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REALITY'S BITE

KERRI LYNN STONE*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 turned fifty last year, and as scholars, judges, and the rest of the world reflect upon its past and continuing impact, attention naturally turns to the courts', specifically the Supreme Court's, most recent opinions, interpretations, and doctrines. Courts' drawing of lines, interpretation of terms, and promulgation of doctrines will dictate, for better or worse, the efficacy and ultimately the legacy of the statute and its success in affording equality of opportunity to and in the workplace. By far, the most pivotal thing to watch as this is done is whether and how courts take so-called workplace realities into account when making decisions that must factor in policy implications and "real world" ramifications.

The realities of the workplace have been captured by years of socio-scientific, industrial organizational, and other psychological research. Human behavior and thought, interpersonal dynamics, and organizational behavior, with all of their nuances and fine points, are now better understood than they have ever been before, but unless they are used to inform and buttress the rules of law and interpretations promulgated by courts, Title VII's ability to successfully regulate the workplace and to rid it of discrimination will be threatened. As Linda Hamilton Krieger and Susan T. Fiske pointed out in 2006, "[a]ntidiscrimination law has long incorporated and reified factual suppositions about the nature of prejudice . . . But well-established insights from psychological science, accumulated over fifty years of peer-reviewed, replicated research, has called these suppositions into serious doubt, if not discredited them entirely."[1]

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This article expands upon that premise, lamenting judges, and specifically justices having eschewed available research and other insights into workplace realities, in favor of their own intuited sense of workplace dynamics, tendencies, and trends. Further, this article observes an interesting asymmetry to how and when so-called "real-world" considerations have been taken into account by the Supreme Court: turning a blind eye to workplace realities that might aid in crafting legal standards and interpretations that do not render legal recourse practically inaccessible to plaintiffs, while *overplaying* workplace realities and reality-based concerns like those about litigation floodgates when it comes to defendant-friendly holdings and constructions. More balance and transparency is needed when courts weigh the policy considerations that underlie a given decision, and these considerations should be informed, wherever possible, by legitimate sources, and not by caricaturish and monolithic premises too often employed by the judiciary.

In the summer of 2013, in a national legal climate that many have described as hostile to employment discrimination plaintiffs,[2] the Supreme Court issued two opinions addressing Title VII. While one dealt with retaliation claims under the statute and the other with sexual harassment, they both engaged in the construction of terms to craft and retool standards under which claims brought are adjudicated.[3]

1 *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1061-62 (2006); *see also* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 319 (2010) ("[G]reater contextualization of workplace circumstances before courts make dismissal decisions based on an abbreviated paper record - context regarding the decision."); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 60 (2011) (discussing how a different interpretation of Iqbal "may avert the effect of stereotypes and implicit bias on judicial decision making at the pleading stage" of employment discrimination cases); Kate Webber, *Correcting the Supreme Court-Will It Listen? Using the Models of Judicial Decision-Making to Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L.J. 305, 305-306 (2014) ("[S]cholars have long debated the question of what drives judicial decisions. They generally agree that judges' individual political preferences play a significant, or even dominant, role in case outcomes . . . The legal community, however, has been slow to incorporate these theories and evidence into . . . analysis of pertinent issues.")

2 *See* Michele A. Whitham, *Supreme Court Makes it Harder for Employees to Bring Suits Under Title VII*, FOLEY HOAG EDUCATION ALERT (Aug. 15, 2013), http://www.foleyhoag.com/publications/alerts-and-updates/2013/august/supreme-court-makes-it-harder-for-employees-to-bring-suits-under-title-vii; Julia E. Judish et. al., *Impact of Supreme Court Pro-Employer Title VII Decisions Blunted by State Laws*, PILLSBURY CLIENT ALERT (July 8, 2013), http://www.pillsburylaw.com/siteFiles/Publications/Alert20130708LitigationImpactofSupremeCourtTitleVIIRulingsBlunted.pdf; *see also* Audrey Williams June, *In Case Involving Medical School, Court Sets Higher Bar for Workers Who Allege Retaliation*, THE CHRONICLE OF HIGHER EDUCATION (June 24, 2013), http://chronicle.com/article/article-content/140005/; Stacy L. Douglas, *Supreme Court Rulings Define Standards Favorable to Employers*, MARTINDALE.COM (Sept. 9, 2013), http://www.martindale.com/civil-rights-law/article_Wood-Smith-Henning-Berman-LLP_1955884.htm.

3 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524 (2013); *see also* Vance v. Ball State Univ., 133 S. Ct. 2434, 2450 (2013).

In one case, *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), the Court held that despite the fact that a claim of discrimination brought under Title VII's core provision requires the plaintiff to show merely that unlawful discrimination was a substantial motivating factor behind the adverse employment action, a claim of retaliation brought under the statute requires a showing by the plaintiff that but-for the demonstrated retaliation, the adverse action (like a firing) would not have happened.[4] This holding has been critically received by practitioners and scholars who believe that such a stringent standard will make retaliation cases, in which the inherently subjective, complex decision-making process surrounding employment decisions already makes them capable of being muddied (whether organically or by design), practically impossible to win.[5] This, critics say, cannot possibly be what Congress intended when it crafted the statute.[6] Critics also fear that protected activity under Title VII will be chilled by employees' understanding of the futility of bringing a retaliation claim.[7]

In the other case, *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), the Court narrowed the definition of the term "supervisor" for purposes of imposing the more plaintiff-friendly standard for supervisory harassment as opposed to the more stringent standard for co-worker harassment.[8] Again, critics believe that this narrow definition leaves victims of harassment with inadequate protection and will deter the vindication of rights under the statute.[9] In both cases, the Court appeared to weigh the policy implications

4 *Nassar*, 133 S. Ct. at 2534.

5 *See infra* note 62.

6 *See Matthew A. Krimski, Uni. Of Tex. Sw. Med. Ctr. v. Nassar: Undermining the National Policy Against Discrimination*, 73 MD. L. REV. ENDNOTES 132, 145 (2014); *see also* Sandra F. Sperino & Suja A. Thomas, *Fakers & Floodgates*, 10 STAN. J. C. R. & C. L. 223, 224 (2014) ("Congress never expressed any intention to limit the number of claims heard by the Equal Employment Opportunity Commission (EEOC) or the courts based on concerns about the sheer volume of such claims. Nor did Congress express any intent that the courts use the substantive law to screen for false retaliation cases.").

7 *See* Abigail Rubenstein, *High Court Poised To Shape Landscape For Retaliation Suits*, LAW 360 (Apr. 22, 2013), http://www.law360.com/articles/434764/high-court-poised-to-shape-landscape-for-retaliation-suits (stating, while discussing *Nassar* before it was decided, that "[i]f, in fact, the employer carries the day in this case and the but-for standard is adopted with respect to retaliation claims, it should definitely have a chilling effect on the frequency and the potency of such claims.'"); *see also* Alyssa E. Lambert, *Supreme Court debates causation standard for employee retaliation claims*, AMERICAN ASSOCIATION FOR JUSTICE (May 16, 2013), Solomon Jones, *Supreme Court's EEOC rulings erode workers' job security*, AXIS PHILLY (July 3, 2013), http://axisphilly.org/article/supreme-courts-eeoc-rulings-erode-workers-job-security/ ("Together, the two cases [*Nassar* and *Vance*] have a chilling effect on American workers. They make all workers more vulnerable to the whims of employers, and leave workers with few options for relief.").

8 *See Vance*, 133 S. Ct. at 2448.

9 *See, e.g.*, *Vance*, 133 S. Ct. at 2439 ("[I]t matters whether a harasser is a supervisor or simply a co-worker."); *see also* Faragher v. Boca Raton, 524 U.S. 775, 807 (1998) ("An employer is

of leaving what it felt was too much room for exploitative plaintiffs to essentially extort a payout while turning a blind eye to phenomena and realities that will render their determinations fatal to many colorable claims and subversive to the statute's enumerated goals.[10]

II. BACKGROUND

Under core anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice" to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[11] Title VII's anti-retaliation provision states, in relevant part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed . . . an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . . ."[12]

In 1986, the Supreme Court recognized for the first time that sexual harassment, or, "unwelcome sexual advances that create an offensive or hostile working environment," or other sex-based "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," did, in fact, constitute a discriminatory alteration of an employee's "terms, conditions, or privileges of employment."[13]

Liability for workplace harassment, however, would be construed to hinge upon the employment status of the alleged harasser.[14] On one hand, where a victim alleges that he or she was harassed by a co-worker, employer liability is only triggered where the employer was negligent in its

subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.").

10 *See Nassar*, 133 S. Ct. at 2531; *Vance,* 133 S. Ct. at 2451.

11 42 U.S.C.A. § 2000e-2 (West 1964).

12 42 U.S.C.A. § 2000e-3(a) (West 1964).

13 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

14 *See, e.g.*, *Vance*, 133 S. Ct. at 2439 ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases which the harasser is a supervisor, however, different rules apply."); Curry v. District of Columbia, 195 F.3d 654, 660 (1999) ("An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action.").

maintenance and control of the workplace environment and conditions.[15] On the other hand, where the alleged harasser is deemed a supervisor and the harassment culminates in a tangible employment action which is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," the employer will be held strictly liable for the harassment.[16]

But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.[17]

A. Vance

In *Vance v. Ball State University*, the Court confronted the issue of precisely how to define the term supervisor for the purpose of engaging in a harassment liability analysis.[18] The Court held that vicarious liability for supervisory sexual harassment would only attach when the putative supervisor was one whom "the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[19] The Court rejected the "nebulous definition of a 'supervisor' advocated in the EEOC Guidance," as well as the plaintiff's "reliance on colloquial uses of the term," thus spurning a definition more likely to resonate with an understanding held by employees.[20]

The Court seemed to prioritize in its reasoning the crafting of a definition that permitted supervisory status to be "readily determined," and not, as the EEOC's definition would, "to depend on a highly case-specific evaluation of numerous factors," and "confound jurors."[21] This looks to signify the triumph of ease of disposition over the real-world considerations of comportment with key players' (employees')

15 *See Vance*, 133 S. Ct. at 2439; *Curry*, 195 F.3d at 660.
16 *Burlington*, 524 U.S. at 761.
17 *Id.* at 765.
18 *Vance*, 133 S. Ct. at 2439.
19 *Id.* at 2443.
20 *Id.*
21 *Id.* at 2443-44.

expectations and perceptions when infusing words with meaning. While the Court maintained that the term had "varying meanings both in colloquial usage and in the law,"[22] many scholars and commentators have critiqued its analysis. In the words of Professor Henry Chambers:

> [T]he Court has mixed two different concepts. . . . The definition the Court adopted may be easier to apply but may not be particularly related to the original issue underlying the affirmative defense-when an employer should be responsible for HWE harassment. . . . Limiting who is a supervisor by using an easy-to-apply definition of "supervisor" may limit liability, but it is not clear that such limitation is more consistent with the purpose of the affirmative defense than using a somewhat less clear definition. . . . [H]ow an employee experiences the supervisor/coworker's power in the workplace would also seem relevant.[23]

Professor Chambers is correct; the Court's disregard for the manner in which the victim of sexual harassment experiences his or her harasser's power in the workplace is significant. It is significant because when the Supreme Court contoured the scope of supervisor liability for sexual harassment in 1998, it acknowledged that actions taken by a supervisor are, in essence, actions taken by the employer that interfere with the terms and conditions of employment that Title VII concerns itself with.[24] From the perspective of a victimized employee, irrespective of whether a harasser technically possesses certain powers, to the extent that he controls aspects and the atmosphere of her employment he is acting to color, if not corrode, the terms and conditions of her employment when he harasses her.[25] The practical effects of this opinion were felt in real workplaces around the country as lower courts applied this holding. Headlines like "10TH CIR.: MCDONALD'S FRANCHISEE NOT LIABLE FOR SHIFT LEADER'S SEXUAL ASSAULT OF TEEN WORKER"[26] practically scream what has happened as *Vance's* holding has been applied: "A restaurant shift leader was not a Title VII supervisor, and the employer therefore was not liable for the off-site sexual activity between the employee and an under-age

22 *Id.* at 2446.

23 Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?* 74 LA. L. REV. 1161, 1168-69 (2014) (emphasis added).

24 *Burlington*, 524 U.S. at 753-54 ("When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII.").

25 *Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/harassment.cfm (last visited Oct. 2, 2014).

26 WOLTERS KLUWER EMPLOYMENT LAW DAILY, Aug. 16, 2013, 2013 WL 4426215.

worker, the Tenth Circuit held, applying the Supreme Court's recent holding in Vance v. Ball State University."[27]

The dissent in *Vance* actually came out and said that the Supreme Court's distinction between supervisory harassment and co-worker harassment "correspond[ed] to the realities of the workplace,"[28] noting that:

> Exposed to a fellow employee's harassment, one can walk away or tell the offender to "buzz off." A supervisor's slings and arrows, however, are not so easily avoided. An employee who confronts her harassing supervisor risks, for example, receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or with placement on a shift spanning hours disruptive of her family life. And she may be demoted or fired. Facing such dangers, she may be reluctant to blow the whistle on her superior, whose "power and authority invests his or her harassing conduct with a particular threatening character." . . . In short, as *Faragher* and *Ellerth* recognized, harassment by supervisors is more likely to cause palpable harm and to persist unabated than similar conduct by fellow employees.[29]

The dissent in *Vance* lamented the majority's removal from the ambit of the definition of the term supervisor those who "control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions."[30] The dissent noted that it would have held that supervisory status is demonstrated by one's "authority to direct an employee's daily activities."[31]

B. Nassar

Perhaps no case better underscores judges' propensity to overstate workplace "realities" when it comes to anticipating insidious motives and behavior on the part of plaintiffs, engaging in fanciful parades of horribles, and crafting standards to closing "floodgates" that may or may not actually exist, than *University of Texas Southwestern Medical Center v. Nassar*.[32] In this 2013 Supreme Court case, the Court confronted the issue of whether the proper standard for proving a retaliation claim under Title VII was that

27 *Id.*
28 *Vance*, 133 S. Ct. at 2456 (Ginsberg, J., dissenting) (citation omitted).
29 *Id.*
30 *Id.* at 2455.
31 *Id.*
32 *Nassar*, 133 S. Ct. at 2517.

retaliation be a substantial factor in the decision to effectuate the adverse action, as is the standard for proving unlawful status-based discrimination, or that retaliation be the "but-for" cause of the decision.[33] The Supreme Court found the latter to be the case.[34]

The Court also grounded its decision in a discussion of causation in tort law, noting that "[c]ausation in fact— i.e., proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim. . . . This includes federal statutory claims of workplace discrimination."[35] The Court went on to note that generally, this meant that the plaintiff had to, as a "default rule," demonstrate "'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct."[36]

The Court made a big point of distinguishing between the statute's prohibition of class or status-based discrimination on one hand and its prohibition of employer retaliation for an employee's opposition to employment discrimination and her submission of or support for a complaint claiming employment discrimination on the other hand.[37] The latter category, the Court noted, consisted of prohibitions premised on protected employee conduct rather than "personal traits."[38] Finally, the Court looked to its history in construing causation standards promulgated by Title VII and other anti-discrimination legislation.[39] The Court noted that in 1989, in *Price Waterhouse v. Hopkins*, it had effectively defined the prohibition against discrimination "because of" protected class status as forbidding an employer's allowing of protected class status to be a "motivating" or "substantial" factor in the employer's decision.[40] This standard, termed by the Court a "lessened causation standard," was codified in the Civil Rights Act of 1991 (the 1991 Act).[41]

The Court also adverted to its decision regarding the proper causation standard under the Age Discrimination in Employment Act in of 1967 (ADEA) in *Gross v. FBL Financial Services, Inc.*[42] In *Gross*, the Court held that ADEA plaintiffs must prove that age was the "but-for" cause of

33 *Id.* at 2522-23, 2526.
34 *Id.* at 2534.
35 *Id.* at 2524.
36 *Id.* at 2525.
37 *Id.*
38 *Id.*
39 *Id.* at 2525-28.
40 *Id.* at 2525. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
41 *Nassar*, 133 S. Ct. at 2526.
42 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

the prohibited discrimination, not merely a substantial motivating factor.[43] The Court's analysis was premised on the plain language in, legislative history of, and Congressional intent behind the ADEA and its prohibition of discrimination "because of" age.[44] Declining to apply the standard construed in *Price Waterhouse*, the Court emphasized Congress's choice not to amend the ADEA when it amended Title VII in 1991.[45] The Court also noted that the *Gross* Court explicitly attached significance to the fact that the 1991 amendments to Title VII, signified that "the motivating-factor standard was not an organic part of Title VII and thus could not be read into the ADEA."[46]

Interestingly, while the majority opinion devoted significant time and space to engaging the arguments of the plaintiff and the U.S. Government, exhorting them to employ rules of statutory construction, analysis, and interpretation of the language, history, and structure of anti-discrimination, it failed to address the underlying realities of the workplace that should have factored into a determination of the most workable and efficacious standard for causation in retaliation cases.[47] When the Court stated that in the course of its analysis, "[t]ext may not be divorced from context," it was referring to the context of the statute's negotiation, passage, and drafting, and not the context of the workplaces it regulates and what dynamics govern their environments and interactions.[48]

Moreover, the policy underpinnings of the Court's holding focused not on the ramifications that a "but-for" causation standard would have on effectuating the legislation at issue's goal, stemming retaliatory behavior in the workplace and freeing employees to pursue recourse under Title VII for perceived violations without fear of retaliation, but rather, on avoiding opening the proverbial "floodgates of litigation."[49] Indeed, the Court noted that:

> *The proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made*

43 *Id.* at 180.
44 *Nassar*, 133 S. Ct. at 2527.
45 *See id.*
46 *Id.*
47 *Id.* at 2528-31.
48 *Id.* at 2530.
49 *See id.* at 2531.

> *with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.*[50]

The majority also worried about the danger of a lessened causation standard adding to or inviting "the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment."[51] By way of illustration, the majority posited:

> The case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage.[52]

Finally, while the majority worried that the costs, "both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent," would be raised if retaliation merely needed to be shown to be a motivating factor in an employer's decision, it did not pay much attention to the ramifications of making the standard for proving a retaliation case impossibly high.[53]

The dissent, as might be expected, emphasized the centrality of an effective anti-retaliation provision to an effective anti-discrimination statute, noting that "[r]etaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it."[54] The dissent refuted the majority's position as to the language of the

50 *Id.* at 2531.
51 *Id.* at 2531-32.
52 *Id.* at 2532.
53 *Id.*
54 *Id.* at 2535.

statute, noting that the term "because of" does not always compel a "but for" analysis, and observing that under the new reading of the statute, a plaintiff claiming retaliation will not be able to prevail if her firing was motivated by both legitimate and illegitimate factors.[55]

Even as the dissent quoted Justice O'Connor's concurrence in *Price Waterhouse*, which noted that "the law has long recognized that . . . leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care"[56] and posited that "a strict but-for test is particularly ill suited to employment discrimination cases,"[57] it never scratched the surface as to precisely why this might be the case, other than to quote the dissent in *Gross*: "[e]ven if the test is appropriate in some tort contexts, 'it is an entirely different matter to determine a "but-for" relation when . . . considering, not physical forces, but the mind-related characteristics that constitute motive.'"[58] The dissent was content to describe the new standard generally as compelling the trier to "engage in a hypothetical inquiry" that may very well "demand the impossible" by "challeng[ing] the imagination of the trier to probe into a purely fanciful and unknowable state of affairs" without delving at all into the unique application of the standard in the workplace.[59] The dissent even went so far as to quote a sponsor of Title VII from its legislative history, opining that a "sole cause" standard for the substantive discrimination provision would be unworkable because "[l]ife does not shape up that way."[60] The dissent then flat-out accused the majority of "lack[ing] sensitivity to the realities of life at work" but failed to elaborate on this unworkability with any kind of discussion of the contemporary American workplace.[61]

This opinion has been criticized by numerous legal scholars,[62] but it

55 *Id.* at 2546 (Ginsburg, J., dissenting).

56 *Id.* at 2531 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989)).

57 *Id.* at 2547.

58 *Id.* (quoting *Gross*, 557 U.S. at 190 (Breyer, J., dissenting)).

59 *Id.* at 2547.

60 *Id.*

61 *Id.*

62 *See, e.g.*, Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1191-93 (2014) (noting that in *Nassar*, the Supreme Court "narrowed retaliation in a way that may not provide nearly as much protection for the employee as Title VII might suggest. Logically, the result of narrowing the retaliation claim will be to discourage employees from challenging unlawful employment practices. Given that the retaliation clause exists to support and encourage employees to challenge unlawful employment practices, the narrowing of the retaliation claim is not just problematic for the employee; it is problematic for Title VII and the workplace."); *id.* at 1186 ("Even though the Court acknowledged-as it had to-that the retaliation claim is a legitimate cause of action, it narrowed the cause of action when it logically could have made it broader. In deciding *Nassar*, the Supreme Court seemed willing to go only as far as Title

should be seen as evidence of a disturbing judicial trend of both eschewing considerations of workplace realities and providing a critically imbalanced portrayal of what they are and how they operate when it comes to plaintiffs' and defendants' arguments.

III. "WORKPLACE REALITIES"

The year 2013 was not the first time that Justice Ginsburg had addressed workplace realities in the course of drafting an opinion (in this case, a dissent), but it was one of the scant few times that the Supreme Court had *ever*, in any context, mentioned or otherwise factored in "workplace realities." In 2012, the Supreme Court held that, due to sovereign immunity, states could not be subjected to suits for damages by employees alleging violations of the self-care provision of the Family and Medical Leave Act of 1993 (FMLA). This was due to the fact that the abrogation of sovereign immunity in that instance would exceed congressional power.[63]

In her dissent, Justice Ginsburg took on and disputed the plurality's contentions that Congress was at a loss for "wide-spread evidence of sex discrimination . . . in the administration of sick leave" and that "state employees likely 'could take leave for pregnancy-related illnesses . . . . under paid sick-leave plans.'"[64] She noted that, on the contrary, "Congress heard evidence that existing sick-leave plans were inadequate to ensure that women were not fired when they needed to take time out to recover their strength and stamina after childbirth" and that the self-care provision at issue was responsive to the concerns that stemmed from that evidence.[65]

Moreover, Justice Ginsburg argued that Congress had deliberately stayed away from crafting the FMLA as a pregnancy-centered statute, fearing that such a focus would "ward off the unconstitutional discrimination it

VII explicitly allowed and showed no deference to prior Courts that had thought about the causation issue. That willingness to rethink a basic aspect of Title VII is troublesome, given the Court's apparent hostility to parts of Title VII."); *see also* Jeffrey M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMP. RTS. & EMP. POL'Y J. 157, 167 (2013) ("the decision is undoubtedly a loss for employees"); Erwin Chemerinsky, *The Court Affects Each of Us the Supreme Court Term in Review*, 16 GREEN BAG 2D 361, 375 (2013) ("In *University of Texas Southwestern Medical Center v. Nassar*, the Court made it more difficult for employees to successfully sue for claims that they were retaliated against for complaining of discrimination."); Alan Rupe et. al., *U.S. Supreme Court Clarifies the Plaintiff's Burden of Proof in Title VII Retaliation Actions*, 83 J. KAN. B.A. 24, 28 (2014) ("Although its impact on summary judgment will be small, *Nassar* will substantially affect employment trials and pretrial submissions in all but Title VII discrimination cases.").

63 *See generally* Coleman v. Ct. App. Md., 132 S. Ct. 1327 (2012).

64 *Id.* at 1346 (internal quotations omitted) (Ginsburg, J., dissenting).

65 *Id.*

believed would attend a pregnancy-only leave requirement."[66] Citing Congress's stated concern that "[a] law providing special protection to women . . . in addition to being inequitable, runs the risk of causing discriminatory treatment [because] [e]mployers might be less inclined to hire women," Justice Ginsburg observed that this concern "was solidly grounded in workplace realities."[67] She noted that, as evidence of this:

> After this Court upheld California's pregnancy-only leave policy in California Fed., Don Butler, President of the Merchants and Manufacturers Association, one of the plaintiffs in that case, told National Public Radio reporter Nina Totenberg that, as a result of the decision, "many employers will be prone to discriminate against women in hiring and hire males instead." . . .Totenberg replied, "But that is illegal, too"—to which Butler responded, "Well, that is illegal, but try to prove it."[68]

Justice Ginsburg's instinct to look to the actual way in which motivations are formed, acted upon, and even obscured, as a way of bearing out the speculations of Congress is all too rare on the Court, and among the judiciary in general.[69] In fact, an early 2014 Westlaw search of the term "workplace realities" in the database that scans all federal cases only turns up fourteen results, *Vance* and this case being two of them.[70] Although there are clearly other ways of conveying a weighing of or engagement with workplace realities, this is still somewhat telling, and legal scholarship on the issue reveals a host of criticism of the fact that workplace realities are all too absent from judicial calculus and analysis in both form and substance.[71]

The only other Supreme Court case in which workplace realities were mentioned or invoked is in the dissenting opinion authored by Justice Ginsburg in the now-defunct Lily Ledbetter decision.[72] Criticizing the

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Vance*, 133 S. Ct. at 2434; *Coleman*, 132 S. Ct. at 1327.

71 *See* Ronald Turner, *Pliable Precedents, Plausible Policies, and Lilly Ledbetter's Loss*, 30 BERKELEY J. EMP. & LAB. L. 336, 364 (2009); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1127 (2008); Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court Than Those Who Say No . . . and Why They Shouldn't*, 20 YALE J.L. & FEMINISM 25, 58 (2008); Kara M. Farina, *When Does Discrimination "Occur?": The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII*, 38 GOLDEN GATE U. L. REV. 249, 273 (2008); Bindu George, *Ledbetter v. Goodyear: A Court Out of Touch with the Realities of the American Workplace*, 18 TEMP. POL. & CIV. RTS. L. REV. 253 (2008).

72 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

majority for being so dismissive of the EEOC's interpretation of Title VII as allowing employers to challenge discriminatorily disparate paychecks each time a new one is received, rather than saying that the applicable statute of limitations runs after a discrete period of time, Justice Ginsburg explained that the interpretation was "in line with the real-world characteristics of pay discrimination," and that it "mirror[ed] workplace realities," earning it "at least respectful attention."[73]

A. An Odd Asymmetry: The Supreme Court Fails to Account for Workplace Realities that Touch on Plaintiffs' Difficulties and Defendants' Behavior in its Determination of a Causation Standard for Title VII Retaliation, but Assesses and Addresses "Floodgate" Concerns that Touch on the "Realities" Concerning Complex, Undeserving, Litigious Plaintiffs.

As noted, in *Nassar*, the Court remarkably failed to appreciate the complexity of the phenomenon of workplace retaliation as it actually occurs. Its protracted discussion of statutory design and construction included no consideration or mention of what Congress's intent with respect to the applicable standard might have been considering the dynamics of workplace retaliation. This is despite its earlier recognitions of the centrality of an anti-retaliation provision in Title VII and acknowledgement of what might happen in the workplace without a strong anti-retaliation provision.

In 2006, the Supreme Court acknowledged that Title VII's anti-retaliation provision, its teeth, and that which "seeks to secure that primary objective by preventing an employer from interfering . . . with an employee's efforts to secure or advance enforcement of the Act's basic guarantees," should be interpreted "to provide broad protection from retaliation [to] help [to] ensure the cooperation upon which accomplishment of the Act's primary objective depends."[74] Moreover, in 2009 the Supreme Court acknowledged the reality that the "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."[75]

Despite these recognitions, and despite the entreaties of various amicus briefs for the *Nassar* Court to take workplace realities into account, the

73 *Id.* at 655, 666 n.6.

74 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63, 67 (2006).

75 Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 279 (2009) (citing Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

Court turned a blind eye. Indeed, one amicus brief noted that "[i]n the employment context . . . an employer typically has multiple reasons for making an adverse decision," that "very few (if any) employees have unblemished employment records," and that "[a]s a result, employers would effectively have permission to consider an employee's protected conduct in their decision-making with impunity, so long as the employee could not disprove an independently sufficient reason for the employer's adverse action."[76] It thus projected that:

> [e]scalating the plaintiffs burden to a 'but-for' standard in retaliation cases would create a chilling effect. Claimants . . . would face prohibitive difficulty in proving their claims. Their unlikelihood of success on a retaliation claim would create an additional incentive to acquiesce to discrimination in the workplace, silencing vulnerable groups of employees from seeking redress for workplace discrimination.[77]

Another amicus brief noted that "[t]oo often public schools and universities censor and retaliate against dissenters for their speech, but cloak those adverse actions in seemingly benign justifications. A but-for standard facilitates such punishment of disfavored speakers and thus imperils the marketplace of ideas."[78] Still another predicted that "[w]ithout adequate protections against retaliation, employees who have been discriminated against - those who have been harassed, for example, or demoted because of their race - may rationally decide to remain silent until they are out of their employer's reach, in other words, until they quit or are fired."[79] Other briefs echoed these realities and this sentiment,[80] but the

[76] Brief for American-Arab Anti-Discrimination Committee et al., as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), 2013 WL 1462054, at * 13.

[77] *Id.* at *14.

[78] Brief for the Foundation for Individual Rights in Education and Alliance Defending Freedom, as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), 2013 WL 1462055.

[79] Brief for Committee of Interns and Residents Seiu, et al. as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), 2013 WL 1557466.

[80] Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), 2013 WL 1557464 ("A sole cause standard in retaliation claims would eviscerate enforcement of Title VII's retaliation provision. An employer would prevail merely by identifying one reason other than discrimination that might have played a role in the decision to take the adverse action against the employee. If the promise of protection from retaliation was rendered meaningless, enforcement of the substantive provisions of Title VII would be substantially undercut."); Brief for the Foundation for Individual Rights in Education and Alliance Defending Freedom as Amicus Curiae Supporting Respondent, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (No. 12-484), 2013 WL 1462055 ("Under a but-for standard, First Amendment retaliation litigants would be handicapped in

Court's majority refused to so much as address these arguments, either in the context of the policy soundness of the decision or in the context of congressional intent.

On the other hand, the Court was incredibly quick to conjure up and posit a duplicitous would-be fired employee-turned-plaintiff who would wield her lawsuit as a sword rather than a shield.[81] In contrast to its analysis of congressional intent and statutory construction, the Court's policy-based rationales for its construction readily invoked dire probable consequences in holding as the plaintiffs and their amici would have it hold.[82] The Court noted, in fact, that as a matter of policy, a "proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[83] It elaborated upon this proposition, observing that:

> This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012. . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.[84]

Moreover, the Court noted that the very *notion* that a "dubious" claim might survive summary judgment and cost an employer money to litigate, *was*, in fact, a good, policy-based reason to insist on a more stringent causation standard:

> Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. . . . It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.[85]

attempts to vindicate their constitutional rights. The requirement that they prove that discrimination was the sole cause of an adverse educational or employment action would dramatically enhance the difficulty of their cases, and thus diminish the availability of remedies. Conversely, this altered standard would relieve government officials of the salutary incentives to fairness that viable retaliation claims bring.").

81 *See Nassar*, 133 S. Ct. at 2531-32.

82 *See id.* at 2533.

83 *Id.* at 2531.

84 *Id.*

85 *Id.* at 2532.

The asymmetry shown by the Court between its conception of a simple employer, who can be shown to have either clearly retaliated or not, and who the Court prioritized sparing costs in as early a stage as possible, and its conception of a feckless, but duplicitous plaintiff, "tempted" to manufacture claims only to cloak herself in the overly-generous protections of Title VII, is staggering.

1. Unjust Depictions of Manipulative, Devious Plaintiffs and Victimized Defendant Employers

This imbalance is reflective of a judicial system that, as many scholars have argued, has erected procedural impediments to plaintiffs' success,[86] and that, as some scholars have posited, harbors out-and-out bias against plaintiffs. According to Professor Michael Selmi:

> The primary reason discrimination cases are so hard to prove has to do with the bias courts bring to their analyses. By the term bias I do not mean that courts hold or express animus toward discrimination cases, though some courts undoubtedly do, but instead I mean that courts approach cases from a particular perspective that reflects a bias against the claims . . . . [I]t seems that the general consensus today is that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence.[87]

Judge Mark W. Bennett observes that:

> [T]he federal judiciary has become increasingly unfriendly towards employment discrimination cases going to trial. Those of us in the legal profession not living under a large rock would be hard pressed not to have noticed this. . . . Employment discrimination cases today are to the federal judiciary what prisoner rights cases were before the passage of the Prison Litigation Reform Act in 1996. In Yogi Berra

86 *See, e.g.*, Lever v. Nw. Univ., 979 F.2d 552, 554 (7th Cir. 1992) ("No rule of law says that employees win all close cases."); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104-05 (2009) ("The fear of judicial bias at both the lower and the appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts."); Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 94 (2012) ("Despite the appearance of a comprehensive federal anti-discrimination scheme, the laws [. . .] provide limited access to the claiming system."); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 909 (2006) ("Plaintiff's victories are a rare event in employment discrimination litigation . . . ."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) ("[T]he volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits.").

87 Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-63 (2001).

> terms, it's déjà vu all over again: "Plaintiff's claims lack merit," "Plaintiff's claims are frivolous," and . . ."Plaintiff's claims are implausible"—all incantations heard with stunning frequency in the federal district courts. . . . Two Cornell law professors, who have done extensive empirical studies of "win" rates in employment discrimination cases . . . note, "The most significant observation about the district courts' adjudication of employment discrimination cases is the long-run lack of success for these plaintiffs relative to other plaintiffs."[88]

Where do these asymmetrical characterizations and depictions come from? Media depictions of employment discrimination are rife with imagery of greedy, undeserving plaintiffs looking to exploit their protected class status, "milk the system," and even mask their own faults and foibles with frivolous lawsuits.[89] As Professor Minna J. Kotkin has said:

> Conservative pundits assert that employers are being held hostage by the discrimination laws. They are besieged by frivolous claims and forced into nuisance settlements to avoid out-of-control legal fees. If they risk litigation, they are at the mercy of jury whims that can lead to crippling awards. Employment discrimination claims are a sub-set of the litigation explosion that is crippling American business and making us non-competitive in the global marketplace. . . . The media also contribute to questionable representations of employment discrimination litigation. One study found that newspaper reports reflected an 85% win rate for plaintiffs with average recoveries of $1.1 million, when the docket entries showed a 32% win rate, and a recovery average of $150,000. On the other hand, some social scientists and legal scholars suggest that bias in the workplace continues at subtle levels not readily amenable to resolution through litigation as the law now stands.
>
> The impact of conservative ideology is readily apparent, both in

88 Hon. Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 697-98 (2013).

89 *See generally* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009) ("we should disclose at the outset our concluding view that results in the federal courts disfavor employment discrimination plaintiffs. . . "); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) ("courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many . . . breaks along the way."); Judge Nancy Gertner (Ret.), *The Virtual Repeal of Kennedy-Johnson Administrations' 'Signature Achievement'*, HUFF POST COLLEGE (Nov. 20, 2013, 5:35 PM), http://www.huffingtonpost.com/judge-nancy-gertner/the-virtual-repeal-of-kennedy-johnson-administrations-signature-achievement_b_4311759.html ("So little do the judges think of discrimination claims that they rarely allow them to get to a jury at all.").

> Congress and in the courts.... Some federal judges have publicly expressed hostility to employment discrimination claims, and both attorneys and litigants are under the perception that the federal judiciary does not treat the claims or claimants with the same attention and respect accorded commercial litigants.[90]

Many scholars have observed that a look at the Supreme Court's most recent Title VII jurisprudence paints a bleak picture in terms of its ability to sustain its objectives.[91] As Professor Henry Chambers has observed:

> [T]he Supreme Court's recent cases have suggested that the Court will focus its interpretation of Title VII on its vision of the meaning of Title VII's text, even if that is inconsistent with Title VII's overall vision or the vision that Congress apparently had when it passed Title VII and its various amendments....
>
> The Court is rethinking Title VII doctrines.... Given this Court's generally skeptical outlook on Title VII, that does not bode well for Title VII's expansion to limits that will allow Title VII to serve its original function of promoting full equality in the workplace.... If the current trend continues, Title VII may be whittled down to its core provisions.[92]

Additionally, the Court has been selective as to when it chooses to be responsive to so-called "floodgates" arguments, as well. In 2012, as the Court formally recognized, and thus cemented, the judicially created "ministerial exception" that bars the application of civil rights laws to religious entities' employment relationships with those defined as "ministers," it noted that:

> The EEOC ... foresee[s] a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC ... such an exception could protect

90 Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 114-15 (2007).

91 William R. Corbett, *Calling on Congress: Take A Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135 (2013); Deborah L. Brake, *Retaliation in an Eeo World*, 89 IND. L.J. 115, 125 (2014) (discussing the Supreme Court's retaliation jurisprudence; specifically noting "In Clark County School District v. Breeden, decided in 2001, the Court set lower courts on a path of markedly different doctrinal protections for internal discrimination complaints versus external complaints. . . [Breeden's] primary significance is to deny retaliation protection for internal complaints. . . The decision has had a devastating impact for employees complaining internally about discrimination..."); Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1162 (2014) ("in recent years, the Supreme Court's interpretation of Title VII and other employment discrimination statutes has called into question the future arc of Title VII doctrine.").

92 Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1191-93 (2014).

> religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers "unfettered discretion" to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States.[93]

However, the Court declined to explore the reaches the EEOC urged it to. Instead, it reiterated that its holding was made within the confines of the facts before it and readily dismissed the EEOC's concerns, observing that:

> [T]he case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits . . . There will be time enough to address the applicability of the exception to other circumstances if and when they arise.[94]

Despite this handy dismissal of what it termed a parade of horribles, the Court nonetheless dwelled on the notion that the proverbial "floodgates" of litigation would burst open when it rendered its opinion in *Nassar* in 2013:

> [L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances.[95]

The Court cited explicitly to *Vance* and its determination that the value in promulgating and choosing a standard "that can be readily applied" lay in its predictability and in the fact that under such a standard, "supervisor status will generally be capable of resolution at summary judgment." Further, the court in *Nassar* observed that "[e]ven if the employer could

93 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

94 *Id.*

95 *Nassar*, 133 S. Ct. at 2531-32.

escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage."[96] The Court's overriding concern, expressed in both opinions that the floodgates of litigation would open for so-called dubious claims is manifest.

IV. BEHAVIORAL REALISM

In their now-famous 2006 article, Linda Hamilton Krieger and Susan T. Fiske incisively critiqued employment discrimination jurisprudence, setting forth the doctrine of behavioral realism, which "stands for the principle that, in deciding which normative choice to make, the Court should, where possible, use psychological science, not *a priori* intuitive psychological theories, in describing, justifying, or predicting the consequences of its chosen legal rule."[97] The authors took issue with the fact that "the behavioral theories embedded in legal doctrines often go unstated. Even when stated, they are often unexamined, and they are almost never empirically tested, except perhaps by a small cadre of . . .scholars whose articles judges seldom read."[98] However, the authors explained, this is particularly insidious because "once embedded in published decisions, a behavioral theory can develop precedential legitimacy and for that reason be difficult to modify, even if it is empirically unsound. . . . Behavioral theories can thus enter and remain embedded in legal doctrine long after they have been disconfirmed or superseded by advances in the empirical social sciences."[99]

Eight years later, this has never been more the case. Despite having opportunities to inject sound, published conclusions about workplace realities into the Title VII interpretation and line-drawing that it has been asked to do, the Supreme Court has persisted in failing to avail itself of virtually any scientifically-based insight or understanding of the workplace scenarios, including supervisory harassment or retaliation, that it has been asked to examine.

A. I/O Psychology

According to the Society for Industrial and Organizational Psychology,

96 *Id.* at 2532; *see, e.g.*, *Vance*, 133 S. Ct. at 2438, 2449.

97 Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1062 (2006).

98 *Id.* at 998.

99 *Id.* at 999.

I/O psychology is "the scientific study of the workplace," in which "[r]igor and methods of psychology are applied to issues of critical relevance to business, including talent management, coaching, assessment, selection, training, organizational development, motivation, leadership, and performance."[100]

1. Psychology Has an Immense Ability to Explain Phenomena or Inform Insights that May Guide Courts When Weighing Policy Arguments

Workplace-based psychology has long had the ability to lend predictive and interpretative insight to projections about the dynamics and mechanics of the workplace. A 1986 article published in the Journal of Applied Psychology[101], for example, explored some of the dynamics of retaliation, a phenomenon whose "realities" were arguably all but ignored in the *Nassar* majority opinion. Referring to the phenomenon as "complex," the article debunked some myths about retaliation that had presumably been widely-held beliefs, which demonstrates that the judges' own intuition, predictions, and modeling when it comes to projecting workplace behavior and mechanics may not be borne out by reality.[102] For example, the article reported upon a study in which it had been "assumed that the decision to retaliate reflected an organizational choice, either a conscious strategy or a decision of which top managers would be aware."[103] This assumption, however, was "called into question by the results" of the study (which looked at whistleblower scenarios), with the authors observing that while:

> [R]etaliation was more comprehensive if the wrongdoing was serious, . . . it was unrelated to the number of individuals who were involved in the wrongdoing. Retaliation by the organization seemed to be unrelated to the power of the whistle blower relative to the organization; the only variable that consistently reduced the whistle blower's power and increased the likelihood of retaliation was lack of support from supervisors and managers.[104]

The *Nassar* court could have chosen to correspondingly consider how retaliation foments and unfolds in such a complex way as to make proof

100 *Professionals*, SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, http://www.siop.org/tab_default/professionals_default.aspx (last visited July 16, 2014).

101 Janet P. Near & Marcia P. Miceli, *Retaliation Against Whistle Blowers: Predictors and Effects*, 71 J. OF APPLIED PSYCHOLOGY 137,137 (1986).

102 *See id.*

103 *Id.* at 141.

104 *Id.*

difficult, even as it contemplated how a shrewd plaintiff undeserving of keeping her job or winning a Title VII case could abuse the system if the standard were not reined in. As Professor Deborah Brake has noted, "[t]he social science literature on bias and the dynamics of challenging discrimination shows retaliation to be a powerful weapon of punishment for persons who challenge the hierarchies of race and gender."[105] She discusses the ways in which social science has borne out phenomena that underlie retaliation: victims' fears of reporting discrimination due to the costs exacted by challenging workplace discrimination, hostility directed toward those who challenge discrimination, and the ways in which the looming specter of retaliation chills speech and action.[106]

Using recently published studies, Professor Brake recited her analysis of the mechanism of retaliation: its function is to both silence those who would challenge perceived inequality and the status quo and to preserve the existing power structure.[107] Professor Brake was able to pierce several misconceptions about retaliation and how it works by using social science to buttress her conclusions, noting, for example, that "[a]n analysis of the costs and benefits of reporting discrimination, rather than an 'ethic of caretaking' or an aversion to conflict, best explains women's decisions not to report discrimination."[108] She also concluded something that would have behooved the Court to factor in when it weighed the policy arguments before it in *Nassar*: "Retaliation occurs with sufficient frequency to justify perceptions of the high costs of reporting discrimination and support the rationality of decisions not to do so."[109]

2. Courts Need to be Receptive to the Science Behind the Workplace in a Variety of Contexts, Especially When Crafting Policy

Courts have long been, and continue to be, receptive to input from psychologists who specialize in areas like industrial organizational psychology. This includes informing their opinions with workplace-oriented and social science when it comes to certain issues, including

105 Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25 (2005).

106 *Id.* at 28-29 (citing Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfactions with Outcome*, 29 SEX ROLES 239, 240, 247-48 (1993)); Cheryl R. Kaiser & Carol T. Miller, *A Stress and Coping Perspective on Confronting Sexism*, 28 PSYCHOL. WOMEN Q. 168, 175 (2004); Charles Stangor et al., *Reporting Discrimination in Public and Private Contexts*, 82 J. PERSONALITY & SOC. PSYCHOL. 69 (2002); Janet K. Swim & Lauri L. Hyers, *"Excuse Me—What Did You Just Say?!": Women's Public and Private Responses to Sexist Remarks*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 79 (1999)).

107 *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-42 (2005).

108 *Id.* at 37.

109 *Id.* at 38.

assessing plaintiffs' harm for the purposes of ascertaining liability or damages in employment discrimination or harassment cases.[110] Courts have been especially receptive when it comes to employment discrimination cases in which the plaintiff alleges that a testing or other screening procedure or mechanism operates in a discriminatory fashion and an expert is consulted to inform the court as to issues like job-relatedness or discriminatory impact.[111] These cases tend to be brought under a disparate impact theory, alleging, in essence, that a facially neutral practice or procedure, like testing, effectively discriminated against a group by disproportionately screening out its members.[112] Federal courts have been extremely receptive to workplace psychology-based testimony and to availing themselves of the knowledge contained in it, even where defendants in Title VII cases have been resistant.[113]

Perhaps the best known of those cases, *Ricci v. DeStefano*, was decided by the Supreme Court in 2009.[114] There, the Supreme Court considered the question of whether and when an employer could engage in what would qualify as disparate treatment under Title VII in order to stave off a valid claim of disparate impact discrimination. The Court ultimately decided that such action would be lawful only when the defendant had a "strong basis in evidence" to believe that it would be liable for disparate impact

110 Johnson v. BAE Sys. Land & Armaments, L.P., No. 3:12-CV-1790-D, 2014 WL 1714487, at *31 (N.D. Tex. Apr. 30, 2014) ("Furthermore, Dr. Ainslie is qualified to offer diagnostic impressions about what impact, if any, plaintiffs' terminations had on their emotional health."); *see supra* note 95.

111 *See* Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1048 (2011) ("Research from the field of I/O psychology--professionally developed methods of analyzing the scientific validity of an employer's test use and expert knowledge of alternative testing technology with the least racial disparity--is critical to Title VII disparate impact analysis.").

112 Title VII states that Title VII is violated when "a particular employment practice...causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(k)(1)(A)(i).

113 Ernst v. City of Chicago, 39 F. Supp. 3d 1005, 1013 (N.D. Ill. 2014) ("The question of adverse impacts of employment testing and alternative testing are certainly in the wheelhouse of the industrial/organizational psychologist."); United States v. City of Erie, PA, 411 F. Supp. 2d 524, 553 (W.D. Pa. 2005) (finding principals of industrial organizational psychology have relevance in the case); Bazile v. City of Houston, No. H-08-2404, 2008 WL 4899635, at *2 (S.D. Tex. Nov. 12, 2008); Reynolds v. Ala. Dep't of Transp., 295 F. Supp. 2d 1298, 1306 (M.D. Ala. 2003); United States v. City of Garland, No. Civ.A.3:98-CV-0307-L, 2004 WL 741295, at *10 (N.D. Tex. Mar. 31, 2004) (using expert witnesses with degrees in industrial organizational psychology); Davis v. Ala. Dep't of Educ. Dep't of Disability Determination Serv., 768 F. Supp. 1471, 1482 (N.D. Ala. 1991) (using expert witnesses in the field of industrial organizational psychology); United States v. State of Del., No. CIV.A. 01-020-KAJ, 2004 WL 609331, at *7 (D. Del. Mar. 22, 2004) (using an expert witness in the field of industrial organizational psychology); E.E.O.C. v. Schott N. Am., Inc., No. 06CV1246, 2008 WL 4452715, at *8 (M.D. Pa. Sept. 29, 2008) (using an expert with a degree in industrial organizational psychology).

114 Ricci v. DeStefano, 557 U.S. 557 (2009).

discrimination if it failed to act.[115] In concluding that the City in that case lacked the requisite "strong basis in evidence" to have acted to refuse to certify exam results, the Court made much of the fact that the City had retained the services of a company called Industrial/Organizational Solutions, Inc. ("IOS") in order to develop and give the exams.[116] According to the Court, IOS "perform[ed] job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the [relevant] positions" and "[w]ith the job-analysis information in hand, IOS developed the . . . examinations to measure the candidates' job related knowledge."[117] Thus, there could be no successful disparate impact suit challenging the exams because the City would have an unassailable defense: the tests were a business necessity, as evidenced by their job-relatedness:

> There is no genuine dispute that the examinations were job related and consistent with business necessity. . . . The CSB heard statements . . . outlining the detailed steps IOS took to develop and administer the examinations. IOS devised the written examinations . . . after painstaking analyses of the captain and lieutenant positions—analyses in which IOS made sure that minorities were overrepresented. . . . The City, moreover, turned a blind eye to evidence that supported the exams' validity. . . . IOS stood ready to provide respondents with detailed information to establish the validity of the exams, but respondents did not accept that offer.[118]

The City's assiduous work to use industrial organizational experts in the preparation of the exams was used (ironically) as evidence that the City would not have lost the disparate impact case that it feared.[119]

When it has come, however, to cases that call for some understanding or modeling of workplace interpersonal mechanics or dynamics, issues that strike at the heart of human motivation, behavior, and reactions, the Supreme Court and other courts have rejected the testimony and information provided by workplace-science experts and their studies, often criticizing their methodologies and lack of precision.[120] For example, in 2011 in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court stated that for their claims to remain viable, the plaintiffs, who sought to be certified as a

115 *Id.*
116 *Id.* at 587-88.
117 *Id.* at 564-65.
118 *Id.* at 587-589.
119 *See id.* at 589.
120 *See* Bolden v. Walsh Const. Co., 688 F.3d 893, 896 (7th Cir. 2012) ("The sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in *Wal-Mart*: it begs the question.").

class, needed to show "'significant proof' that Wal–Mart 'operated under a general policy of discrimination,'" such proof was "entirely absent here," because "[t]he only evidence of a 'general policy of discrimination' . . . was the testimony of [a] sociological expert" who, "[r]elying on 'social framework' analysis, . . . testified that Wal–Mart ha[d] a 'strong corporate culture,' that ma[de] it 'vulnerable' to 'gender bias.'"[121] The Court, however, rejected his testimony because "[h]e could not, . . . 'determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart.'"[122]

Many scholars decried this rejection, and several district courts have shown a willingness to consider social framework evidence.[123] Indeed, in 2012, a district court in California accepted as "persuasive" for the purposes of class certification the testimony of an expert advancing social framework theory that sought to help plaintiffs employed at Costco establish that its "culture fosters and reinforces stereotyped thinking, which allows gender bias to infuse the promotion process from the top down."[124] This testimony, according to the court, "examin[ed] Costco's personnel and promotion policies and practices in the context of social science literature and her expertise in workplace discrimination and 'organizational policies and practices that can mitigate conscious and unconscious stereotyping, automatic and conscious in group favoritism, and sex bias,'" and posited that Costco's "CEO and other top executives employ stereotyped thinking regarding women's roles in society." [125] The expert observed that that "[c]entralized control, reinforced by a strong organizational culture, creates and sustains uniformity in the personnel policies and practices throughout Costco's operational units. This common culture is characterized by unwritten rules and informal, undocumented personnel practices featuring

121 131 S. Ct. 2541, 2553 (2011).

122 *Id.* (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 154, (N.D. Cal. 2004)).

123 *See* Andrea Doneff, *Social Framework Studies Such as Women Don't Ask and It Does Hurt to Ask Show Us The Next Step Toward Achieving Gender Equality*, 20 WM. & MARY J. WOMEN & L. 573, 618 (2014) ("Arguably, the Court's decision in Dukes takes us a step away from holding employers liable for their unconscious biases."); Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 723 (2013) ("Yet, while the Dukes majority might agree that facts are capable of empirical testing, it seems not to countenance the notion that the human decision making process is that kind of fact because it rejected the testimony of sociologist Dr. William Bielby."); Natalie Bucciarello Pedersen, *The Hazards of Duke: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 141 (2012) ("Given the import of social framework evidence in this field, it will be difficult for certain types of plaintiffs to support their cases without the introduction and application of social framework evidence.")

124 Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 520 (N.D. Cal. 2012).

125 *Id.* (quoting Reskin Decl., Docket No. 670, ¶ 5).

discretion by decision makers."[126] She further "contrasted Costco's practices with the more formal practices that, social science research indicates, 'sustain or reduce barriers to women's career success.'"[127]

Other courts in recent years have similarly accepted social framework evidence submitted by an expert, though courts' treatment of such evidence has been markedly inconsistent.[128] However, even if the Court is prone to be dismissive of individual experts' testimony with respect to individual plaintiffs' claims of discrimination, it should not be similarly dismissive of social science and its ability to inform its and other courts' understanding of workplace dynamics and human behavior when it comes to crafting workable standards, promulgating doctrines, and interpreting the law.

V. QUALITY OF SOURCES

A question will naturally arise as to the quality and type of sources that courts should use when contemplating real-world modeling of workplace behavior scenarios. In 1993, the Supreme Court held that rather than requiring "general acceptance" of the substance of scientific evidence or testimony, judges, acting as gatekeepers, ought to ensure, as the rules of evidence require, that it is both relevant and that it rests on a reliable foundation.[129] As the Court noted:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a

126 *Id.* (quoting Reskin Decl., Docket No. 670, ¶ 9).

127 *Id.* (quoting Reskin Decl., Docket No. 670, ¶ 10).

128 Merrill v. M.I.T.C.H. Charter Sch. Tigard, No. 10-219-HA, 2011 WL 1457461, at *4 (D. Or. Apr. 4, 2011) ("District courts have not consistently addressed the relevance inquiry for expert testimony from social psychologists."); *see, e.g.*, EEOC v. Wal-Mart Stores, Inc., No. 6:01-CV-339-KKC, 2010 WL 583681, at *3–4 (E.D. Ky. Feb. 16, 2010) (excluding social psychologist's testimony because the expert pointed to no evidence of intentional actions based on gender stereotyping at the specific facility at issue, opined only that gender stereotyping may have occurred, and the testimony could have confused the jury regarding the burden of proof); Tuli v. Brigham & Women's Hosp., Inc., 592 F. Supp. 2d 208, 214–15 (D. Mass. 2009) (admitting social psychologist's testimony that did not purport to determine whether discrimination occurred under the specific facts of the case, and the testimony was based on testing and studies); EEOC v. Morgan Stanley & Co., 324 F. Supp. 2d 451, 461 (S.D.N.Y. 2004) (admitting social psychologist's testimony about how gender stereotypes may have affected decisions at the defendant's company); Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1262–64 (N.D. Cal. 1997) (admitting testimony, and stating that evidence of stereotyped remarks constitutes evidence that gender played a part in an adverse employment decision).

129 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

standard of evidentiary reliability.[130]

Thus, a court should engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[131] We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate."[132] Several inquiries will be relevant to this assessment, including whether a theory or technique can be and has been tested, whether it has been "subjected to peer review and publication," an assessment of its "known or potential rate of error," the extent of its acceptance within a particular scientific community, and how flexible it is, among others.[133]

This article focuses on the increased use of scientific sources by courts, not to apply to particular facts at issue or to generate better fact finding, but in the course of weighing policy considerations when crafting legal standards or interpreting the law. That said, although a protracted discussion of Daubert's applicability in this context is outside the scope of this piece, it should go without saying that judges ought to select reliable, sound sources for all purposes and in all contexts and that any such source would be preferable to judges' own intuition, or unsubstantiated predictions used for these purposes.[134]

VI. CONCLUSION

As we mark the fiftieth anniversary of Title VII's passage, we measure a half century of social progress evidenced by the creation and preservation of equality of opportunity, but we also must acknowledge the statute's cracks and failings.

130 *Id.* at 590.

131 *Id.* at 592-93.

132 *Id.* at 592-93.

133 *Id.* at 580.

134 *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1024 (2006) ("Daubert stands for the proposition that adjudicative facts should not be based on a psychological theory unless that theory has been empirically tested, subjected to peer review and publication, has garnered widespread acceptance within the relevant scientific community, and, where applicable, has a known and acceptable error rate. But, . . . in elaborating legal doctrines and in applying them in legal reasoning, judges routinely articulate and apply intuitive psychological theories that satisfy none of these normative criteria. And once incorporated into legal doctrine, these lay psychological theories can be quite difficult to modify or uproot.").

This article calls first for an increased awareness of the workplace "realities" that dictate the likely behavioral and legal effects of judicial line drawing or interpretation. Judges should be aware, as Krieger and Fiske have posited, that consciously or unconsciously they engage in projection and modeling when evaluating or predicting the real-world ramifications of a Title VII decision. Yet it is apparent that (1) courts are guided by hunches, instinct, and speculation – even when empirical evidence is increasingly available; and (2) the injection of unsubstantiated instinct regarding workplace dynamics, mechanics, and interactions often renders the analysis and resultant model incorrect, narrow, and oversimplified.

Litigants should try to do more than simply project the likely incentive or deterrent effects of an advocated position: they should educate the judiciary, and, specifically, they should utilize industrial/organizational psychology where possible to substantiate a prediction about how a given ruling will impact the American workplace and the state of employment discrimination jurisprudence. Insight gleaned from this area of science will lend more credence to the policy arguments of litigants and their amici, and it will compel judges and their law clerks to at least educate themselves about what has been proven to occur or what findings have been made as motivations or behavior in certain scenarios. While policy arguments grounded in empirically sound social science evidence may not always prevail, they serve to educate the judiciary and the public. In many cases, defendants, as well as plaintiffs, will benefit from scientific substantiation of their predictions about the effect of various decisions on human behavior in the workplace.

This article calls second for increased transparency in judicial opinions with respect to workplace realities. This simply means that where policy considerations weigh heavily, workplace realities should be factored in more "evenly." Essentially, for example, if any court is going to factor in the potential "floodgate" effect brought about by exploitative plaintiffs with sometimes frivolous claims after a plaintiff-friendly construction, it should also give some shrift to the alternative—the effect that a defendant-friendly, narrow construction or stringent standard may have in terms of shutting down meritorious cases because of the practical challenges to proving them or even the impediments created to bringing them. If there is any validity to these considerations and why they militate toward one conclusion or another, aerating them on both sides in an opinion only affords greater transparency and permits a reader to understand how and why even a good argument may be outweighed by a countervailing argument or proposition.