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Discrimination by Comparison

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DISCRIMINATION BY COMPARISON

Suzanne B. Goldberg*

Contemporary discrimination law is in crisis, both methodologically and conceptually. The judiciary's favored heuristic for observing discrimination – a comparator who is like the discrimination claimant but for the protected characteristic – has nearly depleted discrimination jurisprudence and theory. The resulting deficit can be explained, in turn, by the comparator methodology's profound mismatch with current understandings of identity discrimination and the realities of the modern workplace. Even in run-of-the-mill cases, comparators often cannot be found, particularly in today's mobile, knowledge-based economy. This difficulty amplifies for complex claims, which rest on thicker understandings of discrimination developed in second-generation intersectionality, identity performance, and structural discrimination theories. By collapsing an observational heuristic into a defining element of discrimination, courts have largely foreclosed these theories from consideration, leaving the mismatch in place and sharpening the divide between theory and practice. At the same time, courts have further shrunk the very idea of discrimination by disregarding the lesson of harassment and stereotyping jurisprudence that discrimination can occur without a comparator present.

The comparator methodology retains its appeal, despite these deficiencies, because its empirical patina enables courts to avoid making sociologically-oriented inquiries that stretch core judicial competencies. That is, the methodology permits courts to evaluate discrimination claims without appearing to engage in a subjective analysis of workplace dynamics. Given the complex nature of both identity and discrimination, however, these comparisons produce a false certainty at best. By contrast, alternate methodologies, including the contextual consideration favored in harassment and stereotyping jurisprudence as well as the hypothetical comparator embraced in European law, offer a meaningful framework for

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matching discrimination law and norms to workplace facts, while preserving judicial legitimacy. With comparators off of their methodological pedestal, we may yet recover space for the renewed development of discrimination jurisprudence and theory.

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INTRODUCTION

Contemporary discrimination law is in the midst of a crisis of methodological and conceptual proportions. The underlying problem is that evaluating discrimination allegations requires courts and others to see something that is not

observable directly: whether an accused discriminator has acted because of a protected characteristic. While this challenge has long been with us, as putative discriminators rarely admit discriminatory intent,[1] the crisis arises because the most traditional and widely used heuristic – comparators, who are similar to the complainant in all respects but for the protected characteristic – is barely functional in today's economy and is largely unresponsive to updated understandings of discrimination.

Some decades ago, when identity-based differentiation was relatively open and notorious, and when many workplaces were of a Taylor-esque scale,[2] with easily comparable jobs, individuals claiming discrimination could often point to better-treated counterparts. Courts could then deduce, with some confidence, that the protected trait was *the* reason for the adverse treatment at issue.[3] But in a mobile,

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[1] *See, e.g.*, Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Presumption*, 81 TEX. L. REV. 1177, 1207 (2003) (recognizing that as soon as Title VII became law, "no sensible employer would admit that it based a decision on one of the prohibited classifications").

[2] *See generally* FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911). For further discussion, see also *infra* notes 69-70 and accompanying text.

[3] In this sense, the comparator is used to show causation – that the challenged acts occurred because of the protected trait and would not have occurred absent impermissible reliance on that trait. The causation determination is necessary because the question whether the challenged acts were "because of" a protected characteristic is one the central inquiries in a discrimination case. Title VII of the Civil Rights Act of 1964 provides, for example, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin* . . . ." 42 U.S.C. § 2000e-2 (emphasis added). *See also* 29 U.S.C. § 623a-1 (forbidding, through the Age Discrimination in Employment Act, adverse employment "*because of such individual's age* . . . .") (emphasis added).

These laws aim to determine "whether the employer is treating 'some people less favorably than others because of'" any of these characteristics. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). As a procedural matter, the ultimate question whether a defendant-employer has acted because of a protected characteristic typically goes to a jury, but courts regularly determine, in the course of deciding dispositive pretrial motions, whether the facts presented are sufficiently linked to the protected characteristic at issue.

To make out a disparate treatment claim, which is the type of claim I focus on here, an individual must show that the employer (or other actor) intended to discriminate against him or her based on the protected characteristic. Disparate impact cases do not require a similar showing of discriminatory intent. *See infra* n. 143 and accompanying text. In constitutional discrimination claims, a showing of discriminatory intent is always required. *See* Washington v. Davis, 426 U.S. 229 (1979) (finding no legally cognizable claim of discrimination where a policy had a racially disproportionate impact but there was no evidence of discriminatory intent).

Robert Post has observed, in his sociological theory of discrimination law, that the law in this area is not actually concerned with eradicating all trait-based acts but rather only a subset that

knowledge-based economy, actual comparators are hard to come by, even for run-of-the-mill discrimination claims.[4] For the complex forms of discrimination made legible by second-generation theories, the difficulties in locating a comparator amplify exponentially.[5]

This methodological problem has spilled over, conceptually, to crab the very idea of discrimination. Consider Justice Kennedy's observation that "[d]iscrimination . . . requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic."[6] Or Justice Thomas's statement that discrimination *cannot* occur absent "a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute."[7] On this view, however abusively an employer treats its employees, the bad acts do not present a discrimination problem so long as they are committed in an even-handed fashion.[8] Their position, in essence, is that discrimination laws and norms do not impose obligations with meaningful abstract value.

Yet this foreshortens traditional understandings of discrimination even within the Supreme Court's own jurisprudence.[9] As the case law that addresses

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has been socially disapproved. *See generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1 (2000).

[4] By way of example, consider the case of Wendy Norville, a black nurse who alleged that the hospital where she worked had discriminated against her by "refus[ing] to accommodate her disability despite having made job accommodations for two white nurses." Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (1999) (Sotomayor, J.). Although Norville produced evidence about the better treatment of her white coworkers, she did not persuade the court that other nurses were "subject to the same standards governing performance evaluation and discipline, and [had] engaged in [similar] conduct," and, as a result, lost her claim. *Id.* at 96 (internal punctuation and citation omitted).

[5] *See infra* notes 21-23 and accompanying text and *infra* Part II.B.

[6] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 585 (1999) (Kennedy, J., dissenting).

[7] *Id.* at 618 (1999) (Thomas, J., dissenting).

[8] This view is echoed by courts that have concluded that "equal opportunity" harassers, who harass both men and women, do not violate sex discrimination prohibitions. *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (rejecting sex discrimination claim because "[i]n its totality, the evidence compels the conclusion that [the supervisor] was just [] indiscriminately vulgar and offensive [], obnoxious to men and women alike"). *Cf.* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 345 n.47 (1996) (describing "the dominant 'equality theory' understandings that animate antidiscrimination law" as comparative "(i.e., a man who behaved in the same way would not be subject to discrimination)").

[9] *Cf.* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2291-92 (1995) (pointing out that "*McDonnell Douglas-Burdine* [the burden-shifting framework typically applied in employment discrimination cases] does not by its terms require comparative evidence"); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 206 (2009) (observing that a "similarly situated"

harassment and stereotyping makes clear, objectionable trait-based acts and statements can and do occur in the absence of a comparator.[10] Indeed, in a well-known stereotyping case, the Court specifically found that no comparators existed when Ann Hopkins was discriminatorily denied partnership at her accounting firm.[11] Likewise, the Court unanimously recognized that discrimination, in the form of sexual harassment, could occur in a work environment where only men were present.[12] At the same time, the Court has acknowledged that the presence of a better-treated comparator does not transform permissible acts unto unlawful ones. "Treating seemingly similarly situated individuals differently in the employment context is par for the course," Chief Justice Roberts recently wrote.[13]

Still, the scope of discrimination law continues to shrink.[14] The judicial demand for comparators continues largely unabated outside the harassment and stereotyping contexts,[15] sharply narrowing both the possibility of success for individual litigants[16] and, more generally, the very meaning of discrimination.

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comparator is not required by statute but rather is a way to determine whether difference in treatment is race-based or based on another protected trait) [hereinafter Sullivan, *The Phoenix from the Ash*].

[10] *See infra* Part IV.

[11] Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989).

[12] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). For discussion of other circumstances in which an antidiscrimination norm may be violated absent an actual comparator, including the possible role of a hypothetical comparator, see *infra* Part VI.

In conversation, Charles Sullivan has suggested that harassing acts and stereotyping statements amount to an admission of discriminatory intent. As will be elaborated below, I disagree with that contention, in part because the employers that engage in the acts and make the statements ordinarily defend their conduct as non-discriminatory and the courts that review these kinds of acts and statements often disagree about whether they reflect discriminatory intent. *See infra* Part IV.

[13] Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008).

[14] I develop this claim primarily through identity-discrimination cases brought under federal employment discrimination laws rather than through cases that rest on constitutional equal protection challenges, state law claims, or discrimination claims outside the employment context. Still, as will be elaborated *infra*, the analysis here is not limited to statutory prohibitions against discrimination or to the employment context. Discrimination based on factors other than identity, such as forms of economic discrimination addressed in antitrust law, are beyond the scope here, however, although some of the discussion below may be useful for the conceptualizing of discrimination in those areas as well.

[15] *See infra* Part I.

[16] On the dismal fate of most discrimination claimants, see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444, 449-52 (2004). Employment discrimination plaintiffs who prevail at trial are reversed 42% of the time; judgments for employer-defendants are reversed less than eight percent of the time. *Id.* at 450. *See also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 957-58 (2002); Minna Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50

In this article, I argue that we are seeing the collapse of a heuristic device for observing discrimination into a defining element of discrimination,[17] and that this collapse presents two serious problems. First, methodologically, comparators' deficiencies have come to outweigh their strengths as a device for discerning discrimination. Specifically, the demand for similarly-situated, better-treated others underinclusively misses important forms of discrimination and forecloses most individuals from having even an opportunity to be heard because sufficiently close comparators so rarely exist.[18]

The second problem is conceptual. Since the early 1990s, much of the theoretical work on discrimination has attempted to make legible the many ways in which discrimination occurs beyond the "forms of deliberate exclusion" that are

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WM. & MARY L.J. 1439 (2009) (discussing disproportionately high loss rates for individuals who bring complex discrimination claims).

Some scholars maintain that courts' hostility toward discrimination claims is ideologically-based. *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-569 (arguing that "courts approach cases from a particular perspective that reflects a bias against the claims" and that this ideological bias colors how courts adjudicate discrimination claims); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 21-26 (2006) (asserting that courts resist a structural approach to discrimination claims, in part, because many judges are ideologically opposed to second-guessing decisions by employers). On this view, the choice of the comparator heuristic, which narrows the set of discrimination claims likely to succeed, as explained *infra*, could be seen as both deliberate and in service of ideologically-motivated outcome-oriented aims. Whether or not this is actually the reason for courts' embrace of the comparator heuristic, the lack of transparency and accountability associated with the assumptions and judgments embedded in the heuristic's selection triggers the inquiries I pursue here.

[17] For an extended discussion of heuristics, see Scott Page, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 53-72 (2007). Page explains that heuristics are, in essence, "thinking" rules that generate solutions to problems. *Id.* at 55. Here, the problem lies in the need to discern whether discrimination has occurred when the critical factor – discriminatory intent – is hidden from view, and the comparator heuristic works by reducing the set of likely explanations for the adverse treatment that triggered the claim.

The term "heuristics" came to prominence in cognitive psychology during the 1970s through the work of Daniel Kahneman and Amos Tversky, who "posited that because decisionmaking often involves an abundance of information, time pressures, and an array of possible alternatives, people intuitively and unconsciously use cognitive shortcuts or 'heuristics' to make decisions about probabilities." Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 395-96 (2006) (citing Daniel Kahneman & Amos Tversky, *On the Psychology of Predictio*n, 80 PSYCHOL. REV. 237 (1973); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974), *reprinted in Introduction* to JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982)); *see also* Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556 (2004) (analyzing the "pervasive role" that heuristics play in legal judgments).

[18] *See infra* Parts II and III.

based on relatively thin conceptions of protected traits.[19] Yet when comparators are treated as definitional, these theories cannot gain jurisprudential traction because they too cannot, in effect, be seen by courts.

In the course of this Article's discussion, I consider three of the leading theories.[20] The first is intersectionality theory, which recognizes that although the law designates trait-based protections sequentially, employers and others often target individuals because of their identity as a whole, rather than because of individual traits in isolation from one another.[21] In these situations, an employee, such as a black woman or a disabled older man, for example, claims to have experienced discrimination based on a combination of legally-protected traits. He or she struggles under a comparator regime in part because it can be difficult to decide who is the proper comparator (i.e. is it someone who shares neither of the individual's traits or shares one but not the other?). In addition, because intersectional plaintiffs are often few in number relative to all others in a workplace, decision-makers tend to be skeptical of the comparison's probative value and are typically unwilling to conclude that comparatively worse treatment is attributable to discriminatory intent rather than to the employee's idiosyncratic quirks.

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[19] *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, xx (2001). As will become apparent, first- and second-generation claims are best understood as falling along a spectrum, rather than as sharply distinct, when evaluated through a comparator framework. *See infra* Part II.

[20] Later in the Article and more briefly, I also address additional second-generation theories related to implicit bias and other cognitive psychological research regarding discrimination. *See infra* Part V.C.

[21] For early discussions of intersectionality theory, see, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241, 1243-44 (1991) (exploring "how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the discourses of either feminism or antiracism" (footnote omitted)); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (characterizing and criticizing "gender essentialism – 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"). More recent theory makes the point that the relationship among multiple identity traits is better characterized as multidimensional or cosynthetic, with traits interacting in both dominant and subordinating ways depending on the surrounding context. As Darren Hutchinson has written, "Multidimensionality theorists have attempted to move beyond intersectionality's antiessentialist roots by examining questions of 'intersecting' privilege and subordination – rather than simply focusing on the lives of individuals such as women of color, who are excluded from 'single issue frameworks.'" Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431, 435-36 (2002). For further discussion, see *infra* Part II.B.

The second is identity-performance theory, which conceives identity traits in a thick way and holds that individuals sometimes experience discrimination in connection with stereotypes about behaviors or personal styles associated with their identity group. When operationalized, the theory produces cases in which employees and others seek to show that they have suffered trait-based discrimination because they have, for example, a Spanish-inflected accent or traditionally African hairstyle.[22] Yet a comparator-based approach misses the point in all but the most limited circumstances. For example, we might imagine an employer refusing to promote one Latino but promoting several others and arguing that it was not ethnicity but personal style (i.e. too much Spanish-speaking or too Spanish-inflected an accent) that led to the promotion denial. Unless there is a non-Latino comparator who speaks the same amount of Spanish or has the same accent, the claim will not be legible in an analytic regime that recognizes discrimination only in the presence of a better-treated counterpart.

The third is structural discrimination theory, which focuses on the ways in which the structures and dynamics of workplaces and other environments can effectuate, and obscure, discriminatory intent. Central to this theory are the "patterns of interaction among groups within the workplace [that] . . . over time exclude nondominant groups" based on protected traits but are "difficult to trace directly to intentional, discrete actions of particular actors."[23] Comparators, even if they exist, are unlikely to shed clarifying light on the identity traits that motivated the exclusionary interaction patterns in all but the most blatant situations. The insistence on comparators thus renders imperceptible the link between the protected trait and the reduction in opportunities and increase in adverse treatment.[24]

Stepping back, we see that the comparator methodology has left these theories virtually non-cognizable in the adjudication context and, arguably, by doing so, has depleted antidiscrimination norms of much of their content. Put another way, the synergistic relationship between the law's production of observational tools and those tools' production of law has put comparators in a position to shape, and limit, what courts can see as discriminatory.

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[22] *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000) [hereinafter Carbado & Gulati, *Working Identity*]. For additional literature and discussion of identity performance theory in the context of comparators, see *infra* Part II.B.

[23] Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 665 (2001) (arguing that "discriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior"); Sturm, *supra* note 19.

[24] For further discussion, see *infra* Part II.B.

Several payoffs follow from this clarified picture of the comparator methodology's consequences. For one, by putting into stark relief how little discrimination law is doing in court, we can flesh out more of the story behind the numerous empirical studies showing that discrimination plaintiffs lose their cases at disproportionately high rates.[25] That is, the mismatch between the comparator heuristic and today's work world helps make sense of why so many discrimination plaintiffs lose their cases.

In addition, a more robust understanding of the comparator methodology's conceptual limitations prompts us to revisit Lon Fuller's observations regarding the forms and limits of adjudication,[26] this time in the context of discrimination law. Here we find a longstanding debate about whether discrimination law already overreaches and, even if it does not, whether the newer theories press it to do so.[27] Some argue that because we are largely past the primordial phase of identity discrimination, with its overt or obvious trait-based differentiations, a modified or new paradigm may be needed to redress ongoing issues in the workplace.[28] Others take the position that, whatever one's normative preferences, courts are simply not capable of entertaining the complex, multifaceted forms of discrimination that the newer theories elaborate.[29] Still others maintain that discrimination law has much

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[25] *See supra* n. 16.

[26] Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller defined adjudication as involving the "authoritative determination of questions raised by claims of right" through "the consideration of proofs and reasoned argument," *id.* at xx, and then focused in addressing adjudication's limits, on decision-making that required, for proper resolution, a managerial-style analysis of polycentric and dynamic conflicts. To the extent that cases required judgments that did not rest on proofs and reasoned argument, they seek more than reasonably can be asked of an adjudicator, he argued. *Id.* at xx.

[27] *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* , 84 N.Y.U. L. REV. 97 (2009) (discussing disagreements regarding whether discrimination law prohibits the types of employer conduct captured by structural discrimination theories).

[28] *See infra* Part II.B.

[29] *See, e.g.,* Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 54 (2003) (arguing that "any theory of discrimination that is sufficiently clear to provide guidance . . . cannot deal adequately with the varied, complex, and shifting dynamics and normative meaning of group-based discrimination."); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (describing the difficulty courts have in giving an account of complex cases "that would help integrate such claims into the mainstream of Title VII doctrine.").

In addition, some second-generation theory has challenged the primacy of litigation as a means for redressing discrimination while also recognizing the value of courts working collaboratively with employers to restructure workplaces. *See generally* Sturm, *supra* n. 19, at 522-23 (recognizing the potential for achieving results through litigation where employers and courts engage collaboratively in problem solving); *see also* Susan Sturm, *Law's Role in Addressing Complex Discrimination*, in L.B. Nielsen and R.L. Nelson (eds.), HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 35. Others, however, have moved in directions more attenuated from law entirely, focusing primarily on redressing social norms around identity and discrimination by

it can do to address those whose identity-based injuries were missed by first-generation analyses.

Rather than join this debate directly, my interest here is in using the clarified picture of comparator-centric analysis to gauge the possibilities and limits for both adjudication and theory in this area, however thinly or thickly discrimination is conceived. By shedding light on why the methodology has had such sticking power notwithstanding its striking deficiencies, we can begin to develop a picture of the features necessary to create viable supplements or alternatives.

My claim on this point is that the comparator methodology has retained its popularity in large part because it serves entrenched judicial-legitimacy preferences that favor clearly-defined categories and disfavor sociologically-oriented inquiries. With the advantage of an empirical patina, comparators suggest that the slippery interactions between law and lived experience in this area are susceptible to data-driven analysis based on workplace facts and do not require a judge's subjective perceptions of complex workplace dynamics.[30] This fits with generalized inclination of courts, as I have described elsewhere, to analyze issues involving complex social judgments in ways that appear to turn on "facts," rather than normative judgments.[31]

Along these lines, comparators can also be described as having the virtues of rules because they function as a mechanism that delineates sharply between situations where discrimination might occur and where it might not. As a result, they also constrain courts charged with discerning discrimination and, by the same token, offer predictability to employers interested in avoiding discrimination suits.[32]

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restructuring extralegal conversations. *See, e.g.,* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

[30] *See generally* Part V. Within the employment arena, comparators are likely also appealing because their limited reach enhances the preservation of employer autonomy in workplace decision-making, which has proven to be an enduring value in this area. *See supra* notes 188-190 and accompanying text.

[31] *See generally* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006) [hereinafter Goldberg, *Constitutional Tipping Points*]; Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002) [hereinafter Goldberg, *Anti-Essentialist and Social Constructionist Arguments*].

[32] On these and other virtues of rules, see generally Louis Kaplow, *Rules v. Standards: An Economic Analysis,* 42 DUKE L.J. 557 (1992). Yet, as will be shown below and has been addressed in the context of that debate, rule-like measures and frameworks are typically embedded with unarticulated standard-like assumptions, as is the case for the comparator heuristic, reinforcing that a binary distinction between rules and standards often masks the mutually constitutive nature of those categories. *See generally*, e.g., Kathleen M. Sullivan, *Foreword: The Justices of Rules and*

On the other hand, however, comparators' empirical cast covers the inevitable and contestable judgments about the qualities that make for an acceptable comparison[33] as well as the underlying normative judgments about the nature of discrimination and the capacity of existing law to remedy discriminatory harms.[34]

Standards, 106 HARV. L. REV. 22 (1992) (showing the malleability of rule and standard characterizations) [hereinafter Sullivan, *Rules and Standards*].

[33] *Cf.* Devon W. Carbado, *The Ties that Bind*, 19 CHICANO-LATINO L. REV. 283, 294 (1998) (observing that "our identities are, on some level, unmanageable—fluid, contingent, and contestable").

[34] For example, by design, a comparator framework focuses on capturing formal equality violations but misses the antisubordination theorists' concern with workplace conditions that are formally equal but nonetheless exacerbate trait-related differences among employees. It will miss, for example, the particular consequences for women when an employer refuses to allow breaks or private space for breastfeeding. Likewise, an employer who regularly makes sexualized or race-related comments to all employees would not face a comparator-based claim because all employees would be subjected to the same epithets. Yet the lack of breastfeeding accommodations as well as the making of sexual or racist remarks can surely have a trait-differentiated effect on the ability of women and members of racial minorities to perform in the workplace. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity in the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986) (explaining that "parceling out goods such as workplace benefits according to egalitarian distributive principles may not result in people's positions actually coming out equal in the end"); *see also* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989) (arguing that "neutral" norms perpetuate bias); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, xx (1986) (advocating an antisubordination approach); Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 295 (1988) (suggesting individualization of discrimination claims has undermined efforts to use antidiscrimination law to promote distributive justice in face of historical practice of discriminating against a particular group); Kenneth L. Karst, *Why Equality Matters,* 17 GA. L. REV. 245, 249 (1983) (arguing for approaches to ending discrimination that emphasize substantive rather than simply formal or process equality). Specifically with respect to women in the workplace, see Mary Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247 (1987) (observing that a framework concerned with formal equality will be unable to address job structures that clash with parenting responsibilities typically taken up by women); Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 338 (1999) ("[T]he ban on disparate treatment will not solve the work/family conflict for women who experience actual, rather than perceived, conflicts because they find that there are just not enough hours in the day.").

Still, as Owen Fiss has observed, although "[t]he ideal of equality ... is capable of a wide range of meanings," formal equality, which he describes as the "antidiscrimination principle," has become a "mediating principle" that underlies the concept of equality in both Title VII and the Equal Protection Clause. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976); *see also* Paul Brest, *Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the "antidiscrimination principle" as disfavoring specified classifications and arguing that other inequalities may need to be addressed by different theories and principles, including principles of economic justice). The Americans with Disabilities Act, with its requirement that employers provide reasonable accommodation to employees with qualifying disabilities, is understood as an exception to this general rule.

In the rules/standards debate's terms, we could say, thus, that the rule-like function of the comparator depends fundamentally on normative, and standard-like, judgments about comparators' probative value.

In this light, we can conclude that for all of the judgment-avoidance and other instrumental values comparators may bring to discrimination analysis, courts put too much faith in them. The judicial default to comparators crowds out not only other heuristics but also other more textured conceptions of discrimination, all of which is to the detriment of discrimination jurisprudence and theory.[35] By lowering the comparator heuristic's pedestal, I aim to clear a remaining barrier in the path of first-generation cases, and to illuminate and begin to redress the challenge the comparator heuristic's dominance poses to second-generation theories' translation to jurisprudence.

While the constraining effect of judicial legitimacy concerns must be taken into account, I argue that these concerns need not limit courts' observation of discrimination to instances where comparators can be found. Indeed, an additional payoff from broadening the frame to look at other approaches to seeing discrimination is that the rigidity and blinder-like effects of the insistence on comparators come more clearly into focus. Concomitantly, the virtues of the contextual analysis, currently applied mainly to harassment and stereotyping claims, become clearer, as does that methodology's applicability to other discrimination cases.

Part I of this Article sets the foundation by outlining the ways in which courts rely on comparators as both a default heuristic and an element of discrimination law. Part II then shows that, notwithstanding the occasional value of comparators for revealing discrimination, courts' treatment of comparators as central to discrimination analysis functions primarily to filter out, rather than to facilitate recognition of, numerous types of discrimination. This Part shows, too, the ways in which the insistence on comparators is especially devastating for second-generation claims that rest on intersectionality, identity performance, and structural theories of discrimination. Building on this descriptive presentation, Part III looks critically at the comparisons we do accept, exposes the assumptions embedded in them, and suggests that comparators do not warrant the degree of reliance we now give them as illuminators of discrimination. Part IV considers contextual analysis as a methodological alternative to comparators and shows how this approach governs discrimination cases involving harassment and stereotyping.

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[35] This effort to reduce dependence on a flawed method for observing discrimination dovetails, in a sense, with James Griener's recent effort to challenge the dominance of multiple regression analysis as the chief statistical technique for observing discrimination. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation,* 122 HARV. L. REV. 533 (2008).

Part V asks why comparators have had such sticking power, given their serious limitations and the existence of alternate means of observing discrimination. My aim here is both to shed light on the judicial-legitimacy considerations that reinforce reliance on comparators and to identify factors that may affect the potential for new methodologies to gain traction. Here, I argue that the sociologically-complex nature of identity discrimination along with entrenched concerns about unduly invading employer autonomy lead courts to prefer empirically-styled observational approaches, as these can avoid the appearance of judicial subjectivity in evaluating workplace dynamics. With these factors in mind, Part VI proposes and evaluates several alternate methodologies intended to destabilize the dominance of comparators in discrimination analysis. I consider, as well, whether these alternatives can help recover the space for judicial consideration of antidiscrimination norms that the comparator heuristic's narrow window has largely shut out from consideration.

I. THE EMERGENCE AND INSTANTIATION OF COMPARATORS IN DISCRIMINATION LAW

Observations about the relationship between comparators and discrimination have ancient roots, dating back at least to Aristotle's observation that unequal treatment occurs when likes are not treated alike.[36] Incorporating this view, contemporary discrimination law designates a set of protected characteristics (or, in Aristotle's terms, establishes a group of "likes") and imposes penalties on employers who use these characteristics as a basis for treating employees differently and adversely (in Aristotle's terms, treating the "likes" as "not alike"). Title VII of the 1964 Civil Rights Act, for example, specifies that it is unlawful for an employer to "discriminate . . . because of" race, sex, and the other characteristics protected in the law.[37]

Notably, the statute itself, like other discrimination measures, does not define

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[36] ARISTOTLE, NICHOMACHEAN ETHICS 1131a-b (Martin Ostwald trans., Prentice Hall 1999). Aristotle also acknowledged that difficulty inhered in determining whether comparators were sufficiently like each other. There is some irony in linking Aristotle to today's antidiscrimination regime in that he was arguably more concerned with the problem of treating unlikes equally than in insuring broad-based equality. *Id.* ("[T]his is the source of quarrels and recriminations, when equals have and are awarded unequal shares *or unequals equal shares*") (emphasis added). *See also* SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 19 (2005) (observing that in Aristotle's distributive ethics, "it is unjust for unequals in merit to be treated equally or equals in merit to be treated unequally").

[37] 42 U.S.C. § 2000e-2.

discrimination in a comparative sense.[38] Yet comparators have clear appeal as an aid for gauging whether discrimination has occurred. Initially, they make visible the occurrence of comparatively adverse treatment by showing that not all employees have been fired, disciplined or otherwise unfavorably treated. And then, comparison of the better- and worse-treated employees helps isolate whether the protected trait is the reason for the adverse action. If an employer has two employees who are similar but for X characteristic, and the employer treats employee X worse than employee not-X, we are generally comfortable inferring that X is the basis, or cause, for the different treatment.[39] As the Second Circuit explained, "In the run of the mill discrimination cases, . . . a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who suffered no such fate."[40]

Of course, an inference is a logical determination from known facts,[41] not a guarantee of what has actually occurred. But that is all the law can reasonably require[42] if it is to find discrimination where the employer has denied having discriminated.[43]

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[38] It does elaborate the areas in which unlawful adverse treatment might occur, including hiring and firing but also "compensation, terms, conditions or privileges of employment." 42 U.S.C. § 200e-2a (2006).

[39] *See* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 11 (1987) (finding that disparate treatment on basis of race or gender is an obvious example of discrimination, but proceeding to analyze "the guise of objectivity and neutrality" that afflicts legal reasoning in our society).

[40] Abdu-Brisson v. Delta, 239 F.3d 456, 467 (2d Cir. 2001); *see also* Billingsley v. Jefferson County, 953 F.2d 1351 (11th Cir. 1992) (finding sufficient evidence of race discrimination where black employees were fired for excessive absences while white employees were suspended for three days); *see also, e.g.,* Bradley v. Americold Servs., Case No. 97-2161-KHV, 1997 WL 613335 (D. Kan. Sept. 8, 1997) (denying summary judgment where employer terminated plaintiff for allegedly threatening harm to co-worker if co-worker did not support union, where employer only suspended supervisor for threatening to kill two employees). *But see, e.g.,* Flores v. Preferred Technical Group, 182 F.3d 512 (7th Cir. 1999) (rejecting ethnicity discrimination claim where plaintiff was terminated for breaking a work rule violated by twenty-seven other employees and she and her sister (who was fired for a different reason) were the only two recognizably Hispanic employees and the only two fired).

[41] *See* AMERICAN HERITAGE DICTIONARY 1717 (4th ed. 2000). *See also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) (citing American Heritage Dictionary definition of "inference"); BLACK'S LAW DICTIONARY 781 (7th ed. 1999) (defining inference as "[a] conclusion reached by considering other facts and deducing a logical consequence from them").

[42] *Cf.* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that "[t]he law often obliges finders of fact to inquire into a person's state of mind" and that "[it] is true that it is very difficult to prove what the state of a man's mind at a particular time is").

[43] Indeed, it is all that the preponderance of the evidence standard governing civil actions demands as well. *Cf.* Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2351 (2009) (noting application of preponderance of the evidence standard in context of age discrimination case).

A. *Comparators as the Default Methodology for Observing Discrimination*

It is not surprising, then, that courts have long looked to comparators as a tool to aid in discerning whether impermissible discrimination has occurred. As the Supreme Court explained early on in its employment discrimination jurisprudence, evidence that an employer treated comparable white workers better than a black employee would be "especially relevant" to showing discrimination.[44]

The comparator typically becomes relevant at one of two points in litigation.[45] In "single-motive" cases where the question is whether the employer acted with a discriminatory or benign motive, some courts consider comparators at the prima facie stage of what is commonly known as the *McDonnell Douglas* burden-shifting analysis.[46] They insist that an employee produce a comparator at the outset of a discrimination claim; only after that will the court shift the burden and require an employer to proffer a nondiscriminatory reason for its adverse action. Other courts require comparators only at the third, pretext phase of the sequence.[47] This

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[44] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court recognized that other forms of evidence "*may* be relevant to any showing of pretext," including "facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." *Id.* at 804-05 (emphasis added). The Court added that "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* But the Court also "caution[ed] that such general determinations [about discrimination patterns from statistical analysis], while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." In effect, the Court suggested, absent an admission of racial motivation from the employer, a comparator would likely be the most effective means for showing whether impermissible discrimination had occurred because it could most reliably establish that race discrimination was a proximate cause for the employer's actions.

[45] *See* Sullivan, *The Phoenix from the Ash*, *supra* note 9, at 208 ("[S]ometimes the presence or absence of a comparator is assessed by the court in determining whether plaintiff has made out her prima facie case" but "more commonly, [] the court tends to find comparators critical for pretext proof").

[46] *See, e.g.,* Nagle v. Vill. of Calumet Park, 554 F.3d 1106, 1119 (7th Cir. 2009) (holding that plaintiff "cannot establish a prima facie case of discrimination because . . . he cannot show that similarly situated individuals were treated better"); Adebisi v. Univ. of Tenn., No. 08-5357, 2009 WL 2031865, at *1 (6th Cir. July 15, 2009) (ruling that plaintiff "failed to make a prima facie showing of race discrimination, because he failed to show that a similarly-situated, non-protected person was treated more favorably"); Sims v. Burlington Coat Factory Warehouse of Ala., Inc., Case No. 08-13618, 2009 WL 1393621, at *5-9 (11th Cir. May 20, 2009) (finding that plaintiff "failed to establish a prima facie case of race discrimination . . . because she had not identified any similarly situated employees outside of her protected class who had been treated more favorably").

[47] *Cf.* King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008) ("Instances of disparate treatment can support a claim of pretext, but King has the burden of proving that she and the disparately treated Caucasian substitute teachers were 'similarly situated in all relevant respects.'"). Not each step of the sequence (prima facie case; non-discriminatory reason; showing of pretext) is reached in every case.

juncture gives the employee an opportunity to show that the employer's *real* reason for acting adversely was the protected characteristic, notwithstanding any non-discriminatory reasons the employer advanced in response to the prima facie case.[48]

Notably, while the widely applied *McDonnell Douglas* burden-shifting framework facilitates examination of the challenged employment decision, it provides no guidance as to the techniques a court should use to sift through the competing accounts of an employer's action. Neither does the "mixed-motive" burden-shifting framework, in which the employee shows at the outset that the protected trait was among the reasons for the employer's actions and the employer, in response, attempts to show that it would have taken the same adverse act even without considering the protected trait.[49]

Comparators become relevant to the analysis, then, because they help expose that "likes" have been treated in an "unlike" fashion and give rise to the inference that discrimination is the reason for that differentiation. The Supreme Court has regularly affirmed their value for this purpose[50] as have lower courts, which also

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[48] Although the difference between these approaches can have great significance for an individual case, I sidestep this debate here as my concerns with overwork of the comparator heuristic exist at all stages of the adjudication process. For further discussion, *see, e.g.*, Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839, 855-63 (2002) (arguing that requiring comparative evidence at prima facie stage "violates the statutory language and also has a number of other problems"); Malamud, *supra* note 9, at 93 (arguing that "[s]erious problems inhere in requiring the plaintiff to produce comparative data at the prima facie stage of the case"); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 185 (2005) ("[S]ome courts have taken it too far and found this comparator evidence a necessary part of the prima facie case."); For further discussion, *see, e.g.*, Michael Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1289-1292 (2008) (explaining that plaintiffs can introduce evidence of discrimination at both prima facie and pretext stage, leading to "multiple and overlapping claims and arguments" in discrimination litigation").

[49] In contrast to the *McDonnell Douglas* analysis, where the individual plaintiff bears the burden of persuasion throughout the adjudication process, in a mixed-motive case, once the individual has established the employer's reliance on a protected trait, liability attaches and the employee will recover damages *unless* the employer can show persuasively that it would have "taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B) (2000). In that case, the employee can still obtain certain kinds of declaratory or injunctive relief as well as attorney's fees and costs. *Id.*

[50] *See, e.g.,* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (comparative evidence "may suffice, at least in some circumstances, to show pretext"); O'Connor v. Consol. Coin Co., 517 U.S. 308, 312 (1996) (assuming that a comparator would be useful to show that the employer had acted "*because of*" the plaintiff's age) (emphasis in original); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (observing that a litigant "might seek to demonstrate that [the employer's] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position.").

typically treat comparators as their preferred lens for evaluating discrimination claims.[51] Commentators have observed, as well, that "the first step in most discrimination cases is for the plaintiff to identify an individual of another race (or the opposite sex, etc.) who was treated more favorably than she – a comparator."[52]

The comparator heuristic is used to observe discrimination in other contexts as well. With respect to the use of peremptory strikes of jurors during voir dire, for example, the Court has struggled to determine how best to see whether discriminatory intent, rather than permissible instinct, motivated the strike. After an early decision to allow prosecutors wide latitude in defending their strikes against race discrimination claims, *Swain v. Alabama*, 380 U.S. 202 (1965), the Court moved to a burden-shifting format similar to *McDonnell Douglas*, where, after the defendant advanced a prima facie case and the government offered a legitimate justification for its strike, the burden would return to the defendant to show that the government's justification was pretextual. Batson v. Kentucky, 476 U.S. 79 (1986). Most recently, in applying this framework to a charge of racially motivated peremptory strikes, the Court reinforced the value of comparison in illuminating whether discrimination had occurred. The Court first considered statistics showing the disproportionately high use of peremptory strikes against black potential jurors and then observed that "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

[51] Gossett v. Oklahoma *ex rel* Board of Regents for Langston University, 245 F.3d 1172 (10th Cir. 2001) (explaining, in a sex discrimination suit brought by man who had been involuntarily withdrawn from state university nursing program, that "evidence that the defendant treated the plaintiff differently from others who were similarly situated . . . is especially relevant to a showing of pretext.") (citation omitted); Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000) (citing Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997)) (noting that a plaintiff seeking to show discriminatory conduct by the defendant "often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness"). As the Massachusetts Supreme Judicial Court put the point, similarly situated comparators are "usually the most probative means of proving that an adverse action was taken for discriminatory reasons," even if they are "not absolutely necessary." Trustees of Health and Hosps. of the City of Boston, Inc. v. Mass. Comm'n Against Discrimination, 449 Mass. 675, 682-83 (2007) (citation omitted). For additional examples of lower court reliance on comparators, see *infra.* at notes xx and accompanying text.

[52] Sullivan, *The Phoenix from the Ash, supra* note 9, at 202. Sullivan adds:

> The reality on the ground is that discrimination cases today increasingly turn not on whether the plaintiff has proven her prima facie case or established that the "legitimate nondiscriminatory reason" is a pretext for discrimination (although the courts continue to invoke the *McDonnell Douglas* mantra), but rather on whether the plaintiff has identified a suitable 'comparator' who was treated more favorably than she.

Id. at 193. *See also* Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 Notre Dame L. Rev. 109 (2007) ("The most common form of evidence [in cases based on unconscious discrimination or bias] is comparative evidence."); Lidge, *supra* note 48, at xx (describing the use of a comparator as "a common way of proving" discrimination on account of a protected characteristic). Treatises take this position as well. *See, e.g.*, 1-8 EMPLOYMENT DISCRIMINATION § 8D.04, Note 3 ("The most common way of demonstrating that an employer's explanation for an adverse employment action is pretextual is to show that similarly situated persons of a different race or sex received more

B. *Comparators as a Defining Element of Discrimination Law*

In much of discrimination law, however, comparators have taken on an importance beyond their service as a potentially useful heuristic for seeing discrimination. They are, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition.[53] On this view, discrimination occurs *only* when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination. Comparators thus both define discrimination and serve as the heuristic for seeing it.

Lower courts and commentators regularly take this position, insisting that litigants identify comparators before their cases can proceed and treating the absence of a comparator as fatal to a claim.[54] An observation by the Eleventh Circuit in a discrimination case brought by a black doctor who had been removed from his position at a federal correctional institution is illustrative: "[T]he plaintiff *must* show that his employer treated similarly situated employees outside his classification more favorably than [himself]."[55]

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favorable treatment."); § 8.02[6] (where plaintiff alleges failure to hire based on discrimination, the most common method of making a prima facie case "is to show that the employer subsequently hired someone for the position, and that the hired person had equal or lesser qualifications compared to those of the plaintiff").

[53] Justices Kennedy and Thomas expressed such a view. *See supra* notes 6-7 and accompanying text.

[54] *See, e.g.*, Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316-17 (11th Cir. 2003) (finding that plaintiff could not sustain her discrimination claims because she "[could not] show that similarly situated employees of other races were treated better"); Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012 (7th Cir. 2000) (holding that to establish prima facie case for discriminatory discharge, plaintiff must show that "she was discharged while other, similarly-situated employees who were not members of the protected class were treated more favorably"); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (ruling that plaintiff "did not produce evidence sufficient to support a reasonable inference that her termination was the result of race discrimination" because she failed to identify satisfactory comparators); 3-47 EMPLOYMENT DISCRIMINATION § 47.05 (stating, in the context of pregnancy discrimination, that "if the employee cannot show that she was in fact treated differently from similarly situated non-pregnant employees, her claim will fail"); 3-54 LABOR AND EMPLOYMENT LAW § 54.02 (observing that where plaintiff alleges discrimination in hiring, "failure of the plaintiff to present evidence of comparative qualifications of persons subsequently hired was sometimes viewed as fatal to a plaintiff's prima facie case"). *But see* 3-47 Employment Discrimination § 47D.05 (analyzing *EEOC v. Nw. Mem'l Hosp.*, 858 F. Supp. 759 (N.D. Ill. 1994), where "plaintiff's failure to provide comparative evidence was not fatal to her case").

[55] Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). *But see* Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 545-46 (4th Cir. 2003) (maintaining that although comparative evidence may be "helpful," plaintiff "is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim").

One analytic point is crucial here. If comparators are fundamental to either discrimination statutes or to our theoretical conceptualization of discrimination, we can hardly object to their pervasive use. On the other hand, if comparators are merely one choice among several for how courts might go about the task of perceiving discrimination, as I contend here, we have reason to be more concerned. I take up these questions in Parts III and IV. At this moment, most important is the clear sense of comparators' dominance in shaping discrimination jurisprudence.

II. THE COMPARATOR DEMAND AS BARRIER TO DISCRIMINATION CLAIMS

The judicial demand for comparators turns out to function largely as a barrier to discrimination claims, accounting in part for the low success rates of these claims in ways that have gone underappreciated by courts and commentators. This Part catalogues the sets of circumstances in which courts' insistence on the production of comparators inhibits or precludes discrimination claims.[56] As the discussion shows, the comparator demand poses a serious obstacle both practically, in that comparators are simply hard to find even in workplaces with a diverse group of employees, and conceptually, in that, under some discrimination theories, the existence of a comparator is simply not relevant to the question whether discrimination has occurred.

For analytic purposes, I group these difficulties according to first- and second-generation discrimination claims, with the distinction turning on how thickly discrimination is conceptualized. Although the two types are really points along a spectrum rather than mutually exclusive sets, the distinction is useful for illuminating several different consequences of, and I would argue, problems with, the comparator demand. The first-generation cases described below rest on generally accepted theories about both the kinds of discriminatory acts that are or should be prohibited by governing statutes and the scope of the traits protected under those statutes. These are, in other words, claims of sex, race, or other types of discrimination that would be easily recognizable to the person on the street even if they are not easily proven in court. The second-generation cases, by contrast, offer a thicker conceptualization of discrimination that has not achieved the same popular traction but are nonetheless thought, in much of the scholarly literature, to be the most potentially valuable next steps in bring discrimination law closer to lived experience. As will become apparent, a comparator-obsessed legal regime throws up a serious barrier to many first-generation claims and renders second-

[56] I leave to the following Parts consideration of the impact of the comparator approach on the meaning of discrimination.

generation claims even less likely to succeed.

Before typologizing the challenges that the resort to comparators presents for different kinds of discrimination claims, one aspect of the comparator jurisprudence warrants attention because of its blinder-like consequences for both first- and second-generation cases. When applying a comparator-based analysis, courts typically disregard or discount evidence that is not associated directly with the comparator. Adverse incidents directed at the individual bringing the complaint, such as hostile remarks or treatment by non-comparator co-workers or other supervisors, are usually treated as "stray" remarks not worthy of serious consideration.[57] For example, as the Eleventh Circuit observed in a housing disability discrimination case that challenged a city's use of zoning ordinances to close down a drug-rehabilitation halfway house, "[e]vidence that neighbors and city officials are biased against recovering substance abusers is irrelevant absent some indication that the recoverers were treated differently than non-recoverers."[58] This deliberately acontextual approach, with its "willingness to continue to compartmentalize various aspects of plaintiff's proof to find that none is sufficient,"[59] is, I contend, a side effect of the comparator analysis's dominance and the skepticism it portends toward discrimination claims.[60]

A. *The Comparator Default and the First-Generation Cases*

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[57] The doctrine emerged from a comment by Justice O'Connor in *Price Waterhouse v. Hopkins*, where she wrote that "stray remarks in the workplace, statements by nondecisiomakers, and statements by decisionmakers unrelated to the decisional process itself" should not be treated as proving the connection between an employer's acts and the protected trait. 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

[58] *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1217 (11th Cir. 2008). In the case, which was brought under the Fair Housing Act, neighbors and city commissioners had made statements about not wanting recovering drug users in their town, but the court deemed the statements irrelevant because of the absence of a comparator. *Id*.

[59] Sullivan, *supra* note , at 216 n.93.

[60] This compartmentalization effect is even more notable because it runs contrary to the Court's suggestion that all evidence must be taken together in evaluating a discrimination claim. *See* Reeves v. Sanderson Plumbing, 530 U.S. 133, 148-49 (2000) (identifying as relevant, *inter alia*, the "strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employee's case").

For a critique of the "stray" remarks doctrine, see, e.g., Kathryn Burkett Dickson, Charlotte Fishman, & Leslie F. Levy, *Ten Lessons for Practitioners about Family Responsibility Discrimination and Stereotyping Evidence,* 59 HASTINGS L.J. 1285, 1293-96 (2008). These authors argue that "[s]ocial science research has shown the value of 'stray remarks' as providing a window into the hidden biases in the workplace," and that "[a]s social science research mounts and more courts acknowledge that '[c]ontext matters' –indeed it matters a lot—in these cases, the 'stray remarks' doctrine may be cast aside." *Id.* at 1296 (citing Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006)).

The comparator demand's inhibiting effect on discrimination claims can be seen in five primary ways. In many cases, the potentially comparable co-workers are not seen as sufficiently comparable because of job responsibilities or workplace performance issues. In others, potential comparators are seen as insufficiently probative because of concerns about small sample size. In still others, the comparators are not seen as probative because the individual bringing the claim has a unique position in the workplace; works in an environment that is homogeneous with respect to the relevant trait; or has a trait-related aspect of identity, such as pregnancy, that is treated as inherently not comparable to others outside the trait-bearing group.

Most commonly, the comparator default blocks discrimination claims because courts find there is no one sufficiently comparable to the employee-plaintiff to show that the protected characteristic, rather than some other factor, was the reason for the challenged adverse treatment.[61] Often, this is because the plaintiff's best evidence comes from a comparison to an employee with a different supervisor[62] or with insufficiently similar job responsibilities,[63] or, in the case of a challenge to disparate enforcement of a disciplinary rule, to an employee not

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[61] *See, e.g.*, *Holifield*, 115 F.3d at 1563, in which the court states:

> Holifield has failed to produce sufficient affirmative evidence to establish that the non-minority employees with whom he compares his treatment were similarly situated in all aspects, or that their conduct was of comparable seriousness to the conduct for which he was discharged. Having failed to meet his burden of proving he was similarly situated to a more favorably treated employee, Holifield has not established a prima facie case.

Id.

[62] *See, e.g.*, Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997). *Aramburu* held that "[s]imilarly situated employees," for the purpose of showing disparate treatment in employee discipline, "are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *Id.* at 1404 (internal quotation marks omitted). The Sixth Circuit has stated:

> [T]o be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Hollins v. Atl. Co., Inc., 188 F.3d 652, 659 (6th Cir. 1999). In its recent decision in *Sprint/United v. Mendelsohn*, 128 S.Ct. 1140 (2008), the Court declined to embrace a categorical rule regarding whether evidence of discrimination had to come from comparators with the same supervisor.

[63] For example, in addressing a sex discrimination claim by a female secretary, the Second Circuit wrote: "Given their quite different positions, no rational inference of disparate treatment on the basis of gender could be drawn from evidence that [two male employees] were not given the secretarial-type tasks assigned to" the female plaintiff. Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998).

subject to the same disciplinary standards.[64] Although the circuits vary somewhat in how closely related comparators must be, with some requiring that comparators be "similarly situated in all material respects"[65] and others insisting on "nearly identical" comparators,[66] all agree, as does the Supreme Court, that the fit must be tight.[67] Indeed, the only comparator requirement to cross the line to reversible error came from lower courts that insisted the difference between comparators must be "so apparent as virtually to jump off the page and slap you in the face."[68] As this set of cases reveals, although the comparator heuristic might work well for observing discrimination in large, Taylor-esque workplaces, where multiple workers engage in tasks that are susceptible to relatively straightforward comparison,[69] those workplaces and employment structures are not the mainstay of today's mobile economy.[70] Given the flexible and dynamic nature of many

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[64] *See, e.g.*, Wright v. Murray Guard, Inc., 455 F.3d 702, 710 (6th Cir. 2006) (holding that, in the disciplinary context, comparators must have engaged in acts of "comparable seriousness" and be "subject to the same standards") (internal citations omitted).

[65] *See* Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996), *quoted in* Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators*, 10 U. PA. J. BUS. & EMP. L. 459, xx (2007-08). Beckles's comment reviews in some detail the standards set out in several circuits.

[66] As the Sixth Circuit wrote in the context of a disparate discipline complaint, "the 'comparables' [must be] . . . similarly situated *in all respects*. They must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1993) (emphasis added); Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1185 (11th Cir. 1984) (stating that "a plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if he shows that he was qualified for the job from which he was fired, and 'that the misconduct for which [he] was discharged was *nearly identical* to that engaged in by" an employee outside the protected class whom [the employer] retained) (citation omitted) (emphasis added).

[67] *See, e.g.,* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457-58 (2006) (citing Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)) (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" (internal quotation marks omitted)); Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that qualifications evidence standing alone may establish pretext where plaintiff's qualifications are "clearly superior" to those of selected job applicant); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that a factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job").

[68] While rejecting this formulation, the Court endorsed the requirements in the cases cited *supra* note 67, that, to prevail on a discrimination claim, a promotion applicant must be "clearly superior" or "significantly better qualified" than his or her comparator. *Id.* (citations omitted).

[69] *See generally* TAYLOR, *supra* n. 2.

[70] *See generally* KATHERINE STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).

contemporary jobs, the insistence on comparators seems starkly mismatched with the work-world as it currently operates.

In other instances, the difficulty is that courts are unwilling to treat comparators as a credible means of seeing discrimination, even when they can be found, because of concerns about sample size.[71] As a federal district court observed in a race and sex discrimination case brought by a black woman who worked as a civilian for the army, the "generally small sample size and lack of historical data further undermined the evidentiary value of the statistics" showing that black women were underrepresented in senior-grade Army positions.[72] In systemic disparate treatment challenges, the Court has similarly observed that "small sample sizes produce statistical analyses with little probative value."[73] In other words, when an employee relies on comparative evidence but is either alone or one of few with his or her protected trait, courts have been skeptical that the protected identity trait, rather than a quirk of the employee, is the reason for the adverse action. Current iterations of intersectionality theory suggest that this sort of skepticism about comparison's revelatory effects is well-founded for *all* comparisons, in that all individuals have multidimensional aspects of their

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[71] This presents a particular challenge for individuals who bring discrimination claims based on more than one protected characteristic who tend to be unique, or in a small minority, in their workplaces. *See infra* notes xx and accompanying text.

Even in less complex, first-generation-type cases, sample-size issues can be impediments for individuals bringing discrimination claims. For example, in a case brought by black female students who argued that they were punished more harshly for hazing sorority pledges than were comparable white students, Judge Posner rejected the proffered comparators as inadequate. He observed, in addition, the difficulties with inferring discrimination absent identical comparators.

> In a large number of dissimilar cases, if there were reason to think the dissimilarities were randomly distributed and therefore canceled out, an inference of discrimination might be drawn. And likewise in a small sample if the cases were identical except for a racial difference. But in a very small sample of dissimilar cases, the presence of a racial difference does not permit an inference of discrimination; there are too many other differences, and in so small a sample no basis for thinking they cancel out.

Williams v. Wendler, 530 F.3d 584, 588-89 (7th Cir. 2008).

[72] Judge v. Marsh, 649 F. Supp. 770 (D.C. Cir. 1986). *See also* Morita v. S. Cal. Permanente Med. Group, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied,* 429 U.S. 1050 (1977) ("[S]tatistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded."). The problem with a small sample size is that "slight changes in data can drastically alter appearances." Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1076 (9th Cir. 1986). *See also* Contreras v. City of L.A., 656 F.2d 1267, 1273 n.4 (Cal. Ct. App. 1981) ("Statistics are not trustworthy when minor numerical variations produce significant percentage fluctuations.").

[73] *See, e.g.,* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 582-87 (1979); Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620-21 (1974) (criticizing the "the simplistic percentage comparisons" used by the Court of Appeals as "lack[ing] real meaning in the context of this case" and affirming "the District Court's concern for the smallness of the sample"). *Cf.* Connecticut v. Teal, 457 U.S. 440, 463 n.7 (1982) ("Courts have recognized that the probative value of statistical evidence varies with sample size in disparate-impact cases").

identities and positions in a workplace, meaning that very close comparisons are nearly always hard to come by.[74] In this sense, the comparator analysis can be seen as mismatched not only with today's workplaces, as suggested above, but also with contemporary understandings of identity.[75]

In addition to the difficulties that arise where potential comparators may actually exist in a workplace, there are several types of first-generation cases in which there are simply no comparators to choose from. In some cases, an employee's position is unique, which is particularly common for high-level employees who cannot credibly claim that their responsibilities are closely comparable to anyone else's in the firm. One article cites the "class of one" of Carleton S. Fiorina, who lost her position as President and Chief Executive Officer of Hewlett-Packard and, had she wanted to bring a sex discrimination claim, would have been precluded if required to show a comparator.[76] This difficulty also arises in academic settings where tenure is being considered.[77] More generally, in a knowledge-based economy, the blurring of lines between higher and lower-level jobs increasingly precludes employees from finding comparators. As a result, even employees who are less senior will often hold a unique position and will similarly find themselves without a comparator.[78] In addition, for contractual or other reasons, "cases occasionally arise where a plaintiff cannot show disparate treatment only because there are no employees similarly situated to the plaintiff," as the Second Circuit observed.[79] In that case, the Pan Am pilots

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[74] For additional discussion of intersectionality theory, see *infra* notes xx and accompanying text.

[75] For more on the assumptions inherent in comparator proof, see *infra* Part III.

[76] Beckles, *supra* note 65, at 472.

[77] Mark Adams argues that the use of "collegiality" as a criterion for tenure awards

> may be . . . a pretext for discrimination. Even when not involving intentional discrimination, the use of collegiality in determining tenure may result in discrimination due to the real differences in which men and women, and people of different races, view the world and relate to others, thereby creating difficulties for women and minorities to achieve tenure.

Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 87 (2006). *See also* Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (identifying failure of federal anti-discrimination laws to protect women from discrimination in high-level professional jobs and developing systematic program to combat discriminatory tenure decision in academic appointments).

[78] *See, e.g.,* Sylva-Kalonji v. Bd. of Sch. Comm'rs of Mobile County, 08-0207-KD, 2009 WL 1418808, at *6 (S.D. Ala. May 20, 2009) (finding proposed comparator inadequate where plaintiff, a data clerk, and proposed comparator each performed "unique duties"). *But see* Jackson v. FedEx Corporate Servs., Inc., 518 F.3d 388, 396-97 (6th Cir. 2008) (failure to identify identically situated comparator not fatal to Title VII claim where plaintiff worked in "unique" position).

[79] Abdu-Brisson v. Delta Airlines, 239 F.3d 456, 467 (2d Cir. 2001). In that case, the court found that former Pan Am pilots who joined Delta Airlines had made out a prima facie case of age discrimination, even though they had no comparator pilots, but ultimately found that the Pan Am

who had joined Delta Airlines were not positioned similarly to any others for purposes of their age discrimination claim because of the nature of the agreements accompanying their hire.[80] Thus, again, we see the lack of fit between the comparator demand and the structure of many, if not most, contemporary jobs.

In addition, the plaintiff's particular situation with respect to workplace conduct or performance might be unique enough to make it hard to come by another comparable employee, even if the workplace has potential comparators in it. In one pregnancy-discrimination case, for example, an employee was fired for excessive tardiness the day before her maternity leave was set to begin, and lost her case because she presented no evidence that comparable employees were treated differently. The Seventh Circuit, per Judge Posner, "doubt[ed] that finding a comparison group would be that difficult" and imagined a "hypothetical Mr. Troupe, who [was] as tardy as Ms. Troupe was, also because of health problems, and who [was] about to take a protected sick leave growing out of those problems" at the employer's expense. Perhaps that particular employer had many workers fired on the verge of taking extended sick leaves, but in most, if not all workplaces, the comparator would be far more difficult to find than Judge Posner suggests. Indeed, as the Third Circuit wrote in a case decided shortly after *Troupe*, the plaintiff "has not made a showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave. Of course, it was difficult for her to make such a showing because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy."[81]

In other cases, the lack of comparators arises because the relevant part of the workplace is homogeneous, in the sense that all potentially comparable workers

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pilots failed to rebut the non-discriminatory reasons offered by the airline for their action. On the comparator point, the court wrote:

> While Delta is a long way from the days when it had only a single employee, the 488 Plaintiffs in this case find themselves in a similar conundrum: they are in a class all by themselves. Because all the Pan Am pilots hired by Delta were subjected to the same three employment terms challenged in this action, and because the Pan Am pilots differed materially from the pre-APA Delta pilots in terms of their airline of origin and career expectations, there are no Delta employees similarly situated to Plaintiffs who did not suffer the adverse employment actions.

Id. at 467-68.

[80] *See also* Thomas v. Runyon, 108 F.3d 957, xx (8th Cir. 1997) (rejecting discrimination suit by black non-union supervisor who was involuntarily transferred following conflict with white subordinate because the plaintiff could not identify similarly situated white supervisor who had received better treatment); Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir. 1997) (observing that "these are only a limited number of potential 'similarly situated employees' when higher level supervisory positions for medical doctors are involved").

[81] *In re* Carnegie Ctr. Assocs., 129 F.3d 290, 297 (3d Cir. 1997).

share the same trait that is the basis for the discrimination claim. In those settings, a comparator regime will not recognize most forms of discrimination.[82] Yet this type of occupational segregation remains widespread, which means that the comparator demand leaves large swaths of employment outside the reach of discrimination protections. Not surprisingly, sex-segregated jobs are particularly common.[83] In one illustrative case, all of the relevant secretaries were female, which led the Second Circuit to reject a secretary's sex discrimination case because no comparator existed. "Although she complains that she was treated less favorably than two employees who held positions comparable to her secretarial position," the Court wrote, "both of those employees were women."[84] From this, the court concluded that "[t]here was no evidence that [the plaintiff] was treated differently because of her gender."[85] Likewise, in a sex discrimination case brought by a mother with young children whose preferred time slot was denied after she submitted a transfer request, the court held that "to establish a prima facie case based on a 'sex plus' theory of employment discrimination, the plaintiff must show that similarly situated men were treated differently than women."[86] Her claim failed because she could not provide a comparator in the form of a man with young children; there were no such men in her workplace.

The comparator demand has similarly been a barrier to discrimination claims in racially homogeneous workplaces. Typical is this observation in a discrimination case brought by an employee of Nigerian origin that was affirmed by the Second Circuit: "the other unit [] caseworkers were all African, so while Adenji was the only person in [the unit] assigned homemaking work while the others were assigned protective diagnostic work and homemaking work . . . he cannot claim that employees outside the Title VII protected class were treated differently than those within the protected class."[87]

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[82] As noted earlier and as discussed in depth *infra,* comparators are typically not required for sexual harassment claims, so it is possible that sort of claim will be recognized even in a homogeneous environment.

[83] For a global analysis of sex-based occupational segregation, see MARIA CHARLES & DAVID B. GRUSKY, OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN (2004).

[84] Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998). As Vicki Schultz has explained in exploring the way that "lack of interest" arguments have been used to justify sex-based differences in employment, a homogeneous workplace does not necessarily indicate the absence of troubling gender bias. *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 (1990).

[85] *Galdieri-Ambrosini*, 136 F.3d at 291.

[86] Hess-Watson v. Potter, No. 703CV00389, 2004 WL 34833, at *2 (W.D. Va. Jan. 4, 2004).

[87] Adenji v. Admin. for Children Servs., 43 F. Supp. 2d 407 (S.D.N.Y. 1999), a*ff'd* 201 F.3d 430 (tbl.); *see also* Nieto v. L&H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997) (treating fact that 87% of defendant's workforce were minorities as evidence against plaintiff's race discrimination claim); Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3rd Cir. 1996) (stating that there

And then there are the pregnancy- and breastfeeding-related cases in which there can be no precise comparator by reason of the different reproductive capacities of men and women, and less literally similar comparators are generally not entertained by courts.[88] Most notorious, perhaps, is the Supreme Court's distinction between pregnant and non-pregnant people which led the Court to conclude that pregnancy discrimination did not amount to sex discrimination. In *Geduldig v. Aiello*, where this distinction first appeared, the question was whether California's exclusion of pregnancy from the state disability program's coverage violated the Equal Protection Clause.[89] The Court saw the problem in this way:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups-pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[90]

The Court took the same approach to a claim that pregnancy discrimination amounted to sex discrimination under Title VII, reinforcing that the relevant comparison was between "pregnant women and non-pregnant persons."[91] Consequently, "[a]s a matter of law," at that time, "'an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all.'"[92] While Congress overrode the Court's conclusion in *Gilbert* with the Pregnancy Discrimination Act,[93] which amended Title VII's definition of sex to include pregnancy-based distinctions, the point for our

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would be insufficient evidence of gender discrimination against male employee who was denied promotion that was subsequently awarded to female employee where "there is evidence that the decisionmaker was a man and that the great majority of the employees in the job category at issue were men") (citation omitted). *But see* Legrand v. Tr. of Univ. of Ark. at Pine Bluff, 821 F.2d 478, 480 (8th Cir. 1987) (reversing as legal error district court ruling that plaintiffs had failed to establish prima facie case because "the overwhelming majority of employees in the Physical Plant is black").

[88] These cases, which present some of the most interesting questions related to the role of the comparator heuristic, will be discussed in more detail in later parts. *See infra* notes xx and accompanying text.

[89] 417 U.S. 484 (1974).

[90] *Id.* at 497 n.20. And again: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

[91] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[92] AT&T v. Hulteen, 129 S.Ct. 1962, 1970 (2009) (quoting *Gen. Elec. Co.*, 429 U.S. at 136).

[93] Congress passed the Pregnancy Discrimination Act in 1978, expanding the definition of "sex" in Title VII of the Civil Rights Act of 1964 to include unequal treatment "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).

purposes is that the comparator heuristic missed the possibility, recognized by both the dissent[94] and Congress, that the lack of a comparator did not necessarily mean the absence of discrimination.

Sex discrimination challenges that have been brought related to breastfeeding rules have fared about as well as those in *Geduldig* and *Gilbert*, with courts finding that the absence of a comparator for breastfeeding women rendered it unreasonable to see the rules as discriminatory based on sex. In a decision derided by commentators[95] but representative of other decisions in this area, the Sixth Circuit sustained a challenge to Wal-Mart's ban on breastfeeding in public areas of the store in the context of a public accommodations suit making a state-law sex-discrimination claim.[96] The court insisted that a comparator analysis be followed, holding that "for there to be impermissible sex discrimination, there must be one gender that is treated differently than another."[97] Continuing, the court explained that no sex discrimination had occurred "[b]ecause the only restriction Wal-Mart placed on their business invitees was a prohibition on a type of feeding that only women could do," so there was "no comparable class for comparison."[98] The court also pointed out that the same insistence on a comparator had doomed several other challenges to breastfeeding-related restrictions, including one where the federal district court had found that "the lack of a similarly situated class of men was fatal to the plaintiff's [Title VII] claim: "[I]f there is no comparable subclass of members of the opposite gender, the *requisite* comparison to the opposite gender is impossible."[99] Of the numerous district and appellate court cases it reviewed related to breast-feeding restrictions, none "found that breast-

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[94] As Justice Brennan argued in dissent, "[I]n reaching its conclusion that a showing of purposeful discrimination has not been made . . . the Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed." *Gen. Elec. Co*., 429 U.S. at 149 (Brennan, J., dissenting).

[95] *See, e.g.*, Katherine A. Macfarlane, *Derungs v. Wal-Mart Stores: Another Door Shut – A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection*, 38 LOY. L.A. L. REV. 2319, 2322 (2005) (arguing that "the Sixth Circuit's analysis . . . stymies the natural expansion of sex discrimination protection"); Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 133-34 (2009) (arguing that the Sixth Circuit's decision "leaves breastfeeding mothers vulnerable in their everyday lives and pushes them back into the home by making the world so uncomfortable and full of potential confrontations"); Brianne Whelan, *For Crying Out Loud: Ohio's Legal Battle with Public Breastfeeding and Hope for the Future*, 13 AM. U. J. GENDER SOC. POL'Y & L. 669, 673-74, 705-06 (2005) (analyzing an Ohio law, enacted in response to *Derungs,* that allows a "mother . . . to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted.") (citation omitted).

[96] Derungs v. Wal-Mart Stores, 374 F.3d 428, xx (6th Cir. 2004).

[97] *Id.*

[98] *Id.* at 438, 437.

[99] *Id.* at 438 (quoting Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, xx (S.D.N.Y. 1999)) (internal punctuation omitted) (emphasis added).

feeding fell within the scope of gender discrimination *because of the absence of a comparable class*."[100]

Thus, a conceptualization that recognizes discrimination only in the presence of a comparator will simply not observe discrimination absent a sufficiently close comparator, even in cases, like the ones just discussed, most or all of which fall well within widely accepted, first-generation theories of discrimination. Indeed, in some of these settings, the comparator requirement's very design forecloses the possibility of discrimination, including in homogeneous work environments and in situations where women and men are seen as being categorically different from one another.[101] That is, by demanding that plaintiffs produce a comparator to have a viable case, courts have transformed the comparator methodology into the substantive law of discrimination. Because that method, as applied and, in some instances, by design, allows for only a narrow set of circumstances to be considered discriminatory, the law of discrimination has, in effect, been narrowed as well.

B. *The Comparator Heuristic's Flaws as Amplified in Second-Generation Cases*

Not surprisingly, if finding an adequate comparator is difficult in a "simple" discrimination claim, where an individual alleges that he or she was treated differently because of his or her protected trait, the task becomes more daunting when a claim rests on a more complex understanding of identity or the surrounding workplace structures. Many of the problems posed by the comparator demand in these cases echo those just discussed, which should not be surprising given that first- and second-generation cases exist along a spectrum. Still, the ways in which they manifest render nearly all second-generation cases non-viable. The starkness of the disconnect between these newer theories of discrimination and the existing comparator-focused jurisprudence warrants separate treatment here.[102] Even for those who would not characterize the circumstances described below as involving discrimination, it is useful to see the similarities in the ways

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[100] *Id.* at 439 (emphasis added).

[101] While these cases involving discrimination claims because of a particular aspect of the lives of many women, such as reproduction or childcare, could fit within the discussion of second-generation claims as well, I include them here because they were framed as relatively straightforward discrimination cases yet were barred, nonetheless, by the comparator demand. *Cf.* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, xx (1995) (questioning whether the recognition of differences between men and women related to reproductive capacity as categorical overstates the difference between socially-constructed and biologically-rooted gendered distinctions).

[102] The last Part of this Article returns to this disconnection in connection with alternate observational methodologies that have the potential to be inclusive of the thicker, second-generation conceptualizations of discrimination.

that the comparator demand affects consideration of both these and first-generation types of claims.

Among the cases that track intersectionality theory's insights, the simplest are known as trait-plus cases, in which an employer imposes a rule on one group in a workplace based on a combination of their protected trait and some other unprotected attribute, such as having young children or being married to a fellow employee. An early case in this area, *Philips v. Martin-Marietta*, signaled the possibility of success for an individual who could show, via an explicit policy such as the bar on employment applications from women with small children at issue in that case, that an employer had treated a subset of employees adversely because of a protected trait.[103] Absent an explicitly discriminatory policy, however, an individual is typically required to produce a comparator to show that the adverse treatment is trait-based. This means that the individual must identify a co-worker who not only has comparable job responsibilities and lacks the same protected trait but also has the same unprotected attribute, such as parental or marital status. Given the difficulties associated with finding an adequate comparator in the simplest of circumstances, as described in the previous section, there are likely to be even fewer, if any, close comparators in these kinds of cases.[104] Consider, for example, the Tenth Circuit's rejection of a sex discrimination claim by an airport custodian shift supervisor who alleged that she was treated worse than the male shift supervisors when she was fired because her husband, whom she supervised, was reported to have left his workplace during his shift.[105] The court cited a litany of cases for the proposition that "[g]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender."[106] Adding that "[s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,"[107] the court found that Ms. Coleman's claim failed because she could not show that the employer treated her "differently from men who were also married to subordinate employees."[108]

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[103] 400 U.S. 542, 543 (1971). In *Martin-Marietta*, there was a clear comparator group of men with small children whose applications were not barred by the challenged rule.

[104] The challenge here is thus somewhat similar to the challenge for the "unique" Mrs. Troupe in the pregnancy-leave discrimination case described above.

[105] Coleman v. B-G Maint. Mgt. of Colo., Inc., 108 F.3d 1199, xx (10th Cir. 1997).

[106] *Id.* at 1204. As the court also explained, in a "plus"-type case, "although the protected class need not include *all* women, the plaintiff must still prove that the sub-class of women was unfavorably treated as compared to the corresponding subclass of men." *Id.*

[107] *Id.* at 1204.

[108] *Id.* at 1203 (citing Fisher v. Vassar Coll., 70 F.3d 1420, 1448 (2d Cir. 1995)) (emphasis in original).

More complicated still are the situations in which an individual claims discrimination based on more than one protected category. These intersectional or multidimensional claims arise when an individual seeks to show that the employer discriminated because of the individual's particular combination of traits, rather than simply trying to show that the employer discriminated on two distinct grounds.[109] As one court explained in connection with a suit brought by an Asian woman, for example, "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women" so that the absence of evidence of discrimination against Asian men or white women would not disprove the plaintiff's claim.[110]

Most courts exclude as possible comparators anyone who shares any of the protected characteristics that form the basis of the plaintiff's claim,[111] so that finding a comparator for an intersectional claimant is even more difficult than it is for individuals who base their claim on one protected characteristic. As one court explained, "the more specific the composite class in which the plaintiff claims membership, the more onerous th[e] ultimate burden" of providing discrimination becomes.[112] Thus, even if anecdotal and social science evidence documents the real experience of intersectional discrimination,[113] as a practical matter it will

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[109] *See, e.g.*, Vasquez v. City of L.A., 349 F.3d 634, 654 (9th Cir. 2003) (Ferguson, J., dissenting) (stating that comment about plaintiff having "typical Hispanic male macho attitude" and others like it showed "particularly offensive stereotypes about Hispanics as lazy, and about Hispanic males as aggressive and domineering" and finding that the remarks and other conduct stated claim "as to whether [the plaintiff] was subjected to an abusive workplace because of his race and his sex"); Anthony v. City of Sacramento, 898 F. Supp. 1435, 1445 (E.D. Cal. 1995) (denying defendants' summary judgment motion and stating that "[t]he epithet 'black bitch' cannot be designated exclusively as either racist or sexist"). *But see* Rogers v. American Airlines, Inc., 527 F. Supp. 329 ([court] 1981) (finding that African-American women did not constitute discrete class for the purposes of Title VII suit); DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) ("[T]his lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.").

[110] Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); *see also id.* (noting that "the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experience"); Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) ("The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females."); Kotkin, *supra* note xx, at 1475 (describing *Lam* as "one of the very few 'plus' claims to meet with success").

[111] Kotkin, *supra* note 16, at 1491-92. *Cf.* Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *6 (E.D. Mich. March 22, 2007 (observing that "[c]ourts are split . . . over whether the proper comparator may include only a person outside of the protected class who has the same 'plus characteristic' as the plaintiff (in this case, a male with young children) or whether the comparator may include any *person* (male or female) who lacks the 'plus' characteristic (in this case, a female without young children)."

[112] Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

[113] *See* Kotkin, *supra* note xx, at xx (discussing sources).

usually be impossible for an individual to find his or her negative-mirror image to show that discrimination has occurred. As a result, as one commentator has observed, courts have "basically given up on the complex plaintiff."[114]

An additional type of complex case for which the comparator demand inhibits the observation of discrimination[115] is the identity performance case. Devon Carbado and Mitu Gulati developed the idea that "[w]orkplace discrimination is driven by more than the physiological markers of outsider difference."[116] Outsiders who want to succeed in a workplace "often find themselves having to do extra work to make themselves palatable and their insider employers comfortable," whether by modifying their preferred clothing or hairstyle choices, language use, or styles of socializing, for example.[117] Carbado and Gulati identify "strategic passing," "comforting," using prejudice, and other strategies as existing along this continuum of identity work.[118] Those who do not engage in these "comfort strategies" may find themselves out of work or outside the partnership track.

In one article that considers what a discrimination claim on these grounds might look like, Carbado and Gulati offer the example of the "fifth black woman" who presents herself, through her choices about clothing and socializing, in ways more associated with African Americans than four other black female colleagues.

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[114] *Id.* at 1462.

[115] For those who are unpersuaded that identity performance theory is a form of discrimination, it is still worth seeing how that the comparator demand completely forecloses the possibility that the theory's claims would be recognized in practice.

[116] Carbado & Gulati, *supra* note xx, at xx. *See also* Green, *Work Culture and Discrimination*, *supra* no. 23, at 650-53 (examining "how setting behavioral expectations along a white, male norm imposes extra performance costs on outsiders and forces reconstruction of identity"); Gowri Ramachandran, *Intersectionality as a "Catch 22": Why Identity Performance Demands are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 300 (2005) (observing that "negotiating multiple identity performance demands simultaneously often places intersectionals in a uniquely restricted situation, one that has been referred to in other contexts as a 'catch 22' or 'double bind'"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII,* 79 N.Y.U. L. REV. 1134, 1199-1230 (2004) (arguing that interpretations of Title VII that "fail to account for the role that volitional behavior or race/ethnicity performance plays in defining individual identity" leave courts unable to reach "equitable resolution" of discrimination claims); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal and Ethical Ramifications of Cultural Profiling at Work,* 14 DUKE J. GENDER L. & POL'Y 369, 378-86 (2007) (discussing "[i]dentity [p]erformance as [s]trategic [r]esponse to [w]orkplace [c]ultural [p]rofiling"); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation,* 74 GEO. WASH. L. REV. 365, 369 (2006) (seeking "to begin the process of defining the ways in which employers use trait discrimination so as to begin a more useful normative discussion about when, if ever, antidiscrimination law should prohibit such discrimination").

[117] Carbado & Gulati, *supra* note xx, at 1307.

[118] *Id.* at 1299-1307.

Ultimately, the four others get promoted but the fifth black woman does not. Assuming that the non-promotion may have been "because of" the way that employee performed her race, the question for purposes here becomes whether a court could recognize race discrimination in that set of facts. Even if the fifth black woman could produce a comparator from outside of her demographic group, such as a white man, the promotion of four "comparable" peers who are similar with respect to their race and sex (i.e. the protected traits on which a claim might be filed) would likely be treated as undermining any inference of discrimination a factfinder might otherwise draw from the comparison.[119] There may well be other strategies for illuminating the possibility that the employer acted with discriminatory intent, as will be discussed shortly, but comparison will be unavailing.

For situations where workplace norms, structures, and interactions tend to obscure discriminatory intent (the "structural" cases), the treatment of comparators as prerequisite to a claim may exacerbate the difficulties individuals already face in illuminating discrimination. The claim of structural analysis, as noted earlier, is that the changed nature of the workplace has made it increasingly difficult to capture, through standard enforcement of discrimination laws, the ways in which members of non-dominant groups are excluded or marginalized not only by their supervisors but also by co-workers and others, with a detrimental effect on their terms and conditions of their employment. This analysis, which reflects our increasingly refined understanding of the dynamics producing inequality, turns on recognizing complexly constituted, non-explicit bias in interactions that often take place over time.[120] Yet this understanding of the dynamics that produce inequality does not match the behavioral assumptions behind the comparator approach, which looks for striking differences in treatment of comparable coworkers as *the* signal

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[119] *See, e.g.,* Smith v. Planas, 975 F. Supp. 303, 307 (S.D.N.Y. 1997) ("Five of the seven individuals identified by Plaintiff as having received higher-paying assignments were black-members of Plaintiff's protected class. As such, Plaintiff has failed to make out a prima facie case of race discrimination because he cannot show that the adverse employment action taken against him occurred in circumstances giving rise to an inference of race discrimination."); Samuels v. N.Y. State Dep't of Corr. Servs., No. 94-CV-8645, 1997 WL 253209, at *5 (S.D.N.Y. May 14, 1997) (finding that an African-American woman failed to articulate prima facie case for race discrimination because, as two of her alleged comparators were African-American men, she "[could not] show that the adverse employment action taken against her . . . occurred in circumstances giving rise to an inference of race discrimination."). *But see, e.g.,* Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000) (observing that because Title VII's principal focus is on protecting individuals, rather than a protected class as a whole, "an employer does not escape liability simply because it can prove it treated other members of the employee's group favorably").

[120] *See* Sturm, *supra* note xx, at 469 (explaining that the complexity of these claims "lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy").

of discriminatory intent.[121] Thus, although an individual might be able to show that others were not treated in the ways he or she experienced, many of the exclusions or marginalization from the informal workplace interactions that are central to advancement are more diffuse and, consequently, not evident in ways that a coworker-comparator could illuminate. Because a structural claim involves multiple, often obscured layers of exclusionary treatment, the comparator demand, with its focus on differences in treatment as the basis for drawing inferences about discrimination, is unlikely to be applied in a sufficiently nuanced way to capture these micro-level yet powerful forms of discrimination.

In short, although comparison is the dominant method used for observing discrimination, actually making a comparison that shows discrimination turns out to be unattainable for most individuals who claim discrimination. And, because of the numerous situations in which a comparator does not exist by virtue of the theory underlying the claim, the insistence on comparators renders whole categories of employment beyond the reach of discrimination law.

III. ON THE CONCEPTUAL LIMITATIONS OF COMPARATORS AS WINDOWS ONTO DISCRIMINATION

As we have just seen, courts place comparators on something of a doctrinal pedestal by treating them as the default heuristic and a threshold requirement for illuminating whether discrimination could have occurred. Yet the vast number of cases in which comparisons simply cannot be made[122] begs the question whether comparators deserve this status and whether we ought to accept, as many courts and individual judges have, that if no comparison can be drawn, discrimination could not have occurred.

My argument in this Part is that courts' unequivocal embrace of comparators overstates their revelatory powers related to discrimination in two ways. First, the heuristic is overinclusive; it does not prove as much as it is often treated as proving, at least not without important additional assumptions from the factfinder. And second, the heuristic is underinclusive; a comparator's absence does not necessarily show that discrimination has not occurred. To be clear, I am not suggesting that, as a result of these vulnerabilities, we abandon comparators

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[121] *See supra* note xx (discussing the Court's embrace of the sharp-contrast comparator rule in *Ash v. Tyson*).

[122] By revisiting and broadening the parameters of acceptable comparisons (acceptable in the sense that the comparison could be treated as giving rise to an inference of discrimination), the comparison heuristic could produce different results. Yet, likely for a variety of reasons discussed *infra* and notwithstanding the urgings of some commentators, most courts have yet to make that move. *See infra* notes xx and accompanying text.

entirely as a means for seeing discrimination. Indeed, given the challenges associated with any means of observing discrimination, coupled with the entrenched judicial preferences for comparators and the heuristic's occasional utility, that position would be both unwise and unrealistic.

My point, instead, is that comparators, like other methodological devices, work by virtue of surrounding assumptions about the nature of discrimination and about how best to see it. When we take account of these assumptions, we will be better positioned to see that the comparatively different treatment revealed by the heuristic is a byproduct of discrimination rather than being discrimination itself. With that awareness, we will also be better positioned to avoid erroneously treating the presence of a differently-treated comparator as a necessary (and sufficient, in some cases) element of discrimination.

A. *Comparators as Overinclusive*

At the most basic level, comparators are surely useful in reducing the set of variables that might explain an employer's adverse treatment of one employee relative to another.[123] Yet, the move from the reduced set of explanations to the conclusion that an employer more likely than not acted because of the employee's protected trait is not as defensible as courts sometimes suggest.

Indeed, the confidence that many courts express in the power of comparison to reveal discrimination contrasts sharply with significant strands of American discrimination jurisprudence that recognize the complex and idiosyncratic nature of most employment decisions. As the Court has observed, "treating seemingly similarly situated individuals differently in the employment context is par for the course."[124] And again, "To treat employees differently is . . . simply to exercise the broad discretion that typically characterizes the employer-employee relationship."[125] Although the Court was writing in the context of a public employee's equal protection argument that her layoff was impermissibly arbitrary, its understanding that employers "often must take into account the individual personalities and interpersonal relationships of employees in the workplace"[126] could hardly be limited to those circumstances.

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[123] If two employees have the same academic and experiential qualifications and similar job responsibilities, the set of possible explanations for the employer's negative treatment of one of them is significantly reduced. As compared to a situation in which the employees differed along qualifications and responsibilities dimensions, then, discrimination is proportionately more likely to be the reason for the employer's adverse action.

[124] Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008).

[125] *Id*.

[126] *Id.* at 2154.

Yet if the baseline expectation is that employers will regularly treat similarly situated employees differently,[127] different treatment of similarly situated employees is likely to reflect merely benign variation in the workplace unless we assume that discrimination pervades nearly all workplace decision-making.[128] On this view, the comparator heuristic would be inherently flawed if the fact of different treatment triggered our suspicion that discrimination had occurred.

Even if we assume that employers ordinarily treat similarly situated employees in the same way, different treatment can signal discrimination only if we make several additional, arguably fragile assumptions. For one, reliance on comparators as expositors of discrimination assumes that employers act rationally, so that when they deviate from their typical equal treatment model, they do so deliberately in a way that reliably signals discrimination.[129] If we assume, instead, that employers are not fully rational, we can find discrimination only by making the additional assumption that discriminatory intent, rather than arbitrariness or idiosyncrasy, is more likely to explain deviations from equal treatment.[130]

Of course, any exercise in comparison also requires the analyst to treat the inevitable differences between individuals as non-salient. The typical judicial reliance on the comparator heuristic does not ordinarily engage in depth, or at all, with those consequential determinations.

Further, even conceptualizations of comparators that seek to minimize these vulnerabilities by demanding the tightest of fit between an individual alleging discrimination and other employees cannot escape the overinclusiveness critique. In almost any setting, there are innumerable differences between individuals that conceivably could explain an employer's taking adverse action against one but not

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[127] *See also* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 100 (1998). Although Professors Charny and Gulati were focused on high-level positions, a similar inclination to defer to employers runs across a wide range of cases. This view that employers regularly act arbitrarily but without discriminatory intent reinforces, and is reinforced by, the strong commitment to at-will employment and the related reluctance of courts to "second-guess difficult and expertise-laden personnel judgments." *Id.* For further discussion of the comparator heuristic's synergies with judicial deference to employers, see *infra* notes xx and accompanying text.

[128] *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-62 (2001) (arguing that courts underestimate probability that discriminatory intent infects this sort of seemingly idiosyncratic treatment).

[129] Even if we assume employer rationality and make the related assumption that job classifications can be relied on to show the comparability (or not) across positions in a firm, the dynamic realities of a given workplace may render those articulated classifications unreliable for comparability purposes.

[130] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

another. In "high-skill or knowledge intensive jobs"[131] this is true almost by definition, as no positions are exactly alike or often even very similar, at least in a workplace striving for an efficient, non-duplicative management structure. This not only makes monitoring difficult[132] but also renders the comparator heuristic virtually unusable, as the essence of hiring and promotion in these positions depends on the unique set of skills and contacts that an experienced professional brings to a position. In this light, different treatment can nearly always be attributed to non-discriminatory motivations.

Even in the context of lower-level positions, a comparison between two individuals who share the same function but differ by the nature of their protected trait shows us intentional discrimination occurred only if we make assumptions that allow the comparison to do so. In this context, I think back to my days scooping ice cream at Baskin & Robbins. My manager, Chip, never liked me much and made clear from time to time that he wanted to fire me. Had he done so while leaving in place my male co-workers and replacing me with a young man, I could have demonstrated a prima facie case of sex discrimination. Or, if he fired only me after learning that every scooper, including me, gave away ice cream to friends, the comparison could also suggest sex discrimination – disparate punishment of similarly-situated employees for the same offense – if we let it. Given what we know about Chip's sentiments toward me, however, comparison is not necessarily revealing of Chip's reasons for the adverse action. Still, at the prima facie stage, this might not trouble us – the work comparison does here, at most, is to make an opening suggestion that Chip fired me for an impermissible reason; it need not be treated as conclusive proof.

But, as we move through the burden-shifting process, we ought to consider what additional work, if any, we allow the comparison to do. Or, put another way, the question is whether (and why) we treat the comparison as probative at all. Taking the case to the next stage, imagine that Chip offered a non-discriminatory reason for firing me – he disliked my sense of humor or my commitment to my school work. And suppose I offered evidence in response that he laughed heartily at my jokes and repeated them to others and had given me the same congratulatory ice cream cake for doing well at school as he had given to my male ice-cream scooping peers. Then what? I have arguably shown not only that his reasons for the firing were not credible but also that they were pretexts for discrimination.

At this point, we might say that the set of possible reasons for Chip's actions have been narrowed even further, to the point that we will treat sex discrimination

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[131] Charny & Gulati, *supra* note 127, at 60.
[132] *Id.* at 61.

as the likely reason for his firing me.[133] But, again, comparison is the "closer" here on my discrimination claim only if we are willing to treat Chip's comparatively worse treatment of me relative to my male coworkers as demonstrating his discriminatory intent. The governing law says that we can; although the doctrine would not mandate a determination that Chip discriminated,[134] my evidence would allow a factfinder to hold that Chip had discriminated against me. The comparison of Chip's treatment of me and my fellow employees thus is permitted to do some work toward showing Chip's intent to discriminate.

Yet if we could peer into Chip's mind, we might have learned that his dislike was rooted in my particular ambitions for college (which were different from those of my also-college-bound scooping peers) rather than in my being female.[135] Comparison, seen in this light, was helpful for showing that Chip saw me differently than my peers[136] but was misleading to the extent we read more into it than that. In other words, while the comparison could reliably narrow the set of reasons for Chip's actions, we *choose* to infer that Chip acted "because of sex;" the comparator analysis itself does not require that interpretation of the facts.

Two interrelated observations follow. The first is simply that, as suggested above, comparators are a valuable filtering device, in that we can be reasonably confident in their ability to shrink the set of possible explanations for an employer's action. The second is that comparators are imperfect as a filtering device; they are not a clear, or necessarily reliable, window into discriminatory intent.

Although some might say that this imperfection of fit should lead us to abandon comparators altogether, that is not my suggestion. It is *always* the case that circumstantial evidence requires a factfinder to draw inferences about intent rather than guaranteeing certainty.[137] And it is always the case that, unless we

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[133] *Cf.* Reeves v. Sanderson Plumbing, 530 U.S. 133, 134 (2000) ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

[134] *St. Mary's Honor Ctr.* 509 U.S. at 502 (finding that "trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law").

[135] As the Court explained in *Price Waterhouse v. Hopkins*, "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. 228, 250 (1989).

[136] As a potential additional virtue, the comparator framework may encourage employers to be more explicit and comprehensive about the grounds for their actions and their agents' actions to protect against adverse inferences.

[137] *See supra* note 41 and accompanying text.

limit discrimination claims to situations where employers admit that they acted because of an employee's protected characteristic, we must draw from circumstances. Consequently, to the extent we are committed to a theory that requires employees to prove their employers' discriminatory intent and to a theory that forbids discrimination even when we cannot "see" it directly, comparators are among our best resources.[138] The point, instead, is that comparators themselves do not provide definitive insight into employers' motives or inevitably compel conclusions regarding whether an employer acted because of an employee's protected trait, as courts often suggest they do. Instead, the comparator's revelation of discriminatory intent rests on a set of assumptions not only about the similarity of the comparators but also about the baseline rationality of employers. For the comparators' probative work to be assessed properly, relative to other methodologies, those assumptions must be part of the conversation. The comparator's imperfections as a filtering device ought also to give us pause with respect to the transformation of comparators from heuristic to substantive law.

B. *Comparators as Underinclusive*

The comparator heuristic's underinclusiveness should give us additional cause to be dubious when courts treat it as the only or preeminent method for illuminating discriminatory intent. Recall that the triggering problem for discrimination law is the employer's decision to take action *because of the trait*. This means, again, that while the presence of others may help illuminate an employer's reliance on a protected trait, the existence of a better-off comparator is a byproduct of the discrimination rather than the discrimination itself.

The Supreme Court made this point when considering the sex discrimination claims of female security guards who alleged that the county government running the jail where they worked intentionally paid them less because they were female.[139] In its defense, the county argued that discrimination could have occurred only if the women had engaged in "equal work" relative to the male guards. The Court was clear that the County's comparative conceptualization of discrimination was unduly constrained. "In practical terms," the Court wrote, restricting recognition to instances where comparisons could be made would mean "that a woman who is discriminatorily underpaid could obtain no relief – no matter how egregious the discrimination might be – unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[140] The Court labeled this type of practice as "blatant[ly] discriminatory," recognizing that

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[138] Still, its imperfections do raise interesting questions about why the courts treat comparison as confidently as they do. I consider these questions *infra*.
[139] County of Wash. v. Gunther, 452 U.S. 161, xx (1981).
[140] *Id.* at 178.

the discrimination was rooted not in the comparison between men and women but in the employer's decision to underpay an employee because she is a woman.[141]

Likewise, as the Second Circuit observed:

> If [an] employee were fired for a discriminatory reason, and no one was hired to replace him, he could never demonstrate disparate treatment because there is no point of comparison. . . . [I]t stands to reason that, in such a case, the plaintiff should be able to create an inference of discrimination.[142]

Or, imagine, returning to my ice cream scooping experience, that Chip fired me because of my sex but did not replace me with another scooper. The absence of a comparator would not change the fact that Chip treating me adversely "because of sex."

In other words, if we understand discrimination to mean adverse treatment because of a protected trait, we ought to be able to find discrimination even when comparison is not a meaningful possibility. It is no doubt true that, without a comparator, the fact that an employer acted because of the employee's trait rather than for some other reason becomes more difficult to see. But, to the extent we agree that the discrimination could have occurred, our limitations in seeing discriminatory intent should prompt us to explore other methodologies and perhaps rethink the way courts rely on comparators as our best, or even exclusive, methodology.

C. *Comparison and Disparate Impact*

Interestingly, disparate impact theory and jurisprudence reinforce how questionable the conceptual link is between comparators and proof of discriminatory intent. Comparison is critical to disparate impact cases in that the trait-based impact is ordinarily shown by comparing the effect of a rule or policy on individuals with and without the protected trait at issue. So, for example, in the Court's most recent ruling in this area regarding New Haven's decision not to use results from a firefighter promotion test, the disparate impact claim rested in part on a showing that the city's decision had a comparatively adverse effect on white firefighters who would have been promoted had the test results been counted.[143]

Yet the point of comparative proof in *Ricci v. DeStefano* and other disparate impact cases is not to show the employer's discriminatory intent but rather to

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[141] *Id.* at 179.
[142] Abdu-Brisson v. Delta Airlines, 239 F.3d 456 (2d Cir. 2001).
[143] Ricci v. DeStefano, 129 S. Ct. 2658, xx (2009).

highlight the effect of the challenged decision. Indeed, courts do not draw an inference of discriminatory intent from the comparatively adverse treatment. Instead, intent in disparate impact cases is irrelevant to the analysis and, more deeply, to the law's concern in this area, which is to eradicate employer actions that have the effect, if not the aim, of discriminating based on a protected trait. Thus, while the primary focus here is on the overreliance on comparators in disparate treatment cases, the additional evidence of a disconnection between comparators and intent in the disparate impact context should cast further doubt on the faith courts put in comparators' revelatory powers.

IV. CONTEXT: A METHODOLOGICAL ALTERNATIVE

Notwithstanding the dominance of comparators, sexual harassment and stereotyping jurisprudence make clear that the task of observing discrimination can be managed successfully with other techniques and that discrimination is not centrally defined by comparison. In these cases, courts regularly undertake a contextual analysis to discern discriminatory intent in acts and statements, looking to all of the surrounding circumstances for the ways in which the protected traits may have operated to affect employer decision-making. The application of a totality-of-the-circumstances analysis reinforces the claim here that comparators are best understood as one among several means for observing discriminatory intent rather than as a defining element without which discrimination cannot be said to have occurred. This Part will first trace the development of the contextual methodology in discrimination cases involving stereotyping and harassment and then consider the relationship of this method to the work of comparators as a means for seeing discrimination.

A. *The Emergence of the Contextual Model in Stereotyping and Harassment Jurisprudence*

The recognition that discriminatory intent could be discerned from the context surrounding an employer's acts and statements, rather than from comparison to other employees, took hold initially in the Supreme Court's sexual harassment jurisprudence. In *Meritor v. Vinson*, the Court first held that harassing acts could themselves amount to discrimination, and that an individual did not need to show additional adverse action by the employer, such as demotion or termination, to state a discrimination claim.[144] More interesting for our purposes is the Court's

[144] "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] based on sex.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Although *Meritor* presented a case of sexual harassment, the Court recognized then and subsequently that racially harassing acts can likewise create a hostile, and discriminatory, environment. *See id*. at 66-67; *see also* Nat'l R.R. Passenger Corp. v. Morgan,

approach to determining that the bank supervisor, who had acted in sexually aggressive ways toward the plaintiff, had acted "because of sex" rather than for some other reason. The Court invoked the Equal Employment Opportunity Commission's guidelines, which identified "'[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature'" as sexual harassment and, separately, defined sexual harassment as a form of sex discrimination.[145] And it made clear that not all such advances and conduct would amount to discrimination; instead, only "sufficiently severe and pervasive" acts would warrant remediation under the statute.[146] But neither of these points, by themselves, shows that the sexualized conduct was "because of sex" rather than for some other reason. Indeed, the Court has since reiterated that sexualized harassment is not necessarily harassment "because of sex" within the meaning of Title VII.[147] As Justice Scalia observed for a unanimous court in *Oncale v. Sundowner Offshore Services., Inc.*, "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[148]

Yet, even while characterizing "'the critical issue'" in a comparative manner – that "'members of one sex [be] exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" – comparators were last on the Court's list of methods of seeing the adverse act-protected characteristic link.[149] The more prominent and "easy" methods involved

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536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.").

[145] *Meritor*, 477 U.S. at 65.

[146] *See id.* (stating that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at xx. *See also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (explaining that "it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'"); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (stating that judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'").

[147] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). *See also* David Schwarz, *When Is Sex Because Of Sex? The Causation Problem In Sexual Harassment Law*, 150 U. PA. L. REV. 1697, xx (2002) (observing that modern academics and courts have questioned the assumption that sexual harassment occurs "because of sex.").

[148] *Oncale*, 523 U.S. at 80.

[149] *Id.* at 80-81 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.").

consideration of the harassing statements and actions themselves[150] as well as the defendant's sexual orientation.[151] The larger point, as the Court explained, is that observing discrimination in a workplace requires consideration of not only "the words used or the physical acts performed" but also "a constellation of surrounding circumstances, expectations, and relationships."[152] In short, what matters for seeing discrimination is context, with comparison being but one technique among several for making that contextual evaluation.[153]

This type of contextual but non-comparative evaluation to observe identity-based discrimination can also be seen outside the employment context. In finding that Georgia's segregated confinement of mentally disabled patients amounted to discrimination "because of" disability,[154] for example, the Court in *Olmstead v. Zimring* outright rejected the need for a comparator. It declared instead that it could observe discrimination by analyzing the segregating act in context, similar to its approach in the harassment cases. Specifically, the Court rested its "[r]ecognition that unjustified institutional isolation of persons with disabilities is a form of discrimination" on two observations – one related to the expressive meaning of isolation and the other related to the harm caused to those isolated.

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of

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[150] *Id.* at 80 ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

[151] *Id.*

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.

Id.

[152] *Id*. at 75, 81-82.

[153] This could be characterized as a Bayesian approach to evidence. One might also argue that the Court in these cases has deployed a hypothetical comparator by imagining, in effect, a man who would not have been subject to the same conduct as the female plaintiff. If that is the case, there is no mention of that analytic move by the Court. Further, the "opposite-sex" hypothetical comparator provides little help in understanding the Court's analysis in the same-sex harassment context, where the Court, as in *Oncale*, did not give any indication it was imagining that a female worker on the offshore oil platform where Joseph Oncale was harassed would not also have been subject to harassment. *See id*.

[154] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, xx (1999).

> participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[155]

In short, the Court "saw" that the segregation of mentally disabled individuals was discriminatory because of disability not by comparing the act to the treatment of others but instead by looking more broadly at the segregating act's social meaning and its injurious effect.[156]

The importance of contextual evidence of discrimination, rather than comparator evidence, can be seen in stereotyping cases as well. In *Price Waterhouse v. Hopkins*, for example, the Court found that the accounting firm had discriminated impermissibly by relying on sex stereotypes to deny partnership to Ann Hopkins.[157] Although Hopkins had offered evidence of how male partnership candidates had been treated, the Court noted specifically the district court's finding that she did not have an adequate comparator. There were male candidates who lacked the interpersonal skills that Hopkins had also been accused of lacking, but they were not sufficiently comparable because they "possessed other, positive traits that Hopkins lacked."[158] Instead, the Court looked to the sex-stereotyped remarks made about Hopkins to find that the firm had acted "because of" sex. These included the observation by some partners at the firm that she was "'macho,'" that she "'overcompensated for being a woman,'" that she should "'take a course at charm school,'" and that, "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[159]

In an approach endorsed by others on the Court,[160] the plurality treated its

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[155] *Id.* at 600-01 (1999); *see also* L.A. Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (internal punctuation and citation omitted).

[156] Notably, although Congress had specified this type of segregation as discriminatory, the Court did not simply rest on the statute's findings, which "identified unjustified 'segregation' of persons with disabilities as a form of discrimination," but, as just illustrated, explained and justified that determination. *Olmstead*, 527 U.S. at 583.

[157] 490 U.S. 228, xx (1989).

[158] *Id.* at 236.

[159] *Id.* at 235.

[160] *Id.* at 259 (White, J., concurring) ("I agree that the finding [of sex discrimination] was supported by the record."); *id.* at 261 (O'Connor, J., concurring) (agreeing with plurality that "on the facts presented in this case," Hopkins had showed that firm relied adversely on her sex in its partnership decision); *id.* at 265 (O'Connor, J., concurring) (staring that "Congress was certainly

observation of stereotyping remarks as the equivalent to observing discriminatory intent directly, writing simply that "stereotyped remarks can certainly be *evidence* that gender played a part" in an employer's decision.[161] Although Hopkins had introduced expert testimony to show, through social psychological theory, that these and other comments should properly be seen as sex stereotyping, the plurality characterized that testimony as "merely icing on Hopkins' cake."[162] Making its observation of discrimination sound straightforward, the plurality observed that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[163]

The Court was clear that stereotyped remarks themselves do not necessarily show that impermissible discrimination has occurred. Instead, the employee who has alleged discrimination "must show that the employer actually relied on her gender in making this decision."[164] But, most significant for our purposes, the remarks can help make that showing because they are treated, in effect, as sites that expose the employer's intent to act because of the employee's protected characteristic.

B. *Acts, Statements, and Automaticity*

In essence, the Court, through its "no special training" comments, suggested that drawing the link between acts, statements, and discriminatory intent is undemanding, if not automatic. Yet much like the overstated faith in the comparator heuristic, this characterization also implies that acts and statements themselves do more work than they actually do to establish that an employer has acted because of a protected trait.

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not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex"). Even the dissenters agreed that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process" and that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.* at 295, 294 (Kennedy, J., dissenting).

[161] *Id.* at 259 (emphasis in original). *See also id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Further, the Court explained why stereotypes violate Title VII's sex discrimination prohibition: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.*

[162] *Id*. at 256 (1989).

[163] *Id.*

[164] *Id.* at 251.

Justice O'Connor's commentary in *Price Waterhouse* is illustrative of the way in which difficulties associated with discerning discriminatory intent from stereotyping statements are frequently glossed over. As she explained, not every statement regarding an employee's sex necessarily demonstrates sex stereotyping and, therefore, discriminatory intent. "[A] mere reference to 'a 'lady candidate' might show that gender 'played a role' in the decision," she wrote, "but by no means could support a rational fact-finder's inference that the decision was made 'because of' sex."[165] For Justice O'Connor, this understanding followed from the point that "race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."[166]

Yet distinguishing the comments that reveal discriminatory intent from those that do not is neither as easy nor as obvious as the comments of Justice O'Connor and other members of the Court seem to suggest.[167] While Justice O'Connor did not find the "lady candidate" reference troublesome, others, including Hopkins's expert witness, could make a strong case that the reference showed that the firm's partners' views of Hopkins and ultimate decision to deny her partnership were centrally shaped by her being a woman to the point that the very way they identified Hopkins focused on her being female. Likewise, although the majority in *Olmstead* deemed it "evident" that the act of segregating mentally disabled individuals amounted to discrimination,[168] the dissent found it equally evident that no discrimination had occurred.[169]

Indeed, a central claim of second-generation theories is that discriminatory intent is often missed in precisely the sort of statement made by Justice O'Connor. As discussed earlier, for example, many courts would not see race discrimination

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[165] *Id.* at 277.
[166] *Id.*
[167] Indeed, as suggested earlier, it is this difficulty that, outside of the stereotyping and harassment cases, drives courts to embrace comparator evidence so strongly. The discussion, *infra* notes xx-xx and accompanying text, addresses why context, rather than comparators, has become the default response to the challenge of discerning intent in these kinds of cases.
[168] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999).
[169] *Price Waterhouse*, 490 U.S. at 228, 279-80, 293-94 (Kennedy, J., dissenting). We can see similar disagreement over the link between sex-based rules and stereotyping in *Nguyen v. INS*, where Justice O'Connor, in dissent, had no difficulty concluding that a rule favoring mothers over fathers for purposes of conferring U.S. citizenship on foreign-born children was rooted in impermissible sex stereotypes, while a majority of the Court found the sex-based distinction to be perfectly legitimate. 533 U.S. 53, 75-97 (2001). For further discussion of the ways in which the majority and dissenting opinions in *Nguyen* interpreted the same facts differently and, consequently, reached different conclusions about the constitutionality of the challenged rule, see Goldberg, *Constitutional Tipping Points, supra* note 31 at xx.

in the refusal to promote the "fifth black woman" even if the non-promoted woman could identify negative comments about her African-style clothing or her black church choir membership, so long as her four African-American peers were promoted.[170] Yet as Carbado and Gulati suggest, when examined closely, those sorts of comments reflect the same sort of racial stereotyping that is seen more easily in other settings.[171]

In other words, a case like *Price Waterhouse* may be easy because the Court "gets" the link between sexism and statements about a partnership candidate being too macho. Likewise, the Court may have little difficulty finding that an employer's use of the word "boy" when talking to African-American employees suggests the presence of discriminatory intent.[172] But there is nothing inherent in harassing acts and stereotyping statements in general that makes their underlying discriminatory intent fundamentally easier to unmask than the discriminatory intent that might underlie other types of adverse treatment. Instead, it is agreement (or presumed agreement) on the social meaning of those acts and statements, when considered through a contextual lens, that renders the cases easy for courts to decide. Consequently the "easy" characterization should be understood as describing the Court's comfort level with finding discriminatory intent in particular acts or statements, and not that observing discriminatory intent is any more automatic in the stereotyping and harassment contexts than it is through comparisons.

C. *Reconsidering Comparators in Light of the Contextually-Focused Stereotyping and Harassment Jurisprudence*

Recall Justice Thomas's assertion that a conceptualization of discrimination that does not require a comparison is "'nonsensical'"[173] and "drains the term of

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[170] For examples of differing views of whether statements amount to stereotyping, see, e.g., Zalewska v. County of Sullivan, 316 F.3d 314, 323 (2d Cir. 2003) (declining to give credence to the "stereotype[ ]" that woman wearing pants is dressed "more masculinely"); Weinstock v. Columbia Univ., 224 F.3d 33, 45 (2d Cir. 2000) (finding that labels such as "nice" and "nurturing" used to describe female professor were insufficient as a matter of law to demonstrate sex-discriminatory intent); *cf.* Jesperson v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc) (presenting differing views in majority and dissenting opinions as to whether policy requiring female employees to wear make-up constituted sex stereotyping).

[171] *See* Carbado and Gulati, *supra* note xx, at 1276-70. Again, even readers who reject either the premise of identity performance theory or the view that discrimination law embodies the theory's premise may benefit by seeing that the easy identification of discrimination in some acts and statements but not others is not because those acts and statements are different in kind but rather because there is a more general consensus about discriminatory intent underlying some acts and statements but not others.

[172] Ash v. Tyson, 546 U.S. 454, xx (2006).

[173] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 618 (1999).

any meaning other than as a proxy for decisions disapproved of by this Court."[174] Specifically, Justice Thomas suggested that "no principle" could "limit[] this new species of 'discrimination' claim . . . because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive."[175]

If it is correct that discrimination exists only where an individual can show a comparator in a better-off position, then we ought to be able to locate this type of comparison within the acts and stereotyping jurisprudence. And if not, we ought to ask whether the Justice Thomas's concerns about the potential lack of limiting principle for a non-comparative discrimination analysis should stymie the contextual method for observing discrimination or at least dampen our enthusiasm for it.

As a preliminary matter, it is worth reiterating that Justice Thomas's constrained conceptualization of discrimination did not capture majority support when he advanced it in *Olmstead* and conflicts with the Court's harassment and stereotyping decisions discussed above. Moreover, comparison is arguably counterproductive as a means for illuminating, let alone defining, discrimination in situations in which an employer singles out an employee for harassment or stereotyping because of a protected trait. In these kinds of cases, an employee can often show that others outside his or her protected group were not treated adversely, but the employer can likewise show that some within the protected group were not treated adversely either. At that point, the comparison no more allows for an inference of discriminatory intent based on a protected characteristic than for an inference that something else particular to the employee had provoked the employer's actions.

Yet, as discussed above, it is long settled that an employer's targeting for adverse treatment one employee from among others who share the same protected trait does not preclude a finding of discrimination. Despite Justice Scalia's having joined in Justice Thomas's opinion in *Olmstead*, it was his own opinion in *Oncale* that made this point in allowing a man to bring a sexual harassment claim based on the activities of other men in a workplace where no women were present.[176] Even

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[174] *Id.* at 624.
[175] *Id.* at 623-24.
[176] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, xx (1998). On the question whether ideas of comparison are embedded in conceptualizations of sexual harassment, Katherine Franke has observed that "sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex . . . but because . . . it perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men." Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

Justice Kennedy, who agreed with Justice Thomas's insistence on comparators, did not fully embrace the limited scope Thomas advanced. Instead, he specifically "put[] aside issues of animus or unfair stereotype" when expressing his general support for a comparison-based methodology, suggesting, in effect, that the presence of either could render the comparison-driven analysis unnecessary.[177]

All of this reinforces that while comparators are one acceptable mode of exposing discrimination, they are certainly not, conceptually or doctrinally, a categorical requirement. Yet the question remains whether courts, by finding discrimination absent a comparative showing, are in effect misusing discrimination law to mandate their own preferred code of conduct per Justice Thomas's view.

The very suggestion that comparator-based discrimination findings are objective while non-comparative analyses are subjective significantly overstates the differences between these methods for discerning discrimination and creates a false and unhelpfully dichotomous analysis. As discussed earlier, observing discrimination through comparators is no more automatic than through these other means. The determination that a comparator is adequate (or inadequate) for purposes of illuminating discriminatory intent arguably effectuates the subjective preferences of courts at least as much as the finding of discrimination through an examination of acts or statements. So while it is true that making a contextual determination of which acts or statements reveal impermissible discrimination requires judgment calls or assumptions by the court, so too does the application of the comparator analysis.

Indeed, the suggestion that discrimination can truly be seen only via comparators and that all other non-comparison-based discrimination findings amount to policy judgments is reminiscent of a decades-old debate about the underpinnings of equality guarantees. Prompting that debate was the argument, advanced by Peter Westen, that equality was both "empty" and "entirely '[c]ircular'" because similar treatment could be required only for those deemed to be sufficiently similar.[178] Others quickly responded with a range of theories to

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[177] Justice Kennedy began his opinion by observing "[a]t the outset," that there was "no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled." *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring). *See also id.* at 613 ("absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received different treatment").

[178] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547-51 (1982). *See also id.* at 547 ("Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.").

suggest that the equality guarantee did indeed have valuable content.[179] Yet, however forcefully advocated, each of these positions necessarily rested on the premise that substantive judgments and assumptions were required to give equality its content.[180]

Likewise, the process of locating and observing discrimination necessarily requires judgments about whatever circumstantial forms of evidence we are considering – whether comparisons, harassing acts, or stereotyping statements – as well as underlying decisions about discrimination theory to decide whether they reveal discriminatory intent. As shown earlier, the choices of which comparisons will be treated as exposing discrimination and which will not, just like the choices about which acts and statements are because of a protected trait and which are not, are just that – choices. None is more mechanical or automatic than the other.

Because courts cannot avoid judging the salience of circumstantial evidence, comparators thus provide false certainty to the extent they are treated as elemental to, or confirmatory of, discrimination. This false certainty, in turn, enables courts to claim legitimacy and elide accountability (a) for their decisions to require comparators in the first place; and (b) for their dispositive judgments regarding the scope of acceptable comparators and the diminished value of other non-comparator-based evidence. The contextual evaluation, by contrast, gives more exposure to the choices courts make regarding their theory of discrimination, and the relationship of workplace evidence to that theory, because the doctrine insists that a connection be established between the protected characteristic and the acts or statements at issue.[181] Of course, as illustrated by *Price Waterhouse*, where

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[179] *See, e.g.,* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983) (urging that an "equality-of-respect" model reflects the best substantive understanding of the equal protection guarantee); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983) (arguing that the principle of equality has been central to advancement of greater political rights and social opportunities); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 280-81 (1983) (maintaining that equality rhetoric has substantive effect on legal rights and political culture); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) ("A right to equal treatment is a comparative claim to receive a particular treatment just because another person or class receives it.").

[180] *See* Finley, *supra* note 34 (discussing insight in Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1711 (1976), that "that there is no determinate, coherent way to choose between . . . formal equality or substantive equality. Inevitably, the choice depends on our sets of values and visions of society," and adding that "[t]here is no way, within the doctrinal framework itself, to tell us when we should adopt the approach of formal equality, and when a substantive equality approach is called for. Instead, we must appeal to deeply political conceptions of what values and type of society we wish to foster.").

[181] In addition to its value in terms of judicial accountability, the contextual evaluation also adds substantive value by exposing, and possibly avoiding, the flattening of antidiscrimination norms effected by the comparator heuristic, as discussed *infra* at note 34.

courts find that connection to be easy or obvious, they may move quickly or automatically from the acts or statements to a finding of discrimination. But even in those circumstances, the move is there for all to see, whereas within the comparator rubric, the analytic framework provides cover for courts' judgments and in turn, as I argue below, inhibits development of doctrinal alternatives and the elaboration and enforcement of all but the most formalistic antidiscrimination norms.

V. JUDICIAL LEGITIMACY AND THE STICKING POWER OF COMPARATORS

At this point we have seen that comparators are not the only means for seeing discrimination, that by design (or at least in a typical application), there are serious limitations to the discrimination comparators can conceive and prohibit, and yet also that comparators remain dominant to the point that discrimination lawsuits typically cannot be won without them.

This Part explores the reasons for comparators' sticking power despite their weaknesses, with aims both to explain why such an imperfect means for observing and defining discrimination has achieved such dominance and to understand the possibilities for new or changed methodologies going forward. My central claim is that comparators have gained their status because their empirically-styled appearance enables courts to accommodate a primary legitimacy concern that plagues judicial intervention on issues related to identity and a subsidiary concern related to employer autonomy. This move to embrace a framework that produces observable, fact-like results fits neatly with a more general pattern in judicial decision-making, where decisions that require complex social judgments are regularly recast as either factually compelled or otherwise empirically rooted, less out of commitment to factual accuracy than out of an interest in masking contestable judgment calls.

A. *The Legitimacy Concerns at Play*

The prospect of a free-form, or even relatively unstructured, inquiry into workplace behaviors related to individual identity taps directly into the legitimacy- and capacity-protecting inclination exhibited by many courts to avoid tasks that have the cast of a sociological inquiry.[182] This anti-sociological bent can be seen,

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[182] For extended development of this point, see generally Goldberg, *Constitutional Tipping Points*, *supra* note 31; Goldberg, *Anti-Essentialist and Social Constructionist Arguments in Court*,, *supra* note xx.

We might point to similar reasons to explain courts' turn to sex discrimination as the legal framework for evaluating sexual harassment, rather than dignity, which is the more common approach within European law. As Gabrielle Friedman and James Whitman have observed, "[f]or

for example, in the Court's turn to visible markers, such as ancestral lineage and surnames,[183] when defining identity categories, rather than to the more complex and contested social norms that are widely understood, even by the Court, to contribute importantly to the content of these categories.[184] It can be seen as well in the way that the Court cites changed factual understandings about a social group rather than acknowledging changed social norms when invalidating restrictions on group-member rights previously accepted as legitimate.[185]

The basic idea is that while courts may be well equipped to sift among empirical facts, they are far less institutionally suited, both in terms of training and resources, for deep investigation and analysis of social norms. Consequently, however attentive they may be to trends in social stances on an issue or a particular social group,[186] courts are more likely to register that awareness through commentary about observable facts rather than through a sociologically-styled analysis. While the latter might be more accurate and candid, it also would leave

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Americans . . . the concept of 'dignity' often remains unconquerably vague, unfillable with meaningful content. . . . It is 'discrimination' that seems the *hard* concept in America, the concept with real content." Gabrielle S. Friedman & James Q. Whitman, *The European Transformation Of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 271 (2003). *See also id.* at 268).

[183] *See, e.g.,* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (relying on definitions of race "as a 'continued series of descendants from a parent who is called the *stock*'") (citations omitted) (emphasis in original); Hernandez v. Texas, 347 U.S. 475, 481 n.12 (1954) ("[J]ust as persons of a different race are distinguished by color, these Spanish [sur]names provide ready identification of the members of this class."). These same themes can be traced through lower court decisions as well. *See, e.g.,* Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971) (identifying race and lineage as "immutable trait[s], a status into which the class members are locked by the accident of birth"); Hernandez v. Houston Indep. Sch. Dist., 558 S.W.2d 121, 124 (Tex. App. 1977) (characterizing lineage and race as "classifications based upon unalterable traits"). *But see* Commonwealth v. Rico, 711 A.2d 990, 994 (Pa. 1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group.").

Kenji Yoshino has written in the equal protection context about the way in which a trait's "visibility" enhances the likelihood that for heightened judicial review of trait-based classifications. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 497 (1998). He described this visibility as "the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way." *See id.*

[184] *See, e.g., Saint Francis Coll.,* 481 U.S. at 610-11 (collecting anthropological sources discussing socially constructed nature of race); Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008) (describing "'race'" as "a fuzzy term").

[185] *See* Goldberg, *Constitutional Tipping Points*, *supra* note 31 n.169.

[186] *Cf.* Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2606 (2003) ("[J]udicial decisions rest within a range of acceptability to a majority of the people."); Steven G. Calabresi, Thayer's Clear Mistake, 88 Nw. U. L. Rev. 269, 272 (1993) ("Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago.").

courts far more vulnerable to charges that they are acting beyond their capacity and/or using their powers to institutionalize their own social views into legal mandates.[187]

In addition, courts tend to be especially wary of appearing to be hyper-regulators of the workplace given the strong background commitment, both ideologically and legally, that leads courts, in many circumstances, to defer to employer autonomy. Because discrimination law is an exception to the general tolerance for bad workplace behavior,[188] including "low-grade" discrimination,[189] courts have a strong interest in avoiding the appearance that they are deploying the law in ways that infringe on employers' well-established prerogatives to govern their workplaces as they like.[190]

B. *The Comparator Heuristic's Legitimizing Work*

The comparator heuristic, as it is used by most courts, accommodates both of these concerns because it gives the appearance that the facts of differential

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[187] Goldberg, *Constitutional Tipping Points*, *supra* note 31 n. 169. *Cf.* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, xx (2004) (identifying similar concern as reason for Court's avoidance of explicit morals-based rationales for government action).

[188] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (addressing the "risk" that Title VII might function as "a general civility code for the American workplace"); *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (explaining that Title VII "eliminates certain bases for distinguishing among employees while otherwise preserving employer's freedom of choice" and describing the Court's task as drawing a "balance between employee rights and employer prerogatives").

[189] In the sexual harassment context, for example, the Court has reinforced that that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *See also Oncale,* 523 U.S. at 80 ("'Conduct that is not severe or pervasive enough to create an objectively hostile environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.'") (quoting *Harris*, 510 U.S. at 21, citing *Meritor*, 477 U.S. at 67).

[190] For a discussion of the historical development of the at-will employment doctrine in America, which arguably has influenced contemporary views about judicial deference to employer autonomy, see Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (identifying at-will employment as a "fundamental assumption [that] has shaped our labor law"). *Cf.* Deborah A. Ballam, *Employment At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000) (predicting that expansion of modern tort law is gradually eviscerating at-will employment in America); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 75 TEX. L. REV. 1655, xx (1996) (acknowledging that "[t]he employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all—has been drastically cut back in the last sixty years" and that "the at-will rule now coexists with numerous important exceptions--statutory and common law, state and federal--that prohibit . . . discrimination based on race, sex, age, or other characteristics.").

treatment, rather than the courts' own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene. That is, if the comparison reveals that an employee with X characteristic was treated differently than the similarly situated employee without X characteristic, the inference of discriminatory intent is treated as the comparison's logical, natural product.[191]

The comparison thus has an empirical cast to it – it documents, from facts, the different treatment. Given the pressures created by courts' general orientation to avoid the sociological role and undue disruption of employer prerogatives, the comparator heuristic provides comfort by appearing to produce "hard" evidence. Put another way, the inference of discriminatory intent becomes less superficially vulnerable, at least from the vantage point of the judicial legitimacy concerns just described, to the extent it rests on facts rather than on the court's subjective judgments about a workplace. Yet, as discussed above, comparators produce results regarding the presence of discriminatory intent whose objectivity is surely false. At the same time, by failing to specify the results' underlying subjectivity, they obscure the absence of judicial accountability for the analytic choices and assumptions made.

The contextual methodology for gleaning discriminatory intent from stereotyping and harassing acts might seem to be in tension with these legitimacy concerns because it lacks the comparators' ability to produce "facts." As applied, however, courts find other ways to suggest that it is the workplace context, rather than their own judgment, that is shedding light on the presence *vel non* of discrimination. Recall that in the stereotyping and harassment contexts, courts have stressed that linking workplace conduct to a protected characteristic neither requires "special training" nor presents great difficulties. Put in legitimacy terms, then, the facts appear to be doing the work.

Of course, as discussed above, not all harassing acts or stereotyping statements can be linked to a protected trait and treated as discriminatory.[192] But, from a

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[191] Of course, as shown earlier, the court's choices as to how tight a fit to demand between the plaintiff and the comparator are contestable. But once those choices have been made, there can be no denying the difference in treatment, should one exist.

[192] The debates among experts about whether Wal-Mart stereotyped and then discriminated against its female employees underscore this point. *See, e.g.*, Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMPLOYEE RTS. & EMP. POL'Y J. 1 (2005) (arguing, in context of cases such as *Dukes v. Wal-Mart*, that women continue to face "inequality [in the workplace, that] is deeply grounded in gender stereotypes and assumptions about women's interests."); John Monahan, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1742-43 (2008) (identifying *Dukes v. Wal-Mart* as a landmark case for "the use of social science research on

legitimacy standpoint, if the link is widely understood, the Court need not expend reputational capital to show the presence of discrimination. We see this, for example, in cases where courts have little difficulty finding statements that mothers should not work outside the home while raising young children to be sex-related[193] or that calling an African-American man a "boy" is racially derogatory.[194]

Comparators become important, then, in situations where the challenged conduct is not easily or obviously recognized, per these social understandings, as embodying discriminatory intent or, more colloquially, as speaking for itself. In these cases, comparators' empirical overtones suggest that the inquiry involves more than just the subjective preferences of a particular court, which Justice Thomas derided in response to the non-comparative analysis in *Olmstead*.[195]

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stereotyping to support claims for relief in employment discrimination [lawsuits]"). This is apart from the question of whether the acts and statements are sufficiently harmful to exceed the tolerance for low-grade discrimination.

[193] In applying *Price Waterhouse* to a family-responsibilities discrimination suit, for example, the Second Circuit recently rejected an employer's argument that disparaging comments about women's commitment to work after having children could not be treated as sex-based "without comparative evidence of what was said about fathers." Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004). The statements included inquiries as to how plaintiff was "planning on spacing [her] offspring," requests that plaintiff "not get pregnant until [her supervisor] retire[d]," suggestions that plaintiff "wait until [her son] was in kindergarten to have another child," and statements that it was "not possible for [plaintiff] to be a good mother and have this job." *Id.*, at 115. The court found specifically that no such comparison was required to see discriminatory intent. Instead, "the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based," the court wrote. *Id.* at 122 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). Invoking *Price Waterhouse*, the court added that "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be evidence that gender played a part' in an employment decision," and that, therefore, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive." The court found support in other circuit courts that had agreed that these types of comments support a finding of discriminatory intent. *See, e.g.,* Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (holding that a direct supervisor's "specifically question[ing] whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where plaintiff's employment was terminated shortly thereafter); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (holding, in Pregnancy Discrimination Act case, that reasonable jury could have concluded that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake"); *id.* at 1044 (stating that remarks by head of plaintiff's department that "she would be happier at home with her children" provided direct evidence of discriminatory animus).

[194] *See* Ash v. Tyson, 546 U.S. 454, xx (2006).

[195] The Court showed its sensitivity to this type of critique while allowing a non-comparison-based sex-discrimination challenge to the compensation of the female prison guards in *County of*

Consider the Court's early pregnancy cases in this light. The comparison of pregnant- and non-pregnant people did not produce facts showing that the challenged rules restricting pregnancy benefits were "because of sex."[196] Indeed, the Court in *Gilbert* wrote that it needed only the most "cursory" analysis to reach that conclusion.[197] Had the court wanted to "see" discriminatory intent in that distinction, it would have needed a source other than the comparator to do so. At the time, however, the Court sensed there was not widespread agreement on the connection between pregnancy-related restrictions and sex discrimination. Consequently, without a comparator or easy connection between the employer's acts and discriminatory intent, the majority seemed to suggest that a finding of sex discrimination would have reflected its subjective sensibilities rather than its objective judgment, thereby implicating its legitimacy.[198]

C. *The Call for Experts as a Response to the Legitimacy Concerns*

This legitimacy-protective dynamic that leads courts to prefer factual demonstrations of discriminatory intent via the comparator heuristic also helps explain why scholars have stepped up the call for expert testimony in employment discrimination claims. Experts, like comparative data, enable courts to avoid the appearance of themselves engaging in the arguably sociological task of discerning identity discrimination.

In part, experts may be useful from within the comparator framework to expand courts' sense of which comparisons could be probative. Charles Sullivan, for example, argues that courts need help with the "real question" of "when the putative comparator is similar enough to justify the inference" of discrimination. He suggests that experts can establish the "standard of care" against which an employer's conduct can be measured.[199] For Minna Kotkin, who documents courts' difficulty observing discrimination when a discrimination claim rests on multiple grounds, experts are likewise the key to expanding courts' understanding

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Washington v. Gunther, emphasizing that the discrimination inquiry did not "require a court to make its own subjective assessment of the value of the male and female guard jobs." 452 U.S. 161, 181 (1981).

[196] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976).

[197] *Id.*

[198] The dissenters, by contrast, would have located sex-discriminatory intent in the pregnancy classification following the same model that the Court has since used for linking stereotyping and harassment to discriminatory intent, stating that nothing more than "common sense" was necessary to see the link between the two. *Id.* at 149 (1976) ("[I]t offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'") (Brennan, J., dissenting) (citation omitted).

[199] Sullivan, *Phoenix from the Ash*, *supra* note 9, at 223, 227.

of the operation of stereotypes and their conception of appropriate comparators.[200]

The centrality of experts to theories that advocate non-comparative methods for observing discrimination similarly can be understood as responding to, or at least reflecting sensitivity to, the judicial legitimacy concerns just described. The implicit bias literature, for example, highlights the ways in which experts can document the presence of implicit identity-related biases and the effects of those biases on workplace decisions.[201] If carried out by experts, this approach to identifying discriminatory intent that is otherwise not readily observable can have the appearance of objectivity and, relatedly, of being driven by factors other than the influence of the court's subjective preferences.

The legitimacy concerns also help explain why, even if a plurality of the Court dismissed the expert testimony regarding sex stereotyping at Price Waterhouse as "icing on the cake," those litigating the case had thought the testimony might be helpful. If the Court had not found the link between the statements made and the partnership denial to Ann Hopkins to be so noncontroversial, there would have little, other than the Court's own judgments, to confirm the link between the statements and the protected characteristic of sex. In this light, the expert testimony in the case can be seen as an empiric-like source to verify or even compel that judgment.

It is certainly true that this move to locate determinations about discriminatory intent in experts can be characterized as simply shifting the legitimacy debate from the observation of discrimination to the treatment of expert testimony, where the debate is similarly fraught. Still, the shift may be – and has proven in some cases to be – just enough to overcome the legitimacy concerns that render courts so vulnerable. Justice Scalia has written, in the sexual harassment context, that "common sense and an appropriate sensitivity to social context" is all that is necessary to discern discriminatory intent. But where there is not easy agreement about how best to understand the social context, courts again become vulnerable to charges of imposing their own preferences on a workplace if there is no extrajudicial source that can be said to have compelled their observation of

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[200] Kotkin, *supra* note xx, at 1448-49.

[201] For recent discussion and review of implicit bias research in the social sciences, see, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, xx (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1071 (2006); Linda Hamilton Krieger & Susan Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). The Court has long recognized that these biases can result in cognizable discrimination. *See* Watson v. Fort Worth Bank, 487 U.S. 977, 990 (1988) (acknowledging "the problem of subconscious stereotypes and prejudices" in employment). My focus here is on how courts can come to see the operation of these stereotypes and prejudices.

discrimination.[202]

D. *The Legitimacy Concerns and the Viability of Second-Generation Discrimination Theories*

The legitimacy concerns just described appear to present a particular hurdle for second-generation discrimination theories because, ordinarily, there are no comparators for intersectional, identity performance, or structural claims and the theories have not yet received the mainstream acceptance accorded to first-generation theories. If these theories are to translate to practice, their success will depend on eliding the comparator heuristic and finding a different means of exposing the discrimination at issue, such as the contextual approach of the stereotyping and harassment cases.

Although relatively few second-generation theories have succeeded in making this move to a contextual analysis or in finding an alternate methodology, "family responsibilities discrimination" theory has had notable success in gaining doctrinal traction and may offer valuable lessons.[203] The theory, known as FRD, is concerned with the ways in which employees, and particularly women, face barriers in the workplace associated with their parenting or other caregiving responsibilities.[204] Often, employees who suffer adverse action related to their

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[202] This is not to suggest that expert evidence will always be accepted by courts as sufficient or decisive to establish the presence of discriminatory intent but instead only that the expert testimony enables courts to invoke an external source, rather than themselves, as drawing the link between the challenged conduct and the protected characteristic. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (stating that expert testimony about sex stereotyping at Price Waterhouse would not have been enough to give rise to inference of discriminatory intent) (O'Connor, J., concurring).

[203] *See* Joan C. Williams & Stephanie Bornstein, *The Evolution Of "Fred": Family Responsibilities Discrimination and Developments in the Law of Stereotyping And Implicit Bias*, 59 HASTINGS L.J. 1311, 1357 (2008) (FRD lawsuits have "cemented the recognition that plaintiffs in Title VII disparate treatment cases may show [family responsibilities] discrimination even when they lack a comparator"). *See also* Catherine Albiston, et al., *Ten Lessons for Practitioners about Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, xx (2007-08).

[204] Joan Williams and Stephanie Bornstein have defined family responsibilities discrimination as "discrimination against employees based on their responsibilities to care for family members," which includes "pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities." Williams & Bornstein, *supra* note 203 at 1313. They have observed that "[w]hile FRD most commonly occurs against pregnant women and mothers of young children, it can also affect fathers who wish to take on more than a nominal role in family caregiving and employees who care for aging parents or ill or disabled partners." *Id.* For additional discussion of FRD, *see* JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *Introduction* to WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (WorkLife Law Press 2006); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101-10 (Oxford Univ. Press 2000).

family responsibilities cannot show discrimination through a comparator either because there are no similarly situated co-workers or because the would-be comparators in a workplace are all women or otherwise share the same protected trait.

Rather than try to work from within the comparator heuristic, advocates for recognition of FRD worked around it and, centrally, engaged experts (as well as popular culture) to ease courts' way into seeing the link between employers' skepticism of workers with family responsibilities and the protected characteristic of sex. Social scientists have been particularly important to this effort, as they have documented "an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework."[205] This data, supplemented by additional research, does the work of linking maternal stereotypes to discriminatory intent. Perhaps responding to *Geduldig* and *Gilbert,* where the Court was unable to bring itself to see the pregnancy-sex connection, FRD advocates effectively relocated the task of observing discriminatory intent from the Court to expert social scientists.

Even further, FRD recognition advocates have sought to establish the link between employers' adverse treatment of parents and sexism in the popular culture as well, so that the link between an employer's skepticism toward a new mother's work ethic and sex discrimination can be seen easily and without any "special training."[206] Thus, when these advocates celebrate that courts have accepted non-comparator-based FRD claims, we can understand this success as deriving in part from judicial confidence in public acceptance of the caregiver-sex discrimination link so as to minimize the risk that courts will appear to be meddling unduly in employer freedom or imposing their subjective views of discrimination.[207]

By contrast, consider the poor track record of challenges to sex-based dress

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[205] Williams & Bornstein, *supra* note 203, at 1327.

[206] *Id.* at 1314 (describing the issue of caregiver discrimination as one that "has 'arrived' in the public consciousness").

[207] In a more limited way, discrimination claims related to gender identity and performance have begun to gain traction. *Compare, e.g.,* Schroer v. Billington, 525 F. Supp. 2d 58, xx (2007) (granting sex discrimination claim against Library of Congress, which withdrew job offer it had made to military specialist upon learning she was transgender) to Ulane v. Eastern Airlines, 742 F.2d 1081 (1984) (rejecting sex discrimination claim brought by airline pilot who was fired after airline learned she was transgender). Some of the reasons for these claims' success relate to judicial perceptions about the fixed nature of sex in transgender individuals, consistent with the legitimacy concerns regarding identity described earlier. But others, more relevant to the inquiry here, derive from the sex-stereotyping in these cases, which is as blatant and relatively easy to recognize as the stereotyping in *Price Waterhouse.*

and grooming codes as discriminatory.[208] In these situations, the underlying theoretical claim is that an employer's insistence on having men and women groom and dress themselves differently is not materially different than first-generation-style sex-based classified advertisements or blanket refusals to hire women; in both, the employer impermissibly polices gender norms.[209] Yet courts regularly do not see the sex-based distinction as discriminatory, in part because of the way they apply a comparator analysis to these cases.

The legitimacy concerns can help illuminate why comparators are so difficult to escape in this context. In the view of most courts to have addressed these challenges, the link between the sex-based rules and discriminatory intent is not nearly as "obvious" or easy as in the case of sexual harassment or sex stereotyping. Even relative to FRD, courts do not see evidence that the public imagination considers grooming codes to be obviously discriminatory. Nor is there a wealth of social science that courts can rely on, as there is for FRD, to do the work of establishing that these grooming codes embody sex-based stereotypes or otherwise to illuminate and verify that sex-based discriminatory intent is embedded in the codes.

Because the link between sex-based grooming codes and impermissible stereotyping does not fall within *Price Waterhouse*'s "no special training" standard, some other methodology is needed to review the discrimination allegation, and courts most often funnel these cases through what amounts to a comparator analysis. As the Ninth Circuit found, for example, when sustaining a casino's extensive dress code that required the same uniform but different makeup, hair, and nail care requirements for men and women, "[t]he only evidence in the record to support the stereotyping claim is [the plaintiff's] own subjective reaction to the makeup requirement."[210] The court contrasted the employee's claim in that

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[208] *See, e.g.,* Jesperson v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (rejecting sex discrimination challenge to casino grooming code that imposed different requirements on men and women); Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (2004) (affirming summary judgment for employer where employee alleged that "no facial jewelry" policy constituted religious discrimination); Pitts v. Wild Adventures, Inc., Case No. 7:06-CV-62-HL, 2008 WL 1899306, at *5-6 (M.D. Ga. Apr. 25, 2008) (finding no merit to Plaintiff's allegation that grooming policy that prohibited dreadlocks and cornrows constituted race discrimination against African-American employees). *But see* Tamimi v. Howard Johnson Co., Inc. 807 F.2d 1550 (1987) (affirming judgment in favor of employee who alleged sex discrimination over dress code that required female employees to wear makeup and lipstick).

[209] For a discussion of grooming standards and gender norms, see, e.g., Devon Carbado, et al., *Foreword: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL'Y 1, 1 (2007) (arguing that "grooming standards can (but needn't always) function to regulate and give content to our identities"). *See also* United States v. Virginia, 518 U.S. 515 (1996) (sustaining first-generation-type challenge to exclusion of women from military academy).

[210] *Jesperson*, 444 F.3d at 1112.

case with cases in which, it suggested, the link between a dress code and discrimination would be easier to find, such as where a dress code "tend[ed] to stereotype women as sex objects" or amounted to sexual harassment.[211] Given courts' interests in avoiding sociological judgments about identity discrimination and infringing on employer freedom, it is not surprising that where the court did not find "clear" stereotyping and where a comparison did not produce a striking difference in treatment of men and women,[212] the court did not find discrimination because of sex.[213]

In short, courts' concerns about navigating between with the Scylla of sociological tasks and the Charybdis of employer autonomy surely account for some, if not all, of the comparators' appeal. With their empirical, legalistic cast, comparators strongly suggest that a court's finding of impermissible discrimination is the product of neither an amateur judicial evaluation of social norms and workplace dynamics nor a court's arrogant disregard of employer autonomy. Instead, it is compelled simply and cleanly by both the facts and the governing law.

VI. PROSPECTS FOR CHANGE

Assuming that no social scientific advance will render obsolete the need for judicial inquiries into discriminatory motive and that courts will retain their sensitivity to the legitimacy concerns just described, this Part suggests several possibilities for expanding courts' methodological repertoire for observing discrimination in light of comparators' costly deficiencies. Although full development and evaluation of alternate approaches is beyond the scope here, the suggestions below aim to counter the flattening effect of the demand for comparators on discrimination law and norms in both first- and second-generation theories and cases while also taking account of concerns about both judicial legitimacy and accountability.[214]

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[211] *Id.*

[212] The dissenters disagreed with this characterization of the policy, finding that the grooming code's makeup requirements for women imposed a distinct burden not imposed on men and that this difference in treatment was "clearly and unambiguously" "'because of sex.'" *Id.* at 1114 (Pregerson, J., dissenting) (describing Jespersen's evidence as "show[ing] that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders.").

[213] [discussion to come, if space allows, regarding other failed stereotyping challenges including efforts to address English-only rules] Again, the substantive consequence of this application of the comparator heuristic was to limit the reach of discrimination law and its underlying norms.

[214] Although the focus here is on developing options that might enable recognition of diverse forms of discrimination, it is also possible that, again recalling Fuller, litigation and adjudication are simply not well-suited to resolving certain kinds of complex suits, including those that are the focus of second-generation theorizing. *See supra* notes xx and accompanying text. Legislative and

Setting aside strategies for enlarging the set of acts and statements that are widely understood to expose discriminatory intent,[215] potential means for expanding the set of approaches used to observe discrimination range from tweaks to the current comparator regime to more expansive lenses. The latter have the benefit of allowing more nuanced review, but they also bear the weakness, in some cases, of providing both less guidance and less protection to courts concerned about their legitimacy. Ultimately, I argue that a move toward applying the contextual analysis that is already familiar from the stereotyping and harassment jurisprudence will best address both the legitimacy concerns to which the comparators respond and the accountability flaws embedded in that methodological choice---with the additional benefit of restoring a less formalistic, more substantive treatment of discrimination law and norms.

A. *Involving Experts in Setting Comparators' Contours*

Beginning with the smaller changes, one option would be to accept the comparator methodology's dominance but expand the conception of an appropriate comparator. As noted earlier, the Court itself rejected a formulation demanding that a comparison produce a result that "virtually . . . jumps off the page and slaps you in the face" before finding discrimination.[216] Beyond that, the suggestions of Kotkin and Sullivan that experts be used to establish reasonable comparators despite differences in jobs, supervisors, or even employers could prove helpful in enabling more employees to identify comparators that would be treated as acceptable to highlight their protected trait as the basis for the adverse action. By recasting the selection of comparators as a determination involving facts subject to expert analysis and verification, rather than as a matter turning exclusively on the judgment of the court, it might be possible to broaden the conceptualization of comparators while attending to the legitimacy constraints in this area.

For first-generation theories, this expansion would almost certainly be helpful in mitigating the comparator heuristic's barrier-like effects. The broader the pool,

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policy advocacy as well as collaborative efforts with employers, public accommodation operators, and others may ultimately be more effective in eliminating barriers related to protected (and other) traits. However, because the primary focus of this Article is on what courts can do, and because many of the extra-litigation efforts just described operate in the shadow of doctrine, these alternate analytic approaches are worthy of consideration, even if all they do is enhance the possibilities for success of the non-litigation strategies.

[215] The movement to have FRD recognized provides a strategic model worthy of consideration for these kinds of efforts because of its combined focus on developing social science and establishing understanding of the link between family responsibilities and sex discrimination in the public's mind.

[216] Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006).

the more likely an employee will be able to identify a "colleague" who is similarly situated but for the protected characteristic.

The benefit flowing from the sheer increase in numbers of potential comparators would be much more limited for second-generation intersectionality-type claims. Recall that the difficulty in these cases does not lie, primarily, in finding a comparator. Instead, when an individual appears anomalous amidst the comparator pool because of his or her particular combination of traits, courts tend to be skeptical, even with comparators, that discrimination, rather than a quirk of that individual, motivated the employer's adverse action.[217]

For identity-performance-based suits, broadening the pool of comparators would likewise be unavailing. For example, returning to Carbado and Gulati's example of the fifth black woman, a broader comparator pool would not, in itself, help that employee show that her race, rather than other factors related to her personal presentation, was the basis for the adverse treatment under an identity performance theory. Even with a broad pool, the employer could still produce the four other similarly-credentialed black women it promoted to strengthen its argument that it had legitimate, nondiscriminatory reasons for denying promotion to the fifth black woman. With the benefit of a broader comparator pool, the fifth black woman could potentially identify a non-black woman who had a similar style but received a promotion. As a practical matter, however, it is difficult to imagine this sort of comparison-based claim succeeding; even if the employee could find a comparator, employers could be counted on to undermine the broader comparator pool as insufficiently attuned to salient differences in workplace cultures that are relevant to consideration of employees' personal style.

For the structural discrimination described by second-generation theories, where workplace patterns make discrimination difficult to observe and trace, expanding the size of the comparator pool would seem to be of marginal assistance, at best. Having more employees in the mix could conceivably help illuminate the effects of the discrimination that is masked within employee interactions. But as much of the structurally-focused literature makes clear, the diffuse and subtle nature of much contemporary workplace discrimination, as it is facilitated and exacerbated by social and more formal structures within workplaces, will still escape observation within a comparator framework.

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[217] *See supra* notes 71-73 and accompanying text. Of course, the identification of additional individuals who share the plaintiff's protected traits and have also suffered adverse treatment could bolster the argument that the traits are the likely reason for the employer's action. But even courts that are willing to accept a broader group of comparators are likely to find systemic evidence of discrimination of individuals in other workplaces to be too attenuated to show that discrimination was the reason for the employer's action against the plaintiff.

B. *Considering Hypothetical Comparators*

A related possibility would be to expand the current comparator-based approaches by allowing for hypothetical comparators as well as actual comparators.[218] This approach has been embraced in England, for example, where the Sex Discrimination Act of 1975 "permits a comparison to be drawn between the way in which a woman is treated and the way in which a 'hypothetical male' would have been treated."[219] The European Union has likewise embraced the value of the hypothetical comparator through its discrimination-related directives, which provide that discrimination can be found where "a person is treated less favourably on grounds of" his or her protected characteristic "than another is, has been, or *would be* treated in a comparable situation."[220] As one commentator has observed, "[c]learly, the comparator need not 'exist'; establishment of the probability of 'his' or 'her' better treatment will be enough."[221]

This shift would enhance even further the benefits that flow from broadening the actual comparator pool, at least for first-generation cases, by providing more opportunities to produce a discrimination-exposing comparison. Second-generation cases, by contrast, would experience less gain from this change for the same reasons that gains from enlarging the set of actual comparators would also be limited. Interestingly, though, a move to hypothesize a *smaller* comparative pool in the case of intersectional plaintiffs could possibly be helpful in overcoming courts' skepticism toward the value of comparison for showing discrimination against plaintiffs who are unique in the workforce by virtue of their combination of protected traits.

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[218] Even this proposal would move beyond the discrimination theory advanced by Justice Thomas in *Olmstead*, which would restrict the recognition of discrimination to situations in which actual differences of treatment between actual employees could be documented.

[219] *See* Sarah Fredman, *Reforming Equal Pay Laws*, 37 INDUS. L.J. 193 xx (2008); *see also* Iain Steele, Note, *Beyond Equal Pay?*, 37 INDUS. L.J. 119, xx (2008) (recognizing the value of a hypothetical male comparator for a woman bringing a claim under the Sex Discrimination Act of 1975).

[220] Council Directive 2000/43/EC, 2000 O.J. (L 180) 22. *See also* Council Directive 2000/78/EC, 2000 O.J. (L 303) 16; Council Directive 76/207/EEC, 1976 O.J. (L 39) 40, derogation in 194N, incorporated by 1994 O.J. (L 1) 484.

[221] Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 927, 934 (2005).

The potential problem is that the move to a hypothetical comparator may tread more closely on judicial legitimacy concerns than an approach that expands the scope of "real" comparators because it overtly acknowledges the court's work in seeing discrimination rather than simply in "finding" discrimination in the facts presented. Yet there may be ways around this difficulty. As Sandra Fredman observed with respect to the United Kingdom's equal pay laws, "there is a well-developed methodology for determining what a hypothetical male would have been paid, using either a proportionate value method or a proxy method."[222] This type of expert-driven data-based portrait of the hypothetical comparator can thus fit neatly with the judicial legitimacy concerns in this area.

However, while either legislative commitments or statistical analysis might work in the equal pay context, where job criteria and pay ranges are arguably susceptible to quantification and comparison,[223] hypothesizing a comparison to prove the discriminatory treatment of a corporate executive or a group of plant workers where there are no actual comparators will not have that factual, legitimacy-protecting cast. Imagine, for example, that a court faced with a discrimination claim by the only African American senior executive at a bank was asked to hypothesize a comparator to assess the adverse treatment that had been alleged. While a court might be willing to stretch and consider an expert's analysis of actually comparable positions and employees in the industry, the creation of a purely hypothetical comparator, even if by an expert, arguably leaves a court with little to show that it has observed trait-based discrimination rather than simply bad, but permissible, treatment.

Alternately, a hypothetical comparator might elide these concerns if legislative bodies were to "'elaborate criteria of assessment,'" as the European Court of Justice has suggested.[224] Courts could then point to these bodies, rather than their own views, as driving the comparison. Yet again, while this could conceivably work in the equal pay area (though the comparable worth movement's experience suggests that this would not be feasible in the U.S.),[225] a general statement of acceptable workplace behavior would be exceedingly difficult to conceptualize in a way that would capture discriminatory conduct but not workplace behavior that is offensive but permissible. And even if one could be created, it would face

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[222] Fredman, *supra* note xx, at 201.

[223] The failure of most comparable worth litigation in the U.S. suggests, however, that even this effort might be doomed by charges of unconstrainable subjectivity. *See, e.g.*, Birch v. Cuyahoga County Probate Court, 392 F.3d 151, 170 (6th Cir. 2004) (noting that courts have refused to apply *Gunther* analysis where comparable worth case "involves a subjective assessment of different positions with different duties"); *see generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 181 (1994).

[224] *See* Macarthys Ltd. v. Smith, Case 129/79 [1980] ECR 1275 (ECJ).

[225] *See supra* note 223.

serious challenges from extant political and jurisprudential commitments to employer discretion in workplace governance.

C. *Moving Beyond Comparators*

A move away from treating comparators as central to observing discrimination outside the presence of obvious harassment or stereotyping would, of course, help alleviate the effects of their limitations for both first- and second-generation cases. One option comes directly from the second-generation scholarship. The implicit bias literature, for example, offers courts the opportunity to rely on experts, rather than comparisons, as their lens for observing discriminatory intent.[226] The literature focused on workplace structures likewise shows that expert analysis can aid courts in seeing which particular structures may foster discrimination.[227]

The difficulty, relative to the legitimacy concerns, comes in drawing the link from the insights of the implicit bias and structurally-focused literatures to the dynamics of a specific workplace and the adverse treatment of a particular employee.[228] Although this can be done, methods for seeing discrimination are likely to be more attractive to courts to the extent that the experts, rather than the court, appear to be illuminating the discrimination within the workplace at issue.

Yet another possibility – and the one I advocate most strongly here – would be simply to put comparison in its place as one technique among many for observing discrimination rather than as *the* technique that must be used before discrimination can be seen.[229] This change would also move contextual evaluation from its confined role in stereotyping and harassment cases to a new status as a legitimate analytic option in all cases. Even in its simplicity, this type of frame-shift in the way we see discrimination cases could be transformative in diminishing some of

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[226] *See supra* n. 201.

[227] William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation,*17 EMPLOYEE RTS. & EMP. POL'Y J. 377, xx (2003).

[228] If the research showing the general pervasiveness of implicit bias were accepted as sufficient to show discrimination in a specific case, anyone with a trait that is the subject of an implicit bias in a particular context would conceivably be able to prevail on a discrimination claim. While this turn would not necessarily implicate concerns about courts acting as sociologists, as the discriminatory intent link would rest on expert analysis, it would raise powerful legitimacy concerns related to judicial overregulation of the workplace that would no doubt be powerful because of the methodology's vast potential reach. These would be separate from concerns about whether employers should be held accountable for acting on biases about which they are unaware. *See, e.g.*; Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 Ind. L.J. 1233, xx (1999); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, xx (1999); Nagareda, *supra* note xx, at xx.

[229] This would be outside the context of harassment and stereotyping cases, of course.

the worst offenses of the comparator paradigm. It would do so by more closely matching the observational tools courts use with both the refinements to theory that have taken place in recent decades and our expanded knowledge of the dynamics of discrimination.

Indeed, if comparators are properly understood to be one among a set of imperfect methodological choices for seeing discrimination, courts' cordoning off of "stray" remarks from consideration, rather than looking holistically at all incidents in the work environment as they do in harassment and stereotyping cases, no longer seems so sensible (if it ever did).[230] In short, a contextual approach would free courts from the artificial blinders imposed by the comparator jurisprudence that short-circuit the analysis of discrimination claims and produce crabbed outcomes without either explanation or justification.

This move would be obviously beneficial for first-generation cases because it would expand the set of means by which employees could seek to shed light on discriminatory intent. For second-generation claims, an escape from the comparator demand could prove invaluable by enabling exposure of the nuanced, contextually-rooted and complex forms of discrimination not reached by first-generation theories and foreclosed by a demand for comparators. In other words, releasing the comparator's grip on discrimination analysis reopens the possibility that discrimination jurisprudence could develop in ways that recognize more than just the most formalistic and easily legible violations of discrimination laws and norms.

One objection might be that we have better reason to undertake a broad, contextual (and consequently more searching) assessment in the face of harassment and stereotyping because we have more confidence in our ability to see discriminatory intent in that type of evidence than we do in the mere showing of comparatively different treatment. If we enable an employee to trigger a contextual inquiry based only on a breastfeeding ban or his or her sense of being discriminated against notwithstanding the absence of a comparable co-worker, for example, courts would lack the constraints necessary to prevent them from unduly infringing employer freedom. In this way, the presence of stereotyping or harassing acts could be considered as analogous, under the extant jurisprudence, to a classification that merits heightened scrutiny. In the face of these kinds of acts, courts have some reliable indications of impermissible intent and are, therefore, more willing to be skeptical of non-discriminatory explanations for workplace interactions. The presence of a better-treated comparator might then be analogized to a strong form of rational basis review, where the court has some reason –

[230] *See supra* Part IV and accompanying text.

although not as much as in the case of harassment or stereotyping – to be suspicious of other questionable workplace conduct. Without harassment, stereotyping *or* a comparator, courts arguably should have no reason to be suspicious, and we can see in these cases an approach analogous to the weakest form of rational basis review, which, in this context, would give the challenged adverse action the strongest presumption of legitimacy.

Of course, a move like this, which broadens the pool of potentially successful discrimination cases, has certain costs. With more cases surviving into later stages of litigation, employers are likely to pay employees more, and perhaps more quickly, to settle cases. Courts, too, will face greater burdens to the extent they are charged with overseeing a potential growth in longer-lasting litigation.[231] But, I would argue, these costs are more than matched by the benefit of having open jurisprudential discussion and debate about the proper reach of discrimination doctrine. This is not to say that courts (or employers) would easily embrace the kinds of complex, or even first-generation, discrimination cases that currently lose because the plaintiff lacks a comparator. But under the comparator-requiring regime, these cases, and the theories on which they rely, do not even get to the point of having a meaningful hearing absent a comparator. A move to a contextual evaluation, in other words, would open the possibility for conversation and, perhaps, refinement of the jurisprudence.

Further, if we admit that the way we see discriminatory intent in harassment, stereotyping, and comparators rests on judicial judgment calls aided by whatever heuristics have been deployed, rather than being factually or legally compelled, then maintaining such different frames to determine whether courts are willing even to consider, much less find, discriminatory intent in the workplace begins to make less sense. And a move toward contextualized assessment of all types of workplace rules starts to seem both more sensible and less troubling.

CONCLUSION

Judicial concerns about sociological inquiries and undue incursions into employer discretion, as well as comparators' intuitive appeal as a means for observing discriminatory intent, will no doubt enable the comparator methodology

[231] For plaintiffs, by contrast, the cost of a move to a context-focused regime would be virtually nil. If the production of a comparator was enough, on its own, to enable an employee to prevail, we might be concerned that employers would seek to invoke a contextual analysis to impede potentially successful comparator-based claims. But the comparator alone does not secure victory for the employee; instead, at most, the employee wins the right to survive summary judgment and bring his or her case to a jury. A context-focused analysis simply opens room for the employee to produce additional evidence of discrimination, which at most could supplement, but could not undermine, whatever observations about discrimination a court would make via a comparator.

to retain a central place in discrimination jurisprudence. Still, the methodology's embedded expectation that identities are simple and that workers are easily comparable strikingly belies contemporary understandings of both identity and the modern workforce. The effect has been both to foreclose most discrimination claims and, further, to shrink the very idea of discrimination, both truncating traditional discrimination jurisprudence all but guaranteeing that second-generation discrimination theories will not translate into law.

Because comparators are, in this sense, so mismatched to their task of revealing trait-based discrimination, it is time to recognize them as but one among several imperfect methodologies rather than as foundational to discrimination itself. By dethroning comparators in this way and incorporating the contextual methodology used to observe discrimination in harassment and stereotyping cases, we may yet be able to diminish the damage caused by their troubling stronghold over American discrimination law and theory.