. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

31. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The Court also held that a plaintiff could prove harassment by showing that the harasser was motivated by general hostility to the presence of one gender in the workplace, or with evidence about how the harasser treated members of the other sex. *Id.* at 80–81.

## 2. Problems with Sexual Harassment Law

Even in its new gender-neutral form, sexual harassment law has been criticized as too narrowly focused on sex. First, the doctrine fails to cover many types of harassment claims. Second, because most sexual harassment plaintiffs are women, women are stigmatized as potential plaintiffs, and they may face discrimination in hiring and job opportunities as a result of employers' fears that they may bring costly suits. Third, the doctrine has shifted away from preventing gender discrimination and toward preventing any expression of sexuality in the workplace.

### a. Underinclusivity

Sexual harassment law is substantially limited in its ability to target harassment at work and gender inequality. Feminists argue that sexual harassment law is underinclusive as a result of the legal fixation with formal equality, or avoiding any classifications based on sex. For example, the following fact patterns have sometimes evaded the "because of . . . sex" requirement of Title VII<sup>32</sup>:

*The Equal Opportunity or Bisexual Harasser.* Some courts have held that a harasser who uses sexual conduct to demean both men and women is not engaged in discrimination.<sup>33</sup> If, for example, a harasser touches both men and women in offensive ways, but the men are subjected to worse treatment, that is, the harasser touches men's genitals but not women's, the men would have a cause of action, while the women might not.<sup>34</sup>

*"Real Men."* Where men harass other men for failing to meet masculine gender norms, some courts have held that the harassment is not "because of sex" but rather "because of sexual orientation"—a category not covered under Title VII.<sup>35</sup> The same

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32. These examples are elaborations on those described in Ann McGinley's helpful study. See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1154–58 (2008).

33. *Id.* at 1155–56; Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341 (2005); see also *Holman v. Indiana*, 211 F.3d 399, 402–04 (7th Cir. 2000) ("[B]ecause Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit." (emphasis in original)). *But see Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (rejecting the equal opportunity harasser argument in dicta).

34. *Cf. Breitenfeldt v. Long Prairie Packing Co.*, 48 F. Supp. 2d 1170, 1176 (D. Minn. 1999) (concluding that a man who was subjected to sexual assault was harassed because of sex, by contrast to women who suffered "inappropriate touching" in a less offensive degree). *But see* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (describing harassment cases that examine the totality of the circumstances to determine whether harassment was discriminatory).

35. McGinley, *supra* note 32, at 1156–57; see also, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763–65 (6th Cir. 2006). *But see Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that harassment for failure to conform to a male stereotype is discrimination "because of sex"); *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999) (similar). Over the years, there have been several attempts to plug the gaps in the statute by adding orientation and gender identity to Title VII as prohibited bases for discrimination. See Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 8–13

goes for transsexual identity.<sup>36</sup>

*Hazing and Horseplay.* Where men haze male newcomers or engage in “horseplay” with established male workers, courts conclude it is not discrimination because the harassers are not motivated by homosexual desire or anti-male animosity.<sup>37</sup>

*Gatekeeping.* Where men harass women “to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority,”<sup>38</sup> but not out of sexual desire or in a sexual manner, plaintiffs typically lose.<sup>39</sup> For example, women subjected to unfavorable treatment due to sexist attitudes about their inferiority may not prevail on sexual harassment claims if they were not subjected to sexualized conduct.<sup>40</sup> As a general matter, it is difficult to prove that harassment without sexual advances was “because of sex.”<sup>41</sup>

#### b. Stigmatizing Women as Victims

A second criticism is that sexual harassment law may have perverse economic effects that hinder women’s workplace equality. This results from the fact that women are the primary plaintiffs in sexual harassment suits. Despite the doctrinal expansion, in 2008 men only filed approximately 16 percent of sexual harassment charges.<sup>42</sup> Because women are more likely to bring suit, sexual harassment law could create disincentives for firms to hire women.<sup>43</sup> Hiring discrimination cases

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(2009) (providing a history).

36. *Compare* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–85 (7th Cir. 1984) (concluding that Title VII only makes it unlawful to “discriminate against women because they are women and against men because they are men,” not transsexuals because they are transsexuals), *with* *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

37. *See, e.g.*, *Equal Emp’t Opportunity Comm’n v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 519–23 (6th Cir. 2001).

38. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1687 (1998).

39. Clare Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 *BERKELEY J. GENDER L. & JUST.* 42, 74, 94–96 (2007) (surveying post-*Oncale* cases between 1998 and 2006).

40. *See, e.g.*, Schultz, *supra* note 38, at 1734–35 (discussing *Ramsey v. City of Denver*, 907 F.2d 1004 (10th Cir. 1990)).

41. *Id.* at 1686–87.

42. *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997–FY 2010*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm).

43. *See* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 *N.M. L. REV.* 333, 345 (2008); Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It’s Hard to Fire?*, 45 *J.L. & ECON.* 41, 46 (2002); Suk, *supra* note 27, at 83–84. *See generally* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

are very difficult to prove.<sup>44</sup> And paradoxically, sexual harassment law may discourage gender integration. In law firms, for example, some men in positions of authority are resistant to mentoring women, or choosing them for privileged work that requires closed-door meetings, late-night hours, or travel, for fear of accusations of sexual harassment.<sup>45</sup>

### c. Fixation with Sex

A third problem is that “sexual” harassment law has been interpreted as barring sexual expression (rather than discriminatory harassment), leading to punishment of even benign expressions of sexual desire and suppression of unconventional sexuality. Based on her study of employer policies, Vicki Schultz has concluded that employers have translated sexual harassment doctrine into overly prohibitive policies, creating a desexualized, sanitized, and dehumanized workplace.<sup>46</sup> In a similar vein, Janet Halley has argued that *Oncale* has the potential to turn Title VII into a tool of homophobic panic.<sup>47</sup> She fears that Title VII could be used by purported “victims” of benign, but unwanted, same-sex sexual overtures in the workplace to oppress gay men or lesbians.<sup>48</sup>

## 3. Universal Protection Through Anti-Bullying Law

To address these problems, the grounds for a harassment claim have been gradually expanding beyond sex, race, color, religion, or national origin.<sup>49</sup> Every new prohibited basis for discrimination is also a prohibited basis for harassment. Federal laws prohibit discrimination based on pregnancy,<sup>50</sup> genetic information,<sup>51</sup>

44. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 275 (2000).

45. HOLLY ENGLISH, GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKPLACE 65–70 (2003); see also Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389 (2006).

46. Schultz, *supra* note 6, at 2131 (describing an “avalanche of no-dating policies and love contracts, zero-tolerance policies, self-policing, and discipline for conduct with sexual overtones”).

47. Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 195 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

48. Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM / LEFT CRITIQUE 80, 80–81 (Wendy Brown & Janet Halley eds., 2002). Marc Spindelman responds that Halley cites no reported decision evidencing that courts have indulged any such homophobic plaintiffs. Marc Spindelman, *Discriminating Pleasures*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 201, 204 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004). Although Halley’s fears have yet to play out on the pages of the federal reporters, research supports the view that same-sex sexual overtures toward men are more likely to be perceived as harassment than opposite-sex overtures toward men. See Margaret S. Stockdale, Cynthia Gandolfo Berry, Robert W. Schneider & Feng Cao, *Perceptions of the Sexual Harassment of Men*, 5 PSYCHOL. MEN & MASCULINITY 158, 165 (2004).

49. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006) (enumerating sex, race, color, religion, and national origin discrimination as grounds for a Title VII claim).

50. *Id.* § 2000e(k).

51. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat.

age,<sup>52</sup> disability,<sup>53</sup> and union affiliation.<sup>54</sup> Some state and local laws expand prohibited bases for discrimination further, to appearance,<sup>55</sup> sexual orientation, gender identity, marital status, and victims of domestic violence,<sup>56</sup> to name a few.<sup>57</sup> Moreover, Title VII and other laws prohibit harassment in retaliation against an employee for claiming discrimination—a cause of action valid regardless of whether the plaintiff prevails on the underlying claim.<sup>58</sup> The elements of these harassment causes of action generally track those of a sexual harassment claim. This patchwork of harassment prohibitions is gradually expanding toward a general harassment ban that would take the “sexual” out of harassment law. The creeping expansion of sexual harassment doctrine is accompanied by a shifting understanding of the primary problem with harassment. The harm of harassment is increasingly understood to be its affront to a worker’s dignity or health, not necessarily that harassment contributes to inequality.

However, Title VII provides no remedy for abusive working conditions, no matter how extreme, where the abuse is not discriminatory. Not only is there no “general civility code”<sup>59</sup> for the American workplace, but there is no cause of action whatsoever for most workers who are subjected to nondiscriminatory abuse.<sup>60</sup> As a result, many scholars now call for universal protections against harassment.<sup>61</sup> These scholars are divided on whether new statutory remedies or labor law and traditional tort remedies, such as the cause of action for intentional

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881 (codified in scattered sections of 26, 29, and 42 U.S.C.).

52. 29 U.S.C. § 621 (2006).

53. 42 U.S.C. § 12101(b)(1)–(4) (2006).

54. 29 U.S.C. § 158(a)(3) (2006).

55. See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1081–90 (2009).

56. See, e.g., Human Rights Law, N.Y. EXEC. LAW §§ 290–301 (McKinney 2005).

57. Many corporations prohibit discrimination based on sexual orientation, gender identity, or gender expression. See HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2010: A REPORT CARD ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY IN CORPORATE AMERICA 8, 10–11 (2009), available at [http://www.hrc.org/documents/HRC\\_Corporate\\_Equality\\_Index\\_2010.pdf](http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2010.pdf).

58. See, e.g., Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 417–20.

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

60. See Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2127–39 (2007) (concluding that the majority of jurisdictions hold that hostile work environments are not sufficiently “outrageous” to qualify as intentional infliction of emotional distress); David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL’Y J. 475, 496–97 (2004) [hereinafter Yamada, *Crafting*] (explaining that only a small number of employers have written prohibitions on bullying that could possibly create a contractual obligation); David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 521–22 (2000) [hereinafter Yamada, *Phenomenon*] (concluding that the regulatory framework established by the Occupational Safety and Health Act of 1970 to avoid “serious physical harm” to workers is too focused on physical workplace hazards to address harassment).

61. See *supra* note 8.

infliction of emotional distress,<sup>62</sup> can provide redress to victims or change prevailing norms.<sup>63</sup>

The U.S. approach of prohibiting only discriminatory workplace harassment stands in contrast to the universal approach of many other countries.<sup>64</sup> Around the same time that MacKinnon popularized the concept of sexual harassment in the United States in the 1980s, German psychologist Dr. Heinz Leymann popularized the concept of workplace bullying as a political issue in Europe.<sup>65</sup> Leymann described the phenomenon as “mobbing” or “psychological terror,”<sup>66</sup> and he studied post-traumatic stress disorder in victims.<sup>67</sup> A substantial body of empirical research now documents the effects of workplace bullying, which include harms to the physical, psychological, and economic well-being of workers and increased costs for employers.<sup>68</sup> A number of European countries specifically regulate workplace bullying, including Austria, Belgium, Denmark, England, Finland, France, the Netherlands, and Sweden.<sup>69</sup> Closer to home, Quebec’s labour code was amended in 2004 to ban “psychological harassment,” defined as “vexatious behaviour in the form of repeated and hostile or unwanted conduct . . . that affects

62. See *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008) (commenting that workplace bullying could be a form of intentional infliction of emotional distress).

63. Compare Yamada, *Crafting*, *supra* note 60 (advocating legislative solutions), and Harthill, *supra* note 8, at 1305–06 (advocating regulatory measures), with Ehrenreich, *supra* note 8, at 22 (advocating common law remedies), and Corbett, *supra* note 8 (same).

64. See Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003).

65. Heinz Leymann, *Some Historical Notes: Research and the Term Mobbing*, THE MOBBING ENCYCLOPAEDIA, <http://www.leymann.se/English/11120E.HTM>.

66. *Id.*

67. Heinz Leymann, *How Serious Are Psychological Problems After Mobbing?*, THE MOBBING ENCYCLOPAEDIA, <http://www.leymann.se/English/32100E.HTM>.

68. See Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT’L L. 247, 258–60 (2008); Loreleigh Keashly & Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMP. RTS. & EMP. POL’Y J. 335 (2004). The phenomenon has also spawned a cottage industry of popular nonfiction books. See Workplace Bullying Institute, *Workplace Bullying-Related Books*, WORKPLACEBULLYING.ORG, <http://www.workplacebullying.org/research/suggested-readings.html> (collecting twenty titles on the topic). Lest you think it not serious, the research shows that bullying by pilots has caused fatal plane crashes. *E.g.*, Carl H. Lavin, *When Moods Affect Safety: Communication in a Cockpit Means a Lot a Few Miles Up*, N.Y. TIMES, June 26, 1994, at E18 (describing two plane crashes resulting after bullied crew members became fearful and failed to challenge pilots’ decisions). Bullying by doctors has resulted in patient deaths. *E.g.*, Lisa Rosetta, *Abuse Protection Sought for Health Care Workers*, SALT LAKE TRIB., Oct. 21, 2009 (describing a case in which nurses failed to follow up on a mother’s complaints that her toddler was dehydrated because they were afraid of retribution from a bullying doctor who had told them the toddler was fine, leading to the child’s death).

69. For a summary, see Frank Lorho & Ulrich Hilp, *Bullying at Work* 15–23 (European Parliament Directorate-Gen. for Research, Working Paper SOCI 108 EN, 2001), available at [http://www.europarl.europa.eu/workingpapers/soci/pdf/108\\_en.pdf](http://www.europarl.europa.eu/workingpapers/soci/pdf/108_en.pdf).

an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee."<sup>70</sup>

In the United States, anti-bullying bills have been introduced in twenty state legislatures, including New York and California.<sup>71</sup> All of the statutory proposals are based on model anti-bullying legislation termed the "Healthy Workplace Act."<sup>72</sup> The model act defines actionable conduct more narrowly than other countries' statutes, as "conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests."<sup>73</sup> It specifies that "severity, nature, and frequency" are relevant to determining whether conduct is abusive.<sup>74</sup> A cause of action would look much like a harassment case under Title VII, minus the discrimination, and plus the mental state of "malice."<sup>75</sup>

Although the law on the books prohibits only status-based harassment, in practice, U.S. employers have begun implementing broader harassment bans in the workplace. Even without formal legislation, the global trend toward anti-bullying rules has affected the conduct of U.S. employers.<sup>76</sup> Global employers, faced with different rules in different jurisdictions, have incentives to adopt the most restrictive rules and enforce anti-bullying policies at U.S. as well as European worksites.<sup>77</sup> Some U.S. companies have already added bullying to the list of prohibited practices, along with status-based harassment.<sup>78</sup> Unions have begun to

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70. Act Respecting Labour Standards, R.S.Q. 2002, c. N-1.1, ch. IV, div. V.2, § 81.18 ¶ 1 (Que., Can.), <http://www.canlii.org/en/qc/laws/stat/rsq-c-n-1.1/84271/rsq-c-n-1.1.html#history>. Saskatchewan amended its Occupational Health and Safety Act to bar psychological harassment in 2007. Occupational Health and Safety (Harassment Prevention) Amendment Act of 2007, S.S. 66 (Can.).

71. See *The Healthy Workplace Campaign*, HEALTHY WORKPLACE BILL (Feb. 28, 2011), <http://www.healthyworkplacebill.org/states.php>.

72. *Id.* The New York and California bills follow the Healthy Workplace Act in pertinent part.

73. Yamada, *Crafting*, *supra* note 60, at 517–21.

74. *Id.* at 518.

75. *Id.* at 518–20.

76. The Federal Bureau of Investigation advises employers to adopt workplace violence prevention programs that consider "[h]omicide and other physical assaults . . . on a continuum that also include[s] domestic violence, stalking, threats, harassment, bullying, emotional abuse, intimidation, and other forms of conduct that create anxiety, fear, and a climate of distrust in the workplace." FBI NAT'L CTR. FOR THE ANALYSIS OF VIOLENT CRIME, WORKPLACE VIOLENCE: ISSUES IN RESPONSE 13 (Eugene A. Rugala & Arnold R. Isaacs eds., 2004).

77. Tresa Baldas, *No Matter Where the Employees Are, Make Sure the Rules Are the SAME*, NAT'L L.J., Jan. 7, 2010, available at [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437433481&No\\_Matter\\_Where\\_the\\_Employees\\_Are\\_Make\\_Sure\\_the\\_Rules\\_Are\\_the\\_emSAMEem](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437433481&No_Matter_Where_the_Employees_Are_Make_Sure_the_Rules_Are_the_emSAMEem).

78. See NOA DAVENPORT, RUTH DISTLER SCHWARTZ & GAIL PURSELL ELLIOTT, *MOBBING: EMOTIONAL ABUSE IN THE AMERICAN WORKPLACE* 148–53 (3d prt. 2005) (describing anti-mobbing policies at Levi Strauss & Co. and Saturn Corp.); Cari Tuna, *Lawyers and Employers Take the Fight to "Workplace Bullies,"* WALL ST. J., Aug. 4, 2008, at B6 (reporting that in June 2008, Graniterock, a Watsonville, California distributor of construction materials, "added nondiscriminatory bullying to its list of prohibited conduct in the workplace, which already included harassment based on gender, ethnicity and other protected statuses"); STATE OF OR. DEP'T OF ENVTL. QUALITY, ANTI-MOBBING POLICY, NO. 50.110 (Feb. 12, 2001), available at [http://www.deq.state.or.us/msd/budget/0709GRB/13\\_SpecialReports/AffirmativeActionPlan2005-07.pdf](http://www.deq.state.or.us/msd/budget/0709GRB/13_SpecialReports/AffirmativeActionPlan2005-07.pdf).

add protections against workplace bullying to collective bargaining agreements.<sup>79</sup>

### *B. Expanding Family Leave*

#### 1. Extending Leave Policy from Mothers to Parents

Just as sexual harassment doctrine began as a means to eradicate women's workplace subordination, feminists argued for maternity leave as a remedy for women's exclusion from the workplace.<sup>80</sup> By 1991, fifteen states were providing women up to one year of extended maternity leave, while only four provided men with the same.<sup>81</sup> In 1993, Congress passed the Family Medical Leave Act (FMLA), allowing both men and women to take job-protected, unpaid leave for childbirth or adoption, or for an employee's "serious health condition," or that of the employee's spouse, parents, or children.<sup>82</sup> Parents include "those with day-to-day responsibilities to care for and financially support a child."<sup>83</sup> In 2003, in *Nevada Department of Human Resources v. Hibbs*, the Supreme Court affirmed that the FMLA was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, as a remedy for the states' "differential leave policies" for men and women.<sup>84</sup> Those differential leave policies violated the equal protection clause because they "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."<sup>85</sup> Thus, the Court affirmed Congress's requirement that leave policy be formally gender neutral.

#### 2. Problems with Family Leave Policy

Even in its new gender-neutral form, family leave policy, like sexual harassment law, has been criticized as misdirected. First, the statute is under-inclusive: it gives no help to most workers. Second, because most leave takers are women, women are stigmatized as less-able workers, resulting in discrimination. Third, the doctrine has shifted away from helping women achieve parity in labor markets and toward protecting traditional families.

##### a. Underinclusivity

The FMLA is limited in its ability to address inflexible work and gender inequality. Its coverage has the following shortcomings:

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79. See Yamada, *supra* note 8, at 271.

80. See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 522 (1983).

81. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

82. See 29 U.S.C. § 2612(a)(1) (2006).

83. 29 C.F.R. § 825.122(c)(3) (2009).

84. 538 U.S. at 726–27, 731.

85. *Id.* at 731.



*Low-Income Workers.* Because of the statute's limitations on worker eligibility, forty-six percent of the workforce is not protected by the FMLA.<sup>86</sup> Even for covered workers, the FMLA stops short of ensuring paid leave.<sup>87</sup> The result: low-income workers are unlikely to be protected.<sup>88</sup>

*Single Parents.* Although only half of U.S. households conform to the traditional married-couple model,<sup>89</sup> unpaid leave is of little use to employees without a breadwinning partner to provide support during the period of leave.<sup>90</sup> This places African American and Latino/a families, which are more likely to have a single parent, and women, who are more likely to head single-parent families, at a disproportionate disadvantage.<sup>91</sup>

*Routine Caregiving.* Many of the potential caregiving responsibilities that may interfere with work fall short of a "serious health condition."<sup>92</sup> For example, if a daycare shut down because some children were sick, only the parents of the sick children would be covered by the FMLA, while the parents of the children unaffected by the outbreak would be without daycare but uncovered.<sup>93</sup> The FMLA does not help parents who need time to participate meaningfully in their children's lives when they are healthy. Proposed legislation would give parents time off for school activities, like parent-teacher conferences.<sup>94</sup>

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86. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35622 (Dep't of Labor June 28, 2007). The FMLA applies only to workplaces with fifty or more employees. 29 U.S.C. § 2611(4)(A)(i). The employee must have been on the job for at least a year and have worked at least 1250 hours during the year before the leave. *Id.* § 2611(2)(A).

87. California, Washington, New Jersey, San Francisco, and Washington, D.C. now mandate some form of paid leave, whether financed by employers or through payroll taxes on all workers. Feldblum, *supra* note 9, at 257–59.

88. See Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 62 (2009); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1 (2007); Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 16 (2006).

89. JASON FIELDS & LYNNE M. CASPER, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2000, U.S. CENSUS BUREAU REP. P20-537, at 3 fig.1 (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf> (showing that as of the year 2000, 47.2% of households were not married couples).

90. See Wen-Jui Han, Christopher Ruhm & Jane Waldfogel, *Parental Leave Policies and Parents' Employment and Leave-Taking*, 28 J. POL'Y ANALYSIS & MGMT. 29, 50 (2009) (finding "evidence of stronger effects [of leave legislation] for married than single mothers, as expected, because married women are more likely to be eligible under the laws and able to afford a period of unpaid leave").

91. See Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 245 (2004).

92. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 196 (2004) (quoting 29 U.S.C. § 2611(11) (2000)).

93. *Id.* at 216.

94. Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. (2009).

*Nonparent and Nonspouse Caregivers.* “While the FMLA is quite liberal in defining the parent/child relationship, its view of caregiving is crabbed and unrealistically focused on parenthood as the locus of caregiving.”<sup>95</sup> The FMLA provides for leave to care for spouses but not domestic partners.<sup>96</sup> Siblings and other relatives are not covered. Although many communities are built on ties outside kinship,<sup>97</sup> an employee who wishes to take leave to care for a sick friend or relative who is not a parent, spouse, or child cannot do so under the FMLA.<sup>98</sup>

#### b. Stigmatizing Women as Less-Able Workers

A second problem is that because women are the primary beneficiaries of family leave policy, they are stigmatized as less-able workers. Although the FMLA is gender neutral, women are more likely than men to take leave.<sup>99</sup> As a result, employers may engage in hiring discrimination against women.<sup>100</sup> Some scholars have concluded that the FMLA has exacerbated discrimination against women, to the extent it has had any effect at all.<sup>101</sup> Women, but not men, are penalized in labor

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95. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 408 (2008).

96. See Kimberly Menashe Glassman, *Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave to Protect Domestic Partners*, 37 U. MICH. J.L. REFORM 837 (2004); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005).

97. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269 (1995) (“Blood ties have not held the preeminent position in Black families that they have held in white families.”).

98. See Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 697 (2007); Murray, *supra* note 95, at 408 (“The Act is oblivious to caregivers who provide care, but otherwise do not cohere with normative understandings of parenthood.”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 204 (2007); see also Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 288–92 (2004). *But see* Dep’t of Labor, Administrator’s Interpretation No. 2010-3 (June 22, 2010) (defining “son or daughter” under section 101(12) of the FMLA to give rights to those who care for children regardless of the legal or biological relationship).

99. See U.S. DEP’T OF LABOR WAGE & HOUR DIV., THE 2000 SURVEY REPORT app. A-2, tbls.A2-2.4, 2.6 (2001), <http://www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm>.

100. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 745–50 (2000); see also Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 32 (1998) (“As long as parental leave is de facto maternity leave there will be wide spread, but often difficult to prove, discrimination against women in the workplace.”).

101. See Jean Kimmel & Catalina Amuedo-Dorantes, *The Effects of Family Leave on Wages, Employment, and the Family Wage Gap: Distributional Implications*, 15 WASH. U. J.L. & POL’Y 115, 139 (2004) (finding “a strong negative effect of mandated family leave on employment, implying that gender discrimination has resulted from a federally mandated benefit that employers fear will increase costs”); Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 71 (2004). *But see* Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 404 & n.2 (2007) (concluding that empirical research suggests unpaid leave legislation had little to no negative effect on women’s wages as a

markets for being parents.<sup>102</sup> Courts are beginning to recognize family responsibilities discrimination as a civil rights violation.<sup>103</sup> However, courts have not gone so far as to hold that employers must accommodate employees' family responsibilities.

### c. Fixation with Family

A third problem is that leave policy is too focused on the family to the exclusion of other valuable life pursuits.<sup>104</sup> Katherine Franke extends the feminist critique of compulsory heterosexuality to critique compulsory motherhood, which she terms "repronormativity."<sup>105</sup> Franke questions the claim that mothering "is social production worthy of substantial public support," by pointing out that biological reproduction "is by no means the only manner in which social reproduction takes place, nor is it necessarily the most important."<sup>106</sup> Mary Ann Case gives the example: "what if a poor woman wants to write a book or start a business or get an

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whole, although individual workers who take leave are penalized).

102. See, e.g., ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209 (1997); Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137 (1998); see also Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1332 (2007) (discussing how, in two experiments, one in which undergraduates evaluated fictitious job applications varying in gender and parental status, and one in which employers were sent resumes for fictitious job candidates varying only in gender and parental status, mothers were disadvantaged compared to women without children, while fathers were advantaged over men without children).

103. See *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004). The Center for Work Life Law at UC Hastings Law School has documented a four hundred percent increase in the number of cases brought under the rubric of family responsibilities discrimination in recent decades. MARY C. STILL, *LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 2* (July 6, 2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf>.

104. Kathleen Silbaugh has observed that in some recent FMLA cases, courts have given the term "serious health condition" an expansive interpretation, allowing parents time off to care for routine childhood illnesses. Silbaugh, *supra* note 92, at 204. Silbaugh suggests that these cases show the judiciary has begun to internalize shifting cultural norms toward recognition of ordinary work-family dilemmas and accommodation of workers' caregiving responsibilities. *Id.* at 214–15. She analogizes this trend to acceptance of sexual harassment by a conservative judiciary eager to impose civility norms on the workplace by quashing sexual expression. *Id.* Silbaugh concludes that "[w]hile a decency-based norm of family time need not be as problematic as a decency based norm against sexual expression," feminists must remain vigilant to ensure that work-family policy is accompanied by a focus on equality. *Id.* at 215.

105. Franke, *supra* note 9, at 183.

106. *Id.* at 188–89. Population replacement can be accomplished through immigration policy. *Id.* at 192–95; Case, *supra* note 9, at 1773–74. Arguments to the contrary are often tinged with racism or xenophobia. Franke, *supra* note 9, at 192–95.

advanced degree instead of raising a(nother) child?”<sup>107</sup> Policies that privilege the family may be built on the assumption that the life pursuits of those who opt out of traditional family arrangements are less important or meaningful.<sup>108</sup>

### 3. Universal Protection Through Work-Life Policy

To address these problems, family leave policy, like harassment law, has been undergoing gradual expansion. In 2007, the U.S. Equal Employment Opportunity Commission (EEOC) issued an enforcement guidance on the topic of “caregiving responsibilities” that observes that such responsibilities are not limited to childcare, but also encompass eldercare and caring for individuals with disabilities.<sup>109</sup> Nine states and the District of Columbia have now expanded on the FMLA’s definition of family to include nontraditional family members, such as domestic partners or parents-in-law.<sup>110</sup> In 2008, the FMLA was amended to allow “next of kin” to take twenty-six weeks of leave during a twelve-month period to care for a wounded military service member.<sup>111</sup> Many states have laws requiring leave or giving employers incentives to provide leave for organ, blood, or bone-marrow donors, emergency or disaster volunteers, victims of crimes, victims of domestic violence, witnesses in legal proceedings, those on jury duty, and voters.<sup>112</sup> One handbook of employee benefits lists the following types of leave: pregnancy, post-pregnancy, family, sick, disability, personal, bereavement, weddings, jury duty, military service, educational, government service, and sabbatical.<sup>113</sup> These new forms of leave expand coverage to more situations and move away from the focus on women and family to a focus on workers’ liberty interests in structuring their work and personal lives.

107. Case, *supra* note 9, at 1781.

108. See BELLA DE PAULO, *SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER 255* (2006) (arguing that single people “get last dibs on vacation time, travel options, and choice of assignments because the obligations and interests that make their lives meaningful are deemed less important than the outside-of-work commitments of married people”); see also ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* (2000) (similar).

109. EEOC, *supra* note 14.

110. *State Family and Medical Leave Laws That Are More Expansive Than the Federal FMLA*, NAT’L P’SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968> [hereinafter NAT’L P’SHIP FOR WOMEN & FAMILIES].

111. 29 U.S.C. § 2612(a)(3) (2006 & Supp. III 2009). One scholar argues that these reforms have laid the groundwork for future laws expanding the definition of family under other provisions of the FMLA. Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46 (2009).

112. See NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 110.

113. 2 HR SERIES POLICIES AND PRACTICES § 109:18 (2010) (providing a checklist of potential topics for an employee handbook); *id.* § 207:8 (discussing trends in paid leave, such as sabbatical leave for mid- to upper-level executives).

As with anti-bullying legislation, the U.S. approach to work-life issues stands in contrast to that of Europe.<sup>114</sup> The United States and Australia are the only liberal welfare states that do not mandate some form of paid leave.<sup>115</sup> Statutes in Belgium, France, Germany, and the Netherlands require flexible working rights for all employees, while under U.K. law employees with childcare or caregiving responsibilities have the right to request flexibility.<sup>116</sup> The difference might be explained by contrasting attitudes toward social entitlements,<sup>117</sup> or by the fact that the European policies were intended to stem declining fertility rates and labor shortages, problems that are not on the radar in the United States.<sup>118</sup> Whatever the reason, the average European worker works three hundred fewer hours per year than the average U.S. worker.<sup>119</sup>

Some scholars go beyond the equality focus to argue that in the ideal workplace, “job-protected, paid leave would provide not only time off from work for family-related reasons, but also time away from the job for the pursuit of other life endeavors such as education, rest, or rejuvenation that would make a worker more productive.”<sup>120</sup> Advocates refer to “manifold” reasons an employee might require flexible work arrangements, from caring for an elderly parent, to attending a weekly Bible session, to volunteer engagements.<sup>121</sup> The EEOC has concluded that employers should adopt best practices to allow “all workers,” regardless of sex, “to balance work and personal responsibilities.”<sup>122</sup>

114. See Saul Levmore, *Parental Leave and American Exceptionalism*, 58 CASE W. RES. L. REV. 203 (2007); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010).

115. See *The World's Women Reports*, U.N. Doc. ST/ESA/STAT/SER.K/WWW/16/Rev.5, UNITED NATIONS STATISTICS DIV. (Apr. 22, 2005), <http://unstats.un.org/unsd/demographic/products/indwm/ww2005/tab5c.htm>. Lesotho, Papua New Guinea, and Swaziland also do not provide paid leave. *Id.*

116. ARIANE HEGEWISCH, INST. FOR WOMEN'S POLICY RESEARCH, EQUALITY & HUMAN RIGHTS COMM'N, *FLEXIBLE WORKING POLICIES: A COMPARATIVE REVIEW*, at iii (2009), available at [http://www.equalityhumanrights.com/uploaded\\_files/research/16\\_flexibleworking.pdf](http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf).

Australia also provides employees with children the right to request flexible work arrangements. *Fair Work Act 2009* (Cth) ch 2 pt 2 div 4 (Austl.).

117. See Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185, 190–92 (2009).

118. See Levmore, *supra* note 114, at 207–10. Moreover, paid leave is less expensive in countries with low fertility rates. *Id.* at 208.

119. Marcello Estevão & Filipa Sá, *The 35-Hour Workweek in France: Straightjacket or Welfare Improvement?*, 23 ECON. POL'Y 417, 420 (2008).

120. Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 120–21 (2009); see also Case, *supra* note 9, at 1786 (“Just as for the ancient Israelites the promised land flowed with milk and honey, so for modern feminists it would offer all inhabitants, regardless of sex or of their need to give or receive care, the time and resources and liberty to pursue their freely chosen life projects unconstrained.”).

121. Feldblum, *supra* note 9, at 270.

122. EEOC, *supra* note 14.

In the mid-1990s, corporations and human-resources professionals moved from the term “work-family” to the term “work-life.”<sup>123</sup> A national survey of employers found that many had adopted flexible work options such as part-time, job-sharing, time off, compressed workweeks, employee control over work hours, and telecommuting.<sup>124</sup> Some state laws give certain employees the right to ask for such arrangements.<sup>125</sup> A few workplaces have abandoned the time clock altogether, allowing each worker the discretion to decide when to work and measuring performance based on whether deadlines are met and results achieved.<sup>126</sup> Other feminists propose a broad range of universal solutions, from shortened workweeks to containing suburban sprawl.<sup>127</sup> Whatever the specific policy, the norm has shifted to universality: “[W]hile work-life policies historically were adopted with a goal of breaking down barriers to the inclusion of women and those with caregiving demands, the goals of work-life policies have now broadened to include a multitude of nonwork identities.”<sup>128</sup>

123. Paulette R. Gerkovich, *Work-Life Policy and Practice in the USA: Gendered Premise, Radical Potential?*, in *WORK-LIFE BALANCE: A PSYCHOLOGICAL PERSPECTIVE* 276, 279 (Fiona Jones, Ronald J. Burke & Mina Westman eds., 2006).

124. JAMES T. BOND, ELLEN GALINSKY, STACY S. KIM & ERIN BROWNFIELD, *FAMILIES & WORK INST.*, 2005 NATIONAL STUDY OF EMPLOYERS (2005), available at <http://familiesandwork.org/site/research/reports/2005nse.pdf>; see also Arnow-Richman, *supra* note 9, at 1095.

125. See HAW. REV. STAT. § 302A-610 (West 2008) (school employees may apply to job share); MONT. CODE ANN. § 2-18-107 (2009) (job sharing); OR. REV. STAT. § 240.855 (2009) (state agency employees may request telecommuting arrangements).

126. See Erin L. Kelly & Phyllis Moen, *Rethinking the ClockWork of Work: Why Schedule Control May Pay Off at Work and at Home*, 9 *ADVANCES IN DEVELOPING HUM. RESOURCES* 487 (2007); see also Michelle Conlin, *Gap to Employees: Work Wherever, Whenever You Want*, *BLOOMBERG BUSINESSWEEK*, Sept. 17, 2009, [http://www.businessweek.com/careers/managementiq/archives/2009/09/gap\\_to\\_employee.html](http://www.businessweek.com/careers/managementiq/archives/2009/09/gap_to_employee.html) (discussing initiatives at Best Buy and the Gap Outlet corporate headquarters).

127. See JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 182–85 (2004); Schultz, *supra* note 9, at 1942, 1947–48, 1956–57 (proposing restructuring of the labor market to shorten the workweek, democratize workplaces, and subsidize a living wage); Schultz & Hoffman, *supra* note 12, at 133–34. The range of policy options falling under the work-family label extends far beyond the workplace. See, e.g., Selmi & Cahn, *supra* note 88, at 9 (advocating more state-funded childcare in the form of lengthened school days and before- and afterschool programs); Katharine B. Silbaugh, *Women’s Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 *FORDHAM L. REV.* 1797, 1800 (2007) (proposing containing suburban sprawl and designing better houses to reduce commute and housework burdens).

128. Ann Marie Ryan & Ellen Ernst Kossek, *Work-Life Policy Implementation: Breaking Down or Creating Barriers to Inclusiveness?*, 47 *HUM. RESOURCE MGMT.* 295, 298 (2008) (internal citation omitted); see also Brad Harrington & Jamie J. Ladge, *Work-Life Integration: Present Dynamics and Future Directions for Organizations*, 38 *ORG. DYNAMICS* 148, 148 (2009) (“Rooted in the history of women’s rights and equal opportunity in education and the workplace, the notion of work-life has shifted in focus from solely a woman’s concern to a workforce management issue.”). But see FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 177 (2009) (arguing that tools of equal opportunity like flextime and grievance procedures were in the “personnel arsenal” before the women’s movement arrived).

## II. THE UNIVERSAL TURN IN ANTIDISCRIMINATION THEORY

The foregoing discussion suggests why universal protections are seen as the cures to the ailments of sexual harassment law and family leave policy. These universal protections are connected to a broader universalist paradigm for approaching discrimination. In this Part, I describe this universal turn and discuss the purported advantages of such a shift in terms of equality. I also identify potential disadvantages for those concerned with antidiscrimination. I conclude that the purported advantages and disadvantages of the universal turn are theoretical. By theoretical, I mean that it cannot be assumed that any particular policy will result in these effects. Particular policies must be analyzed in context to determine whether they would fulfill the theoretical promise of universalist theory. Part III will take up such a contextual inquiry with respect to anti-bullying rules and work-life accommodations.

### A. Defining the Universal Turn

The universal frame is distinct from the two conventional paradigms for understanding discrimination—anticlassification and antisubordination—both of which rely on protected or prohibited identity categorizations like race or sex.<sup>129</sup> The anticlassification principle prohibits rules that differentiate based on race or other forbidden characteristics, while the antisubordination principle prohibits rules that create or reinforce caste systems based on race or other group affiliations.<sup>130</sup> By contrast, the new universalism endeavors to draw attention to problems once seen as issues of inequality without recourse to identity categories.<sup>131</sup> It does so by (1) changing the axis of protection from identity traits to universal conditions like vulnerability,<sup>132</sup> (2) shifting focus from equal rights to universal rights like liberty<sup>133</sup> or dignity,<sup>134</sup> or (3) moving away from condemnation of prejudice toward banning disrespect<sup>135</sup> or irrational decision making.<sup>136</sup>

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on the scene). Although policies like flextime did not become strategies for women's equality until the 1980s, *id.* at 179, the conventional wisdom is that flexible work arrangements were historically accommodations for women.

129. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

130. See *id.* at 9–10.

131. See *supra* note 12. For a discussion of universalism's revival as a theoretical position, see generally Linda M.G. Zerilli, *This Universalism Which Is Not One*, 28 DIACRITICS 3 (1998).

132. See Fineman, *supra* note 12, at 21.

133. See YOSHINO, *supra* note 12, at 190; Yoshino, *supra* note 12, at 792.

134. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736–53 (2008). I note that Yoshino uses the term “dignity” to refer to the synthesis of equality and liberty concerns. Yoshino, *supra* note 12, at 749. For purposes of this Article, I follow Whitman and Freidman in referring to “dignity” as an independent concept that refers to “being shown deference and respect in everyday interaction,” which may either coexist or be at odds with “equality,” defined as freedom from discrimination on the basis of certain prejudices. See Friedman & Whitman, *supra* note 64, at 264, 268–70.

135. See Fisk, *supra* note 8, at 94–95.

136. See YOSHINO, *supra* note 12, at 177.

The following grid attempts to collect the terms associated with the antistubordination, anticlassification, and universalist paradigms of discrimination:

FIGURE 1  
THREE APPROACHES TO DISCRIMINATION

	<i>Antistubordination</i>	<i>Anticlassification</i>	<i>Universalism</i>
<i>Value at Stake</i>	Social Equality	Civil Equality	Liberty / Dignity
<i>Paradigmatic Policy</i>	Redistribution	Antidifferentiation	Human Rights
<i>Role of Reform</i>	Leveling	Neutrality	Expanding Protection
<i>Goal of Policy</i>	Accommodation	Assimilation	Transformation
<i>Protected Identity</i>	Difference	Sameness	Balance
<i>Relevant Unit</i>	Groups	Individuals	Humanity
<i>Harm of Harassment</i>	Enforcement of Gender Norms	Sex-Based Differentiation	Abusive Environments
<i>Harm of Inflexible Work</i>	Subordination of Mothers	Discrimination Against Parents	Work-Life Conflicts

The point of this grid is simply to provide a provisional map of a changing lexicon of associated ideas, not to imply any conceptual clarity, rigorous distinctions, or chronological evolution. Indeed, many particular legal rules could be characterized as fitting within two or three of these rubrics. Universalism does not seem to be an independent third way, nor does it seem to be the synthesis of the antistubordination and anticlassification positions. Nonetheless, it has the potential to offer common ground for adherents of both the antistubordination and anticlassification models.<sup>137</sup> The model avoids identity categories, appealing to those who oppose group-based protections, while promising universal structural change that will improve conditions for everyone, appealing to those concerned with subordination. But in practice, would this model be blind to identity categories? Would it resolve subordination along with universal harms? It is important to consider how legal rules framed in terms of the “new” category might entail the benefits and drawbacks of the old ones.

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137. Cf. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 977–78 (2010) (describing the “cross-ideological appeal” of post-racialism).



*B. Theoretical Advantages of the Universal Turn*

The universal turn would have the advantage of providing coverage to groups not always cognizable under equality jurisprudence, including those who face discrimination on the basis of sexual orientation.<sup>138</sup> In addition to expanding protection to everyone, advocates of the universal turn argue that it would advance equality, by avoiding “essentialism” and “backlash.”

## 1. Essentialism

One of the motivating impulses behind the universal turn is to avoid “making assumptions about group cultures.”<sup>139</sup> Because universalist solutions focus on values like liberty or dignity, rather than claims to identity, they would theoretically avoid essentialist ideas about identity groups such as “men” or “women.”

Anti-essentialism entails rejection of gender stereotyping—associating certain behaviors, characteristics, or aptitudes with men or women.<sup>140</sup> Any claim to rights based on “women’s experiences” is essentialist because it assumes the category of women has a unitary and coherent essence, whether based in biology or culture.

Another aspect of anti-essentialism is opposition to generalizations: rejecting “the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”<sup>141</sup> Intersecting axes of oppression, such as sexism, racism, classism, and homophobia, cannot be reduced to just one dynamic. In addition to the descriptive problems, there are normative problems with gender essentialism: understanding oppression through the tunnel vision of a theory of gender subordination may replicate other patterns of oppression.

Other feminists have argued that in creating rights against discrimination, the law produces the very stigmatized identities it is intended to protect. Judith Butler disputes that gender is “a timeless and inalterable ideal.”<sup>142</sup> She describes gender as a social norm that “only persists as a norm to the extent that it is acted out in social

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138. See Fineman, *supra* note 12, at 3.

139. YOSHINO, *supra* note 12, at 189; see also *id.* at 191 (“While it need not do so, the equality paradigm is prone to essentializing the identities it protects.”); Yoshino, *supra* note 12, at 795–96.

140. This theory has had some appeal for the Supreme Court. In *Price Waterhouse v. Hopkins*, the Court held that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” and that no woman should be placed in a “catch 22” by “[a]n employer who objects to aggressiveness in women but whose positions require this trait.” 490 U.S. 228, 251 (1989), modified by statute on other grounds recognized in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–102 (2003); see also *United States v. Virginia*, 518 U.S. 515, 533 (1996) (finding that equal protection prohibits “overbroad generalizations about the different talents, capacities, or preferences of males and females”); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (describing a history of “gross, stereotyped distinctions between the sexes” in the United States).

141. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

142. JUDITH BUTLER, *UNDOING GENDER* 48 (2004).

practice and reidealized and reinstated in and through the daily social rituals of bodily life.”<sup>143</sup> At the same time that feminists build legal fences around women to keep danger out, they are fencing women into constricting spaces:

To have a right *as* a woman is not to be free of being designated and subordinated by gender. Rather, though it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation.<sup>144</sup>

For example, rights for women based on their roles as mothers do not simply reflect the reality that many women are mothers; they promote that vision of reality. The only “women” recognized by such a law will be mothers. Worse yet, whether women’s roles as mothers are seen as fixed by nature or nurture, the appeal to static gender roles makes resistance seem futile.<sup>145</sup> This problem is debilitating to the goal of undermining the gender norms that lock women into lives as mothers. Legal rights based on gender may prevent people from dividing, sharing, permuting, and questioning gender roles.

Essentialism is a problem not just for identity, but also for institutions, such as the family (i.e., the idea that the essence of family is the sexualized union of a man and a woman for purposes of procreation), and concepts, such as sexuality (i.e., the idea that the essence of sexuality is heterosexual domination). To inscribe concepts like “sex” and “family” into the law is to invite stereotypical constriction of their meanings and to exclude outsiders from normative consideration. For example, legal rules that allow only “family” members to inherit rent-stabilized apartments can be difficult to enforce for same-sex partners.<sup>146</sup>

## 2. Backlash

A second theoretical advantage of the universal turn is avoiding the dangerous political dynamics that result when the law seems to be “picking favorites among

143. *Id.* Butler also deconstructs the divide between biological sex and cultural gender. This is not to deny biological differences, but to argue that we can only recognize and understand those differences through culture. See Yoshino, *supra* note 26, at 866–68 (reading Butler as making a weak performative claim, not that “there is no biological substrate to sex,” but rather, that “there may be a biological component to sex, but that we will never be sure what that biological component is, as we can only apprehend it through culture (that is, gender)”).

144. Wendy Brown, *Suffering the Paradoxes of Rights*, in *LEFT LEGALISM/LEFT CRITIQUE* 420, 422 (Wendy Brown & Janet Halley eds., 2002) (emphasis in original).

145. See Schultz, *supra* note 9, at 1892–93.

146. *Compare* 390 W. End Assocs. v. Wildfoerster, 661 N.Y.S.2d 202, 202–03 (N.Y. App. Div. 1997) (stating that a “very close, loving relationship” in which a partner cared for a tenant dying of AIDS was insufficient to qualify as a “family” relationship), *with* AFE Realty Corp. v. Diamond, No. 2004-219 KC, slip op. (N.Y. App. Term, May 23, 2005) (finding a familial relationship where the tenant cared for the occupant of the apartment during his teenage years while his mother was sick, and later babysat his children in exchange for help with shopping and paying bills).

groups.<sup>147</sup> Legal rules caught up in “identity politics” can result in backlash, leading to stigmatization of the identity group seeking recognition and polarization of discussion. The result is to transfer the costs of the new policy to those it was intended to protect.<sup>148</sup> The arguments for universal protection, by contrast, demonstrate how issues brought to light by the women’s movement point to larger problems with the structure of the work environment for everyone.<sup>149</sup> Seeing the harm as a universal threat to dignity or autonomy avoids the politically fraught process of drawing lines around identity groups.

Policies that appear to confer “special rights” can result in a counterproductive dynamic of stigmatization.<sup>150</sup> Political projects aimed at recognizing an identity group and redistributing resources to that group “leav[e] intact the deep structures that generate . . . disadvantage” and so “must make surface reallocations again and again.”<sup>151</sup> Affirmative action is a case study in the political limits of identity politics. Advocates of affirmative action argued that purportedly meritocratic processes of selection in education and employment were in fact skewed toward privileged groups due to lingering effects of historical discrimination and current forms of implicit bias.<sup>152</sup> But by the mid-1990s, opponents of affirmative action had characterized the policy as “unnecessary, unfair, and even un-American.”<sup>153</sup> Even those sympathetic to the “moral and empirical force” of the arguments for affirmative action recognized that “there is a sense in which [these arguments were] not being heard.”<sup>154</sup> Affirmative-action advocates were unable to reframe the debate because “[t]he most compelling moral claims [were] simply dismissed as special-interest pleading.”<sup>155</sup> Once “affirmative action” became anathema it had to

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147. YOSHINO, *supra* note 12, at 188; *see also* Fineman, *supra* note 12, at 4; *cf.* Yoshino, *supra* note 12, at 751–54 (discussing “pluralism anxiety,” which he defines as “apprehension of and about [our country’s] demographic diversity”).

148. The effect is unfair. *See* Jeremy Waldron, *Indirect Discrimination*, in *EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE* 93, 97 (Stephen Guest & Alan Milne eds., 1984) (“Since inequality is rooted in social and economic structures, the pursuit of equality is difficult and costly. Who should bear these costs? The answer is, surely, that they should be distributed as fairly as possible in society, like the other burdens and benefits of social cooperation.”).

149. *Cf.* Lani Guinier & Gerald Torres, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002) (“Those who are racially marginalized are like the miner’s canary: their distress is the first sign of a danger that threatens us all.”); Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221 (2002).

150. In Nancy Fraser’s terms, the problem is the dilemma of “redistribution-recognition.” FRASER, *supra* note 15, at 23.

151. *Id.* at 29.

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

153. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 *CALIF. L. REV.* 953, 954 (1996).

154. *Id.* at 955.

155. *Id.*

be recast in terms of “diversity”—an ideal that aspires to inclusion rather than equality.<sup>156</sup>

Relatedly, labeling a problem as “discrimination” can backfire.<sup>157</sup> Second-generation forms of discrimination—for example, unexplained gender hierarchies in the workplace—often overlap with “patterns of bad management, general worker abuse, or other unprofessional conduct.”<sup>158</sup> Calling the problem “sexism” may result in a climate of hostility and recriminations rather than an atmosphere conducive to problem solving.<sup>159</sup> The process of drawing the “boundary lines between unprofessional and discriminatory conduct can deflect attention from the institutional dysfunction producing both types of problems.”<sup>160</sup> A close case becomes the focus of dissensus in the workplace, “pos[ing] the greatest risk of polarization, delegitimation of the antidiscrimination norm, and perceived unfairness if addressed primarily as a question of whether the challenged behavior should be punished because it technically crossed the legal line.”<sup>161</sup>

### C. Theoretical Disadvantages of the Universal Turn

The universal turn also entails potential risks in terms of equality, which I refer to as “assimilation” and “dilution.”

#### 1. Assimilation

Assimilation is the downside of crafting legal protections to avoid essentialist notions of identity.<sup>162</sup> Rights that are tailored to women’s experiences risk essentializing those experiences and reinforcing women’s subordination, but

156. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 962 (1998).

157. Cf. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 189–90 (2003) (describing race as a “neon light” attracting backlash in school admissions cases because it is an “easy mark for the frustration of those who are excluded by admissions choices—choices that have little to do with race and much to do with discretionary, even arbitrary, decisionmaking”).

158. Sturm, *supra* note 25, at 472.

159. See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1901 (2009) (“[T]hreat and confrontation about race and gender bias, which people do not want to possess or exhibit, may inadvertently provoke shame, guilt, and resentment, which lead to avoidance and resistance, and ultimately to more stereotyping.”); cf. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 340 (2008) (“Honest disagreement can lead to dialogue and reconciliation, but . . . the charge of bigotry . . . leave[s] no room for persuasion or holding one’s peace—[it is an] attack[] on character and integrity and must either be pressed to a conclusion or recanted and apologized for.”).

160. Sturm, *supra* note 25, at 472–73.

161. *Id.* at 478.

162. See Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 90 (2009).

generic rights fail to redress specific harms typically suffered by women.<sup>163</sup> Martha Minow has referred to this problem as the “dilemma of difference.”<sup>164</sup> Feminists have long debated whether gender-blind or gender-conscious remedies can best address discrimination. This debate is relevant to whether universal or targeted solutions are best.

Generic rights may assist only those whose lives are patterned in the mold of the privileged group. And worse, by making that mold seem more inclusive, generic rights may legitimate structural conditions that contribute to inequality. The problem with status-blind solutions is the myth of neutrality:

Equal treatment requires everyone to be measured according to the same norms, but in fact there are no “neutral” norms of behavior and performance. Where some groups are privileged and others oppressed, the formulation of law, policy, and the rules of private institutions tend to be biased in favor of the privileged groups, because their particular experience implicitly sets the norm.<sup>165</sup>

Gender-neutral rules assist “mostly women who have been able to construct a biography that somewhat approximates the male norm.”<sup>166</sup> To give a simple example: a school admissions test that rewards students for making educated guesses may seem objective, but if cultural norms inculcate risk-taking behavior in males and discourage it in females, males will come out ahead on the test. The females who succeed on the test will be those who had the resources or the luck to learn risk taking. Although legal rules may be blind to difference, society and the economy are not. Inequality in any one sphere—whether the home, the workplace, or public life—can create inequality in the others.<sup>167</sup>

To gain rights equal to those of the privileged group, a disadvantaged group must argue that it is like the privileged group in all relevant respects.<sup>168</sup> By accepting the baseline norm without question, and showing that it is amenable to

163. See Brown, *supra* note 144, at 430.

164. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990) (“[W]hen does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on *that* basis?” (emphasis in original)).

165. Young, *supra* note 19, at 269.

166. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 37 (1987).

167. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 19–20 (1983) (discussing “complex equality”). I am indebted to Maxine Eichner for this connection.

168. Equality doctrines are premised on an “Aristotelian logic” that the like be treated alike and the different different. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2395 (2002) (citing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215–34 (1989)) (“[T]he complainant must show that she and her disadvantaged group are ‘like’ the people or group advantaged by the law’s classification.”); cf. Goldberg, *supra* note 34, at 779–80.

the inclusion of disadvantaged groups, those disadvantaged groups bolster the legitimacy of the baseline norm, and worsen the adverse sanctions for those who would challenge or deviate from that norm. For example, some queer theorists oppose the movement to legalize same-sex marriage because it would strengthen the hegemony of marriage as an institution by demonstrating that marriage can stretch to accommodate same-sex couples.<sup>169</sup>

I add to this account of assimilation by observing that assimilation can also operate on the level of norms. For example, antidiscrimination norms might be lost if they are assimilated into universal norms. To give an example, a generic “diversity” norm that focuses on all forms of difference rather than historically salient patterns of subordination could mean that “the white farm boy from Idaho is considered as important to firm diversity as the black inner-city kid from Los Angeles on the basis of geographic diversity, . . . justify[ing] a workforce that is primarily white or male (but is diverse on other dimensions).”<sup>170</sup>

## 2. Dilution

Universal expansion of civil rights laws also presents another new risk. It could dilute the rights of disadvantaged groups by trivializing the more serious harms of discrimination and undermining support for antidiscrimination in general. Moreover, it is likely to cost more to protect an expanded class of beneficiaries from an expanded class of harms. Due to these increased costs, the level of protection may be watered down.

Such arguments have been made against extending civil rights protections to new groups or activities. Richard Thompson Ford has argued that “the fight for social justice” is “an exercise in discretion as well as valor.”<sup>171</sup> Ford argues that it dilutes protection to analogize racism to other, less “serious” harms, such as discriminatory grooming requirements,<sup>172</sup> failure to recognize gay marriage,<sup>173</sup> mistreatment of animals,<sup>174</sup> and employment discrimination based on appearance.<sup>175</sup> Like the boy who cried “wolf,”<sup>176</sup> those who cry “racism” too often may lose protection when they need it most. “The good-natured humanitarian who listens attentively to the first claim of social injustice will become an impatient curmudgeon after multiple similar admonishments. . . . If goodwill is exhausted and popular opinion sours, the coercive force of law will be of little effect.”<sup>177</sup> Ford’s

169. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

170. Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1632 (2001).

171. FORD, *supra* note 159, at 337.

172. *Id.* at 146–56. Ford describes such harms as “racism without racists.” *Id.* at 37–92.

173. *Id.* at 106–22.

174. *Id.* at 93–98.

175. *Id.* at 122–46.

176. Julie C. Suk, *Race Without Cards?*, 5 STAN. J. C.R. & C.L. 111, 115 (2009) (reviewing FORD, *supra* note 159).

177. *Id.* at 114 (alteration in original) (quoting FORD, *supra* note 159, at 176).

argument has all the more force in the context of the universal turn, where the goal is not just to expand protections incrementally, but to universalize them.

However, Ford's argument relies on two assumptions, which may or may not apply in any given policy context. First, Ford assumes "that there is a small, fixed quantity of goodwill for civil rights causes, which should be used sparingly on the most worthwhile of them."<sup>178</sup> At least with respect to the federal judiciary, Ford may be right. Since *Bell Atlantic Corp. v. Twombly* changed the pleading standard in federal courts to allow district judges to dismiss claims they deem implausible,<sup>179</sup> the rate of dismissal of discrimination cases has increased in a larger increment than the rate of dismissal of other types of cases.<sup>180</sup> When the extent of protection is left up to the private sector, sometimes the response to the legal requirement that everyone be treated the same is to treat everyone equally badly. For example, after the Montana Supreme Court held that a state employer could not allow unmarried *cross-sex* couples to purchase health insurance if unmarried *same-sex* couples could not, the Montana Blue Cross Blue Shield dropped *all* unmarried couples from coverage.<sup>181</sup> To make a more simple point—more expansive workplace protections require more resources for enforcement, such as an administrative agency or human resources personnel, which can trade off with resources previously devoted to assisting victims of discrimination.<sup>182</sup>

Second, Ford assumes that those playing the race card in new contexts will not succeed in convincing the public that the analogy to racism is strong.<sup>183</sup> But many social movements have succeeded by analogizing new forms of discrimination to

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178. *Id.* On the other hand, vanguard civil rights movements may lend legitimacy to the rearguard by comparison. For example, the prospect of affirmative action for transsexuals led one conservative to wax nostalgic about race-based affirmative action. See, e.g., Kim Trobee, *President Appoints 'Transgendered' Individual to Federal Post*, CITIZENLINK (Jan. 4, 2010), <http://www.citizenlink.com/2010/01/citizenlink-president-appoints-transgendered-individual-to-federal-post> (quoting Matt Barber, associate dean at Liberty University, complaining that the appointment of a transgender individual to a federal post "isn't like appointing an African-American in order to try to provide diversity and right some kind of discriminatory wrong").

179. 550 U.S. 544, 570 (2007); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

180. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029–31; Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008).

181. Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1317 (2006).

182. Cf. Janet E. Halley, "Like Race" Arguments, in WHAT'S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY 40, 58–59 (Judith Butler, John Guillory & Kendall Thomas eds., 2000).

183. See Suk, *supra* note 176, at 114.

old ones.<sup>184</sup> Ultimately, the question is whether a new claim of injustice has merit.<sup>185</sup>

To make a different but related point, expanding protections to all can water down protections for some, because rights must be more abstract and narrow to apply to more contexts.<sup>186</sup> For example, scholars have warned that extending constitutional rights to noncitizens could “pose dangers to constitutional rights at home” because “constitutional protections may suffer dilution when they are extended into areas previously thought outside their coverage.”<sup>187</sup> “Arguments for limiting the rights in their new application have a way of filtering back to undermine the original core.”<sup>188</sup> Expanding a civil rights remedy may result in lesser protections in the new context, with those limitations drifting back into the core doctrine.

#### D. Assessing Particular Examples of the Universal Turn

The foregoing discussion provides a set of questions for critiquing any novel universalist policy initiative to expand civil rights laws beyond equality. Does universalization of an antidiscrimination rule avoid gender essentialism and the political backlash against targeted protections? Or does it require a form of assimilation that obscures gender discrimination and dilutes the resources available to address it? These questions are important to any scholar or policy maker concerned about whether particular protections can combat gender inequality.<sup>189</sup>

184. *Id.* at 116 (“Moral consensus condemning practices like racial segregation did not exist before social movements made good-faith attempts to push the boundaries of existing notions of racial equality.”).

185. *Id.* at 118.

186. *Cf.* KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 117 (1988) (“[The] proliferation of antidiscrimination strategies . . . can be seen as the logical extension of the universalization of rights—by including *all* groups, it further dilutes the benefits received by the historically most disadvantaged groups.” (emphasis in original)). On the other hand, scholars have argued that in theory, the expansion of antidiscrimination statutes to cover new groups could require more capacious understandings of the operation of discrimination generally, leading to the expansion of remedies available to the original group. *See* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1789–90 (2008); Yoshino, *supra* note 26, at 781.

187. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 984 (1991); *see also* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1966–67 (2009) (“[W]hen judges expand the substance of a right, they usually must overcome any costs by cutting back on access, and when they expand access to a right, they usually must overcome any costs by cutting back on the right itself. . . . The effect is not unlike the addition of water to scotch. This ensures that there is enough to go around for everyone, but it satisfies no one.”).

188. Neuman, *supra* note 187, at 984. Neuman points to Justice Harlan’s opinion in the 1970 Supreme Court case *Williams v. Florida*, 399 U.S. 78, 118 (1970) (Harlan, J., concurring in part and dissenting in part), in which the Court held that Florida’s six-member jury statute satisfied the Sixth Amendment’s right to a trial by jury, and Justice Harlan lamented that the historic twelve-member-jury guarantee in the federal system had thus been diluted by incorporation of the Sixth Amendment against the states. *Id.*

189. My examples pertain to gender inequality, but this framework may also be helpful in



FIGURE 2

<i>Presumptive Problems with Targeted Approach</i>	<i>Presumptive Problems with Universal Approach</i>
Essentialism	Assimilation
Backlash	Dilution

This is not to say that feminism is the only metric for evaluating policy.<sup>190</sup> Rather, this Article aims to refute the claim that universalized protections would be good for everyone, or that universalizing protections is the best way to secure gender equality. An analysis of this sort may not reveal whether a universal policy is beneficial from a utilitarian perspective,<sup>191</sup> but it does reveal whether those committed to equality should prioritize universal policies, and whether and how those committed to equality should seek to modify policy proposals.

Essentialism, backlash, assimilation, and dilution are problems likely to manifest themselves in varying degrees in response to any workplace protection. The risk of any one of these problems is not a reason to reject a policy proposal, but rather, something to be assessed in terms of the ultimate impact on the gendered division of labor.

For example, at some level, every legal regime is essentialist: legal protections are constructed around prototypical victims, and “the price of receiving legal protection is the cost of acting in a manner that fits the prototype.”<sup>192</sup> Yet rights claims, such as the right to paid work or freedom from sexual violence, have mitigated and attenuated gender subordination, creating the space that allows women to pursue any political end.<sup>193</sup> Therefore, we “cannot not want” rights, in the words of Gayatri Chakravorty Spivak.<sup>194</sup> Recognizing this dilemma, many theorists advocate “strategic essentialism.”<sup>195</sup> This does not mean that feminists

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examining discrimination along other axes.

190. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) (arguing against a sort of feminist tunnel vision which refuses to consider any costs or benefits unrelated to advancing the cause of women).

191. For example, a policy that improved working conditions for men alone while leaving the status of women unchanged might be justified from a utilitarian perspective, even though it failed to reduce women’s inequality.

192. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1827 (2003) (reviewing *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Fransisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002)).

193. See Brown, *supra* note 144, at 422.

194. GAYATRI CHAKRAVORTY SPIVAK, *OUTSIDE IN THE TEACHING MACHINE* 46 (1993).

195. See GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 205 (1987). Spivak herself later abandoned this phrase, if not the project, because she thought it had “bec[o]me the union ticket for essentialism.” Sara Danus & Stefan Jonsson, *An Interview with Gayatri Chakravorty Spivak*, *BOUNDARY 2*, Summer 1993, at 24, 35 (quoting Spivak). For an overview of the theory, see Lara Karaian, *The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis*,

should write off the risks of essentialism, just that those risks must be assessed in relation to the risks of other legal rules, and weighed against other potential advantages and disadvantages of legal regimes.<sup>196</sup>

Likewise, assimilation is a risk that is endemic to law. As Yoshino puts it: “[c]ivil rights practice, after all, is fundamentally about who has to change: The homosexual or the homophobe? The woman or the sexist? The racial minority or the racist?”<sup>197</sup> Racial minorities may engage in strategic assimilation: “[t]he radical multiculturalist insists that if assimilation will make greater demands on racial minorities than on whites, it must be summarily rejected as discriminatory. But the pragmatist would ask whether the unequal demands of assimilation are more or less severe than the likely alternatives.”<sup>198</sup>

This Article does not endeavor to take a side in the debate between those who are more concerned with essentialism and those who are more concerned with assimilation. Nor does it assume that universal policies, rather than those targeted at equality, will avoid identity politics but cause dilution. These are not debates that can be resolved in the abstract. Rather, the preceding theoretical discussion is intended as a template for analysis of how the universalization of particular legal rules might impact gender equality. The next Part of this Article will examine anti-bullying and work-life accommodation mandates in terms of essentialism, backlash, assimilation, and dilution.

### III. UNIVERSAL BUT UNEQUAL

This Part will analyze two proposed universal policies: anti-bullying statutes, along the lines of the Healthy Workplace Act,<sup>199</sup> and procedural or substantive rights to various types of work-life accommodations.<sup>200</sup> Would new laws providing a cause of action for bullying or a right to work-life accommodations better avoid essentialism and backlash than targeted rules? Would they cause assimilation and dilution? Unfortunately, anti-bullying and work-life accommodation rights do not seem to resolve the problems of targeted laws. Additionally, these rules create new disadvantages in terms of inequality.

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*Queer Porn, and Canadian Anti-Discrimination Law*, in FEMINIST AND QUEER LEGAL THEORY 375, 378–80 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

196. See Yoshino, *supra* note 26, at 933 (commenting that “the risk of essentialization ought not to be understood in a vacuum, but rather relative to the risks of alternative regimes”).

197. *Id.* at 938. To Yoshino, “it seems fanciful to be for or against assimilation, as assimilation simply exists as a requirement of cultural intelligibility, of culture itself.” *Id.* at 930.

198. FORD, *supra* note 159, at 347.

199. See *supra* notes 71–75 and accompanying text.

200. See, e.g., Arnow-Richman, *supra* note 9 (advocating a law providing all employees the right to request accommodations and imposing procedural obligations on employers to consider the request).

*A. An Anti-Bullying Cause of Action*

## 1. Essentialism: Creating New Scapegoats

Would anti-bullying rules move away from essentialist notions of gender and other identities that are often produced in the interpretation, application, and enforcement of sexual harassment law? Would universal rules avoid stigmatizing women as potential plaintiffs and squelching any expression of sexuality in the workplace?<sup>201</sup> This Part concludes that while anti-bullying rules would avoid some of the forms of essentialism promoted by sexual harassment law, they would not necessarily avoid stigmatizing women or allowing employers to enforce puritanical standards. This conclusion is provisional because no U.S. jurisdiction has yet adopted an anti-bullying statute that can be studied empirically; however, comparative legal scholarship suggests cause for concern.

## a. Increased Inclusivity?

To be sure, an anti-bullying rule has many advantages over a sexual harassment rule when it comes to avoiding essentialism. Defining harassment sans discrimination would move away from gender stereotypes in which “women are uniquely vulnerable to men[,] . . . men are always vulgar and loutish, or . . . women have ‘special’ sensitivities and rights that men do not share.”<sup>202</sup> An anti-bullying rule would also avoid essentialist generalizations by protecting individuals harassed for complex reasons—including hostility on account of a victim’s position at the intersections and margins of identity groups. And an anti-bullying regime would not privilege sex or race as a prohibited basis for discrimination. It would avoid all suspect classes and classifications, protecting anyone from harassment, whether because of sex, gender, race, orientation, appearance, or even, in the words of one New York legislator, “[i]f somebody does not like you because you are [a] Yankees fan.”<sup>203</sup> It would not involve courts in outing alleged same-sex harassers.<sup>204</sup> It would not require inquiry into the often-inscrutable motives of harassers at all.

On its face, a generic harassment ban would protect more people than a ban on discriminatory harassment. But even a generic harassment rule would not protect

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201. See *supra* Part I.A.2.

202. Ehrenreich, *supra* note 8, at 21; see also *id.* at 53–54 (arguing that, by defining the harm of sexual harassment as discrimination, the law promotes “an essentialist understanding of workplace relations between the sexes”); Fisk, *supra* note 8, at 85 (arguing that the illumination of the unique harm of sexual harassment had an unintended effect: “[f]ocusing on the psyches of women may perpetuate a protectionist assumption when courts do not consider this kind of expert evidence about the corrosive effect of workplace humiliation on the psyches of men”).

203. Interview by Neil Cavuto with Bob Barra, Member, N.Y. State Assembly (Aug. 22, 2007) (discussing the differences between a bullying prohibition and a sexual harassment prohibition).

204. Cf. *supra* note 31 and accompanying text (discussing how, under *Oncale*, a plaintiff can prove same-sex harassment is discriminatory in a Title VII case by showing the harasser is homosexual).

everyone. Less-skilled, unorganized workers—who are more often people of color, women, and undocumented immigrants—are more likely to do precarious work and hence are more susceptible to workplace abuse.<sup>205</sup> Yet these are the workers least able to bring complaints or civil litigation. And the tort experience suggests that courts may not recognize bullying against marginalized workers as an assault to dignity. If a worker is already marginalized, courts raise the bar for actionable offenses. “The humiliations that courts deem outrageous enough to be actionable seem heavily influenced by the court’s notions of status, gender, and class.”<sup>206</sup> Courts are likely to recognize infringements on dignity only when a high-status person suffers an insult to that status—for example, when the executive is punished with janitorial duties.<sup>207</sup>

#### b. New Gender Stereotypes

Although anti-bullying rules would expand protection to certain privileged workers, they would also have the unintended effects of opening new avenues for essentialism. Many of the essentialist problems with sexual harassment were unintended. For women’s stories to resonate with employers, juries, and judges, those stories had to conform to a prototypical account of sexual harassment in the workplace, generally involving crass male behavior and feminine sensitivity. Would an anti-bullying law differently construct workplace victims and perpetrators? What are the prototypical stories of workplace bullying, and how do they differ from the prototypical stories of sexual harassment?

If popular culture is any guide, the prototypical workplace bully is a woman.<sup>208</sup> In the media’s coverage of the anti-bullying movement, news programs have aired

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205. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 41–42 (1988).

206. Fisk, *supra* note 8, at 89.

207. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991) (“We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete.”). Fisk thinks it is “difficult to rationally explain why working as a janitor may have dignity for some, be humiliating but not actionable for others, and constitute actionable humiliation for a few.” Fisk, *supra* note 8, at 88.

208. See, e.g., Judith P. Miller, *Review: The Devil Wears Prada and Working Girl: Sympathy for the Devil*, 19 YALE J.L. & FEMINISM 221, 221 (2007). A large percentage of workplace bullies are reported to be women. See WORKPLACE BULLYING INST., (STILL) BULLYING WITH IMPUNITY: LABOR DAY SURVEY 2 (Sept. 2009), available at <http://www.workplacebullying.org/res/N-N-2009D.pdf> (reporting that 65% of workplace bullies are women, according to a nonscientific survey of 422 self-selected online respondents). But see WORKPLACE BULLYING INST. & ZOGBY INT’L, U.S. WORKPLACE BULLYING SURVEY 7 (Sept. 2007), available at <http://www.workplacebullying.org/res/N-N-Zogby2007.pdf> (reporting that 40% of workplace bullies are women, according to online interviews of 7740 representative adults). A self-help industry has sprung up for these so-called “bully broads.” See, e.g., JEAN HOLLANDS, SAME GAME DIFFERENT RULES: HOW TO GET AHEAD WITHOUT BEING A BULLY BROAD, ICE QUEEN, OR “MS. UNDERSTOOD” (2002)

clips from the popular film *The Devil Wears Prada* to demonstrate bullying.<sup>209</sup> In that movie, the title character, the editor of a successful fashion magazine, is criticized for sending her younger female assistants on impossible housekeeping and childcare errands, and treating them with cold disdain.<sup>210</sup> At one point, the movie's heroine points out the double standard: "If she were a man, the only thing people would talk about is how good she is at her job!"<sup>211</sup> One feminist critic has concluded that the movie "transforms the genre of punishing uppity women for violating gender norms into a celebration of ambition in women and a recognition of the real behind-the-scenes labor—women's work—which enables the contemporary workplace."<sup>212</sup> Subjecting devils in Prada to legal liability would work against this subversive possibility.

Such dramas are not just in the movies; they also fill deposition transcripts. For example, in one discrimination case, a plaintiff testified that her female boss was "harassing, demeaning, bullying, vicious, vile and vindictive," while other witnesses described the boss as simply "hard-nosed," "abrupt," and "rude," with a "dominating personality."<sup>213</sup> The dispute was never resolved because the court held that the boss "was an equal opportunity oppressor, using her intense, dominant, abrupt, rude, and hard-nosed management style on all . . . employees."<sup>214</sup> If an anti-bullying statute had applied, a judge or jury would have been required to decide whether this equal opportunity oppressor's bad management tactics were illegal. In a culture that expects women to be caring and motherly, women would face harsher scrutiny than men for the same behavior.<sup>215</sup>

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(book by "executive coach" to help intimidating women tone it down).

209. See, e.g., *Good Morning America* (ABC television broadcast Feb. 24, 2009) (showing a clip from *The Devil Wears Prada* during a segment on workplace bullying); *The Today Show* (NBC television broadcast July 14, 2009) (same).

210. *THE DEVIL WEARS PRADA* (Twentieth Century Fox 2006).

211. *Id.* For a legal example of this type of double standard, see Jeffrey Rosen, *The Case Against Sotomayor*, *NEW REPUBLIC* (May 4, 2009), <http://www.tnr.com/article/politics/the-case-against-sotomayor> ("The most consistent concern was that Sotomayor, although an able lawyer, was 'not that smart and kind of a bully on the bench,' as one former Second Circuit clerk for another judge put it.").

212. Miller, *supra* note 208, at 225; see also Rebecca Traister, *Sympathy for the She-Devil*, *SALON.COM* (June 30, 2006), [http://www.salon.com/mwt/feature/2006/06/30/women\\_bosses/index.html](http://www.salon.com/mwt/feature/2006/06/30/women_bosses/index.html).

213. *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 607–08 (Tenn. Ct. App. 2007).

214. *Id.* at 609.

215. See, e.g., CATALYST, *THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP: DAMNED IF YOU DO, DOOMED IF YOU DON'T* 4, 8 (2007), available at <http://www.catalyst.org/file/45/the%20doublebind%20dilemma%20for%20women%20in%20leadership%20damned%20if%20you%20do,%20doomed%20if%20you%20don't.pdf> (qualitative analysis of surveys of twelve hundred business leaders concluded that female leaders are more likely to be seen as either "too soft" or "too tough," but "never just right," and either competent or likeable, but rarely both); Victoria L. Brescoll & Eric Luis Uhlmann, *Can an Angry Woman Get Ahead?: Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 *PSYCHOL. SCI.* 268 (2008) (study of adults shown videotaped scenarios demonstrated that women who expressed anger in a professional context were considered entitled to lower status than men expressing the same emotion); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 *EMP. RTS. & EMP. POL'Y J.* 401 (2003) (discussing stereotypes that impede women's workplace equality); Ramit Mizrahi, Note, "Hostility to the

What about the victims? Some survey data indicates that 56.7% of the victims of bullying are female.<sup>216</sup> Such surveys prompt essentialist theorizing.<sup>217</sup> One scholar has argued that playground socialization shunts girls into passive aggression and boys into active aggression, patterns replicated in adult workplace bullying situations.<sup>218</sup> The analysis then veers off into essentialist territory, referring to “innate and socially conditioned differences” between men and women that render women uniquely vulnerable to bullying.<sup>219</sup> Because the study of bullying grew out of industrial psychology, the phenomenon may be apt to be considered in terms of psychological profiles of victims and aggressors. These profiles are then marshaled to support essentialist conclusions about men and women. The media has latched onto the phenomenon of women bullying other women; some articles characterize this form of sabotage as a violation of “their shared identity as women,” like mothers eating their young.<sup>220</sup> But as Leymann pointed out when confronted with similar findings in Swedish research, the sex segregation of bullying is not surprising when one considers that most workplaces are sex segregated.<sup>221</sup>

And if anti-bullying rules are simply added on to sexual harassment rules, they will give employers more, not fewer, opportunities to employ stereotypes in policing workplace expression.<sup>222</sup> Schultz asks whether holding employers liable for bullying would give them “a progressive justification for firing employees whose colorful language or aggressive styles threaten management authority, even if those employees aren’t genuinely abusive to anyone.”<sup>223</sup> Groups who already face stereotypes, for example, African Americans who are presumed to be “overly aggressive,” are likely to bear the brunt of new bullying rules.<sup>224</sup> Although anti-

*Presence of Women*”: *Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 YALE L.J. 1579, 1589–91 (2004).

216. WORKPLACE BULLYING INST. & ZOGBY INT’L, *supra* note 208, at 7.

217. *See, e.g.*, Mizrahi, *supra* note 215, at 1591–93 (describing and criticizing “[b]iology- and socialization-based explanations for female hostility”).

218. Kerri Lynn Stone, *From Queen Bees and WannaBes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 52–53 (2009) (discussing RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* (2002)).

219. *Id.* at 62.

220. Mickey Meece, *Backlash: Women Bullying Women*, N.Y. TIMES, May 10, 2009, at 1. By contrast, very little is written on female-on-female sexual harassment cases alleging gender-based hostility, rather than same-sex sexual desire. *See* Mizrahi, *supra* note 215, at 1585–86 (counting only twenty-three such cases).

221. Heinz Leymann, *The Content and Development of Mobbing at Work*, 5 EUR. J. WORK & ORG. PSYCHOL. 165, 175 (1996); *see also* Boushey, *supra* note 23, at 39–40 (describing continued sex segregation of American workforce); Mizrahi, *supra* note 215, at 1594–1607 (discussing how workplace sex segregation results in “female-on-female hostility”).

222. *See* Vicki Schultz, Gabrielle S. Friedman, Abigail C. Saguy, Tanya K. Hernandez & David Yamada, *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 EMP. RTS. & EMP. POL’Y J. 151, 188–89 (2004) [hereinafter *Global Perspectives*].

223. *Id.* at 192; *see also* Ehrenreich, *supra* note 8, at 59.

224. *See Global Perspectives, supra* note 222, at 188–93.

bullying laws have not been enforced through pre-emptive firings in Quebec, in that province, “workers have a right to reinstatement for unjust dismissal and are much more likely to be represented by a union.”<sup>225</sup> In the United States, employment is at will and fewer workers are unionized.

### c. Enforcing Traditional Sexual Mores

Anti-bullying rules have the advantage of steering the focus away from sexual conduct to all degrading conduct. This was part of the impetus behind France’s enactment of a law against *moral* harassment<sup>226</sup>—to avoid the “puritanical” focus of American sexual harassment law.<sup>227</sup> Arguably, a moral harassment law is a step away from the sanitized workplace. But words like “dignity,” “civility,” and “decency” hearken back to an archaic aristocratic ethos, with all its puritanical gender norms.<sup>228</sup> Handing these concepts over to conservative employers and judges may result in application of standards like “that’s no way to treat a lady.”<sup>229</sup>

The Israeli experience with dignity-based protections provides “a cautionary tale” for radical reformers.<sup>230</sup> Seeking to avoid the limitations of the American preoccupation with anticlassification, Israeli feminists advocated and won passage of a sexual harassment law grounded in both dignity and equality, with the emphasis on dignity.<sup>231</sup> But the concept of dignity proved “highly susceptible to traditional and patriarchal interpretations.”<sup>232</sup> For example, one harassment case referred to the harm as the male harasser’s violation of his duty “carefully to watch

225. Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 EMP. RTS. & EMP. POL’Y J. 423, 451 (2004).

226. The law provides civil and criminal penalties for acts that degrade an employee’s right to dignity, affect an employee’s mental or physical health, or compromise an employee’s career. See C. TRAV. art. L122-46 to -54; see also C. PEN. art. 222-33-2.

227. See Friedman & Whitman, *supra* note 64, at 270 (“The American concern with sexual harassment, according to this widespread continental point of view, is of a piece with the American inability to accept bare breasts on television or on public beaches, with the illegality of prostitution in most American jurisdictions, with Americans’ comical ineptness in flirting and their excessive horror at adultery.”).

228. See Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN’S L.J. 1, 3 (2008) (describing both an elitist and a universalistic sense of dignity, and arguing that the two meanings are analytically intertwined); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1168–69 (2004) (discussing etiquette as one of the “social roots of European dignitary law”).

229. Cf. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 47, at 1, 17 (arguing that the failure to explain why sexual coercion of women in the workplace is harmful “means that antidiscrimination law rather unselfconsciously incorporates a gender-conventional understanding of why harassment harms women (it is a form of socially inappropriate conduct, ‘not a nice way to treat a lady’)”).

230. Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391, 395 (2008).

231. *Id.* at 392.

232. *Id.* at 446.

over” the female plaintiff—an “inexperienced young woman soldier” and a “precious pledge.”<sup>233</sup> Thus, it is not clear that laws underscored by dignity principles would avoid essentializing sexuality any better than laws underscored by antidiscrimination principles.

## 2. Backlash: Shifting Identity Politics

Many anti-bullying advocates argue that their policies will avoid identity politics and the attendant stigmatization, backlash, and polarization.<sup>234</sup> Appeals to “dignity” may resonate with persons who cannot listen to “feminism,” “women’s rights,” “sexism,” “sexual harassment,” and the like.<sup>235</sup> One scholar has gone so far as to argue that “[t]he impression that law will aid only some people in the quest for a workplace free of harassment and humiliation provides a cover of legitimacy, and perhaps even fuel, for a backlash that may undermine all anti-discrimination law.”<sup>236</sup>

However, it is not clear that enacting *more* anti-harassment rules would diffuse the backlash. Researchers are “on the fence” between (1) linking bullying to sexual and racial harassment, a strategy that “carries a risk that workplace bullying will become contaminated by association and similarly undermined as a manifestation of ‘political correctness,’” or (2) claiming that bullying is an entirely distinct phenomenon, thereby missing the opportunity to draw from the established discourse on sexual and racial harassment.<sup>237</sup>

The U.S. anti-bullying movement has attempted both strategies: linking itself to movements for equality and claiming the universal high ground. New York’s anti-bullying initiative is supported by the NAACP, the Business and Professional Women of New York State, and several unions.<sup>238</sup> The bill’s advocates have not

233. *Id.* at 419 (quoting HCJ 1284/99 *Jane Doe v. IDF Commander (Galili)* [1999] IsrSC 53(2) 70). Perhaps the problem is that tying the concept of harassment to sexualized conduct, as Israel’s dignity-based law does, may provide a means for enforcement of retrograde sexual mores. *Id.* at 394 (“[T]he dignitary paradigm of sexual harassment is explicitly correlated with sexual behaviors. Courts focus on the ‘sexual’ in sexual harassment, thereby legitimating other forms of sex-based harassment that working women often experience.”). Israel chose to criminalize sexual harassment as a practice associated with “other sex offenses, such as ‘indecent behavior.’” *Id.*

234. *See, e.g.,* Coleman, *supra* note 8, at 89–90 (“[A] status-neutral approach does not involve a zero-sum game. That is, moving from a ‘status-based’ to a ‘status-neutral’ approach enlarges the pie rather than leads to battles over the size of slices . . . .”); Ehrenreich, *supra* note 8, at 63 (“A tort approach to the workplace harassment of women emphasizes that such harassment is not wrong because women somehow have ‘special’ rights.”); Friedman & Whitman, *supra* note 64, at 272 (arguing that sexual harassment law appears “to create a zero-sum conflict between women and workers” that “stir[s] up competition among the classes of potential ‘disadvantaged’ beneficiaries”).

235. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997).

236. Fisk, *supra* note 8, at 93.

237. Deborah Lee, *Gendered Workplace Bullying in the Restructured UK Civil Service*, 31 PERSONNEL REV. 205, 209 (2002).

238. *See, e.g.,* 2010 Legislative Summary, NEW YORK HEALTHY WORKPLACE



foregrounded the policy's links to sexual and racial harassment; rather, they characterize bullying as a public health issue, naming their legislation the "Healthy Workplace Bill" and invoking the need to protect human dignity.<sup>239</sup> But this packaging has not obscured the anti-bullying movement's linkages to civil rights controversies. In Illinois, one Christian lobbying group claims, "Many of the 'Bullying Programs' are actually being used to promote and protect homosexuality in the workplace."<sup>240</sup> Other right-wing groups demanded that the bill exclude religious expression from the definition of "abusive conduct" unless the [aggressor's] intent is to intimidate or harass."<sup>241</sup> Anti-bullying advocates have responded by referring to these lobbyists as "anti-gay" and "extremist," and by exhorting legislators "to tell these hate-mongers to keep their hands off our legislation designed to provide dignity for EVERYONE!"<sup>242</sup>

Arguably, an anti-bullying rule would eliminate any tendency for employers to prefer men over women in hiring out of concern that women are more likely to bring harassment suits.<sup>243</sup> Expanding the class of potential workplace harassment plaintiffs to include individuals who are not discrimination victims could mean that more white men bring suit, and employers would be less likely to see women and minorities as costly liabilities in hiring decisions.<sup>244</sup> But if women are stereotyped as both the aggressors and victims in most bullying cases, a new law could exacerbate the incentives not to hire female workers.

It is also unlikely that anti-bullying rules will avoid the destructive workplace dynamics of accusations of status-based mistreatment. The language of "bullying" can make it difficult for organizations to take "collective responsibility" for the problem, because individuals are "repelled by the spectre of being labelled as a pathological predator or having to define their experiences as the victims of such a person."<sup>245</sup> To the extent that the psychological-profiling model predominates in the discussion on workplace harassment (as adoption of the popular name "bullying" suggests that it does), new rights claims are not likely to make workplaces any less antagonistic.

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ADVOCATES, <http://www.nyhwa.org/index.html>; see also Yamada, *supra* note 8, at 268.

239. See Yamada, *supra* note 8, at 277–78.

240. Concerned Christian Americans, *Christianity in the Workplace Under Attack*, CONCERNED CHRISTIANS NEWSLETTER (Mar. 2009), <http://www.concernedchristianamericans.com/node/272>.

241. *BIG News on Illinois Healthy Workplace Bill SB3566*, STOP WORKPLACE BULLYING! (Mar. 2010), <http://bullyfreeworkplace.org/id37.html>.

242. *Current Status & News*, HEALTHY WORKPLACE BILL, <http://www.healthyworkplacebill.org/states/il/illinois.php> (capitalization and punctuation in original).

243. Cf. *supra* notes 43–44 and accompanying text.

244. Whether this hypothesis would bear out empirically is a question for further research.

245. Caitlin Buon & Tony Buon, *The 'Bully' Within*, COUNSELING AT WORK, Summer 2007, at 5, 8 ("[H]ow can we get the parties to the table if both parties are only able to speak about bullying using language that is shame-and-blame based and carries with it the emotional baggage of the 'pathological' or predatory bully when in all likelihood this does not reflect their actual experience?").

### 3. Assimilation: Depoliticizing Sexism

#### a. Undermining Sexual Harassment Law

Bullying has been referred to as “status-neutral” or “generic” harassment, a label that invites the classic feminist critique of assimilationist reform strategies.<sup>246</sup> The problem of bullying is not status-neutral.<sup>247</sup> Rather, bullying often takes the form of sexual harassment, and even “generic” harassment disproportionately affects women and those who do not conform to gender norms.<sup>248</sup> A legal response to bullying that does not account for the gendered nature of the injury cannot solve the problem.

Part of the reason for the development of the Title VII doctrine of sexual harassment was that torts like intentional infliction of emotional distress failed to address sexual harassment.<sup>249</sup> To prove an intentional infliction of emotional distress claim, a plaintiff has to show that the conduct that caused the distress would have been “outrageous” to a reasonable person.<sup>250</sup> Judges and juries would ask, “what [is] so outrageous about a dirty joke or a crude proposition . . . ?”<sup>251</sup> “[M]ale judges . . . could not see why come-ons, however crude, should not be seen as compliments and . . . could not understand why women should not just have to put up with dirty jokes if they wanted to participate in a male world.”<sup>252</sup> The norm established by tort law was one in which sexist joking and crude propositions were just part of doing business. To survive in such environments, women had to assimilate to the discriminatory culture. They had to accept that they were going to be considered the objects of jokes and sexual advances, rather than being seen as equally qualified workers. Tort law could not account for sexual harassment as a mode of gender subordination. Crafting a new cause of action under Title VII was not just a legal strategy, but also a political move designed to highlight the gendered dimensions of the problem of workplace harassment.<sup>253</sup>

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246. See Corbett, *supra* note 8, at 140–42 (“[S]tatus-blind harassment law is grounded on arguments made by proponents of the formal equality theory of employment anti-discrimination law, or perhaps more pointedly, opponents of the protected-class theory.”).

247. See Fisk, *supra* note 8, at 80 (“To the extent that law has focused more systematically on the humiliation of women and people of color at work, the focus is justifiable because of the extraordinary destructiveness of being shamed for one’s very identity and because of the pervasiveness of such humiliation that members of the dominant group never need confront.”).

248. See Fisk, *supra* note 8, at 80; McGinley, *supra* note 32, at 1154–55.

249. Ehrenreich, *supra* note 8, at 33. Ehrenreich nonetheless concludes that a reinvigorated workplace tort regime could now supplement sexual harassment law. *Id.* at 3–4.

250. *Id.* at 33.

251. *Id.*

252. *Id.*

253. MacKinnon rejected gender-neutral approaches to sexual harassment because, “by treating the incidents as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker,” gender-neutral rules failed to redress gender dominance. MACKINNON, *supra* note 29, at 88.

An anti-harassment rule focused on dignity, rather than gender, could undermine the impetus for courts, employers, and employees to consider how certain workplace interactions contribute to gender subordination.<sup>254</sup> If discriminatory harassment is subsumed under the broader category of bullying, “we may lose sight altogether of the more subtle and insidious ways that harassment is linked to discrimination and structural inequality in workplaces.”<sup>255</sup> The psychological theories that explain bullying sit uneasily with the theory of sexual harassment as gender subordination. Indeed, many of the mobbing researchers have been ambivalent as to whether gender is even a factor in the phenomenon.<sup>256</sup> It is not the case that we must always name gender discrimination to fix it;<sup>257</sup> just as discrimination may operate in subtle or unconscious ways, so may its solutions. But it is a fair point that because it may be easier to label conduct as bullying, employers may ignore how bullying could be part of a pattern of discrimination.<sup>258</sup> In a typical German labor-law text, the pages covering mobbing far outnumber those on sexual harassment.<sup>259</sup> In that country, women may have less access to grievance resolution procedures to address mobbing than established male workers.<sup>260</sup> In this country too, labor movements have been slow to recognize sexual harassment complaints.<sup>261</sup>

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254. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1187–88 (1998) (“Triers of fact may not recognize the gendered forms that disrespect takes. Employers charged with prevention may not recognize the subtly stereotypic or devaluative attitudes that increasingly fuel harassment as women move into the workplace in greater numbers and as competition becomes more intense. Employees asked to modify their behavior prospectively may not grasp the range of conduct that is forbidden or the underlying attitudes that need to be re-examined.” (footnotes omitted)).

255. Parkes, *supra* note 225, at 449; *see also* Lee, *supra* note 237, at 209 (“[I]f sexual and racial harassment are defined as only types of bullying, this might undermine the specificity and visibility of sexual and racial harassment.”).

256. *See* Lee, *supra* note 237, at 206–08 (describing the various views of bullying researchers on the connection between bullying and sexual and racial harassment).

257. *But see* Parkes, *supra* note 225, at 450.

258. *Id.* at 451.

259. Friedman & Whitman, *supra* note 64, at 257 (“A standard 2001 handbook on German labor law will now devote a couple of sentences to sexual harassment as ‘a special legislative expression of the protection of personality’—and then go on to devote several pages to mobbing.”).

260. *See* Gabrielle S. Friedman, *The Real Harm*, LEGAL AFFAIRS, Sept./Oct. 2003, at 30, 34 (“In Germany, anecdotal evidence suggests that men—many of them middle managers—are more likely than women to bring mobbing complaints to their firm’s grievance resolution boards.”).

261. *See* Marion Crain, *Strategies for Union Relevance in a Post-Industrial World: Reconceiving Antidiscrimination Rights as Collective Rights*, 57 LAB. L.J. 158, 162 (2006) (“Threats to male workers’ job security posed by women’s sexual harassment complaints are viewed as raising collective economic issues that are the traditional province of unions, while the right to be free from sexual harassment on the job is conceived of as a noneconomic, personal, individual interest.”).

## b. Depoliticizing Harassment

A bullying rule could “neuter” sexual harassment law through an “apolitical” account of the harm.<sup>262</sup> Enacting a rule to remedy harassment as a dignitary injury could obscure the significance of harassment as a tool of discrimination.<sup>263</sup> Even worse, it could be part of a political project that denies the existence of discrimination in a post-racist, post-sexist era. Indeed, one scholar attributes the rise of status-neutral initiatives to the fact that “a significant segment of society believes that forty years of powerful legal intervention has abated virulent workplace discrimination against African Americans, women, and others.”<sup>264</sup> In Canada too, “much of the literature on bullying and psychological harassment contains the implicit or explicit assumption that sexual harassment is no longer a problem or, at least, is much less of a problem than workplace bullying.”<sup>265</sup>

Some scholars advocate a substitutive approach that would replace sexual harassment law with a gender-neutral regime.<sup>266</sup> Other scholars reject the substitutive approach as antifeminist and advocate an additive approach: allow victims to “have it both ways” by raising Title VII claims alongside claims of dignitary injuries.<sup>267</sup> But even the additive *legal* approach risks undermining feminist *political* concerns.<sup>268</sup> Workplace harassment law has an enormous expressive effect because it regulates quotidian interactions, sets standards of etiquette, and is a topic of public fascination.<sup>269</sup> Dignity is depoliticizing.<sup>270</sup> “Say ‘dignity,’ and you have opened the class of women to the competition of a numberless population of those who feel themselves no less oppressed.”<sup>271</sup>

262. Abrams, *supra* note 254, at 1185–86.

263. *Id.* at 1186–87 (acknowledging that harassment injures a worker’s dignity, but cautioning that “if we do not appreciate that this dignitary injury is a function of, and connected to, other injuries within an unequal, hierarchical relationship, we miss much of what is morally and politically significant about the wrong”).

264. Corbett, *supra* note 8, at 100.

265. Parkes, *supra* note 225, at 448.

266. For defenses of the substitutive approach, see Coleman, *supra* note 8, at 89–90; Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375 (1998); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333 (1990).

267. Ehrenreich, *supra* note 8, at 62. Ehrenreich focuses on expanding tort remedies, although she notes the possibility of a “state statutory approach to workplace harassment.” *Id.* at 54 n.244; see also Yamada, *Crafting*, *supra* note 60, at 507 (“The Healthy Workplace Bill is meant to supplement, not supplant, current laws against discrimination and harassment grounded in a target’s protected class status.”).

268. See Friedman & Whitman, *supra* note 64, at 272 (Although, “[w]ithin the intellectual world of the law, it makes no logical sense to respond to the claim ‘women are being harassed’ with the riposte, ‘well everybody else is harassed too[.]’ . . . that kind of riposte is devastating indeed within the logic of everyday political argument.” (emphasis in original)).

269. *Id.*

270. See *id.* at 273.

271. *Id.*

In other countries that have enacted generic harassment bans, the feminist objections to gender-based harassment have taken a back seat. In Europe, the “movement against employee harassment is beginning to submerge the movement against sexual harassment.”<sup>272</sup> There, sexual harassment “is becoming simply one variety of employee harassment—and not necessarily the most important variety either.”<sup>273</sup> In Germany, “feminism aims at social change, and mobbing [law] tends to privilege older and more established workers and traditional ideas of social status.”<sup>274</sup> And in Quebec, “sexual harassment and other forms of discriminatory harassment are generally characterized as a sub-set of psychological harassment, both formally in legislation and informally in popular discussion of the law.”<sup>275</sup> Also in Israel, “in the analysis of sexual harassment and its harms, this caselaw prioritizes dignity over equality so much so that the discriminatory aspects of this social practice are no longer part of the legal discourse.”<sup>276</sup> These comparative law lessons should be considered carefully by proponents of anti-bullying law in the United States.<sup>277</sup>

### c. Legitimizing Hostile Structures

Anti-bullying rules could also legitimate the structural dimensions of work that result in hostile environments. To see why, it is helpful to take a step back and consider two divergent strands of theory on the origins of mobbing: (1) psychology, which holds that “mobbing results from the collision of victim personalities and abuser personalities,” and (2) organizational theory, which holds that “mobbing is the result of a dysfunctional communication pattern.”<sup>278</sup> Research has identified many other structural causes of bullying—the growth of a service sector economy that requires more personal interaction in the form of “emotional labor,” the “siege mentality” resulting from increased pressure to provide more goods and services at a lower cost in a globalized economy, the decline of unions as “safety valve[s]” for resolving disputes, the failure to manage diversity, and the increased reliance on contingent workers considered “depersonalized” and “disposable.”<sup>279</sup> These dynamics are unlikely to be reversed by new legal prohibitions on bullying. Advocates of the anti-bullying movement emphasize the psychological model

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272. *Id.* at 243.

273. *Id.*

274. *Global Perspectives*, *supra* note 222, at 159.

275. Parkes, *supra* note 225, at 447.

276. Rimalt, *supra* note 230, at 393. It is important to keep in mind, however, that Israel, unlike the United States, has afforded “constitutional status” to human dignity but not to equality. *Id.* at 404–05.

277. See Friedman & Whitman, *supra* note 64, at 243 (concluding that the lesson for American scholars is that “[w]e may not be able to pursue the goals of dignity without sacrificing some or all of the goals of anti-discrimination”).

278. *Global Perspectives*, *supra* note 222, at 157.

279. Yamada, *Phenomenon*, *supra* note 60, at 485–91; see also Nathan A. Bowling & Terry A. Beehr, *Workplace Harassment from the Victim’s Perspective: A Theoretical Model and Meta-Analysis*, 91 J. APPLIED PSYCHOL. 998, 1005 (2006).

almost exclusively.<sup>280</sup> The psychological literature on bullying takes an individualized approach to the problem—identifying victims and perpetrators—rather than looking for structural or systemic causes.<sup>281</sup> Legal prohibitions based on the psychological model would shift the blame from corporate and economic structures to a few bad apples.

#### 4. Dilution: Swallowing Sexual Harassment

Anti-bullying rules would expand the class of potential harassment plaintiffs. They would also make it easier for plaintiffs to recover, because those plaintiffs would not have to establish proof that the harassment was “because of sex” (or otherwise discriminatory). But expansion of sexual harassment doctrine to include nondiscriminatory hostile work environments could also risk trivializing the harms of discrimination and diluting protections.

The very rubric of bullying implies that the problem is trivial. It evokes the schoolyard and the problems of children.<sup>282</sup> Anti-bullying advocates may have chosen the wrong mantra for their movement. Indeed, there is no consensus on whether the phenomenon should be called abuse, bullying, mobbing, moral harassment, psychological harassment, generic harassment, or something else.<sup>283</sup> The term “mobbing” sounds foreign and animalistic,<sup>284</sup> and “harassment” risks association with sexual harassment and identity politics. The concept of “offensiveness” sounds like political correctness and the idea of “incivility” sounds like the standard of an age gone by.<sup>285</sup>

Many stories of purported mobbing evoke not sympathy but impatience about overly sensitive victims overreacting to ordinary office politics.<sup>286</sup> Cultural

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280. See, e.g., *Frequently Asked Questions*, WORKPLACE BULLYING INSTITUTE, <http://www.workplacebullying.org/faq.html> (defining bullying as “a laser-focused, systematic campaign of interpersonal destruction” by a bully against a victim that “has nothing to do with work itself”).

281. Parkes, *supra* note 225, at 450.

282. On the other hand, even school bullying is now considered by some to be a serious threat as the cause of a number of teenage suicides. See, e.g., Emily Bazelon, *What Really Happened to Phoebe Prince?*, SLATE (July 20, 2010), <http://www.slate.com/id/2260952/entry/2260953> (providing a complicated account of a high-school student’s suicide, by contrast to the public’s rush to deem the cause of the tragedy to be simple “bullying”).

283. See Loreleigh Keashly & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, in BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE 31, 31–33 (Ståle Einarsen et al. eds., 2003).

284. Mobbing may also invoke the lynch mob—helpful if one sees the harm of workplace bullying as severe, but insulting if one sees the comparison to race-motivated murder as trivializing. See Coleman, *supra* note 8, at 54–55 (making the comparison to a lynch mob).

285. See Abrams, *supra* note 254, at 1184–85 & n.92.

286. See Coleman, *supra* note 8, 57–58 (“Perhaps unsurprisingly, the concept [of mobbing] struggles against an accusation of triviality—as most of us routinely endure varieties of social aggression or insult, of course, and it is sometimes difficult to discern when inevitable workplace conflicts reach the level of psychological destruction needed to qualify as mobbing.”).

differences may be at work. Americans seem to care more about inequality than indignity. To Americans, the concept of dignity seems vague and subjective.<sup>287</sup> For example, as one Swedish individual said of mobbing: “‘If everybody else leaves the coffee room when you walk in, *that’s* a violation of your dignity, and the law should do something about it.’”<sup>288</sup> To thick-skinned Americans, this sounds ridiculous.<sup>289</sup> Of course, an isolated incident of this sort would not be actionable under the Healthy Workplace Bill,<sup>290</sup> but the risk of frivolous lawsuits or legal threats could undermine public support for the law.<sup>291</sup>

Remedial efforts may be diluted:

This is not simply an abstract point but an issue with ramifications for public education, legal enforcement, and private efforts at prevention. The public will better understand the need for concerted enforcement efforts, and employers will better comprehend the need for strong affirmative obligations of prevention and response, if they understand that they are remedying a longstanding, often entrenched problem [such as gender discrimination].<sup>292</sup>

Dilution is a problem that can be limited through statutory design. For example, the Healthy Workplace Bill would not involve state administrative agencies in deciding claims and, therefore, would not strain existing state agencies.<sup>293</sup> However, the new cause of action would increase the caseload of courts and the workload of state

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287. See Friedman & Whitman, *supra* note 64, at 267–68 (explaining that “[t]he continental countries are places where high-status persons used to lord it over their inferiors in insulting and degrading ways,” giving rise to the European principle of dignity for all workers, while U.S. law is driven by a different “evil of the past”—slavery—and so, in the U.S., the “task of the law is to end discrimination for particular historically disfavored groups, not to ensure respect for everybody”).

288. *Id.* at 264 (emphasis in original) (quoting Interview with Jonas Alberg, Arbetslivsinstitutet, Stockholm).

289. See, e.g., *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1250 (M.D. Ala. 2001) (“[I]n our pluralist society, no employee can expect the rough and tumble professional world to completely accommodate his or her private sense of decency, civility, and morality.”).

290. Even in Sweden, this type of behavior would probably not qualify as mobbing unless it was repeated. Sweden’s Ordinance on Victimization at Work defines “victimization” as “recurrent reprehensible or distinctly negative actions which are directed against individual employees.” 1 § ORDINANCE OF THE SWEDISH NATIONAL BOARD OF OCCUPATIONAL SAFETY AND HEALTH CONTAINING PROVISIONS ON MEASURES AGAINST VICTIMIZATION AT WORK (Statute Book of the Swedish National Board of Occupational Safety and Health [AFS] 1993:17) (Swed.). It does not create a cause of action for aggrieved employees; rather, it imposes administrative obligations on employers to prevent harassment. *Id.* § 4.

291. One scholar argues that an anti-bullying statute has the potential to “weaken[] the entire field” of antidiscrimination law. Corbett, *supra* note 8, at 144.

292. Abrams, *supra* note 254, at 1187.

293. Yamada, *Crafting*, *supra* note 60, at 504–05.

agencies called upon to issue guidances to interpret the new statute. Public education and employer initiatives could also be diluted.<sup>294</sup>

Anti-bullying rules may also risk watering down sexual harassment doctrine. This depends on how the harms are conceptualized. There could be three ways to conceptualize the overlap in definitions between bullying and hostile environment sexual harassment. The first conception would be that all dignitary harms are coterminous with gender discrimination.<sup>295</sup> A second view is that gender discrimination is a subset of bullying.<sup>296</sup> This view could be the basis for a “hate bullying” paradigm in which sexual harassment would be considered a more offensive class of bullying.<sup>297</sup> A third view is that the phenomena may have a segment of overlap but certain distinct features.

Even if the paradigm is the third view, principles developed in mobbing law may drift into sexual harassment law, and vice versa, until the result is the first view—that sexual harassment melts into bullying.<sup>298</sup> Anti-bullying rules are generally less restrictive than sexual harassment rules. First, in Europe, bullying must be repeated and take place over a long period of time, while sexual harassment may be isolated.<sup>299</sup> In the United States, a hostile work environment

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294. Employers might add anti-bullying training to the now ubiquitous sexual harassment trainings, but the efficacy of such sessions is unproven in any event. See THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 155–57 (2005); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001).

295. Although this conception is not expressly advocated by any scholars, some come very close in describing the gendered origins of bullying: bullying is aggression, aggression is masculine, and therefore bullying is gendered. See, e.g., McGinley, *supra* note 32, at 1232.

296. See Ehrenreich, *supra* note 8, at 63 (suggesting this diagram).

297. Yamada, *Phenomenon*, *supra* note 60, at 530; see also Ehrenreich, *supra* note 8, at 54–55; *id.* at 39–44, 54 (arguing that, in some tort cases, courts treated the discriminatory context “as an exacerbating factor when assessing the severity of workplace harassment of women”). But see Parkes, *supra* note 225, at 453 n.127 (concluding that such proposals would “not resolve the concern that the systemic factors that contribute to workplace harassment will go unaddressed”).

298. For example, when France enacted its moral harassment law, it also amended its sexual harassment law in the interest of consistency. Abigail C. Saguy, *International Crossways: Traffic in Sexual Harassment Policy*, 9 EUR. J. WOMEN’S STUD. 249, 264 (2002). That amendment expanded the definition of sexual harassment to include harassment by coworkers as well as superiors. *Id.* Although in the French case, the drift resulted in more expansive protections, there is a risk of contracted protections as well. Note that France is a civil law country; the development of civil law may not parallel the evolution of common law.

299. See Lorho & Hilp, *supra* note 69, at 9–10. The Healthy Workplace Act would limit actionable isolated conduct to an “especially severe and egregious act.” Yamada, *Crafting*, *supra* note 60, at 498. Similarly, Quebec’s law proscribes “[a] single serious incidence of such behaviour that has a lasting harmful effect on an employee.” Act Respecting Labour Standards, R.S.Q. 2002, c. N-1.1, ch. IV, div. V.2, § 81.18 ¶ 2 (Que., Can.), <http://www.canlii.org/en/qc/laws/stat/rsq-c-n-1.1/84271/rsq-c-n-1.1.html#history>. The harmful effect of the incidence “must be felt over time.” COMMISSION DES NORMES DU TRAVAIL, INTERPRETATION OF THE ACT RESPECTING LABOUR STANDARDS, ITS REGULATIONS



may be “severe *or* pervasive.”<sup>300</sup> Second, the Healthy Workplace Act requires that the victim prove the aggressor had a mental state of “malice,”<sup>301</sup> whereas harassment law requires only a showing that the harassment was because of sex or another protected characteristic.<sup>302</sup> Third, the damages available to a mobbing victim would be more limited than those available under Title VII.<sup>303</sup> And finally, bullying policies are more likely to give victims options of in-house grievance procedures, mediation, or arbitration, rather than access to courts. Should these limitations drift from bullying law into Title VII harassment law, antidiscrimination protections would be watered down. Due to the antipathy of the judiciary and business community toward workplace regulations, I predict it is more likely that Title VII harassment rules will be watered down than that bullying rules will be strengthened.

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In sum, although there is not yet enough empirical research on these questions to reach firm conclusions, the available scholarship suggests that anti-bullying rules would not have significant advantages over sexual harassment prohibitions in terms of avoiding essentialism or backlash. And anti-bullying rules are likely to impede antidiscrimination goals by obscuring the connections between harassment and patterns of subordination, and diluting the scope of harassment prohibitions.

### B. Work-Life Accommodations

#### 1. Essentialism: Defining the Balanced Worker

##### a. Moving Away from Family

Work-life policy has advantages over work-family policy in avoiding essentialism. Balancing the work-family equation is the new feminine mystique.<sup>304</sup>

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AND THE NATIONAL HOLIDAY ACT 66 (2010), available at [http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c\\_0111\\_a.pdf](http://www.cnt.gouv.qc.ca/fileadmin/pdf/publications/c_0111_a.pdf).

300. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (emphasis added) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)). Careful drafting could avoid this problem. For example, one state agency defines mobbing as persistent behavior while clarifying that an isolated incident may constitute harassment. STATE OF OR. DEP'T OF ENVTL. QUALITY, *supra* note 78 (“Mobbing is persistent and systematic harassment and does not include isolated incidents or appropriate corrective measures which may be covered in other policies. For example, a single use of an offensive comment is unacceptable and may be a violation of the harassment-free workplace policy, but a single offensive comment is not mobbing.”).

301. Yamada, *Crafting*, *supra* note 60, at 501.

302. *See id.* at 497.

303. *Compare id.* at 504 (proposing a bill that would provide that where an employer’s conduct “did not culminate in a negative employment decision, its liability for damages for emotional distress shall not exceed \$25,000, and it shall not be subject to punitive damages”), with 42 U.S.C. § 1981a(a)(1) (2006) (authorizing compensatory damages and punitive damages without limits in cases of intentional discrimination under Title VII).

304. *See Moran*, *supra* note 98, at 288 (implying that the “work-family” rubric suggests

Finding the optimal arrangement—just the right amount of work and just the right amount of family—has become the successful woman’s imperative.<sup>305</sup> Stay-at-home moms are blamed for women’s inequality in paid labor, while workaholic women are told their lives are meaningless without children.<sup>306</sup> Although it is gender neutral, the unstated premise of the “work-family accommodation model” is that work should be more flexible so that we women can “balance paid work with ‘our’ family responsibilities.”<sup>307</sup> The paradigmatic beneficiary of this policy is the harried mother working the second shift who “talk[s] about sleep the way a hungry person talks about food.”<sup>308</sup>

Work-life policy may better avoid such gender stereotypes. Universal protection would reflect that inflexible workplaces are not problematic just for women or parents, but rather are harmful to everyone.<sup>309</sup> Making flexible arrangements available to all workers does not require employers or the judiciary to determine whether workers have legitimate family relationships or caretaking needs.<sup>310</sup> Work-life policies avoid generalizations about any particular person’s life goals or the form “family” should take. Workers would be able to shape their careers to accommodate any variety of life pursuits: caretaking, military service, volunteering, education, or watching reality television shows.<sup>311</sup> Work-life policies do not privilege motherhood, parenting, or family over other life pursuits.

Despite these advantages, work-life policies continue to exclude many workers and invite new forms of essentialism.

#### b. Those Left Out by Work-Life Balance

The work-life mantra is not all-inclusive. The work-life concept re-centers workplace norms around those who desire balance between at-work and after-work activities, potentially to the detriment of those for whom work is life (i.e.,

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the goal is for “women to follow a script of combining work and family”).

305. Single women without children are rendered invisible by this norm, *id.*, while mothers who have “too many” children become spectacles, see Jessica Grose, *Extreme Moms and Why We Love Them: Our National Obsession with Kate Gosselin, Michelle Duggar, and Octomom*, DOUBLEX.COM (Nov. 24, 2009), <http://www.doublex.com/section/arts/extreme-moms-and-why-we-love-them>.

306. See generally Joan Williams, “*It’s Snowing Down South*”: *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002).

307. Schultz, *supra* note 9, at 1954–55.

308. ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 10 (rev. ed. 2003).

309. See Ryan & Kossek, *supra* note 128, at 298.

310. Ellen Ernst Kossek & Brian Distelberg, *Work and Family Employment Policy for a Transformed Labor Force: Current Trends and Themes*, in WORK-LIFE POLICIES, *supra* note 9, at 3, 34 (“Some of the most effective companies define work and family issues broadly, as this helps them develop a performance, rather than a police, culture on monitoring access to flexibility and other supports.”).

311. I mean this only partly in jest. According to proponents of work-life policies, the prototypical worker is interested in time off for enriching pursuits such as religious study, caregiving, physical fitness, or emergency-preparedness training. But Americans over age fifteen spend half of their leisure time watching television. News Release, U.S. Dep’t of Labor, *American Time Use Surveys—2009 Results 2* (June 22, 2010), <http://www.bls.gov/news.release/pdf/atus.pdf>.

“workaholics”), and those for whom life is work (i.e., the prototypical overstretched woman in the “sandwich generation” caring for both elderly parents and young children). Generation X workers may be more concerned about work-life balance than baby boomers.<sup>312</sup> And some members of the next generation of workers want to deconstruct the divide between work and life.<sup>313</sup> The “work-life balance” metaphor suggests that every individual must work to maintain the two separate and opposing spheres at equilibrium, rather than finding overlaps and synergies between roles.<sup>314</sup>

Policies that allow workers to spend less time in the workplace in exchange for lower wages are helpful only to high earners,<sup>315</sup> who are more likely to be white and male. Those who need *more* wage work to support themselves and their families have little use for such work-life accommodations. For example, one work-life accommodation for retail workers allows them to “claim availability” by declaring the times they can work.<sup>316</sup> But in doing so, they risk receiving fewer hours.<sup>317</sup> These workers are forced into the choice between “working preferred hours” and “working enough hours.”<sup>318</sup>

And although “flexibility” may be good for high-income workers when it is a perk intended to improve recruiting, retention, and productivity, “flexibility” has an entirely different meaning for low-income workers.<sup>319</sup> Many low-wage workers need the opposite of flexibility—they need predictable schedules, rather than schedules given on little notice, so they can make arrangements for childcare and

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312. CATALYST, *THE NEXT GENERATION: TODAY’S PROFESSIONALS, TOMORROW’S LEADERS* 2–3 (2001); FAMILIES & WORK INST., *GENERATION AND GENDER IN THE WORKPLACE* 3 (2004), available at [www.familiesandwork.org/site/research/reports/genandgender.pdf](http://www.familiesandwork.org/site/research/reports/genandgender.pdf); see also Ellen Galinsky, *Work-Life Policies: A “Both/And” Approach*, in *WORK-LIFE POLICIES*, *supra* note 9, at 289, 304.

313. See *Forum: Men and Marriage* (C-SPAN2 television broadcast Oct. 19, 2009), available at <http://www.c-spanarchives.org/program/id/214130> (held by the Center for American Progress) (statement of Courtney Martin, at 19:02) (“In my generation . . . this kind of work slash life language doesn’t even make sense, because we want our work to be part of our lives and we want our lives to work.”). See generally ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997).

314. Diane F. Halpern & Susan Elaine Murphy, *From Balance to Interaction: Why the Metaphor Is Important*, in *FROM WORK-FAMILY BALANCE TO WORK-FAMILY INTERACTION: CHANGING THE METAPHOR* 3, 3 (Diane F. Halpern & Susan Elaine Murphy eds., 2005) (“The message in this balance metaphor is clear—spend too much time at work and your family will suffer and vice versa. . . . These metaphors are not only anxiety provoking; the message that they send is wrong. Work and family are not a zero-sum game.”).

315. See Selmi & Cahn, *supra* note 88, at 8.

316. Susan J. Lambert, *Making a Difference for Hourly Employees*, in *WORK-LIFE POLICIES*, *supra* note 9, at 169, 177.

317. *Id.*

318. *Id.*

319. See Kerry Rittich, *Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY*, *supra* note 12, at 31, 31; Schultz, *supra* note 16, at 1220–21.

other plans.<sup>320</sup> Telecommuting is touted as a work-life solution, but there are two tracks of telecommuters: (1) predominantly male elite professionals for whom telecommuting is “a benefit that gives workers increased choice, flexibility, and autonomy,” and (2) predominantly female clerical workers for whom telecommuting “result[s] in decreased pay, benefits, autonomy, job security, and advancement opportunities.”<sup>321</sup>

The international experience suggests that work-life solutions are often enacted with compromises that disadvantage the economically powerless. For example, when France implemented a thirty-five-hour workweek, working-class and immigrant women benefited the least from the law, because companies demanded larger tradeoffs for the reform in terms of being able to choose work hours and restrain wages.<sup>322</sup> Some workers were required to work “yo-yo shift patterns” in which “[s]hifts were shortened but multiplied so that working patterns fitted in with management ideologies of permanent availability while workers hung around in between shifts.”<sup>323</sup>

### c. The Employer Discretion Double Bind

Work-life reformers face a double bind. To best avoid essentialism, every worker must be able to customize his or her job. Some psychologists define an “inclusive workplace” as one that “values individual and intergroup differences in the primacy of work versus other life roles” and “supports variation in domestic backgrounds and in blending work and nonwork demands.”<sup>324</sup>

It is one that equally values those who believe leaving work early to attend a child’s soccer game is critical as well as those who do not mind missing games, and for those who use all their available paid time off to train for a triathlon as well as those who feel personal time is reserved for family emergencies.<sup>325</sup>

For these psychologists, every worker should be able to negotiate the shape of his or her career.

But U.S. workplaces are not structured to allow radical customization. Customization of jobs is at the discretion of the employer. And the more an employer has discretion to approve or deny flexible work arrangements, the more opportunities for essentialism, as each supervisor brings his or her own views on the normative case for accommodation.<sup>326</sup> When mothers want to work from home,

320. Lambert, *supra* note 316, at 190.

321. Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 285 (2003).

322. GILL ALLWOOD & KHURSHEED WADIA, GENDER AND POLICY IN FRANCE 55 (2009). However, professional women reported improvements. *See* Schultz & Hoffman, *supra* note 12, at 146.

323. ALLWOOD & WADIA, *supra* note 322, at 55.

324. Ryan & Kossek, *supra* note 128, at 296.

325. *Id.*

326. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural*

supervisors may deny the request based on the stereotype that working mothers are likely to be distracted by their children.<sup>327</sup> On the other hand, supervisors are more likely to agree to reductions in work hours for female than for male employees, perhaps based on stereotypical assumptions that women should engage in more caretaking.<sup>328</sup> Other supervisors may be more willing to support traditional families, defined to exclude those with elder care responsibilities, single people, or same-sex couples. If only mothers or childcare needs are accommodated, the transition from “work-family” to “work-life” is simply a change in labels rather than the loosening of essentialist ideas.<sup>329</sup>

## 2. Backlash: Creating a New “Mommy Track”

Work-life accommodations used by all workers may appear to avoid identity politics—benefiting men, women, parents, and nonparents alike—without stigmatizing their beneficiaries.<sup>330</sup> Some experience bears this out. Best Buy’s corporate headquarters implemented a successful program called “results-only work environment,” or “ROWE,”<sup>331</sup> to get rid of fixed hours for all employees,

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*Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 108–11 (2003). In the alternative, a legal regime could provide a detailed list of all the activities for which leave should be required (i.e., breastfeeding, school plays, children’s sporting events, etc.). Cf. Arnow-Richman, *supra* note 9, at 1090–91 (describing the “incredible breadth and detail” of the recent Military Leave Amendments to the FMLA which “require employers to provide FMLA leave to employees experiencing a ‘qualifying exigency’ as a result of a family member serving or called to active duty in the Armed Forces”). But such a list would reflect essentialist notions of the core activities of caretaking. Moreover, “it is unclear how law makers would extend laws like school involvement legislation to provide workers with the requisite flexibility to accommodate all of the particular needs of their families without creating a highly complex and unwieldy system of rules.” *Id.*

327. Arnow-Richman, *supra* note 9, at 1104. Although, in theory, such a failure to accommodate would be actionable discrimination, it would be difficult to prove that the action was motivated by bias rather than a legitimate business justification, particularly if the supervisor’s prejudices were implicit or unconscious. *Id.* at 1104–05. Arnow-Richman argues that a law giving employees the right to request accommodations would temper subconscious bias by requiring the employer to focus on relevant business considerations and meet with the requesting employee. *Id.* at 1111–12. But Arnow-Richman admits that her assessment is “highly optimistic.” *Id.* at 1112–13.

328. Ryan & Kossek, *supra* note 128, at 301 (citing Lisa Barham, Benjamin H. Gottlieb & E. Kevin Kelloway, *Variables Affecting Managers’ Willingness to Grant Alternative Work Arrangements*, 138 J. SOC. PSYCHOL. 291 (1998)).

329. See Janet Smithson & Elizabeth H. Stokoe, *Discourses of Work-Life Balance: Negotiating ‘Genderblind’ Terms in Organizations*, 12 GENDER, WORK & ORG. 147, 164 (2005) (conducting qualitative analysis of survey responses from employees of UK firms and finding that “de-gendered terms [like work-life] do not in practice change the widespread assumption within organizations by managers and employees, both women and men, that these issues are strongly linked to women”).

330. Case, *supra* note 9, at 1768 (arguing that proposing flexible work arrangements available to parents and nonparents alike “would broaden the coalition for such change and potentially reduce the possibility for zero-sum games among employees”).

331. Phyllis Moen, Erin Kelly & Kelly Chermack, *Learning from a Natural Experiment: Studying a Corporate Work-Time Policy Initiative*, in WORK-LIFE POLICIES, *supra* note 9, at

“replacing institutionalized clockworks with an emphasis on the quality of job done.”<sup>332</sup> The program’s creators considered it essential to their success that they deliberately avoided any reference to their project as “work-family,” “mother’ friendly or even ‘family’ friendly.”<sup>333</sup> Similarly, many medical practices have been able to provide flexible work arrangements by framing the initiative as a set of “broad developments that address a wider range of worker and organizational needs beyond those linked to family.”<sup>334</sup> A historical example: by expanding the FMLA from family leave to medical leave, supporters were able to increase the policy’s appeal across the political spectrum and achieve passage of the bill.<sup>335</sup> There seems to be more support for the argument that universalism avoids backlash in the work-life context than in the harassment context.

But in many workplaces, even universally available flexible work arrangements and leave policies are regarded as special accommodations for caretakers or “mommy tracks.”<sup>336</sup> Although both men and women express concern about work-life issues, flexibility remains seen as a “women’s issue.”<sup>337</sup> Employees, particularly men, fear that using flexible arrangements will signal that they lack commitment to the job and hinder their career advancement.<sup>338</sup> A study of the medical profession found that increased flexibility goes hand-in-hand with increased bureaucratization.<sup>339</sup> This is because the larger the practice and the more standardized the procedures, the less any one physician is viewed as indispensable.<sup>340</sup> Women and parents are more likely to work in such practices, but at the cost of autonomy, prestige, and income.<sup>341</sup> This caused one researcher to ask, “Does gaining flexibility mean losing the professional ‘calling’?”<sup>342</sup>

One way to avoid the “mommy track” problem is to *mandate* work-life balance for everyone. An example: to increase gender parity, many scholars advocate mandatory paid maternity *and* paternity leave.<sup>343</sup> Another example: some

97, 103.

332. *Id.* at 101.

333. *Id.* at 106.

334. See Forrest Briscoe, *The Design of Work as a Key Driver of Work-Life Flexibility for Professionals*, in WORK-LIFE POLICIES, *supra* note 9, at 83, 89–91.

335. See STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 150 (2001).

336. See JACOBS & GERSON, *supra* note 127, at 111 (“‘Mommy tracks’ . . . ask women to forgo upward mobility in order to combine motherhood and work. . . . ‘Gender neutral’ family policies may appear less pernicious. But if they stigmatize parental involvement, both involved mothers *and* fathers are disadvantaged.” (emphasis in original)); Kelly & Moen, *supra* note 126; Schultz, *supra* note 9, at 1955–56.

337. CATALYST, WOMEN AND MEN IN U.S. CORPORATE LEADERSHIP: SAME WORKPLACE, DIFFERENT REALITIES 29–30 (2004) (studying Fortune 1000 executives directly below the CEO level); Gerkovich, *supra* note 123, at 276.

338. See Kelly & Moen, *supra* note 126, at 490 (summarizing research).

339. See Briscoe, *supra* note 334, at 86–87.

340. *Id.*

341. *Id.* See generally CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTÉ, THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER (1999) (describing this phenomenon in law firms).

342. Briscoe, *supra* note 334, at 89.

343. See, e.g., Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1180 (2010);

employers, rather than giving religious employees the Sabbath off, close up shop for all workers.<sup>344</sup> But still, the focus is on accommodating parents or religious preferences. And while these solutions may work for homogenous workforces (all young parents, all members of certain religions), they will not work as well for heterogeneous workforces consisting of people with varying caregiving responsibilities, religious orientations, and other extracurricular needs and interests.<sup>345</sup>

Universal workplace accommodations may be just as likely as caretaking accommodations to shift costs onto disadvantaged groups. Research suggests that managers and coworkers assume that the users of flexible work arrangements are a drain on productivity, whether or not they really are.<sup>346</sup> If men as well as women began taking advantage of work-life policies, it might stem cost shifting in the form of hiring discrimination against women. But to the extent that only women use workplace accommodations, the costs of absences are likely to be shifted onto other women.<sup>347</sup> Because many workplaces are segregated, with certain employers hiring almost all women,<sup>348</sup> women are likely to bear any costs of maternity leave or other employer-funded mandates targeted at women.<sup>349</sup> And regardless of what group the

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Suk, *supra* note 114, at 68 (“[M]andatory paternity leave may enable fathers to resist employer pressures to continue working, even when they want to stay home to care for a young child.”). *But see* Selmi, *supra* note 100, at 774 (arguing that “[d]espite its possible success, the objections to a mandatory paternity leave policy would almost certainly block its implementation”). Examples of possible objections include the infringement on the liberty of both parents and questions about whether the policy would apply to fathers who are not married to or living with the mother. *Id.* Sweden employs a “use-it-or-lose-it” model for fathers, in which both parents are allocated thirteen total months of paid leave, but at least two of those months can only be used by fathers. Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES, June 9, 2010, at A6; *see also* Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373, 375 (1996).

344. *See, e.g.*, Adam Goldman, *Ultra-Orthodox Jews Hit It Big with Cameras*, CHARLESTON GAZETTE & DAILY MAIL, Dec. 1, 2005, at 13A (“[B&H Photo-Video] employs 800 to 900 people, many of them religious Jews. The store closes each Friday afternoon until Sunday in observance of the Sabbath, and on about a half-dozen Jewish holidays each year.”); *Why We’re Closed on Sundays*, CHICK-FIL-A, <http://www.chick-fil-a.com/Company/Highlights-Sunday> (“Our founder, Truett Cathy, made the decision to close on Sundays in 1946 . . . . He believes that all franchised Chick-fil-A Operators and Restaurant employees should have an opportunity to rest, spend time with family and friends, and worship if they choose to do so.”).

345. A prejudiced employer could exploit preferences for such schedules for discriminatory purposes. *See* Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797 (2009).

346. *See* Ellen Ernst Kossek, Alison E. Barber & Deborah Winters, *Using Flexible Schedules in the Managerial World: The Power of Peers*, 38 HUM. RESOURCE MGMT. 33, 40 (1999) (surveying managers, and concluding that “productivity concerns are most strongly associated with use of flextime; slightly, but significantly related to use of leaves; and not related to use of part time work”).

347. Case, *supra* note 9, at 1756.

348. *See* Boushey, *supra* note 23, at 39–40.

349. Case, *supra* note 9, at 1757 (“[I]n female-dominated jobs, like those so many

mandate is targeted at, “[e]mployers may shift costs disproportionately to secondary labor market workers (those who are easily replaceable because their human capital is basically irrelevant) in an effort to avoid cutting compensation of incumbent primary employees (those whose human capital is necessary to their job).”<sup>350</sup>

In a heterogeneous workforce, work-life policies can be polarizing when one worker’s life conflicts with another’s. When flexibility is conceptualized as accommodation, it comes to be seen as “a favor or a perk” rather than a “mutual benefit.”<sup>351</sup> What if Jane wants the afternoon off to volunteer to plant trees, while John wants to leave early for his daughter’s soccer practice? “Work/family issues are inevitably personal: people feel as if they are defending their own life choices in a context where no one feels entirely comfortable because everyone is caught in the clash of social ideals.”<sup>352</sup> Managers may seem to apply different standards, causing a perception that the organization is unjust.<sup>353</sup> Some advocates claim that jealousy and backlash can be avoided if managers communicate and apply objective parameters for use of work-life policies.<sup>354</sup> But the more rigid the parameters, the less likely the policies are to meet the needs of a diverse workforce. And employers are hesitant to adopt formal policies for fear of creating legal “entitlements.”<sup>355</sup>

### 3. Assimilation: Increasing the Gendered Division of Labor

The critique of assimilationist reform strategies has the most force in the work-life context.<sup>356</sup> Work-life balance problems are not gender neutral. Women do the

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women occupy, ‘the existing employees’ on whom the ‘excess work’ resulting from schedules favoring mothers on the job is ‘dump[ed]’ are other women, most likely women without children.”); Jolls, *supra* note 44, at 284 (“[R]estrictions on wage differentials frequently will not bind for female workers, as a result of occupational segregation, and, thus, that accommodation mandates targeted to female workers will be likely to be financed by those same workers primarily in the form of lower wages.”).

350. Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 59 n.240 (2005) (citations omitted).

351. Galinsky, *supra* note 312, at 301.

352. Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3, 7 (2006). *But see* JACOBS & GERSON, *supra* note 127, at 199 (concluding that the “child free” backlash against workplace entitlements for parents is not a strong force); Robert Drago, David Costanza, Robert Caplan, Tanya Brubaker, Darnell Cloud, Naomi Harris, Russell Kashian & T. Lynn Riggs, *The Willingness-to-Pay for Work/Family Policies: A Study of Teachers*, 55 INDUS. & LAB. REL. REV. 22 (2001) (similar).

353. *See* Kelly & Moen, *supra* note 126, at 490.

354. Ryan & Kossek, *supra* note 128, at 299–300 (arguing that supervisors can avoid “backlash and jealousy in coworker relations” by implementing measures to avoid conflicts, such as “cross-training, setting core hours, and modes for communication and back-up systems when people are flexing”).

355. Erin L. Kelly & Alexandra Kalev, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or ‘A Right to Ask,’* 4 SOCIO-ECON. REV. 379, 382, 394 (2006).

356. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 4–8 (2000).



lion's share of caregiving, and they are penalized for it in the labor market.<sup>357</sup> In contrast to policies that encourage caregiving, policies that accommodate all life pursuits equally will confer the greatest advantage in labor markets on workers with no domestic responsibilities, in other words, those who assimilate to traditional male norms. Under open-ended rules, women will have incentives to take leave to better engage in caregiving, while men will have incentives to use flexible work arrangements to better engage in paid work. The result is to legitimate the gendered division of labor.

a. Constrained Choices

Work-life accommodations are premised on a universalistic liberty ideal: employers should respect all workers' choices in how to combine life and paid work. But for good reasons, feminists have criticized recent generations of scholarship for fetishizing choice.<sup>358</sup> As Vicki Schultz has put it: "workplace flexibility programs and their advocates assume that the rhythms and dynamics of family life, and any patterns of sex segregation that are associated with flexible work options, are *exogenous* to workplace arrangements."<sup>359</sup> Workers are not radically free to make choices, such as whether to stay home with children or seek employment,<sup>360</sup> whether to work as nurses or plumbers,<sup>361</sup> or whether to dress demurely or provocatively on the job.<sup>362</sup> Such choices are constrained and sometimes wholly determined by the options available in the home and workplace. The very fact that workers face such choices is not a natural feature of the social landscape, but rather a situation that has resulted from the intersection of gender norms with legal, political, and economic structures. For example, the so-called "opt-out revolution"<sup>363</sup> of professional women leaving their jobs to stay home with children was more about mothers being pushed out of inflexible workplaces than about mothers being pulled back home by biological urges (to the extent any such trend existed).<sup>364</sup> Likewise, men do not avoid housework and childcare due to

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357. *See id.* at 2; *supra* note 102.

358. *See* Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 58 (2008); Tracy E. Higgins, *Why Feminists Can't (or Shouldn't) Be Liberals*, 72 FORDHAM L. REV. 1629, 1632–33 (2004).

359. Schultz, *supra* note 16, at 1216 (emphasis in original).

360. *Cf.* Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 513 (1998).

361. *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, 1840–43 (1990).

362. *See* Rhode, *supra* note 55, at 1058–59.

363. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42. Empirical support for any "opt-out" trend is lacking. *See* Heather Boushey, "Opting Out?" *The Effect of Children on Women's Employment in the United States*, 14 FEMINIST ECON. 1, 30–31 (2008) (concluding that changes in the effect of having a child on women's employment between 2000 and 2005 were not statistically significant, and recent declines in women's employment are more likely an effect of the weak labor market for all women).

364. PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007); JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, CTR. FOR

intractable biological inclinations—between 1975 and 1998, men’s unpaid work increased by an hour a day.<sup>365</sup>

b. Flexibility for Men; Leave for Women

Women have fewer choices in work scheduling than men. Women are less likely than men to have access to flexible work schedules, even in the same industries.<sup>366</sup> Research suggests this is likely because women hold fewer elite positions.<sup>367</sup> Many organizations have formal policies referring to “legal ideals of fairness and consistency,” and supervisors look to these policies when granting requests for flexible work arrangements.<sup>368</sup> But those policies are written to safeguard managerial discretion “and avoid creating ‘new entitlements.’”<sup>369</sup> In practice, managers offer flexible work arrangements to reward those employees viewed as good performers—employees with bargaining power in the labor market who might find new jobs if not accommodated.<sup>370</sup> “Ethnic and racial minorities, and women, especially mothers, may find it more difficult to be recognized as a ‘high performer’” in this system.<sup>371</sup> However, women are more likely to have access to

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WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT: THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 42–47 (2005).

365. Linda C. Sayer, *Gender, Time, and Inequality: Trends in Women’s and Men’s Paid Work, Unpaid Work and Free Time*, 84 SOC. FORCES 285, 297 (2005) (analyzing nationally representative time-diary data from 1975 and 1998). Women still do more total combined paid and unpaid work, leaving a thirty-minute-per-day leisure gap. *Id.* at 296; see also Melissa A. Milkie, Sara B. Raley & Suzanne M. Bianchi, *Taking on the Second Shift: Time Allocations and Time Pressures of U.S. Parents with Preschoolers*, 88 SOC. FORCES 487, 507–08 (2009) (analyzing two nationally representative samples of U.S. parents with preschoolers, and concluding that women working full-time and married to a husband working full-time worked an extra week-and-a-half a year compared to similar men).

366. Lonnie Golden, *Limited Access: Disparities in Flexible Work Schedules and Work-at-Home*, 29 J. FAM. & ECON. ISSUES 86, 104 (2008); see also Elaine McCrate, *Flexible Hours, Workplace Authority, and Compensating Wage Differentials in the US*, 11 FEMINIST ECON. 11 (2005); Deanna L. Sharpe, Joan M. Hermsen & Jodi Billings, *Factors Associated with Having Flextime: A Focus on Married Workers*, 23 J. FAM. & ECON. ISSUES 51 (2002); Jennifer E. Swanberg, Marcie Pitt-Catsoupes & Krista Drescher-Burke, *A Question of Justice: Disparities in Employees’ Access to Flexible Schedule Arrangements*, 26 J. FAM. ISSUES 866 (2005).

367. EEOC, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (Mar. 4, 2004), [http://www.eeoc.gov/eeoc/statistics/reports/glass\\_ceiling/index.html](http://www.eeoc.gov/eeoc/statistics/reports/glass_ceiling/index.html) (concluding, based on 2002 data, that women were 48% of the workforce but only 36.4% of managers or officials); Kim A. Weeden, *Is There a Flexiglass Ceiling? Flexible Work Arrangements and Wages in the United States*, 34 SOC. SCI. RES. 454, 455–56 (2005).

368. Kelly & Kalev, *supra* note 355, at 382, 394.

369. *Id.* at 394.

370. *Id.* at 402–04.

371. *Id.* at 407.

one type of flexible work arrangement—work-at-home arrangements<sup>372</sup>—perhaps because such arrangements facilitate their increased caregiving relative to men.<sup>373</sup>

By failing to connect the problems that workers have in integrating work and life with larger patterns of gender subordination, work-life policies fail to address inequality. One problem is that men don't take leave as often as women.<sup>374</sup> Research suggests men want to take leave, but the economic incentives are stacked against it, since men are likely to earn higher wages than their female partners.<sup>375</sup> Additionally, in many workplaces, men are explicitly or implicitly discouraged from taking leave.<sup>376</sup> The effect of women's disproportionate use of leave is to reinforce labor specialization—women develop better caretaking skills and lose ground in paid labor markets during their time off, while men fail to develop caretaking skills and gain ground in paid labor markets.<sup>377</sup>

And when men do use work-life accommodations, it does not necessarily decrease women's caretaking burdens. Men are more likely to use flexible work scheduling so that they can work when they are most productive, while women are more likely to use flexible work scheduling to accommodate caretaking.<sup>378</sup> When France implemented a thirty-five-hour workweek, the number of men with two jobs increased.<sup>379</sup> Joan Williams offers the anecdote that when a law school where she worked in the 1980s gave mothers *and* fathers a semester's leave for the birth of a child, "Women used the leave for child care, while one man went to Mardi Gras during his leave (without the baby) and another used his leave to write a law review

372. Golden, *supra* note 366, at 105.

373. Employers may also be more likely to grant reduced work hours to women, as opposed to flexible work hours. *See supra* note 328 and accompanying text.

374. *See supra* note 99 and accompanying text.

375. *See* Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994); Malin, *supra* note 100, at 39–42; Selmi, *supra* note 100, at 711–12.

376. *See, e.g.*, Erin L. Kelly, *Failure to Update: An Institutional Perspective on Noncompliance with the Family and Medical Leave Act*, 44 L. & SOC'Y REV. 33, 59 (2010) (quoting one survey respondent as describing the common attitude that: "You don't pay dads to take time off to be home to take care of the children. Just forget it, that's ridiculous. I never did it. Forget it. My wife takes care of that stuff").

377. *See, e.g.*, Jennifer L. Hook, *Care in Context: Men's Unpaid Work in 20 Countries, 1965–2003*, 71 AM. SOC. REV. 639, 643–44 (2006) (summarizing past sociological research on this phenomenon). Hook's research concludes that married, employed men in countries that offer gender-neutral parental leave do more unpaid work than men in countries that offer leave only to women. *Id.* at 653.

378. Katie L. Winder, *Flexible Scheduling and the Gender Wage Gap*, 9 BERKELEY ELEC. J. ECON. ANALYSIS & POL'Y 1, 1 (2009), <http://www.bepress.com/cgi/viewcontent.cgi?article=2197&context=bejeap>.

379. Estevão & Sá, *supra* note 119, at 455; *see also* Michelle A. Travis, *What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1239 (2010) (citing Arturo Vega & Michael J. Gilbert, *Longer Days, Shorter Weeks: Compressed Work Weeks in Policing*, 26 PUB. PERSONNEL MGMT. 391 (1997)) (discussing Vega and Gilbert's study of compressed work weeks for "nearly all-male" patrol officers, in which 85.3% of respondents reported that the most favorable benefit of the new schedule was that it allowed them to work second jobs).

article.”<sup>380</sup> Some research suggests that “fathers step in to assist with housework only when mothers are not available.”<sup>381</sup> Consistent with this premise, another study found that men who take advantage of *leave* policies engage in larger shares of the types of repetitive and time-sensitive housekeeping traditionally performed by women, like cooking, cleaning, and laundry.<sup>382</sup> The same is not true, however, of men who take advantage of flexible work arrangements.<sup>383</sup> The reason may be related to research demonstrating that married men who work shifts that do not overlap with their wives’ (in other words, men who are home alone) do a larger share of the housework than other men.<sup>384</sup> Thus, policies that create incentives for men (or both parents, to put it neutrally) to take leave may better undermine the gendered division of labor than generic workplace accommodations.

### c. Legitimizing Inflexible Work Structures

Giving certain workers accommodations as exceptions to the norm of inflexible work legitimates inflexible work structures. Many workplaces are still centered around the norm of the husband earning the “family wage” while the wife stays home, even though only sixteen percent of American families fit this mold.<sup>385</sup> The ideal worker is one who can devote absolute attention to work.<sup>386</sup> Work-life initiatives that look like special benefits “may inure management to the real sources of work-life imbalance”—“how jobs are designed, how work is coordinated, how organizational rewards are determined, and how the culture supports or hinders work-life balance.”<sup>387</sup>

380. Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 YALE J.L. & FEMINISM 79, 89 (2009). This anecdote leaves me wondering whether the father who went to Mardi Gras spent the whole semester on Bourbon Street or eventually made it back home to help with childcare.

381. Mary C. Noonan, Sarah Beth Estes & Jennifer L. Glass, *Do Workplace Flexibility Policies Influence Time Spent in Domestic Labor?*, 28 J. FAM. ISSUES 263, 283 (2007). When women use certain flexible work arrangements, like working from home or reduced work hours, those women do more housework and childcare. *Id.* at 266–67. When women use flexible work scheduling, however, men do more housework, perhaps because their wives are not home during mornings and evenings when many routine family care obligations arise. *Id.* at 267. The study did not find that a father’s use of flexible work arrangements affected a mother’s domestic labor. *Id.*

382. Sarah Beth Estes, Mary C. Noonan & David J. Maume, *Is Work-Family Policy Use Related to the Gendered Division of Housework?*, 28 J. FAM. ECON. ISSUES 527, 538 (2007).

383. *Id.* at 542.

384. Noonan, *supra* note 381, at 267 (analyzing data from a longitudinal sample of 196 women who were pregnant and postpartum in the 1990s).

385. See *America’s Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, tbl.FG10, <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html> (providing that there are 83,617,000 family groups in the United States); *id.* at tbl.FG1 (providing that out of those family groups, 13,074,000 are married couples with only the husband in the labor force).

386. See WILLIAMS, *supra* note 356, at 1.

387. Cynthia A. Thompson & David J. Protas, *Elaborations on a Theme: Toward Understanding Work-Life Culture*, in WORK-LIFE POLICIES, *supra* note 9, at 51, 53.

Another problem is the phenomenon described as the “time divide”—employers have incentives to overwork salaried employees and underwork hourly employees.<sup>388</sup> Under the Fair Labor Standards Act, employers are not required to pay managerial, salaried, and professional workers for overtime,<sup>389</sup> creating incentives for employers to hire fewer of such workers and overwork them.<sup>390</sup> Employer benefit plans generally cover only full-time workers.<sup>391</sup> To avoid paying costly benefits to additional workers, employers have incentives to create part-time, contingent, or contract positions.<sup>392</sup> The result is a situation in which men are more likely to have difficulty avoiding overwork and women are more likely to have difficulty finding sufficient paid work.<sup>393</sup> Individual accommodations that allow certain workers to “maneuver around workplace norms that create gender inequality” detract focus from this structural problem.<sup>394</sup>

Legitimation results both from universal accommodations and those targeted at caregivers or women. However, if elite workers, who are more likely to be men, benefit from accommodations like flexibility that do not increase their caregiving relative to women, they will have no incentive to support policies to benefit all workers.<sup>395</sup>

#### 4. Dilution: Undermining Protections for Care

Expanding work-family policies to work-life policies may trivialize the needs of caretakers and water down protections like parental leave. The trivialization problem goes hand-in-hand with any solution that takes an agnostic view on which life pursuits merit workplace accommodation. Although employers may find caregiving responsibilities good reasons to allow worker flexibility, manicures, fantasy football, and tropical vacations garner less sympathy. These “frivolous” reasons for seeking flexible work arrangements threaten to undermine the entire project, which is why advocates use examples of life pursuits like military service, community volunteering, and disaster preparedness training. These pursuits mimic childrearing in that they contribute to the reproduction and preservation of American life and culture. But many work-life proposals would equally protect the

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388. JACOBS & GERSON, *supra* note 127, at 163–64.

389. Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1) (2006).

390. JACOBS & GERSON, *supra* note 127, at 183; Schultz & Hoffman, *supra* note 12, at 138–39.

391. JACOBS & GERSON, *supra* note 127, at 183.

392. Schultz & Hoffman, *supra* note 12, at 138–39.

393. Schultz, *supra* note 16, at 1206.

394. *Id.* at 1212. In response, Schultz proposes a universal solution: the thirty-five-hour workweek. This Article does not specifically address whether the thirty-five-hour workweek, on balance, would avoid essentialism, backlash, assimilation, and dilution; rather, it analyzes whether rules requiring universal work-life accommodations would reinforce or ameliorate the gendered division of labor.

395. Levmore, *supra* note 114, at 217–18 (“Employers have incentives to offer generous benefits, in lieu of cash, to employees who value these benefits and who value the signal the employer sends about its willingness to accommodate or attract workers who expect to be parents. But once these employees are satisfied, they have no incentive to work through the political process for more generous leave policies for all employees.”).

worker who just wants to spend more time watching television. If a work-life policy leads to widespread freeriding and abuse, the entire endeavor is at risk. Indeed, support has now waned for leave in general because the FMLA is utilized for many short, personal sick leaves that employers perceive as costly and illegitimate.<sup>396</sup>

Expanding leave may water down protections for caregivers. If all employees were entitled to request leave for any reason, and employers were not be permitted to inquire into a worker's reasons for taking leave, then a worker who needed the day off to take an elderly parent to a doctor's appointment would have the same chance of getting that accommodation as a worker who wants the day off to go fishing.<sup>397</sup> Or maybe neither worker will get the day off. Some employers have reduced paid maternity leaves as family responsibilities discrimination litigation has grown.<sup>398</sup> One scholar argues: "If employers are required to treat women the same as men, and to treat people with caregiving responsibilities no differently from all other workers, the easiest way for employers to comply with antidiscrimination law is to offer nothing to both men and women, especially in a tough economy."<sup>399</sup>

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In sum, based on available empirical research on different forms of work-life accommodation, it seems likely that universal accommodations would have some advantages in terms of avoiding essentialism and backlash, but would not eliminate the problems. And universal accommodation requirements risk obscuring the connections between the lack of workplace flexibility for caretakers and the gendered division of labor, and undermining all workplace flexibility projects through dilution.

#### IV. TOWARD A MORE INCLUSIVE WORKPLACE

##### *A. Lessons for Other Universalizing Projects*

This analysis demonstrates that universalized protections may fail to advance equality. While at first it seemed that universal rules would avoid essentialism and backlash, a closer examination reveals that packaging reforms as benefits to "all workers" does not necessarily strip them of their associations with identity groups. Additionally, when they are characterized as subsuming protections against discrimination, universal protections run the risk of evisceration-by-assimilation of

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396. Suk, *supra* note 114, at 48.

397. See Arnow-Richman, *supra* note 9, at 1101 (discussing liability that may result if employers inquire into workers' reasons for seeking accommodations).

398. Suk, *supra* note 114, at 57 ("During the last ten years, as FRD litigation grew, employers cut back on paid maternity leaves. In 1998, twenty-seven percent of a nationally representative sample of 1100 employers provided fully paid maternity leave; only sixteen percent provide such leave today. Over this period, the maximum length of paid leave has decreased from 16.1 weeks to 15.2 weeks." (footnotes omitted)).

399. *Id.*

feminism as a political project, and dilution-by-expansion of antidiscrimination as a redistributive project.

Although in theory universal protections should avoid essentialism, this is not necessarily the case. It is true that universal solutions do not revolve around identity claims. But like traditional civil rights protections, universalized protections are fixated on individuals—changing people rather than workplaces. Universal protections may open new avenues for enforcement of stereotypes and generalizations, for example, about what sort of conduct is bullying and what sort of workers deserve accommodation. Courts, employers, and the public may import essentialist notions in interpreting, enforcing, and understanding universal laws. While sexual harassment laws imagine women as imperiled victims, anti-bullying laws imagine them as dragon-ladies. While family-leave policies imagine women as needy mothers, work-life policies imagine them walking a tightrope. It would not be strategic to embrace any of these essentialist notions.

Universal solutions do not necessarily avoid the backlash resulting from identity politics. To be sure, moving beyond equality to universalism can be politically savvy.<sup>400</sup> Crafting solutions that are universally available may reveal the value of reforms for more workers. However, whether this approach works to quell political dissensus will depend on the strength of the competing interests at stake. For example, religious conservatives who oppose extension of anti-harassment rules to harassment based on sexual orientation may also oppose generic anti-harassment rules.<sup>401</sup> But gay-rights groups may not see the benefit of expending resources on the anti-bullying cause. Work-life initiatives may find support from women's groups, but at the cost of becoming "mommy tracks."

Universal protections can eviscerate feminist political goals through assimilation. Movements for equality risk death by absorption into universalistic politics. Antidiscrimination rules require employers to ask, "am I treating anyone differently because of gender?" while universal rules require employers to ask, "is this workplace too hostile or inflexible?" If the universal rule swallows the antidiscrimination rule, the transformative potential of requiring employers and the public to scrutinize whether employment decisions are gendered is lost. Rules protecting dignity or liberty may end up replicating inequality. The law has trouble recognizing indignities to those at the bottom of class hierarchies, for example, those who already do "menial" work, or threats to the liberty of those constrained by gender norms, for example, couples who "choose" traditional breadwinner-caregiver family arrangements.<sup>402</sup> A theory of universalism that imagines the sphere of universal harms as subsuming gendered harms could become part of a "post-feminist" political project that either denies the existence of gender inequality

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400. See Fineman, *supra* note 12, at 17 ("The realization that disadvantage is produced independent of racial and gender biases in many—but of course not all—instances provides an important political tool. Mobilizing around the concept of shared, inevitable vulnerability may allow us to more easily build coalitions . . .").

401. See *supra* notes 240–42 and accompanying text.

402. This is not to say that couples who organize their work and family lives according to the traditional model suffer from some form of false consciousness, just that we cannot determine whether they would have made the same "choices" if they had been presented with different options for combining career and family.

or chalks it up to personal choices rather than economic and political structures. Compliance efforts that focus on weeding the bad seeds out of the workplace or creating new tracks for non-ideal workers may mask deeper problems.

Finally, universal policies have the potential to water down existing protections. Cases on the fringe of bullying resemble office politics, and cases on the fringe of work-life accommodation resemble free riding. The fringe cases threaten to trivialize the entire endeavor and undermine the core of protections. Due to limited resources, the requirement that all protections be universal may result in no protections at all.

Yet the disadvantages to universal rules described in Part III of this Article are not reasons to completely abandon universalizing projects. To return to Part I of this Article: sexual harassment law and family leave policy are tragically underinclusive. Cases are hard to win because bias is difficult to prove. Many workers are not covered by existing rules, such as those harassed because of sexual orientation, physical appearance, or native language, or those with nontraditional families or personal lives. The harms of harassment and inflexible work are widespread. Why should any worker be required to risk dignity, liberty, health, or safety to earn a living?<sup>403</sup> Some types of anti-bullying and work-life policies might provide recourse to those left out by current laws while avoiding the problematic fixation with sex and family.

#### *B. Reframing the Discussion to Focus on Inclusivity*

There is no tidy solution to the dilemma posed by this Article: that gender issues may point to larger problems with the structure of the workplace, but universal solutions may create new gender issues. Is there is a way to provide universal protection without undermining equality? To minimize the tradeoffs between universality and equality, I propose that goals be reframed in terms of making workplaces more inclusive.<sup>404</sup>

This Article does not conclude that there is nothing to be gained from universalist theories or that unhinging legal protections from identities is never a good move. There are likely to be cases in which a policy grounded in an identity category is so woefully underinclusive, essentialist, and divisive that a universal policy would be an improvement regardless of the risks of assimilation and

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403. Cf. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957–58 (1996) (arguing that affirmative action presents “an opportunity to take from the margin to rethink the whole” by asking larger questions about the fairness of one-size-fits-all merit-based selection systems for everyone).

404. Cf. powell, *supra* note 22, at 802–03 (proposing “targeted universalism” that would be “inclusive of the needs of both the dominant and the marginal groups, but pays particular attention to the situation of the marginal group”); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250 (2006) (supporting a “project of achieving inclusive institutions” that goes beyond “eliminating discrimination or even increasing the representation of previously excluded groups” to “creat[e] the conditions enabling people of all races and genders to realize their capabilities as they understand them”).



dilution.<sup>405</sup> However, the bullying and work-life examples demonstrate that universal moves should be made with caution. Universality and equality can be conflicting goals. Universal protections take aim at harms that affect all workers at the risk of ignoring how those harms are gendered and how uniform solutions may only assist privileged workers. Equality-based protections take aim at harms that affect women at the risk of ignoring harms to all workers, expressing essentialist notions, and sparking divisive identity politics.

Inclusiveness is not the same as equality. Equality requires eliminating disparate treatment or subordination. Inclusiveness requires constant reconsideration of how legal rules and workplace structures exclude certain workers. The inquiry would not stop at asking whether men and women are treated the same, but it would also ask, for example, why workers aren't protected against discrimination on the basis of sexual orientation, or discrimination based on the intersection of race and gender. An inclusive approach would not abandon universalist goals like liberty and dignity; rather, it would insist on *equal* liberty and dignity.<sup>406</sup> To insist on bare equality of treatment, without reference to other values, is to repeat the mistake of the anticlassification paradigm—ignoring the interplay between legal rules and status hierarchies.<sup>407</sup> It is also to miss the potential of equality norms to spark re-evaluation of universal standards. Equality-based movements can bring problems to light that require that we lift the floor for everyone, rather than simply equalize conditions.<sup>408</sup> We can “understand[] accommodation as a process of interrogating the existing baseline, by focusing on part of the population that was neglected in the creation of that baseline, to make changes to that baseline that may affect everyone.”<sup>409</sup> An inclusive approach would not require blanket rejection of protections based on universal norms. Rather, it would not allow universal norms to eclipse equality concerns, by requiring careful consideration of potential problems such as assimilation and dilution.

Neither is inclusiveness the same as universality. To make a workplace more inclusive, reformers must pay attention not just to the commonalities between workers' problems, but also the differences. Otherwise, the problems of those

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405. One likely example is the recasting of sex trafficking as human trafficking. *See* Chuang, *supra* note 27.

406. *Cf.* Neil S. Siegel, “*Equal Citizenship Stature*”: Justice Ginsburg’s Constitutional Vision, 43 N.E. L. REV. 799, 840 (2009) (explaining how Justice Ginsburg’s constitutional “vision encompasses both an equality and a liberty component”).

407. Balkin & Siegel, *supra* note 129, at 13–14 (describing how anticlassification norms are implemented along with other norms that may either preserve or dismantle social relations).

408. Siegel, *supra* note 406, at 840–41 (arguing for a constitutional vision of equal liberty that recognizes “a floor, an irreducible minimum of autonomy that government must accord each person regardless of how it treats other persons—a zone of individual freedom into which government may not intrude”).

409. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 894 (2008) (recognizing that a model that “treats disability as a lens through which to see the need for universal improvements” risks losing “disabled people and their particular needs . . . in the mix” and “[t]he whole idea of accommodation risks dissolving into a general social welfare program in which disabled people’s needs matter no more and no less than anyone else’s”).

disadvantaged by race, gender, class, and other hierarchies are likely to be overlooked. Gender subordination will be considered a thing of the past and the manner in which gender subordination continues today will become difficult to discern. Thus, legal rules must continue to focus on inequality. But not all differences can always be accommodated. An approach that aims to increase inclusiveness would confront potential costs and tradeoffs rather than attempting to take a universal shortcut around difficult debates over recognition of differences in the workplace. It would forgo appeals to the universal high ground in favor of finding common ground between workers and revealing second- and third-party benefits.<sup>410</sup> It would reject universal solutions, realizing that achieving greater inclusiveness is always an unfinished project.<sup>411</sup>

An inclusive approach requires expansion of workplace protections, but not at the expense of marginalized and vulnerable workers. Thus, it requires consideration not just of the benefits of greater inclusivity, but also critical examination of whether universal expansion would have advantages in terms of avoiding essentialism and backlash, and disadvantages in terms of assimilation and dilution.

### *C. Inclusive Approaches to Harassment and Work-Life Conflicts*

This Part offers some preliminary suggestions for achieving greater inclusiveness by eliminating harassment and work-life conflicts. In accord with a paradigm of inclusiveness, harassment and work-life conflicts should be addressed by solutions that (1) avoid assimilation and dilution by maintaining attention to gender and other forms of discrimination, (2) avoid essentialism and identity politics by focusing on eliminating discrimination, rather than enforcing particular norms about gender, sex, and family, and (3) remedy underinclusiveness by gradually expanding protections to other forms of discrimination and experimenting with flexible solutions to universal harms.

The law should continue to focus on discrimination to avoid the assimilation and dilution problems. Despite their limitations and problems, civil rights laws have been successful in alleviating many of the most harmful forms of discrimination. Sexual harassment law has changed cultural norms and eliminated many forms of egregious workplace behavior.<sup>412</sup> Millions utilize the FMLA's leave provisions every year.<sup>413</sup> Plaintiffs have achieved notable successes in litigating family

410. For a discussion of second- and third-party benefits, see *id.* at 873–74.

411. “[I]nclusiveness is an ideal, an ideal that is impossible to realize, but whose unrealizability nevertheless governs the way in which a radical democratic project proceeds.” Letter from Judith Butler to Ernesto Laclau (May 1995), in *The Uses of Equality*, 27 *DIACRITICS* 3, 4 (Reinaldo Laddaga ed., 1997). A project based on inclusiveness is “bound to fail . . . because the various differences that are to be included within the polity are not given in advance.” *Id.* Those differences are always “in the process of being formulated and elaborated.” *Id.*

412. See, e.g., Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 47, at 247, 251–52.

413. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,042 (Nov. 17, 2008) (amending 29 C.F.R. pt. 825 (2008)) (estimating that seven million workers took

responsibilities discrimination cases.<sup>414</sup> In anthropological terms, these laws have created awareness of discrimination by allowing plaintiffs to “name” the harms they suffered, “blame” their employers, and “claim” legal remedies.<sup>415</sup> Grouping these well recognized forms of discrimination together with nondiscriminatory harms could eliminate opportunities to redress “specific instances of explicit discrimination that might be more effectively managed through straightforward rights claiming.”<sup>416</sup> Civil rights laws must continue to play a role as “backstop[s]” against classic forms of discrimination, such as sexual coercion in the workplace, or firing a worker for taking family leave.<sup>417</sup>

Discriminatory harms are of a different character than harms that affect all workers. Universal solutions, at least on paper, would not judge between claims based on sexual orientation, marital, parental, or other status.<sup>418</sup> But in their agnosticism, universal rules fail to treat discriminatory harassment any worse than personality conflicts, and fail to protect caregiving responsibilities any better than leisure pursuits. This is not to say that anyone deserves to be bullied or that leisure time is not worthy of protection, but rather that these problems are of a different order than those linked with discrimination.<sup>419</sup> Discriminatory harassment and a workplace that is incompatible with caretaking obligations are legacies of women’s historical marginalization in paid labor (and the inextricably related problem of men’s exclusion from caretaking).<sup>420</sup> These problems contribute to women’s continued disadvantage today.<sup>421</sup> Discrimination is a “vicious cycle of exclusion” in which those who are subordinated face stereotypes and stigmatization, causing them to believe they will be denied opportunities, causing them to “choose” not to develop their human capital, causing them to be denied opportunities and perpetuating stereotypes and stigmatization.<sup>422</sup> Antidiscrimination rules target this

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FMLA leave in 2005).

414. See 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, 122–61 (2003).

415. See Resnik, *supra* note 412, at 252 (citing William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . .*, 15 L. & SOC. 631 (1980–81); Austin Sarat, *Naming, Blaming, and Claiming in Popular Culture*, 50 DEPAUL L. REV. 425 (2000)).

416. Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 393 (2009).

417. Cf. Sturm, *supra* note 25, at 483 (discussing law’s role as backstop).

418. See *supra* Part I.A.2 (describing gaps in sexual harassment law); Part I.B.2 (describing gaps in family leave policy).

419. Cf. Emens, *supra* note 409, at 894–96.

420. As Jeremy Waldron has written,

Everyone knows that sexual and racial differences have been used in the past to justify profound differences of treatment, rights, and social status. . . . We could say that respect is due to humanity as such. But “equality” has the extra and important resonance of indicating the sort of heritage we are struggling against.

Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350, 1363 (1991).

421. See Abrams, *supra* note 254, at 1187 (“Correcting a nonsystematic problem of disrespect is a far less urgent matter than curtailing a practice of gender discrimination, which imposes consequences on women’s economic and personal well-being and which has parallels throughout society.”).

422. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the*

dynamic by expressing condemnation of prejudice and providing incentives for those who are excluded to develop their human capital.<sup>423</sup> Antidiscrimination law disrupts “wholesale” forms of injustice that create patterns and systems of subordination, as opposed to “retail” forms of injustice involving individual breaches of norms of ethical conduct.<sup>424</sup>

To avoid essentialism without going so far as the universal turn, antidiscrimination projects can be refocused from protected groups to protected activities or prohibited forms of discrimination. Antidiscrimination projects must attack rather than reinforce stereotypes about gender, sex, and sexuality. As discussed in Part I of this Article, sexual harassment law and family leave policy are being pulled away from a focus on discrimination and toward anti-sex and pro-family agendas. There is a problem with sexual harassment laws that are enforced to rid the workplace of sexuality rather than sex discrimination.<sup>425</sup> I agree with feminist scholars who argue that the law should prohibit any harassment in the service of gender stereotyping or segregation.<sup>426</sup> There is also a problem with laws that support traditional families rather than caretaking.<sup>427</sup> Caregivers should be provided with paid, job-protected leave. As Gillian Lester proposes, leave should be publicly financed to avoid the risks of employers shifting costs onto women or other likely caretakers.<sup>428</sup> To avoid essentialism, leave programs should be made attractive for men as well as women. Empirical research suggests that paid leave, if not too long in duration, increases women’s likelihood of returning to the workforce.<sup>429</sup> Feminists can ground arguments for prioritization of caregiving in the state’s duty toward dependent or vulnerable citizens, rather than maternalist notions of valuing women’s roles.<sup>430</sup>

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*Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 841–43 (2003) (summarizing the sociological account of discrimination).

423. *Id.* at 844.

424. *See id.* at 837, 846–47.

425. *See supra* Part I.A.2.

426. *See* Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 745 (1997) (proposing conceptualizing harassment as conduct “used to enforce or perpetuate gender norms and stereotypes”); Schultz, *supra* note 6, at 2173 (proposing that the definition of sex harassment include “any type of conduct that occurs because of sex—regardless of whether it is sexual, nonsexual but overtly sexist, or even gender-neutral in content” (emphasis in original)).

427. *See supra* Part I.B.2.

428. *See, e.g.,* Lester, *supra* note 350, at 73 (proposing paid family leave financed through across-the-board payroll taxes or general revenue).

429. Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. ECON. 285, 287 (1998).

430. *See* MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 178 (2004) (arguing that preoccupation with autonomy has prevented Americans from seeing that we are all dependents at various points in our lives, and proposing that the state support dependent children, the elderly, the disabled, and those who care for them); Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285, 1287 (2005); Fineman, *supra* note 12, at 23 (“Equality must be a universal resource, a radical guarantee that is a benefit for all. We must begin to think of the state’s commitment to equality as one rooted in an understanding of vulnerability and dependency, recognizing that autonomy is not a naturally occurring

To avoid underinclusiveness, antidiscrimination protections in the workplace should be gradually expanded to include new forms of discrimination that are analogous to the old; for example, discrimination based on sexual orientation should be prohibited. Such expansions entail identity politics, but, as this analysis demonstrates, anti-bullying laws and universal leave policies would entail the same political backlash.

Finally, further study and experimentation is required to address universal harms, like nondiscriminatory bullying or work-life conflicts unrelated to caretaking responsibilities. Such experimentation could take the form of requirements that employers engage in problem solving to devise solutions to bullying and work-life conflicts together with employees, government agencies, and other stakeholders.<sup>431</sup> For example, the mandate of an administrative agency, such as the Occupational Safety and Health Administration (OSHA), could be expanded to address bullying.<sup>432</sup> OSHA has recognized workplace violence as a threat to health and safety,<sup>433</sup> and has issued guidelines for prevention of violence in high-risk industries.<sup>434</sup> Similar approaches could be applied to address work-life conflicts. Private solutions that transform workplace norms for everyone, instead of creating new tracks as exceptions to the norm, are appealing experiments.<sup>435</sup> Flexible regulatory mechanisms, with a focus on open-ended procedure over defined substance, would be good ways to test out solutions before risking the assimilation or dilution of antidiscrimination norms.<sup>436</sup> Moreover, the types of structural and cultural changes required to resolve the broad array of problems that have been labeled “bullying” and “work-life conflicts” will differ from workplace to workplace. A proliferation of workplace-level approaches, rather than universal legal prohibitions, would allow experimentation and study to determine best practices, with attention to whether the new programs contribute to or diminish status hierarchies.<sup>437</sup>

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characteristic of the human condition, but a product of social policy.”).

431. Cf. Sturm, *supra* note 25, at 539 (cautioning against “superimposing universal solutions over an area where culture and context are key to effective problem solving and normative elaboration”).

432. See 29 U.S.C. § 651(b) (2006); Harthill, *supra* note 8, at 1251.

433. See, e.g., OSHA Interpretive Letter from Richard E. Fairfax, OSHA Director, to Morgan Melekos (Sept. 13, 2006), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25504](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504).

434. See OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA PUB. NO. 3148-01R, GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTH CARE AND SOCIAL SERVICES WORKERS (2004), available at <http://www.osha.gov/Publications/osha3148.pdf>.

435. See LOTTE BAILYN, BREAKING THE MOLD: REDESIGNING WORK FOR PRODUCTIVE AND SATISFYING LIVES 10 (Cornell Univ. 2006) (1993) (setting out a normative vision of “[a] world in which care and community are valued and legitimated, where boundaries between family and work and between male and female roles are permeable, and where organizational processes are linked to the social needs of the society”); Moen et al., *supra* note 331, at 101–03 (describing Best Buy’s “results-only work environment” project, which originated with two female in-house human resources professionals and attempted to restructure “the temporal organization of jobs”).

436. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 34–37 (2006).

437. Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic*

## CONCLUSION

As an end goal, universal protection has great appeal. The arguments for universal protection demonstrate how “women’s issues” point to problems in the structure of the workplace for everyone. But viewed through an antidiscrimination lens, a civility code for the American workplace would have significant drawbacks. Extending the civil rights model to the problems of bullying and work-life conflicts could backfire for those committed to equality, inviting overzealous enforcement of gendered norms masquerading as civility codes, making inequality invisible, and diluting protections. Closer examination reveals that although the problem of the hostile workplace is universal, there is no one-size-fits-all solution. To better fulfill the universal turn’s promise of inclusivity, reformers must consider the conflicts between equality and universalist projects.

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*Experimentalism*, 98 COLUM. L. REV. 267, 314–15 (1998). *But see* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 300–01 (2006) (concluding that best practices are effective in gaining compliance from regulated entities, but may not result in the “best” practices being adopted, and suggesting congressional or agency oversight to improve best-practice rulemaking). On the other hand, some types of civil rights rules might allow just as much experimentation—for example, affirmative action programs that give employers numerical targets and timetables, and allow employers discretion to determine how to reach those targets. I am grateful to Vicki Schultz for raising this point and providing the affirmative action example.

