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## ARTICLES

### Social Closure Discrimination

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## INTRODUCTION

Sociologist Max Weber long ago articulated a theory of social closure as a process for drawing boundaries, constructing identities, and building communities to monopolize scarce resources for one’s own group and exclude others from using them.<sup>1</sup> Social closure both constructs the boundaries of groups and privileges some groups over others. When it falls along socially salient lines like race and sex, social closure is a form of discrimination. Tap-on-the-shoulder systems for promotions, word-of-mouth hiring, and nepotism or cronyism—these are just a few examples of workplace structures and processes that facilitate and constitute social closure. Even though social closure has been prominent in social science research about inequality for several decades, it has been largely absent from the legal discourse about discrimination.

Discrimination in the legal realm is a term of art. Title VII of the Civil Rights Act of 1964 prohibited “discrimination” but did not explicitly spell out what discrimination means, leaving elaboration to the courts.<sup>2</sup> Over time, the Supreme Court has developed the meaning of discrimination through several broad legal theories. For example, the Court has long maintained that employers who treat their employees differently because of their race, sex, religion, color, or national origin violate Title VII of the Civil Rights Act,<sup>3</sup> even if they express no animus against members of the protected group.<sup>4</sup> The Court has also held that employment practices that have a disparate impact on members of a protected group can constitute discrimination under Title VII.<sup>5</sup> And in a series of cases in the late 1980s

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1. Jurgen Mackert, *Social Closure*, OXFORD BIBLIOGRAPHIES (Aug. 29, 2012), <http://www.oxfordbibliographies.com/> (follow “Sociology” hyperlink under “Browse By Subject”; then follow “S” hyperlink; then follow “Social Closure” hyperlink).

2. Civil Rights Act, 42 U.S.C. § 2000e-2(a) (2017).

3. See *Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

4. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (holding that a plaintiff can prove discrimination by inference from an employer’s false reason for an employment decision without providing evidence of biased statements on the part of the decision maker); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See also *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975).

5. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); 42 U.S.C. § 2000e-2(k).

and early 1990s, the Supreme Court held that harassment at work can amount to discrimination if it is sufficiently severe or pervasive.<sup>6</sup>

The devil is in the details, however. Over the decades, courts have developed accompanying evidentiary proof structures within these broad legal theories to help guide their evaluation of evidence.<sup>7</sup> We will call these evidentiary proof structures “legal frameworks.” Legal frameworks can provide helpful guidelines for evaluating evidence offered to prove discrimination. Legal frameworks can also help judges, lawyers, and litigants to apply the law, and employers, administrative bodies, and diversity consultants to implement the law in ways that overcome misconceptions and cognitive biases.<sup>8</sup> Finally, legal frameworks signal policy priorities and expectations to employers seeking to comply with the law.

Nevertheless, over time, these legal frameworks, and the broader discrimination theories within which they operate, have become out of step with social scientific understandings of the mechanisms of bias.<sup>9</sup> As a result, we need to re-think how the law can more accurately reflect and capture discrimination as it operates in the real world. Indeed, scholars have begun to call for more comprehensive approaches to evaluating evidence of discrimination that consider social context and structure.<sup>10</sup> Change can be difficult, however, particularly when legal frameworks become so entrenched that they shape how we think about underlying discrimination itself, rather than merely articulating one of many ways to prove that discrimination occurred.

Indeed, the problem is not with legal frameworks per se, but with their continued and sometimes rigid application even in the face of evidence that they do not accurately capture how discrimination operates in real life.

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6. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

7. See, e.g., *McDonnell Douglas Corp.*, 411 U.S. 792 at 802; *Teamsters*, 431 U.S. 324 at 37, *Griggs*, 401 U.S. 424 at 432; *Meritor*, 477 U.S. 57 at 69; *Harris*, 510 U.S. at 22. The Civil Rights Act of 1991 further elaborated and codified some of these evidentiary proof structures. 42 U.S.C. §§ 2000e-2(k), (m).

8. For example, research suggests that frameworks delineating clear rules are more likely to reduce the impact of bias in legal decisions than frameworks providing standards as general guidance. See Erik J. Girvan, *Wise Restraints?: Learning Legal Rules, Not Standards, Reduces the Effects of Stereotypes in Legal Decision-Making*, 22 PSYCHOL. PUB. POL'Y & LAW 31 (2016).

9. See generally Robert L. Nelson, Ellen C. Berrey & Laura Beth Nielsen, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. OF L. & SOC. SCI. 103 (2008).

10. See, e.g., Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995). See also SANDRA F. SPERINO & SUJA THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017) (arguing that many frameworks and doctrinal requirements have been created and/or used by judges to dispose of meritorious employment discrimination claims without allowing them to go to a jury).

Outdated legal frameworks can cabin our thinking, fail to address compelling empirical evidence about the nature and manifestations of bias, and prevent us from accurately theorizing and recognizing real world barriers to equality. Legal frameworks are useful only to the extent they are tools for addressing discrimination, not straightjackets constraining our understanding.

In this article, we examine social closure, a theory of discrimination new to the legal literature that has been well documented in social science research but insufficiently recognized in existing legal doctrine.<sup>11</sup> In Part I, drawing on substantial sociological research, we theorize and elaborate social closure as a form of discrimination. We then illustrate how social closure operates by using facts from some familiar employment discrimination cases, cases in which the courts did not explicitly recognize social closure but in which social closure may have been operating. In Part II, we turn to a discussion of legal frameworks. We argue that courts apply existing legal frameworks, even those designed to address systemic forms of discrimination, in ways that tend to mask social closure. Courts mask social closure in two distinct ways: (1) by individualizing bias, and (2) by isolating employment practices from their history and organizational context. We make several recommendations for legal approaches that would capture social closure better. For purposes of this article, these recommendations are judge-focused: We urge courts to refrain from individualizing bias, particularly under the systemic disparate treatment framework and cases involving harassment and stereotyping. We also advocate that courts consider context, past and present, when they examine employer practices. We leave developing recommendations for changing existing legal frameworks to future work.

## I.

### SOCIAL CLOSURE AS DISCRIMINATION

Social closure is a fundamental sociological concept explaining how society produces and maintains inequality. Proposed by Max Weber to explain the legal profession's privileged legal, social, and economic status,<sup>12</sup> social closure "refers to processes of drawing boundaries, constructing identities, and building communities in order to monopolize scarce resources for one's own group, thereby excluding others from using

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11. See generally Nelson et al., *supra* note 9.

12. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 341–44 (1978) (explaining the rise and persistence of the state sanctioned monopoly on the practice of law, and how this was related to the high social and economic status of members of the legal profession).

them.”<sup>13</sup> Social closure depends on the creation of group boundaries. Weber explained social closure in this way:

[O]ne group of competitors takes some externally identifiable characteristic of another group of (actual or potential) competitors—race, language, religion, local or social origin, descent, residence, etc.—as a pretext for attempting their exclusion. It does not matter which characteristic is chosen in the individual case: whatever suggests itself most easily is seized upon.<sup>14</sup>

Because social distinctions in a given culture, including race, sex, and national origin, are often the most salient and historically relevant categories, the dynamics of social closure often operate around the social categories protected by Title VII.

Social closure does more than rely on group boundaries; it constructs and reifies them. Exclusionary closure involves “a process of subordination in which one group secures its advantages by closing off the opportunities of another group . . . that it defines as inferior and ineligible.”<sup>15</sup> Thus social closure not only advantages the group that appropriates scarce resources, but also socially constructs those who lie outside group boundaries as subordinate and inferior.<sup>16</sup> When resources are overlaid onto these status distinctions, over time society attributes competence and worth to the group with more resources, thus reifying both the distinction and the inequality.<sup>17</sup>

As we discuss in more detail below, the efforts at boundary drawing and exclusion that characterize social closure often give rise to institutionalized workplaces structures and practices.<sup>18</sup> In *Economy and Society*, Weber discussed how the process of social closure creates an “interest group” that pursues advantage through boundary drawing and exclusion, sometimes in conjunction with the state. He noted “a growing tendency to set up some kind of association with rational regulations” so that the group engaged in social closure becomes a legally privileged

13. Mackert, *supra* note 1.

14. WEBER, *supra* note 12, at 342.

15. Raymond Murphy, *The Structure of Closure: A Critique and Development of the Theories of Weber, Collins, and Parkin*, 35 BRIT. J. OF SOC. 547, 548 (1984).

16. Donald Tomaskovic-Devey & Kevin Stainback, *Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces Since the Civil Rights Act*, 609 ANNALS AM. OF ACAD. POL. & SOC. SCI. 49, 57 (2007) (explaining that “social-closure based discrimination is both about protecting opportunities for the dominant group but also acts to preserve the status distinctions between in-group and out-group”).

17. Nancy DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism: Bias for Versus Bias Against*, 35 RES. IN ORG. BEHAV. 57, 64 (2015). Although groups constructed as subordinate can also engage in boundary drawing, if these groups lack access to resources and power such boundary drawing does little to rectify inequality. See also NANCY DITOMASO, *THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM* 10–11 (2013).

18. Tomaskovic-Devey & Stainback, *supra* note 16, at 53, 56–58 (“Employment segregation is the product of a series of well recognized microlevel mechanisms—prejudice, cognitive bias, statistical discrimination, social closure around desirable employment opportunities, and network-based recruitment.”).

group,<sup>19</sup> for example, through legal restrictions on who can practice law. Some efforts at exclusion, such as the protectionist legislation applied to women in the early twentieth century, may even appear to have benign or positive motives, yet still operate to foreclose employment opportunities for those outside the boundaries of the group engaged in social closure.<sup>20</sup> That legislation prohibited women from working in certain industries or working long hours, effectively excluding them from many lucrative jobs and preserving those jobs for men.<sup>21</sup> Because social closure often produces and capitalizes on seemingly group-neutral rules, it can be difficult to identify, even when it facilitates monopolizing jobs or other resources for one group over another.

Group-based efforts at social closure can also operate through formal institutional arrangements like trade guilds and the legal profession, which control the criteria for who may join their ranks.<sup>22</sup> In addition, social closure can include workplace processes like tap-on-the-shoulder promotion practices that interact with informal preferences for people similar to or socially connected to a decision maker.<sup>23</sup> These practices persist because interests in maintaining in-group benefits can even overcome concern for efficient performance. Indeed, monopolizing organizational positions, such as desirable jobs, is one of the primary targets of struggle among status groups engaged in social closure.<sup>24</sup>

This Weberian theory of social closure has generated a robust literature on how in-group favoritism operates in modern workplaces. In Part I.A., we review some of that research to give a better sense of how social closure can be a form of discrimination. In Part I.B., we then take a deeper look at several well-known employment discrimination cases to reveal what social closure discrimination looks like in action, and what we may have been missing in our current legal frameworks.

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19. WEBER, *supra* note 12, at 342.

20. See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (2003); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUESTION FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 30–33 (2001).

21. KESSLER-HARRIS, *OUT TO WORK*, *supra* note 20; KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 20. See also *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (discussing the historical use of law to exclude women from occupational and educational opportunities).

22. WEBER, *supra* note 12, at 342; Raymond Murphy, *The Structure of Closure: A Critique and Development of the Theories of Weber, Collins, and Parkin*, 35 BRIT. J. OF SOC. 547–67, 549 (1984).

23. See Tomaskovic-Devy & Stainback, *supra* note 16, at 55–57 (stating that social linkages can also be institutionalized through club memberships [e.g. fraternities], shared educational backgrounds [e.g. Exeter], religious ties, or even the Social Register).

24. Murphy, *supra* note 15, at 549.

### A. Social Science Research on Social Closure

Ample social science evidence documents the process of social closure. One important line of research shows how social closure can operate at the micro-relational level of bias in ongoing interactions. For example, social closure can take the form of in-group bias—or social preferences for people similar to oneself—what social scientists call homosocial reproduction.<sup>25</sup> In-group bias influences institutional processes such as hiring.<sup>26</sup> It also affects how information is shared among employees and how bonds of friendship and mentoring develop.<sup>27</sup> Social closure can also take the form of a sense of mutual obligation toward those who share ethnicity, nationality, race, and gender. As Donald Tomaskovic-Devey and Kevin Stainback put it, “helping people you like and know is expected of friends and even acquaintances,” yet those networks of affiliation tend toward homosocial reproduction.<sup>28</sup> Hiring within those networks may not be discriminating *against* a minority candidate so much as discriminating *in favor* of a friend.<sup>29</sup> Indeed, research on in-group favoritism indicates that warmth toward the high status in-group often exceeds coldness toward the out-group, suggesting that positive rather than negative feelings are the drivers of social closure.<sup>30</sup> Anthony Greenwald and Thomas Pettigrew argue these actions should be understood as the “*nonoccurrence of a helpful act*” rather than a hostile action, but they still effectively cause substantial inequality.<sup>31</sup> Greenwald and Thomas argue that “in-group-directed

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25. Tomaskovic-Devey & Stainback, *supra* note 16, at 55. Interestingly, in-group preference and bias can be generated even when groups are created arbitrarily and subjects are aware of this fact. This bolsters support for our social closure thesis, that it is perceived in-group *status or affiliation* rather than racial animus driving this form of discrimination. See Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669, 671 (2014); see also Nancy DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism: Bias for Versus Bias Against*, 35 RES. IN ORG. BEHAV. 57, 62 (2015).

26. Tomaskovic-Devy & Stainback, *supra* note 16, at 56.

27. *Id.* See also Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553–84 (2010).

28. Tomaskovic-Devey & Stainback, *supra* note 16, at 56; DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism*, *supra* note 17, at 61.

29. Tomaskovic-Devey & Stainback, *supra* note 16, at 57 (An employer could not escape statutory liability for discrimination by asserting a preference for members of an all-male club and claiming that preference was based on club camaraderie rather than gender; social closure based on unexamined social ties in effect accomplishes the same thing). See also Greenwald & Pettigrew, *supra* note 25, at 672.

30. DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism*, *supra* note 17, at 60.

31. Greenwald & Pettigrew, *supra* note 25, at 673. The research indicates that not only does social closure solidify an in-group and define an out-group, but also that in-group becomes higher status over time. As a result, not only do members of the in-group favor themselves, but also those *excluded* from the in-group at times favor the high status in-group. *Id.*

favoritism” drives inequality more than outgroup-directed hostility in the United States.<sup>32</sup>

Social closure can also take the form of expressly race- and sex-based employment policies, such as employers’ historical use of explicitly segregated job listings, which created patterns of exclusion that produced inequality across group lines. In this case, the structures and systems were both the product of the process of social closure and also the means for maintaining group-based advantage. As sociologist Vincent Roscigno and colleagues explain, “[S]ocial closure as a sociological construct directs us toward an in-depth understanding of the processes through which stratification hierarchies are both defined and maintained.”<sup>33</sup>

Over time, exclusion based explicitly on race or sex has become prohibited by law, but social closure theorists posit that race and sex as exclusionary criteria have been replaced by individualized criteria that nevertheless have much the same effect.<sup>34</sup> Blocked by law from explicit race, ethnic, or gender exclusions, powerful groups engaged in social closure by setting up formal job requirements, like tests and education requirements, to match their own characteristics and to exclude those who did not share them.<sup>35</sup> In this form of second order social closure, which can no longer rely explicitly on legally prohibited criteria such as race or sex, job requirements appear neutral and therefore unrelated to discriminatory closure efforts even if they do not predict actual job performance.

Culture too can be a substantial, more covert means of social closure. Pierre Bourdieu, in *Outline of a Theory of Practice*, explains the concept of habitus: the habits, skills, social sense, and knowledge of patterns of interaction and behavior that we possess because of our life experiences.<sup>36</sup> People with similar life experiences share unspoken knowledge and cultural competencies. They know how to navigate social situations with others like them given “the harmonization of agents’ experiences and the continuous reinforcement that each of them receives from the expression . . . of similar or identical experiences.”<sup>37</sup> Habitus is both product and marker of social position, a position defined in part by experiences based on class, race, and

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32. *Id.* at 669.

33. Vincent J. Roscigno et al., *Social Closure and Processes of Race/Sex Employment Discrimination*, 609 ANN. AM. ACAD. POL. & SOC. SCI. 16–48, 21 (2007). *See also* Marion Fourcade et al., *The Superiority of Economists*, 17 REVISTA DE ECONOMÍA INSTITUCIONAL 13–43 (2015).

34. Raymond Murphy, *The Structure of Closure: A Critique and Development of the Theories of Weber, Collins, and Parkin*, 35 BRIT. J. OF SOC. 547–67, 550 (1984).

35. *Id.*

36. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 85 (1977).

37. *Id.* at 80. The reality and knowledge created by these similar social experiences, however, seems objective and self-evident to those that experience it, rather than the product of social construction through interaction.

gender.<sup>38</sup> As sociologists Donald Tomaskovic-Devey and Kevin Stainback note:

Friendship, influence, and information tend to travel through networks of socially similar others. While the motivations for these informal ties are likely to be social similarity and comfort, they can also lead to the marginalization of people who do not share the dominant status characteristics. These informal manifestations of in-group bias lead to increased positive information and visibility of majority members to decision makers higher in the chain of command.<sup>39</sup>

Habitus, then, can be a cultural mechanism for producing social closure based on these categories, and for privileging some over others in the distribution of workplace outcomes such as pay or promotion. Research makes it abundantly clear that most people, most of the time, find their jobs through social networks and personal connections.<sup>40</sup> Networks are not equal, however, because they are “group-based, unequally distributed, and also unequally effective in the translation of social capital into positive life outcomes.”<sup>41</sup> Knowing the right people and having the right friends is easier for some than for others based on group membership and the existing distribution of resources, both material and cultural, among status groups.<sup>42</sup>

In addition, enforcing soft criteria about the behavior, appearance, or performance that make up habitus can differentiate out-group members from members of the preferred group and leave out-group members out of opportunities for advancement.<sup>43</sup> For example, a preference for individuals who are comfortable with a culture of discussing sexual conquests, debating the merits of professional sports teams, or playing golf, can all be forms of social closure that tend to benefit one group over others.<sup>44</sup> These cultures further social closure through stereotypes that make it more difficult for outsiders to satisfy these behavioral expectations, or by penalizing them when they do because the behaviors violate culturally proscribed behavior for their group.<sup>45</sup> Culture communicated in subtle ways, such as

38. *Id.* at 82–85.

39. Tomaskovic-Devey & Stainback, *supra* note 16, at 55.

40. DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism: Bias for Versus Bias Against*, 35 RES. IN ORG. BEHAVIOR 57, 58 (2015); *see generally* MARK GRANOVETTER, GETTING A JOB: A STUDY OF CONTACTS AND CAREERS (1995); D.A. ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE COLLAR JOBS (2003).

41. DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism*, *supra* note 40, at 61.

42. *Id.*

43. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (requiring workers to be willing to relocate to be promoted to management, a requirement that disproportionately disadvantaged women). This is also how habitus and social demarcation are reproduced.

44. *See* Sapna Cheryan et al., *Ambient Belonging: How Stereotypical Cues Impact Gender Participation in Computer Science*, 97 J. OF PERSONALITY AND SOC. PSYCHOL. 1045–60 (2009).

45. Julie E. Phelan et al., *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCHOL. OF WOMEN Q. 406–13 (2008). *See also* LAUREN

environmental cues<sup>46</sup> or the gendered language of job descriptions,<sup>47</sup> can even discourage cultural outsiders from seeking positions by communicating they are not welcome and do not belong.

Additional research confirms that formal hiring systems can exclude by interacting with more informal, social means of social closure that define who is a good “fit” for the job. Gender theorists explain how gender as a relevant social category is reproduced through everyday interactions and shapes how evaluators assess women’s qualifications and performance at work.<sup>48</sup> Similarly, in their content analysis of a representative sample of discrimination claims, sociologist Vincent Roscigno and colleagues document how managers used malleable criteria in evaluation to prefer white employees and relied on stereotypical judgments based on gender to conclude that women just didn’t belong.<sup>49</sup>

Another study, by social psychologists Eric Uhlmann and Geoffrey Cohen, showed that evaluators shifted their hiring criteria for a police chief position such that the specific strengths of the male applicant were more valued than were those of the female applicant.<sup>50</sup> When the male applicant was described as “street-smart” and the female applicant as “well-educated,” evaluators rated street smarts as more important for job success. The reverse was true when the male applicant held the advantage on education.<sup>51</sup> In this way, even when the systems themselves are not the product of social closure, social closure in the culture of a workplace or job category can define group-based behaviors that interacts with those systems to produce group-based advantage.<sup>52</sup>

Sociologist Lauren Rivera shows similar dynamics at play in hiring decisions for high wage jobs in investment banks, management consulting firms, and law firms.<sup>53</sup> In her study, those involved in interviewing and in deciding whom to hire tended to define and evaluate merit in ways and

RIVERA, PEDIGREE (2015) (describing “polish” as a mechanism for screening out black applicants and favoring elite whites).

46. Cheryan et al., *supra* note 44.

47. Danielle Gaucher et al., *Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality*, 101 J. OF PERSONALITY & SOC. PSYCHOL. 109–28 (2011).

48. Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125–51 (1987). See also Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC’Y 510–31 (2004); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. OF SOC. 1297–339 (2007); Claudia Goldin & Cecilia Rouse, NAT’L BUREAU OF ECON. RES., ORCHESTRATING IMPARTIALITY: THE IMPACT OF “BLIND” AUDITIONS ON FEMALE MUSICIANS (1997), <http://www.nber.org/papers/w5903.pdf>.

49. Roscigno et al., *supra* note 33, at 30, 42.

50. Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474–80 (2005).

51. *Id.* at 477–78.

52. Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 139 (1990).

53. RIVERA, *supra* note 45.

through processes that tilted the playing field in favor of socioeconomically advantaged individuals and white men.<sup>54</sup> Interviewers, for example, scrutinized nonwhite candidates more closely for “polish” than white candidates. Black men were commonly rejected for being “too stiff” or “too causal,” whereas white men who were too stiff or too casual were seen as needing coaching and were passed on to second-round interviews.<sup>55</sup> Similarly, considerable research shows that in both evaluations and the allocation of resources, white men, but not other groups, are given the benefit of the doubt, are rewarded for promise more than performance, and are often forgiven or not held accountable for mistakes or misdirection.<sup>56</sup>

The research leaves little doubt that social closure is a mechanism of bias that produces inequality, including inequality in the workplace. But is it “discrimination” in the legal sense of the word? Despite its ordinary meaning in everyday usage, discrimination has become a term of art in antidiscrimination law, its meaning developed through several legal theories and their frameworks for proving and imposing legal liability.<sup>57</sup> We will consider these legal theories and their frameworks in Part II. For now, it is enough to see that under Title VII, one basic component of most unlawful discrimination is differential treatment because of “race, color, religion, sex or national origin.”<sup>58</sup>

Employment discrimination claims tend to focus on whether employer actions *exclude* workers from employment opportunities, but differential treatment based on *preferences* for a favored group, rather than animus toward a disfavored group, is also actionable. For example, job advertisements that state a preference for workers of a particular sex are clearly prohibited by Title VII.<sup>59</sup> Moreover, differential treatment need not be motivated by hostile intent or negative attitudes to be actionable under Title VII. Any differential treatment because of these statutory categories, whether the motive is hostile, benign, or even neutral, is potentially legally actionable.<sup>60</sup> For example, policies that exclude women to “protect” women and their fetuses have been struck down as discriminatory.<sup>61</sup>

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54. *Id.* at 211–51.

55. *Id.* at 224–25.

56. DiTomaso, *Racism and Discrimination Versus Advantage and Favoritism*, *supra* note 17, at 62.

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

58. Civil Rights Act, 42 U.S.C. § 2000e-2(a) (2017).

59. 29 C.F.R. § 1604.5 (2017).

60. Greenwald & Pettigrew, *supra* note 25, at 670. *See also* *Watson v. Fort Worth Bank and Tr.*, 487 U.S. 977 (1988); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

61. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

The Civil Rights Act was enacted to ensure fairness in the workplace and also to enable efficient utilization of the labor force.<sup>62</sup> For example, because social closure operates through these culturally salient categories of status, individuals excluded by social closure on the basis of race in one workplace may not be able to find work elsewhere because similar dynamics operate in other workplaces as well. This makes social closure particularly problematic from the perspective of promoting labor market equality and efficiency. Yet courts have been slow to recognize the danger of social closure in the workplace context. In the next section, we expose how social closure lurks behind the scenes in well-known cases and in scholarly discussions of harassment and stereotyping.

### *B. Seeing Social Closure in Some Familiar Cases*

With a sense of what social closure is we can investigate how it might be operating in specific workplaces. In this section, we illustrate how social closure operates by using facts from some familiar employment discrimination cases—cases in which the courts did not explicitly recognize social closure but in which social closure may have been operating. By social closure discrimination, we mean collective biases operating through institutions that create and maintain boundaries that advantage some groups over others. For the moment, we focus on the processes of social closure discrimination. In Part II, we consider how theorizing social closure should affect judicial application of our frameworks for proving discrimination.

#### *1. Social Closure Through Harassment, Culture, and Stereotyping.*

At first blush, sexual harassment may not look like the in-group favoritism or boundary drawing of social closure, but considered in terms of its effect and often its intent, sexual harassment fits the social closure model. To violate Title VII, harassment must be “because of” a protected group characteristic, like sex or race,<sup>63</sup> and a central quandary for both courts and commentators has been how to determine whether harassment meets this “because of” standard.<sup>64</sup> Some courts focus on whether the

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62. For example, the Civil Rights Act of 1964, when first introduced as House Bill 7152 in the 88th Congress, explicitly stated that “discrimination impairs the general welfare of the United States by preventing the fullest development of the capabilities of the whole citizenry and by limiting participation in the economic, political, and cultural life of the Nation.” H.R. 7152, 88th Cong. § 2(a) (1st Sess. 1963). It also stated that “discrimination . . . reduces the mobility of the national labor force and prevents the most effective allocation of national resources.” *Id.* at 12.

63. Civil Rights Act, 42 U.S.C. § 2000e-2(a) (2017).

64. See, e.g., Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1152–54 (2008) (describing varying definitions of “because of sex” advocated by scholars and adopted by courts). See also TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL*

allegedly discriminatory behavior was sexual in nature, tending to discount non-sexualized harassment as not “because of sex.”<sup>65</sup> But as Vicky Schultz has argued, disaggregating sexualized harassment from sex-based harassment directed solely or primarily at women misses the fact that all such harassment marks women as outsiders and harms their success at work.<sup>66</sup> Although she does not use the term “social closure,” Schultz describes the role of harassment in maintaining male dominance in work in much the same way as social closure theorists like Weber would. “Harassment serves a gender-guarding, competence-undermining function: By subverting women’s capacity to perform favored lines of work, harassment polices the boundaries of the work and protects its idealized masculine image—as well as the identity of those who do it.”<sup>67</sup>

Social closure theory views harassment not in terms of the various behaviors and targets of sexual harassment, but in terms of the in-group benefits that harassment accomplishes. Seen in this light, sexualized as well as non-sexualized harassment against women is social closure that discourages women from participating in a particular workplace.<sup>68</sup> Sexualized as well as non-sexualized harassment against men who do not conform to stereotypical masculine norms is social closure that excludes men who fail to meet these stereotypes.<sup>69</sup> And sexualized harassment generally is a form of social closure that preserves a masculinized space, even if that means sexualizing men to create or reinforce the boundary.<sup>70</sup> All are forms of social closure that benefit male workers who are willing and able to engage in hyper-masculinized behaviors that exclude others.<sup>71</sup>

Workers, often but not always women, who are not willing to perform the behaviors or who are chosen as victims of the behaviors are relegated to the out-group, and sometimes driven out of the workplace altogether. Indeed, once we see that culture can be a mechanism for and product of social closure, we can see how a sexualized and “crass” culture like the one on an oil rig or a construction site, in a law firm or on a trading floor, need not be traced to one person targeting another person on the basis of their sex in order to be problematic under Title VII. It is the collective benefit through socially stereotyped action that gives rise to our concern.

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OPPORTUNITY LAW 89–92 (2017) (describing how courts use the “because of sex” requirement to preserve all-male workspaces).

65. See Schultz, *supra* note 57, at 1713–20 (1998) (describing cases).

66. *Id.* at 1720–29.

67. *Id.* at 1691.

68. *Id.* See also Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

69. Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006). *But see* Hively v. Ivy Tech Cmty. Coll. of Ind., 830 F.3d 698 (7th Cir. 2016).

70. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998). See also EEOC v. Boh Bros. Constr. Co., 731 F.3d 444 (5th Cir. 2013) (en banc).

71. See Oncale, 523 U.S. 75.

Seeing social closure in sexual harassment scenarios not only ties sexualized harassment to other forms of harassment, as Vicki Schultz would rightly have us do; it also ties harassment to stereotyping. In the famous case, *Price Waterhouse v. Hopkins*, the plaintiff Ann Hopkins was denied partnership at the accounting firm Price Waterhouse because she was brusque with the staff.<sup>72</sup> She was told she should wear make-up, style her hair, and go to charm school to improve her chances the next time.<sup>73</sup> The Court held in her favor, stating “we are beyond the day when an employer could evaluate employees by assuming or insisting that they match[] the stereotype associated with their group.”<sup>74</sup> The Court’s larger point was that these assumptions or requirements denied Ann Hopkins a fair evaluation of her individual qualifications by focusing instead on whether she met the cultural expectations for women as a group.

But stereotypes like those used by partners at Price Waterhouse are problematic not just because they put individual workers like Ann Hopkins out of a job based on group generalizations. Stereotypes and harassment exclude entire groups from opportunities. Indeed, harassment and stereotyping are often seen in workplaces where the target of the harassment is the only one or one of few of her kind, e.g. the token woman. For example, of the 662 partners at Price Waterhouse when Hopkins went up for partnership, only seven were women.<sup>75</sup> Of the 88 candidates who went up for partner the same year as Hopkins, she was the only woman.<sup>76</sup> There may, of course, be reasons other than social closure discrimination for these disparities, but the insidious dynamic of social closure is one possibility, and recognizing this raises concerns about all women working their way up at Price Waterhouse, not just Ann Hopkins.

Women seeking to enter lucrative blue collar work experience stereotyping and harassment, but of a somewhat different kind. In the landmark affirmative action case of *Johnson v. Transportation Agency*,<sup>77</sup> the plaintiff Diane Joyce sought access to traditionally male positions after watching the county give a raise to every employee except the 70 female account clerks.<sup>78</sup> When she applied for a road crew position, her supervisor shouted at her “You’re taking a man’s job away!”<sup>79</sup> Even after she secured the position, her coworkers and supervisors harassed her, denied her

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72. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 134 (1989).

73. *Id.* at 235.

74. *Id.*

75. *Id.* at 233.

76. *Id.*

77. *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1987).

78. Ann C. McGinley, *Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1033 (1997).

79. *Id.*

necessary equipment, told her after she complained the women's room was always locked "You wanted a man's job, you learn to pee like a man," and shouted at her "We don't want you here. You don't belong here. Why don't you go the hell away?"<sup>80</sup> One of her supervisors referred to her as a "rebel-rousing [sic] skirt-wearing person" and "not a lady."<sup>81</sup> This form of harassment is perhaps most obviously social closure as it references the gender-exclusionary views of the harassers and the idea that certain jobs were reserved only for men.

Use of stereotyping in social closure goes well beyond harassing women and racial minorities for attempting to enter traditionally white male occupations. For example, women in some firms have been denied promotions or overtime in favor of men because men "have famil[ies] to support,"<sup>82</sup> while men are denied family leave because they are not viewed as the appropriate caretakers in families.<sup>83</sup> Women with children are passed over for promotion, put into part-time or "mommy" tracks, or find their employment terminated because they are presumed to be less competent and committed than other workers, even in the face of evidence to the contrary.<sup>84</sup> Women and racial minorities are assigned to "emerging" diverse markets rather than the more well-established markets because they are expected to connect more easily with people in those markets (and assumed not to connect easily with people in the more well-established markets).<sup>85</sup> What these stereotypes all have in common is that they construct more lucrative, stable work to be compatible with one particular culturally privileged group: white male workers with social connections, families to support, and adequate caretaking labor at home.<sup>86</sup>

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80. *Id.* at 1034.

81. *See Johnson*, 480 U.S. at 624 n.5.

82. *See Desert Palace, Inc. v. Costa*, 299 F.3d 838, 861 (9th Cir. 2002), *aff'd*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

83. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Knussman v. Maryland*, 272 F.3d 625, 629–30 (4th Cir. 2001) (employer said male employee was not eligible for "nurturing leave" as primary caregiver of newborn unless his wife were "in a coma or dead").

84. *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir. 2009); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (the plaintiff's only "deeply critical" performance evaluation was received shortly after she announced her pregnancy and therefore could be discounted); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (evidence showed that the employer had a policy of not hiring women with preschool age children but did not have a policy of not hiring men with preschool age children).

85. *See JOHN SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE* (2014).

86. *See JOAN WILLIAMS, UNBENDING GENDER* 5 (2000) (describing the ideal worker norm).

## 2. Social Closure Through Formal Structures.

Social closure also lurks in perhaps the most well-known and controversial employment discrimination decision, *Griggs v. Duke Power Co.*, which first articulated the disparate impact theory of discrimination under Title VII.<sup>87</sup> In *Griggs*, the Court described the question as whether an employer could require a high school education or a passing score on a general intelligence test as a condition of employment.<sup>88</sup> These two hurdles effectively excluded black applicants from hire except in poorly paid labor positions, and also from promotion from the labor department to the other departments with much better pay and opportunities for advancement. The Court famously held that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>89</sup> Although the Court’s attempt to set aside the question of intent was presumably meant to expand the reach of Title VII, it effectively shut down inquiry into the history and operation of these facially neutral practices.<sup>90</sup>

The history of the requirements at Duke Power Company points to social closure in action. Prior to the effective date of the Civil Rights Act of 1964, the company openly excluded black applicants and black employees from any department other than labor.<sup>91</sup> All other departments were uniformly white.<sup>92</sup> In 1955, the company also instituted a policy requiring high school education for initial assignment to any department other than labor, and for transfer to the more desirable divisions.<sup>93</sup> *On the day Title VII became effective*, the company instituted the aptitude tests as well as the high school education requirement for placement in any department other than labor, and continued to require high school education for transfer into any of the other more desirable departments.<sup>94</sup> As the Court noted, these race-neutral requirements effectively excluded black applicants, in part because of a history of inferior education provided to black students by the state of North Carolina.<sup>95</sup> White employees without high school educations who were already employed in desirable departments, however, continued

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87. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see infra* Part I.B.2.

88. *Griggs*, 401 U.S. at 425–26.

89. *Id.* at 430.

90. *See infra* Part I.B.2.

91. *Griggs*, 401 U.S. at 426–27.

92. *Id.* at 427.

93. *Id.*

94. *Id.* at 427–28.

95. *Id.* at 430.

to perform their jobs and were not required to pass aptitude tests to retain their positions.<sup>96</sup>

The long history of racial exclusion at Duke Power, the timing of the company's decision to adopt the aptitude tests as a barrier to hire, the apparent disregard of the low qualifications of white employees in the more desirable departments, and the correlation between race and high school education and race and scores on the aptitude tests, all suggest that white managers at Duke Power were engaging in social closure to ensure that all but the labor department remained white. Indeed, although the Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms [that disadvantage] minority groups and are unrelated to measuring job capability,"<sup>97</sup> the Court's reference to the "fabled offer of milk to the stork and the fox"<sup>98</sup> suggests that even the Court understood Duke Power to have been engaged in a subordination project, but was playing innocent.

Another, more recent case from the Supreme Court, *Ricci v. DeStefano*, involved a reverse discrimination claim brought by white men and one Latino man challenging the New Haven fire department's decision not to certify the results of a test that it had administered for promotion decisions.<sup>99</sup> The Court held that "[t]he City rejected the test results solely because the higher scoring candidates were white," thus characterizing the decision not to certify the results as a facially discriminatory action that discriminated against white test-takers.<sup>100</sup> Not certifying the results,

96. *Id.* at 428.

97. *Id.* at 432.

98. *Id.* at 431. Aesop's famous fable is as follows:

The Fox one day thought of a plan to amuse himself at the expense of the Stork, at whose odd appearance he was always laughing.

"You must come and dine with me today," he said to the Stork, smiling to himself at the trick he was going to play. The Stork gladly accepted the invitation and arrived in good time and with a very good appetite.

For dinner the Fox served soup. But it was set out in a very shallow dish, and all the Stork could do was to wet the very tip of his bill. Not a drop of soup could he get. But the Fox lapped it up easily, and, to increase the disappointment of the Stork, made a great show of enjoyment.

The hungry Stork was much displeased at the trick, but he was a calm, even-tempered fellow and saw no good in flying into a rage. Instead, not long afterward, he invited the Fox to dine with him in turn. The Fox arrived promptly at the time that had been set, and the Stork served a fish dinner that had a very appetizing smell. But it was served in a tall jar with a very narrow neck. The Stork could easily get at the food with his long bill, but all the Fox could do was to lick the outside of the jar, and sniff at the delicious odor. And when the Fox lost his temper, the Stork said calmly: *Do not play tricks on your neighbors unless you can stand the same treatment yourself.*

THE AESOP FOR CHILDREN, WITH PICTURES BY MILO WINTER, 44–45 (1919).

99. *Ricci v. DeStefano*, 557 U.S. 557, 574–75 (2009).

100. *Id.* at 580. *See also id.* at 608–09 ("[T]he Court pretends that '[t]he City rejected the test results solely because the higher scoring candidates were white.'" (Ginsburg, J., dissenting)). Justice Alito also suggested in his concurring opinion that New Haven refused to certify the results to appease politically active minority constituents, implying that minority interests sought to exclude white

however, merely maintained the status quo of officer ranks disproportionately occupied by white firefighters. No one who took the test, regardless of race, was promoted at that time.<sup>101</sup> New Haven stated it refused to certify the results to avoid disparate impact liability for a potentially biased test, one that could exacerbate decades of exclusion of minority candidates for promotion.<sup>102</sup> A majority of the Court held that it was a violation of Title VII for the employer not to certify the test results unless the employer could show “a strong basis in evidence” that relying on the test results would violate the disparate impact provision of Title VII.<sup>103</sup> The Court held that New Haven did not have such evidence, despite the fact that white firefighters disproportionately passed this test compared to minority firefighters.<sup>104</sup>

Here, too, a closer look at the facts of the case suggests social closure discrimination in action. This was not the first litigation over access to promotion among fire-fighting jobs in New Haven.<sup>105</sup> The City had a long history of white dominance in fire-fighting jobs, and high-ranking officer jobs in particular. In the early 1970s, African-Americans were 30 percent of the New Haven population, but only 3.6 percent of its firefighters.<sup>106</sup> Of the 107 officers in the fire department, only one was black, and he held the lowest rank of officer.<sup>107</sup> The City was sued in the 1970s and pursuant to a settlement agreement it initiated efforts to increase minority representation.<sup>108</sup> In 2003, the year that the test at issue in *Ricci* was administered, African Americans were 40 percent of the New Haven population and 30 percent of firefighters.<sup>109</sup> But the senior ranks remained mostly white. African Americans constituted only 9 percent of senior officers.<sup>110</sup>

In devising the test for promotion, the City adhered to a two-decades-old contract with the local firefighters’ union requiring a written exam, which would account for 60 percent of an applicant’s total score, and an oral exam, which would account for the remaining 40 percent. When the City of New Haven saw the disparate impact of its test on the basis of race,

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firefighters in a form of reverse social closure. *Id.* at 597–605 (Alito, J. concurring). However, not all advocacy is social closure. Indeed, given the evidence of longstanding social closure by whites in the New Haven fire department, advocacy by racial minority groups in this case seems aimed at disruption of dominant social closure rather than at shoring up resources for one’s own group.

101. *Id.* at 562 (majority opinion).

102. *Id.*

103. *Id.* at 585.

104. *Ricci v. DeStefano*, 557 U.S. 557, 586–87 (2009).

105. *Id.* at 610 (Ginsburg, J., dissenting).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Ricci v. DeStefano*, 557 U.S. 557, 610 (2009) (Ginsburg, J., dissenting).

110. *Id.* at 610–11.

it brought in experts, one of whom noted the availability of “different types of testing procedures that are much more valid in terms of identifying the best potential supervisors in [the] fire department”—procedures that also were less racially skewed.<sup>111</sup>

The long history of racial exclusion in the New Haven City fire department, adherence to a decades-old union contract establishing test features and weighting that historically favored whites, and evidence that the test had a disparate impact on African American and Hispanic test takers and was not the best way to evaluate for on-the-job officer skills together point to social closure. The majority masks this possibility by focusing on the plaintiff fire fighters who did well on the test, fire fighters who in the words of concurring Justice Scalia sought “only a fair chance to move up the ranks in their chosen profession.”<sup>112</sup> Presumably the minority fire fighter applicants who invested substantial time, money, and personal commitment to prepare for the exam *also* sought a fair chance to move up in the ranks of their chosen profession, one not constrained by a biased selection process.

As Justice Ginsburg points out, “[t]he legitimacy of an employee’s expectation depends on the legitimacy of the selection method.”<sup>113</sup> Yet even in the face of evidence that the test might be racially biased, the Court reiterates the assumption that tests are objective and indicate neutrality in overall treatment, stating that “New Haven, like many cities, relies on objective examinations to identify the best qualified candidates.”<sup>114</sup> Implicit in the Court’s reasoning is the assumption that the successful white applicants were entitled to promotion on the basis of the test, without consideration of evidence that the test was a structural mechanism of social closure.

### 3. *Social Closure Through Recruitment, Promotion Practices, and Personal Ties.*

Another area ripe for social closure analysis is employer recruitment practices that rely on social or geographical segregation to accomplish racial segregation in their workplaces. For example, the employer in *Wards Cove Packing Co. v. Atonio* used a two-prong recruitment technique to fill its positions.<sup>115</sup> Jobs on the cannery line were filled through the local union hiring hall in Alaska, near the canneries.<sup>116</sup> By contrast, non-cannery line positions, virtually all of which paid more than cannery line positions, were

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111. *Id.* at 615.

112. *Id.* at 607 (Alito, J., concurring).

113. *Id.* at 630 (Ginsburg, J., dissenting).

114. *Id.* at 562 (majority opinion).

115. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 647 (1989).

116. *Id.*

filled through the company's offices in Washington and Oregon. These separate hiring channels produced cannery line workers who were nearly uniformly Filipinos and Alaskan natives, and non-cannery workers, regardless of skill level required, who were predominantly white. Not only were the job classifications racially segregated, but the two groups of workers slept in separate living quarters and ate in separate mess halls. Nevertheless, the Court found in *Wards Cove* that this evidence regarding hiring practices that excluded many minority applicants from consideration for better-paid positions was not sufficient to demonstrate discrimination.<sup>117</sup>

*Wards Cove* is notorious for many reasons, and has been essentially legislatively overridden by the Civil Rights Act of 1991.<sup>118</sup> What is striking, however, is that the opinion does little to delve into the longstanding history of racial segregation of cannery and non-cannery positions and the lower pay associated with the largely minority workforce on the cannery lines. Moreover, the record made clear that there were non-skilled non-cannery positions for which Alaskan applicants were qualified, yet they had no access to those better-paid jobs—even though presumably more competition for those jobs would help lower wages and thus benefit the employer. Racial segregation was not simply an unhappy accident of ad-hoc recruiting procedures; it was a continuation of longstanding practices of exclusion facilitated by mechanisms of social closure through hiring practices, yet the Court was unwilling to even consider this history in its analysis.

We can see similar social closure dynamics through other types of recruitment processes, including not only restricted geographic locations, but also limited outreach to certain educational or training institutions, nepotism, cronyism, and recruiting through word-of-mouth.<sup>119</sup> Word-of-mouth recruiting is controversial in part because to many it seems natural and neutral (some courts label it a “passive” employment practice that is not reviewable using the disparate impact theory).<sup>120</sup> Like many other practices through which discretion and in-group biases can operate, however, word-of-mouth recruiting permits existing employees to reach out to those who

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117. *Id.* at 655 (holding that plaintiffs did not make out a *prima facie* case of disparate impact).

118. *See, e.g.,* *Smith v. City of Jackson*, 544 U.S. 228, 228–29 (2005); *United States v. Brennan*, 650 F.3d 65, 90 (2d Cir. 2011).

119. *See, e.g.,* *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (restricted geographic locations); *Foster v. Dalton*, 71 F.3d 52 (1st Cir. 1995) (cronism); *Lewis v. Univ. of Pittsburg*, 725 F.2d 910, 927 (3d Cir. 1983) (Adams, J., dissenting) (noting that “nepotism is by its nature a nonobjective consideration in hiring or promotional decisions that has the effect of locking the racial and ethnic status quo”); *EEOC v. Chicago Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985) (word-of-mouth recruiting).

120. *Chicago Miniature*, 622 F. Supp. at 1309.

are most like themselves to provide information and insider details about open positions.<sup>121</sup>

Seemingly neutral promotion practices within institutions, too, can both be the product of social closure and interact with social behavior and biases to serve as a mechanism for social closure. Standardless and discretionary decision-making systems in hiring and promotion can provide space for in-group favoritism, as can obscurity in paths for promotion or requirements for jobs. In *Butler v. Home Depot*, for example, the plaintiffs alleged that women were being passed over for promotions and paid less than men as the result of stereotypes against women working as managers and in departments traditionally associated with men, like heavy equipment.<sup>122</sup> Women were not interviewed for their preferred jobs when they applied, and channels for knowledge of and recommendation to open positions were obscure and favored the male network.<sup>123</sup>

The consent decree in the case required Home Depot to set up an easily accessible computerized system for all employees to gain information about open jobs and to indicate their preferences for open jobs.<sup>124</sup> Managers were required to interview at least three applicants for positions and to follow a structured interview process.<sup>125</sup> These procedures were aimed at counteracting the processes of social closure that formerly restricted information about and access to jobs to a network of male employees.

These cases were pursued under different legal theories, and yet can be understood as examples of the same phenomenon: social closure that operates along the lines of race and gender but references individualistic criteria that are not explicitly race or gender. The driving motivation is not necessarily animus toward a particular group, but instead preserving desirable work and jobs for the preferred group, accomplished through the exclusion or passing over of others. Sometimes social closure takes form as the “nonoccurrence of helpful acts” rather than as a hostile action. These non-occurrences—the failure to mention an open job, to accept applications for all jobs in the company, to consider members of a particular group for promotion, to offer mentorship to those different from oneself—all contribute to advantages for the in-group and exclusion for the out-group. To consider only out-group hostility, and overlook subtle patterns of in

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121. See generally GRANOVETTER, *supra* note 40.

122. See *Butler v. Home Depot, Inc.*, 1997 U.S. Dist. LEXIS 16296, at \*47 (N.D. Cal. 1997) (finding that plaintiffs had sufficient evidence that defendant failed “to provide its store managers with meaningful criteria by which to guide hiring, assignment, promotion, and compensation decisions” to avoid summary judgment on claim of disparate impact on female employees). See also Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 510–11 (2001).

123. Sturm, *supra* note 122, at 510–11.

124. *Id.* at 512–14.

125. *Id.*

group favoritism, is to miss much of what drives inequality in the workplace today.

## II.

### SOCIAL CLOSURE AND EMPLOYMENT DISCRIMINATION LAW

#### *A. Understanding Social Closure Reveals Mechanisms of Discrimination.*

From our discussion of research on social closure we learn that it is a collective process, not an individualized one. One act of social closure may not by itself be particularly harmful or problematic, but many acts together and in concert can create a wave of group-based advantage and corresponding disadvantage. Indeed, social closure often subtly builds as a collective phenomenon, even when discrete yet extreme individual discriminatory actions attract most of the judicial scrutiny. Focusing too closely on one discrete incident may cause us to miss the broader processes of social closure in the workplace.

The research we have discussed also teaches that social closure principally stems not from animus or conscious effort to exclude but from favoritism directed at members of the dominant group.<sup>126</sup> This in-group affinity can make it socially and politically difficult for in-group members to disrupt a work culture or hiring practice that benefits their group. Moreover, social closure is likely to build group advantage into the norms, practices, policies, and narratives of an institution over time. Thus, social closure is not only affected by institutional structures and policies but also generative of them.

If we look for social closure in organizations, then, we should look for social and cultural processes driven by collective, not individualized, decisions and actions. We were able to see social closure in the cases above because we widened the lens to include multiple people acting toward and for collective advantage, rather than focusing on individual action and animus. To capture this process, we should consider history, not just practices or policies isolated in time. We were able to see the social closure in *Griggs*, *Ricci*, and *Wards Cove*, for example, because we considered not only the policies and practices at issue, but also the broader history of those policies with regard to bias.

Understanding social closure as a form of discrimination will help organizations that seek to advance equality and to increase diversity. If organizational leaders look not only at individual bias, but also at workplace practices and social processes that preserve advantages for one particular group, they are more likely to find points of meaningful change.

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126. See *supra* notes 25–32 and accompanying text.

Understanding social closure also cautions against exclusively individualized solutions, such as discipline of individuals who show bias or training directed at reducing individual bias. Instead, it encourages leaders of organizations to consider how everyday workplace practices and policies might reflect and fuel social closure. For example, research shows that changes to recruitment, job posting systems, and work organization can be effective measures for reducing discrimination.<sup>127</sup> So too can changes that establish responsibility for managers to expand recruitment, discourage insular practices, and make workplace culture more inclusive.<sup>128</sup> Importantly, knowing the research on social closure can encourage leaders who are genuinely interested in equality to evaluate how they personally may benefit from existing practices. This may encourage them to revise those practices that favor members of their group over others.<sup>129</sup> In all these ways, then, social closure moves the focus away from individual bias toward a more process-based theory of discrimination that takes into account organizational culture and structure.

*B. Understanding Social Closure Warrants Reexamining Employment Discrimination Frameworks.*

We turn now to probe the limits of the established legal frameworks on which judges rely when they see (or fail to see) social closure. We focus on two principal ways that existing legal frameworks as applied by the courts mask social closure. The first is the courts' increasingly narrow focus on individual bias in harassment and disparate treatment claims, whether individual or systemic. The second is the narrow focus on policies in isolation under disparate impact theory. With these problems in mind, we make several suggestions for how judges applying existing legal frameworks might identify and address social closure discrimination better.

*1. The Problem of Focusing on Individuals.*

By focusing too narrowly on individuals in our legal theories, we risk losing sight of social closure. It makes sense here to start with *Wal-Mart Stores, Inc. v. Dukes*,<sup>130</sup> as this is one of the most recent and extreme cases of a court individualizing discrimination to problematic end. The *Wal-Mart* plaintiffs alleged claims under the legal theories of systemic disparate treatment and disparate impact.<sup>131</sup> They presented statistical evidence

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127. GREEN, *supra* note 64, at 136–40 (describing measures with social science support).

128. *Id.*

129. Susan Sturm argues in *Second Generation Discrimination* that Home Depot as a company had just such an epiphany, realizing that more rational, modern, and transparent hiring processes would not only reduce bias but also benefit the company. See Sturm, *supra* note 122, at 512.

130. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

131. *Id.* at 344–45.

showing unexplained disparities in pay and promotion for men and women,<sup>132</sup> testimony of social scientists that Wal-Mart had a decentralized decision-making policy,<sup>133</sup> testimony of managers and other employees reflecting a work culture permeated with stereotyping and bias,<sup>134</sup> and testimony of individual women who alleged that they were denied promotions or paid less than men at Wal-Mart because of their sex.<sup>135</sup> The plaintiffs' central claim was that Wal-Mart's avowed policy of subjective decision-making for promotion and pay decisions together with a culture rife with stereotyping resulted in gender-biased decisions and ultimately in less pay and fewer opportunities for promotion for women relative to men.<sup>136</sup>

In finding no commonality among plaintiffs' claims that would satisfy the requirement for class certification, a majority of the Court focused narrowly on whether the individual managers at Wal-Mart who were authorized to make pay and promotion decisions acted on similar biases.<sup>137</sup> Focusing closely on these individual managers, the Court rejected the plaintiffs' evidence, explaining that "merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice" to show a companywide discriminatory pay and promotion policy that would support class certification.<sup>138</sup> Tellingly, the Court thought the plaintiffs' statistical showing insufficient because in the Court's view, it is "quite unbelievable that all managers would exercise their discretion in a common way without some common direction."<sup>139</sup> Without citation, and in direct contradiction of the plaintiff's expert testimony, the Court stated "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral performance-based criteria for hiring and promotion that produce no actionable disparity at all."<sup>140</sup>

The Court in *Wal-Mart* makes two fundamental errors. First, understanding social closure helps us see that focusing solely on individual managers is a mistake.<sup>141</sup> Social closure operates in day-to-day interactions

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132. *Id.* at 346.

133. *Id.*

134. *Id.*

135. *Id.* at 344.

136. *Id.* at 344–45.

137. *Id.* at 349–58.

138. *Id.* at 357.

139. *Id.* at 356.

140. *Id.* at 355.

141. The plaintiffs' argument also tended to focus on individual managers rather than on the context for decision-making more broadly at Wal-Mart. See Plaintiffs' Motion and Memorandum in Support of Class Certification, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (No. 3:01CV02252).

and perceptions as much as in key moments of decision, like a pay or promotion decision. Thus, systemic disparate treatment theory, one of the principal legal frameworks for proving discrimination, is useful for addressing social closure because it looks to the aggregate, requiring proof that discrimination “is the regular, rather than the unusual practice,”<sup>142</sup> within an organization rather than proof of discrimination in any specific, individualized instance. Systemic disparate treatment theory has long been a tool for identifying those organizations in which biased action is widespread and leads to disparate outcomes, regardless of the specific points at which discrimination is operating. It does not and should not require proof that managers at the point of promotion or pay decisions were the sole people acting with bias.

Second, understanding social closure helps us see that the Court’s reasoning relies on empirically incorrect assumptions about human behavior. A long and robust line of empirical research documents that people are more comfortable working with members of their own group and that these in-group preferences influence hiring, promotion, the sharing of information in the workplace, and mentoring relationships.<sup>143</sup> Social closure research tells us that it is far from unbelievable that managers at Wal-Mart, most of whom were men, would exercise discretion in a common way, even without specific direction from on high. Indeed, managers at Wal-Mart had arguably been engaging in social closure for many years. This does not mean that they were acting in conscious concert, coming together for meetings about how to keep women out of management, but it does mean that they had created an environment in which men were likely to be advantaged in promotion and pay decisions by employment practices that facilitated social closure.

Wal-Mart displayed multiple features of social closure. It is a longtime male-dominated company, particularly at the high levels.<sup>144</sup> For many years, Sam Walton, the founding father of Wal-Mart, organized an annual quail hunt as a corporate retreat for executives and senior management, and executives rejected proposals to change the hunt to a skiing or river-rafting trip.<sup>145</sup> Gender stereotyping was also prevalent and documented at the time that plaintiffs’ brought their complaint. Senior managers allegedly called female store associates “Janie Qs” and “girls,” and a company newsletter featured an executive sitting in a giant leopard-skin stiletto surrounded by

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142. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977).

143. See *supra* notes 25–56 and accompanying text.

144. Plaintiffs’ Motion and Memorandum in Support of Class Certification at 5, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (No. 3:01CV02252).

145. *Id.* at 11 n.67. The quail hunt in particular might have been a subtle attempt to privilege not only men, but men from cultures and locations that have strong gun and hunting cultures—notably the South, where Wal-Mart is headquartered and holds all of its management meetings.

dancing women.<sup>146</sup> Numerous plaintiffs in the case submitted declarations reciting multiple incidents where male managers responded to women's requests to transfer to departments like hardware or guns with sex-stereotyped refusals, including statements like "[y]ou're a girl, why do you want to be in Hardware?" and "[y]ou don't want to work with guns."<sup>147</sup>

Systemic disparate treatment theory developed a framework for identifying organizations in which widespread bias permeates the workplace and leads to disparate outcomes, a systemic rather than isolated process of inequality. The systemic disparate treatment framework requires evidence of disparate outcomes that are unlikely to be the result of chance, coupled with anecdotal or other evidence suggesting that discrimination within the organization explains the disparities.<sup>148</sup> Indeed, the evidence in *Wal-Mart* matched this standard: gross disparities in the gender make up between the labor pool and managers, and evidence of widespread gender stereotypes and informal networks disadvantaging women.<sup>149</sup> Yet the Court in *Wal-Mart* largely ignored the systemic discrimination framework and its history to reformulate the test as one focused on individual animus or bias.

This is not to say that we need a new evidentiary framework for identifying social closure in these instances. The systemic disparate treatment evidentiary structure means that the precise contours of any particular social closure could, but need not, be identified in litigation. Using a systemic disparate treatment approach leaves largely to organizations the power to assess where social closure might be operating.<sup>150</sup> Is it in specific policies or practices that are the product of

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146. *Id.* at 10.

147. *Id.* at 13 n.76; *see also Wal-Mart*, 564 U.S. at 371–72. Testimony also reflected stereotypes held by male managers of women as not wanting management jobs and/or as too weak to be managers in certain “rough” areas. Plaintiffs’ Motion and Memorandum in Support of Class Certification at 12, *Wal-Mart*, 564 U.S. 338 (2011) (No. 3:01CV02252). Similar assumptions show up in other cases. *See, e.g., EEOC v. Sears, Roebuck & Co.*, 839 F.2d. 302, 320 (7th Cir. 1988) (the idea that women did not want to leave the store to do sales (except apparently for drapes), or that they feared the competitive nature of commissions sales, even though many women at Sears applied specifically for the commission sales positions); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 191 (1991) (attempt to “protect” any potentially fertile woman from the more lucrative battery manufacturing positions at the company because of the potential she might become pregnant). In both instances, women very much wanted these positions and applied for them; in at least one case a woman had herself sterilized to keep her position. Yet their employers used the characteristics, stereotypical or biological, of their gender to preserve the more desirable, lucrative work for men.

148. *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. 395, 444–46 (2011) (describing the role of statistics and social science expert testimony in proving a pattern or practice of discrimination).

149. *Wal-Mart*, 564 U.S. at 370–72 (Ginsburg, J., dissenting). The statistical analyses took into account experience, education, and other factors such as performance reviews that could have explained these disparities. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 604 n.26 (9th Cir. 2010). Also, the evidence showed that Target and other big box stores promoted far more women than Wal-Mart. *Id.* at 604 n.27.

150. *See* Green, *supra* note 148, at 447–49.

social closure? In group-based biases and stereotyping that are interacting with those or other policies and practices? Or in some combination of these mechanisms? While any of these may be operating to produce social closure, there is no need to change the law to require these specific findings. All that systemic disparate treatment need require in these instances is a demonstration of systemic disparate effects coupled with anecdotal or other evidence of bias operating within the organization. It was the *Wal-Mart* Court's reaching beyond this standard to add an individualized bias requirement that we argue incorrectly constrained consideration of social closure under systemic disparate treatment theory.

Beyond systemic disparate treatment, individualization also hampers judges' ability to see social closure in individual cases. Harassment is a good example. Harassment cases are often brought by individuals, and the law, with its requirement that a hostile work environment be subjective and objectively severe or pervasive,<sup>151</sup> tends to encourage this. But, as we saw above, social closure research shows us that harassment is frequently a tool of social closure.<sup>152</sup> Accordingly, it can be carried out through a broader hostile work environment as much as through individualized targeting. Understanding social closure, therefore, helps us see that harassment law needs to take a more holistic approach to evaluating the context of harassment. The question should be whether a work environment would be reasonably perceived as hostile by members of a protected group. It should be error for courts to isolate individual actors, disaggregate acts of harassment, or require egregious individual sexual or racialized acts.

To take an extreme example of the faulty reasoning of courts faced with claims of harassment, a black electrician in one case was "badgered frequently by his coworkers," who directed generally derisive comments and naming calling at him such as "dickhead," "dumbshit," "asshole," "faggot," and "fool."<sup>153</sup> One coworker used the terms "honky" and "nigger" in his presence, and at one point warned him "you better be careful because we know people in [the] Ku Klux Klan."<sup>154</sup> The trial court granted summary judgment in favor of the employer, holding that the badgering of the plaintiff was "commonplace of the blue collar environment of the electronics shop," and concluding that the "evidence shows only isolated and sporadic racial comments."<sup>155</sup> The appellate court affirmed, describing the law in the circuit as requiring plaintiffs to show "more than a few isolated incidents of racial enmity."<sup>156</sup> According to the court, "[i]nstead of

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

152. *See supra* notes 63–86 and accompanying text.

153. *Bolden v. PRC Inc.*, 43 F.3d 545, 549 (10th Cir. 1995).

154. *Id.*

155. *Id.* at 550.

156. *Id.* at 551.

sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.”<sup>157</sup> The court held that as a matter of law the plaintiff’s experience did not amount to a hostile work environment because of his race, meaning that the case would not get to trial before a jury.

In light of social closure, this should have been error: longstanding or “common place” social closure in blue collar environments should have been seen as discrimination, not as a reason for rejecting a claim of discrimination. Otherwise, courts essentially hold that racial minorities are expected to tolerate a broader cultural context in the workplace in which they are disparaged and ridiculed based on their race.

In addition, the law should not require targeted behavior when an environment as a whole is operating to exclude members of disfavored groups. For example, according to the appellate court above, “the record reveal[ed] the intimidation, ridicule, and insult were directed indiscriminately, not targeted at [the plaintiff] due to his race.”<sup>158</sup> Could a black employee reasonably expect to be treated fairly in such an environment? What was the history of pay, promotion and success at this workplace for black workers? Just as the racialized and tormenting behavior by coworkers in this case should be understood as a possible form of social closure, pornographic magazines left in break rooms, like other sexualized behavior used to reify masculine space, may not “target” specific women, but it is a form of social closure that drives women from the workplace by labeling them the other. Courts are wrong to hold otherwise.<sup>159</sup>

Individual disparate treatment theory and its various frameworks, including the framework for proving harassment, often focus on individuals for a reason. When a plaintiff brings a claim of individualized discrimination, the law is trying to determine whether a protected characteristic motivated a specific adverse employment action to determine what relief to provide.<sup>160</sup> But sometimes the story of social closure is one of broader environment leading up to a specific adverse employment action. In

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157. *Id.*

158. *Id.*

159. *See, e.g.,* Ellett v. Big Red Keno, Inc., 221 F.3d 1342, at \*1 (8th Cir. 2000) (unpublished table decision) (“A dually offensive sexual atmosphere [including pornography] in the workplace, no matter how offensive, is not unlawful discrimination unless one gender is treated differently than the other”); Scott-Riley v. Mullins Food Prods., Inc., 391 F. Supp. 2d 707, 718 (N.D. Ill. 2005) (“[P]ornographic pictures not directed at a plaintiff (i.e., so-called ‘second-hand harassment’) may not constitute a hostile environment.”); Williams v. Chicago, 325 F. Supp. 2d 867, 876 n.18 (N.D. Ill. 2004) (suggesting that pornography not targeted at the plaintiff because she is a woman is not harassment that would amount to disparate treatment). *Cf.* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1498 (M.D. Fla. 1991).

160. From this determination of individualized wrong, the court determines individualized relief, for example, back or front pay, or injunctive relief in the form of requiring the employer to re-hire or to promote a specific individual, or even damages for emotional distress. *See* 42 U.S.C. § 1981a (2017). *See also* GREEN, *supra* note 64, at 105–06.

these cases, courts need to be willing to see that environment and take into account facts that indicate processes of social closure in action. Existing systemic disparate treatment and harassment law may be capacious enough to address social closure, but only if judges resist individualizing those theories in ways that mask social closure. Moreover, courts will have to also consider more systemic rather than solely individualized remedies, including but not limited to injunctive relief directed at disrupting continuing patterns of social closure.<sup>161</sup>

## 2. *The Problem of Focusing on Policies or Practices Without Context.*

Disparate impact theory isolates policies and practices that have a group-based effect, termed “disparate impact,” on members of a protected group, and requires employers to eliminate those practices unless they can justify their use.<sup>162</sup> We can expect practices that are the product of social closure to have a disparate impact, which might make disparate impact theory seem well suited to address social closure in the workplace. However, there are several reasons why the existing disparate impact theory framework, at least as currently framed, is a relatively ineffective legal tool for capturing social closure.

The disparate impact legal framework strips practices and policies from their context in two key dimensions: the past and the present. The past is the history of the policy, particularly within the organization in question. In *Griggs*, for example, the Supreme Court was careful to place the high school diploma requirement and the testing requirement in a broader historical context of exclusion.<sup>163</sup> However, although the Court noted that the tests were adopted on the same day Title VII became effective, this historical fact did not seem central to its reasoning.<sup>164</sup> The connection to history in the *Griggs* opinion came primarily from the longstanding

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161. Although courts should consider broader forms of injunctive relief, they must ensure disruption of the practices of social closure, and not merely symbolic change. Indeed, most measures implemented in consent decrees and through litigation today, including measure sought by plaintiffs and by the EEOC, tend to focus on changing individuals over broader systemic disruption. See generally GREEN, *supra* note 64, at 109–15. See also Tristin K. Green, *Targeting Workplace Change: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 658, 705–15 (2003) (describing some of the challenges of formulating injunctive relief); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008) (arguing that efforts at reducing discrimination are focused too narrowly on individuals). For recent research on measures sought by the EEOC in consent decrees, see Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519 (2014).

162. Civil Rights Act, 42 U.S.C. § 2000e-2(k) (2017). If the employer does justify a practice’s use, it can still be an unlawful practice if the plaintiff shows that there is an alternative practice without the impact that the employer refuses to adopt. *Id.*

163. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

164. *Id.* at 427–28.

discrimination against blacks in education in North Carolina, where Duke Power was located, and not as much from actions within Duke Power.<sup>165</sup>

This approach may have made sense given that at the time organizations and governmental entities were turning to neutral practices as means for excluding blacks from everything from education and voting to jobs. *Griggs* may also reflect the lawyers' arguments that the Court should adopt a theory of discrimination that did not rest on a finding of purpose by high level decision makers.<sup>166</sup> Significantly, though, while nothing in the *Griggs* opinion prevents courts from considering organizational history when engaging in disparate impact analysis, since *Griggs*, courts applying disparate impact theory tend to ignore evidence that the practice itself may have been the product of bias. Instead, disparate impact analysis tends to start with identification of a policy or practice, taking no account of how that policy or practice came into being.

Ignoring history in disparate impact analysis matters because it means that all practices are subjected to the same defense, asking whether the practice is job related and consistent with business necessity.<sup>167</sup> But some practices are more likely to be driven by social closure than others. Take, for example, the practice of not providing restrooms to pole workers at an electric company in the case of *DeClue v. Central Illinois Light Co.*<sup>168</sup> In this case, the plaintiff alleged harassment, but the court held that her claim should really be considered under the disparate impact framework.<sup>169</sup> Apparently, when the workforce was all male, not providing bathrooms caused no trouble; the men peed in public without complaint.<sup>170</sup> But when women entered the ranks, they encountered hostility for not meeting the male standard of public urination—a behavior accepted for men, but considered inappropriate for women. Plaintiff Audrey DeClue was subject to demeaning comments made toward her because she did not want to urinate in public, comments like “[y]ou’re just like my damn kids. I’m ready to leave and I have to wait for them to go to the bathroom” and “[y]ou’ve got the bladder of a three-year-old.”<sup>171</sup> If women workers were

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165. *Id.* at 430.

166. See ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE (2014) (describing the effort by civil rights advocates to advance a disparate impact theory).

167. Civil Rights Act, 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2017).

168. *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000).

169. *Id.* at 437 (dismissing the plaintiff's claim because she did not allege a theory of disparate impact in her complaint).

170. At least by the men. *Id.* at 436. There were apparently a few complaints made by members of the public about the pole workers, including DeClue, urinating in public. *Id.* at 438 n.1 (Rovner, J., dissenting).

171. *Id.* at 439 n.2 (Rovner, J., dissenting). DeClue also experienced a co-worker deliberately urinating on the floor near where she was working, as well as one or more men shoving, pushing, and hitting her, engaging in sexually offensive touching, and exposing her to pornographic magazines. *Id.* at

hassled by their male co-workers for refusing to urinate in public, then failing to provide restrooms could easily become a mechanism of social closure.

Our point here is that it helps to see the history of an organizational practice—the history of homophily and exclusion over time. Even when the practice may not have been originally adopted with social closure in mind, it helps to be able to see how the practice—like a lack of bathrooms—might become a mechanism for, or product of, social closure. If we do not see this history, then it is just about a lack of a bathroom, yesterday, today, and tomorrow. More pernicious still is the mental turn that takes place when we isolate the practice from history and context within the organization: the perceived problem with the practice, the reason for the disparate impact, becomes one of women who do not like urinating in public, rather than of a traditionally male occupation resisting women attempting to enter its workforce. In other words, isolating the practice from its history locates the problem in the individual woman rather than in a culture that exploits a workplace structure built around exclusively male workers as a way of excluding women.<sup>172</sup>

In much the same way, the nepotism and other practices used to hire for the non-cannery positions at *Wards Cove* appear to have been part of a longstanding project of segregation at the company. Filipino and Alaskan natives still ate in separate mess halls and slept in different dorms from their white counterparts when the suit was filed. If nepotism and other practices can be shown to be part of social closure within the organization over time, then a disparate impact claim challenging those practices should be on a different par than one where that showing cannot be made.

But under current disparate impact law, it is not. Employers using any practice that causes a disparate impact are provided the same defense: the employer need only show that the practice is job related and consistent with business necessity. This tends to translate into an evaluation of cost in balance with the benefit, e.g., whether it would cost the employer too much to provide a bathroom for pole workers or harm employee morale to eliminate nepotism. This then skews outcomes toward the status quo because any change from the status quo is likely to be costly, even if the status quo was created when people of only one gender or race held the job in question.

The other dimension is the present, organizational context in the here and now. Disparate impact theory fosters a false confidence in a judge's ability to separate formal practices and policies—that may or may not have

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435–36. The court held that these incidents were outside of the limitations period and that she could “no longer base a claim upon them.” *Id.* at 436.

172. See, e.g., *id.* at 436 (“Women are more reticent about urinating in public than men.”).

been the product of social closure—from the less formal, relational mechanisms of social closure, like stereotyping, harassment, culture, and in-group bias in day-to-day interactions. Here, too, we can think of *DeClue* and *Wards Cove*. But it might help to consider another recent case, *McReynolds v. Merrill Lynch*.<sup>173</sup> This case is often thought of as a success by progressives because the court of appeals, in an opinion written by Judge Posner, reversed a denial of class certification.<sup>174</sup> Moreover, the judges saw some evidence of social closure as problematic.

The case involved black brokers at Merrill Lynch who sued, alleging that they had suffered discrimination in pay. Posner explained how a practice of allowing brokers to form their own teams might work as “little fraternities” that excluded black brokers.<sup>175</sup> He sought to isolate two specific practices used by Merrill Lynch for disparate impact review: the practice of allowing brokers to form their own teams and a practice of allocating accounts in a way that rewarded the most financially successful teams.<sup>176</sup> Once the case was analyzed within a disparate impact framework, Posner saw it on different footing from *Wal-Mart* and remanded for class certification.<sup>177</sup>

Despite Judge Posner’s recognition of social closure in these facts, the impact on black brokers at Merrill Lynch was caused not by these two practices in isolation (or even as they interacted with black brokers’ skills brought in from outside of the organization) but by the practices as they intersected with white brokers’ in-group oriented biases within the organization. That is the dynamic of social closure. If Judge Posner understood this, then why did he frame the case around the two practices in isolation? Possibly because pulling the case into the disparate impact framework allows the employer to raise the job related and consistent with business necessity defense.<sup>178</sup> That is, once the policies are isolated from their context and operation, the employer has the opportunity to justify them as important to the specific job and necessary to the brokerage business despite their disparate impact. Yet it is myopic to focus solely on the practice or policy without any consideration of how it interacts with social processes of closure around specific groups.

Indeed, there are real practical difficulties with a defense that focuses on justifying a practice in isolation from other features of the particular workplace. In isolation, we can see why a practice of allowing brokers to form their own teams and allocating accounts to the most successful teams

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173. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

174. *Id.* at 492.

175. *Id.* at 489.

176. *Id.* at 488–89.

177. *Id.* at 492.

178. *See* Civil Rights Act, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2017).

might make business sense. The problem, though, is not that the practices lack business justification; it is that the practices are serving as mechanisms of social closure within the organization—they are interacting with biases in ways that advantage white brokers and disadvantage black brokers. In this way, artificially isolating the practice can lead to an overly circumscribed legal inquiry into whether the practice itself is job related and consistent with business necessity, when the real inquiry needs to include the white brokers' biases and the overall culture as well. And because that inquiry is likely to be complex, research tells us that judges are likely to defer to employer practices rather than order their elimination or change.<sup>179</sup>

The greater complexity of the problem in these cases also means that the solution or remedy may be not to eliminate a specific, identified practice, but rather to alter the culture or other mechanisms of social closure that are interacting with that practice. The electric company might work on creating a culture of respect for all around urination, while perhaps providing some privacy for all workers. Merrill Lynch might alter its culture to value black brokers for all work (evidence in the case showed a campaign to use black brokers primarily to connect with minority markets) as well as increase equality in formation of teams, while keeping some aspects of its teaming practice and its practice of allocating accounts. In fact, this is precisely what Bank of America, which had since purchased Merrill Lynch, agreed to do in the settlement agreement in the case.<sup>180</sup>

In our view, these limitations suggest that disparate impact theory at least in its current form is of less utility in addressing social closure than many might think. Certainly it can be useful, like in *Griggs*, to isolate a specific practice and to call for business justification. Sometimes organizations adopt practices by following trends and other organizations in the industry. When that happens, disparate impact theory can serve as an important check on problematic practices. Beyond this narrow set of cases, though, disparate impact theory needs new legs. Judges should allow and consider evidence of historical and organizational context to identify those practices that are likely to be the product of social closure or an intertwined mechanism or means of social closure. Once identified, the easiest and most immediate way for judges to better align the law with the reality of social closure would be to consider practices of social closure as disparate treatment, different treatment on the basis of protected group. This would eliminate the justification defense and would also help with formulation of remedies as it would acknowledge the interplay between practices and biases. This might open up consideration of a broader range of remedies,

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179. Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. OF SOC. 888 (2011).

180. Settlement Agreement and Release, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (N.D. Ill. Aug. 23, 2013) (No. 05-CV-06583).

including but not limited to injunctive relief, targeted at disrupting the interplay of bias and organizational practices.

#### CONCLUSION

Our goal for this essay was threefold: to theorize social closure as a form of discrimination, to reveal social closure as we believe it was operating in some well-known cases, and to analyze how judicial actors might better apply our legal frameworks to address social closure discrimination. With regard to the first of these goals, some might object that all we have shown is “discrimination” generally, not a more specific theory of social closure discrimination, but we disagree. We have shifted the lens away from individualistic acts directed *outward* at protected groups, and toward collective acts of boundary drawing and exclusion directed *inward* to benefit privileged groups and obtain a monopoly over resources, desirable jobs, and organizational decision making for their members. That is, we have identified an under-theorized mechanism of discrimination, and we have shown through examples that this lack of theory leads to an inability or unwillingness to see social closure as a mechanism for recreating inequality in the workplace.

We have also suggested some measures that would make employment discrimination law under Title VII better suited to identifying social closure in the workplace, and to incentivizing work organizations to address it. First, courts evaluating cases for discrimination under disparate treatment theories—particularly systemic disparate treatment theory, but also individual disparate treatment cases involving harassment and stereotyping—should move away from a focus on individual acts of animus or bias and instead examine collective processes, organizational cultures, and organizational practices that facilitate boundary drawing and exclusion directed *inward* to benefit privileged groups. *Wal-Mart* arguably is one case where the Court failed to engage in this analysis. This does not, as critics might argue, revert systemic disparate treatment theory to a policy of requiring “quota” hiring to ensure absolute parity between racial proportions in the labor market and the employer’s work force. It does, however, position our law to encourage organizations to examine their own systems, practices, and cultures for social closure. It requires, in short, more than tolerating social closure dynamics in the workplace, especially when they interact with, and in some instances generate, the employer’s own practices and policies.

Moreover, our law should not consider seemingly neutral practices in isolation; instead, it should be looking at context. Courts should consider the history of the workplace practices and cultures challenged. If a practice when considered in context is a product of or means for social closure, then employers should not be able to retain the practice on mere showing of job

relatedness and business necessity. Too often courts examining egregious forms of boundary keeping and exclusion sanitize the facts to strip away decades of exclusion of women and minority workers from desirable, lucrative employment. These facts are not irrelevant details; they help reveal the collective, exclusionary operation of social closure in the workplace. This history must be part of the analysis in evaluating whether any set of practices and policies, even if nominally useful for business purposes, have been hijacked for the purposes of social closure.

Surely we have not laid to rest all concerns about social closure discrimination in this essay; nor have we responded to all critiques of our proposed future of the legal frameworks of Title VII to address it. We have, however, laid the groundwork for movement in the direction of addressing social closure as discrimination. Allowing doctrinal categories and frameworks together with their baggage to cabin our thinking as we contemplate new problems will most certainly keep us from where we need to go.

