"FREE TO BE ARBITRARY AND . . . CAPRICIOUS": WEIGHT-BASED DISCRIMINATION AND THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW

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We have demonized subordinating practices of the past to such a degree that condemning such practices may instead function to exonerate practices contested in the present, none of which looks so unremittingly "evil" by contrast. That which we retrospectively judge evil was once justified as reasonable.[1]

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.[2]

In this article, I seek to offer an approach to antidiscrimination law that resists placating itself with the "demonization of subordinating practices of the past" by requiring a stronger attunement to the subordinating practices of the present. In particular, my focus here is on a specific failing of American antidiscrimination law: its reliance on inaccurate and deeply misleading premises about how human bias, stereotyping, and prejudice function, and its concomitant stance that only those forms of discrimination that are reflective of these inaccurate premises merit legal remediation. This failing results in two major areas of underinclusivity: Antidiscrimination law in this country fails to cover both those types of

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1 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

2 Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) (concurring in decision striking down Title I of the A.D.A. as against the states).

discrimination that do not comport with a perpetrator-blame model, and those types that disadvantage groups not deemed to have suffered sufficiently in the past at the hands of such blameworthy perpetrators. As I will discuss below, the example of weight-based discrimination serves as an important illustration of how this underinclusivity fails many Americans and leaves them without recourse for arbitrary, irrational, and unfair treatment.

Civil rights law in America is inordinately resistant to extending protection to the victims of "new" forms of discrimination—"new," at least, in the sense that they are not already enshrined in our legal code, even if they have been occurring for centuries. By this point in our history, we are relatively comfortable with the notions of race-, religion-, and ethnicity-based intentional, animus-driven discrimination as morally problematic; we are slightly less comfortable with that characterization of gender-based discrimination, somewhat less comfortable with it as applied to disability and age discrimination, and very much less comfortable with extending it to sexual orientation discrimination. The further we move away from the racial end of this spectrum, the less protection we are willing to afford. Anything beyond sexual orientation discrimination does not exist on the legal spectrum at all; these are simply "social preferences" into which the legal system does not inquire.

There is a similar resistance to moving onto a different spectrum entirely: that of non-intentional forms of discrimination that may occur outside of the individual's awareness. No matter what the effects of these other types of discrimination—no matter how regularly they result in denial of jobs, wrongful termination, exclusion from public accommodations, or other harms—they are still not deemed to warrant legal remediation, both because they are insufficiently "concrete," and because those who perpetrate them are thus not worthy of "blame." This is the kind of reasoning employed by Justice Powell in *Wygant v. Jackson Board of Education*, where he argued, in the context of race-based affirmative action: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive."[3]

This conception of antidiscrimination law, I argue, has it backwards. Antidiscrimination law does not, and should not, exist principally to punish those who do "blameworthy" things; it is not perpetrator-focused in the same sense as the criminal law. Rather, the purpose of American

[3] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

antidiscrimination law (and the doctrine of equal *protection*) has been, from the start, to provide a recourse and a remedy for those denied their civil rights, whether by the government or, slightly later, by private actors. Whether the people engaging in these forms of discrimination are somehow "bad" or "blameworthy" is entirely beside the point. If the discriminatory acts of one group deprive another group of civil or human rights, intentionally or otherwise, then the law should be able to provide a remedy—regardless of whether the deprived group is a previously acknowledged (in the law) target of discrimination.

I maintain that American antidiscrimination law, completely consistently with its purpose, can extend broader protections to "new" groups and targets of forms of discrimination for which there may be no particular person, group, or period in our history to "blame." In so doing, I use the problem of weight-based discrimination to illustrate how a "non-traditional" and often non-explicit form of discrimination can have a profound negative impact on members of the target group. Weight discrimination is also an area in which plaintiffs, defendants, advocates, and courts have struggled to fit the claims that arise into the existing statutory schemes, both federal and state, with little consistent success. The principal reason behind this lack of success is the narrow specificity of many antidiscrimination statutes, intended to address only certain "subjects" of discrimination, such as race, sex, or disability. The present statutory scheme, I argue, draws an essentially arbitrary distinction between these types of discrimination and others, when, in reality, most types of discrimination are functionally the same, and the kinds of harms they perpetrate vary only with respect to the target population. Thus, in creating a body of antidiscrimination law, we should not seek to constrain the availability of remediation based solely on the identity of the target population or on the intent of the actor. Rather, we should adopt a more flexible approach, which would essentially allow Title VII-type federal antidiscrimination statutes to be applied to *any* group for which there is substantial proof of systematic discrimination. This approach also suggests a much closer relationship between the law (especially legislators) and the social sciences, since, in many cases, what the law considers a "new" or as yet untouched problem has actually been the subject of research for many years. Obesity discrimination, as we shall see below, is certainly one such example. Moreover, while there are definite difficulties and challenges with this approach that need to be addressed, any criticism that merely echoes Justice Powell in complaining that such a remedy would punish the "innocent" fundamentally misunderstands both the nature of the problem and the critical need for a solution.

This article will proceed as follows. Part I will address the basic questions of what bias, stereotyping, prejudice, and discrimination are

and how they function, both implicitly and explicitly. In so doing, it will cover terrain that, at least to my knowledge, has never been addressed rigorously and thoroughly within legal scholarship and with particular reference to legal issues; although several legal scholars have incorporated one or another particular psychological or sociological theory of prejudice and discrimination into their work, my goal here is to answer the question of what, taken together, *all* of the past and current social science research has to tell us about how, when, and why we stereotype and discriminate. Part II will then move into a close analysis of obesity discrimination as an illustration of how American antidiscrimination law, in its current form, fails to afford any consistent protection against a very real, extensively documented, and much-suffered form of discrimination. In Part III, I will turn to the remediation issue, where I will argue that remedies for obesity discrimination and other similar types of discrimination must be made available at the federal level. Specifically, I will argue that antidiscrimination statutes such as Title VII, or at least the fundamental logic behind them, should not remain "subject-matter restricted," but should be able to accommodate any form of harmful discrimination—whether "intentional" or automatic—that deprives a target group of protected civil rights.

I. ETIOLOGY OF PREJUDICE AND BIAS

As Susan Fiske explains, the psychological study of stereotyping, prejudice, and discrimination began in the second quarter of the twentieth century, so that there was already an extensive literature review on the subject by 1954.[4] Before going into the details of how our understanding of bias has evolved since then, however, it will be useful to present a few basic definitions of already familiar words that are also psychological "terms of art," which will help to clarify the subsequent discussion.

A. DEFINITIONS

The terms "stereotyping," "prejudice," and "discrimination," as used in psychology, refer to different aspects of category-based reactions to people from groups perceived to differ significantly from one's own.[5]

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[4] Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357-58 (4th ed. 1998).

[5] As Fiske notes, *id.* at 357, there is some semantic and conceptual disagreement on this point, but regardless of the labels or framework chosen there seems to be consensus as to the existence of distinctions between these three phenomena. For another discussion, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1176 (1995). For the purposes of this article, and specifically because the choice of semantic labels doesn't matter much for these purposes, I have chosen to adopt Fiske's definitional and semantic framework,

Stereotyping is generally understood as the cognitive component of these category-based reactions: the part arising from and relating to the thought process, by which we process information and assign meaning to experience. Prejudice is a term with a fairly broad range of meanings; as used in the social-psychological literature, it can refer either to a subject's immediate emotional response to a target group (e.g., pity, anger, fear), or to the attitudes or beliefs that result from this response (e.g., contempt, inferiority). I use it here to refer to the affective, or emotional, component of these reactions: how one feels about a member of a different group, or about that group generally. In order to distinguish between the two potential meanings, I will refer to the attitudes and beliefs that result from affective prejudice as "bias"; I am using this term in order to distinguish it not only from prejudice, but also from discrimination, which is a behavioral phenomenon. Discrimination refers to how people implement their stereotypic thoughts and prejudicial feelings in dealing with members of different groups: refusing to hire them, marry them, speak to them, etc. As we will see later, stereotyping, prejudice, and bias, as well as many combinations thereof, can lead to discriminatory behavior.

B. STEREOTYPING AND PREJUDICE

1. *Historical overview*

Prior to 1920 or so, group-based stereotyping and prejudice were not subjects of study because they were not really seen as a problem; "the existence of real differences between the races was widely, if not universally, accepted."[6] Beginning in 1920, however, psychologists began to look for the sources of prejudice, and by 1940, as Beschle explains, they were looking for the sources of "irrational prejudice."[7]

Since the 1940s, several different theories have gained currency as psychological explanations for stereotyping, prejudice, and discrimination. While their respective primacies have waxed and waned, these theories have all influenced the current understanding of how these phenomena work. Perhaps the most important point to stress is that stereotyping, prejudice, and discrimination seem to be multiply determined—there is no single factor or influence that accounts for why stereotypes or prejudices form, and, consequently, how discrimination then occurs. Thus, in reviewing the history of this area of study, it will

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although I have added the term "bias" in order to clear up some of the confusion between the different meanings of "prejudice."

[6] Donald L. Beschle, *"You've Got to Be Carefully Taught": Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141, 1163 (1996).

[7] *Id.* (quoting Franz Samuelson, *From 'Race Psychology' to 'Studies in Prejudice': Some Observations on The Thematic Reversal in Social Psychology*, 14 J. HIST. BEHAVIORAL SCI. 265, 265 (1978)).

be useful to keep the different theories in mind as illuminating different aspects of the etiology question, rather than viewing it as a scientific trial-and-error progression from "wrong" account to "wrong" account until we finally arrive at the "right" one.

Social psychology has offered two different broad groups of theories to explain the occurrence of stereotyping, prejudice, and discrimination: one centered on the individual, and another centered on social and social-structural factors. The earliest work in this area, beginning in the late 1940s, was mostly individual-focused, "hing[ing] on the individual's conscious or unconscious conflict between the personal (desires, beliefs, or feelings) and the social (appropriate or learned responses)[.]"[8] In the late 1940s and 1950s, researchers responding to the horror of the Holocaust focused on "authoritarian personality theory,"[9] which sought to delineate the personality traits that would most predispose someone to outgroup-hatred: "blind submission to authority, strict adherence to middle-class conventions, aggression against those who do not live conventionally, and the tendency to think in rigid categories."[10]

In the 1960s and 1970s, some researchers began to question whether, notwithstanding the existence of some "virulent" outgroup-haters, the dominant affect of prejudice in general was not actually hatred, which would in turn lead to aggression, but rather "ambivalence and discomfort, leading to avoidance."[11] This insight led to the development of several theories known collectively as "subtle racism," all building on the notion that whites' attitudes toward blacks might best be characterized as generally ambivalent and conflicted rather than hostile. For example, one such theory, symbolic racism, held that "because whites were no longer comfortable expressing racism directly (perhaps as the result of a change in norms), they would express it instead by advocating traditional values and policy preferences that all happened to disadvantage black people."[12] Another, aversive racism, held that:

> Modern norms against overt racism make their own racism aversive to whites, so they cannot admit it to themselves. Because aversive racists are concerned with their

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8 Fiske, *supra* note 4, at 360.

9 *Id.* at 358.

10 *Id.* at 358.

11 *Id.* at 359.

12 *Id.* at 359. *See also* Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. SOC. ISSUES 445, 465 (1999) (arguing that "laissez-faire racism," which "legitimates persistent Black disadvantage in the United States . . . [and] condones as much Black disadvantage and segregation as the legacy of historic discrimination along with modern-day free-market forces and informal social mechanisms can reproduce or exacerbate," has replaced much of Jim Crow racism in modern America).

> own egalitarian self-images, they avoid acting in overtly discriminatory ways. But when their behavior can be explained away by other factors (i.e., when they have a nonracial excuse), or when situational norms are weak, ambiguous, or confusing (i.e., when right and wrong are less clear), then aversive racists are most likely to discriminate overtly because they can express their racist attitudes without damage to their nonracist self-concept.[13]

In the 1990s, the "dissociation" model built on and extended the insights of subtle racism theory, emphasizing a distinction between people's conscious beliefs about others and their early internalization of cultural stereotypes. This model holds that people learn cultural stereotypes about others at an extremely young age, when they are not yet able to evaluate such stereotypes critically, and these stereotypes become activated automatically on encounters with members of the stereotyped groups.[14] However, "people's personal beliefs—which may complement or contradict their knowledge of cultural stereotypes—develop later than their cultural knowledge, are less practiced, and thus are less automatic."[15]

At the same time, beginning in the mid-1950s, another strain of psychological research began to examine the social and contextual aspects of stereotyping, prejudice, and discrimination. The resulting line of scholarship on "social cognition theory" focused mostly on categorization: the ways in which ordinary human cognitive processes drive people to process the world in categorical terms—including, with regard to the social world, the us-them distinction between "ingroups" and "outgroups."[16] As Fiske points out, the real forerunner in this line of scholarship was Gordon Allport, whose 1954 book, *The Nature of Prejudice*, was among the very first to emphasize "the role of social categorization and its amelioration by constructive interethnic contact."[17] Although Allport still made extensive reference to distinctions between "prejudiced" and "tolerant" *types* of people,[18] he nonetheless argued that categorization was a normal and inevitable aspect of how human beings process the world

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[13] Fiske, *supra* note 4, at 360 (citing S.L. Gaertner & J.F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61 (J.F. Dovidio & S.L. Gaertner eds., 1986)). *See also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987) (from a particularly Freudian perspective, arguing that racism, including aversive racism, originates in the unconscious).

[14] Fiske, *supra* note 4, at 360.

[15] *Id.*

[16] *Id.* at 361.

[17] *Id.*

[18] *E.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 174-75 (1954).

around them, including each other. As applied to "other" groups of which the perceiver is not a member, however, categorization could often result in negative stereotypes and prejudice. He summarized his argument as follows:

> Impressions that are similar, . . . especially if a label is attached, . . . tend to cohere into categories (generalizations, concepts). All categories engender meaning upon the world. . . . [T]he principle of least effort inclines us to hold to coarse and early-formed generalizations as long as they can possibly be made to serve our purposes. . . . A rational category is built around the essential or defining attributes of the object[; a]n ethnic prejudice is a category concerning a group of people, not based on defining attributes primarily, but including various "noisy" [i.e., nonessential and possibly false] attributes, and leading to disparagement of the group as a whole.[19]

Allport felt that intergroup contact could be extremely important in mitigating these categorization effects with regard to interethnic prejudice, but not just any contact would do; in fact, the wrong kind of contact could easily exacerbate the problem, especially in the short term.[20] He promoted "equal status contact . . . in the pursuit of common goals[,] . . . sanctioned by institutional supports . . . lead[ing] to the perception of common interests and common humanity . . . ."[21]

During the next two decades in the U.S. and Europe, and especially in the 1970s, social psychologists built on and greatly extended Allport's cognitive theory of prejudice into what came to be known as social cognition theory. Experiments established repeatedly that ingroup-favoritism and outgroup-bias could be evoked in people even on the basis of arbitrary or socially meaningless group assignations.[22] For example, Tajfel and Wilkes found that, in asking subjects to estimate the relative lengths of eight lines on a page, the results differed depending on whether the lines were presented as belonging to either "Group A" or "Group B," or whether they were simply presented as eight individual, ungrouped lines.[23] "[O]nce they introduced the concept of 'groupness'

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19 *Id.* at 175-76.

20 *See generally id.* at 261-82 (chapter 16 titled "The Effect of Contact").

21 *Id.* at 281.

22 *See* Fiske, *supra* note 4, at 361 ("The minimal group paradigm, in which research participants are divided into arbitrary groups by explicitly trivial or random means, reliably demonstrates ingroup favoritism in the distribution of rewards . . . ."); *see also* Beschle, *supra* note 6, at 1166-67.

23 Krieger, *supra* note 5, at 1186 (discussing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgement*, 54 BRIT. J. PSYCHOL. 101 (1963)).

into the situation, subjects perceived objects in different groups as more different from each other, and objects in the same group as more similar to each other, than was in fact the case."[24] A better known (or at least better publicized) example of this kind of work was the series of "brown-eyes/blue-eyes" simulations begun by elementary school teacher Jane Elliott after the assassination of Dr. Martin Luther King, Jr. in 1968, which illustrated how quickly ingroup-outgroup prejudices could form on the basis of a normally socially insignificant trait, and how quickly the effects of such prejudices became substantial and detrimental to the target group.[25] These and many other similar experiments established fairly conclusively that "[t]he mere perception of belonging to different groups triggers ingroup favoritism and relative outgroup discrimination."[26]

Social cognition theories begin with the premise that "people are cognitive misers, overwhelmed by the complexity of the social environment and forced to conserve scarce mental resources."[27] Viewed in this light, categorization serves an important cognitive function in terms of efficiency, but at the same time leads to fundamental errors, as Taylor proposed:

> [C]ategorization (1) tags information by physical and social distinctions such as race and gender, (2) minimizes within-group differences and exaggerates between-group differences, and (3) causes group members' behavior to be interpreted stereotypically. As a result of categorizing a set of people into two or more groups, small groups (i.e., solos, pairs, or minorities within a larger group in any given setting) elicit (4) more distinctions among themselves and (5) more stereotyped perceptions. Increasing familiarity, however, (6) allows more distinctions and (7) creates subtypes.[28]

As Fiske explains, these kinds of "cognitive-shortcut" theories "[remain] a dominant theme in current understandings of stereotyping, prejudice, and discrimination . . . ."[29] However, in the 1990s, researchers

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24 *Id.*

25 For details of Elliott's work, see WILLIAM PETERS, A CLASS DIVIDED (1971); WILLIAM PETERS, A CLASS DIVIDED: THEN AND NOW (1987). Elliott's experimental framework spawned a research literature of its own; *e.g.*, Deborah A. Byrnes & Gary Kiger, *Prejudice-Reduction Simulations: Ethics, Evaluations, and Theory into Practice*, 23 SIMULATION & GAMING 457 (1992); Angie Williams & Howard Giles, *Prejudice-Reduction Simulations: Social Cognition, Intergroup Theory, and Ethics*, 23 SIMULATION & GAMING 472 (1992).

26 Fiske, *supra* note 4, at 361.

27 *Id.* at 362.

28 *Id.* (discussing S.E. Taylor, *A Categorization Approach to Stereotyping*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 83 (D.L. Hamilton ed., 1981)).

29 *Id.* at 363.

came to place less emphasis on the notion of the "cognitive miser" *constrained* to make these kinds of categorization shortcuts, and instead came to view the shortcuts as only one cognitive option among many that people could pursue, depending on context and on predilection. These more recent theories, based on what Fiske terms the "motivated tactician" metaphor,

> assume that people normally engage in cognitive shortcuts, unless motivated to go beyond them. The term "tactician" suggests that people strategically choose which interactions merit additional effort and which do not, motivated by their current goals. Goal-based choices could be made strategically (that is, planned before a specific encounter), but more likely they are made on the fly, tactically, in the course of a busy social interaction.[30]

2. *Current views*

a. Stereotypes

The current understanding of stereotyping and prejudice, as alluded to above, does not adhere exclusively to any one of these earlier theories; nor does it reject any of them outright. Rather, prejudice and stereotyping are understood to result from a host of different factors, both inside and outside of the individual's awareness. For example, on the cognitive end, the process of categorization itself seems to occur largely "automatically," without intentional intervention by the perceiver,[31] as does a bias toward ingroup favoritism.[32] Moreover, stereotypic judgment can *become* essentially automatic through repeated exposure and "practice," which then serves to enhance further the processing speed advantage obtained by using stereotypes to begin with.[33]

Cognitive schemas, when they occur, also seem to occur automatically. As Krieger explains, cognitive schema theory holds that, in creating categories, we create mental images of "typical" or "ideal" category members, for example, the "typical letter a," "typical chair," "typical law school professor," or "typical urban gang member."[34] Then, in determin-

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30 *Id.*

31 *Id.* at 364 ("What is startling about categorization is, first, how rapid and apparently automatic it can be; and second, whether automatic or not, how many potentially automatic ramifications it has.").

32 *Id.* at 365. Interestingly enough, as Fiske notes, the finding of automatic ingroup favoritism is far more robust than that of outgroup derogation, although there is some evidence for the latter as well.

33 *Id.* at 366.

34 Krieger, *supra* note 5, at 1189-90.

ing whether a new letter, object, or person fits into any of these categories, we do so by comparing it to the category prototype and making some assessment of the distance between the two. These cognitive schemas function as theories about the nature of events or situations we face, and, "[o]nce activated, the schema influences the interpretation, encoding, and organizing of incoming information and mediates the drawing of inferences or the making of predictions about the schematized object or event."[35] However, as with any other cognitive shortcuts, there is a price to the cognitive economy of schemas: As Krieger puts it, "categorical structures . . . bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later."[36] Thus, in intergroup relations, cognitive schemas can result in discrimination.

Another demonstrable, automatic aspect of stereotyping results from attribution errors. In particular, what is commonly referred to as the "ultimate attribution error" refers to "the tendency to accept the good for the ingroup and the bad for the outgroup as personal and dispositional, but more important, to explain away the bad for the ingroup and the good for the outgroup with situational attributions."[37] In other words, if I succeed and you fail, I am more likely to say that that is because I am smarter or more capable than you; but if I fail and you succeed, I am more likely to say that you had more time to work on the project than I did, or that you tried harder, or that you had better access to resources. The ultimate attribution error thus serves to reinforce the separate tendency to favor stereotype-confirming information by making such information "dispositional"—not only is the perceiver more likely to register stereotype-confirming information about others, but s/he is also more likely to view such information as reflective of others' inherent dispositions rather than of external, social factors.[38] Thus, to take a linguistic example,

> People apparently encode and communicate positive ingroup and negative outgroup behavior more abstractly . . . than counter-stereotypic behavior. The effect is subtle but telling: An ingroup member may have punched someone, but an outgroup member was aggressive. This linguistic intergroup bias apparently stems from stereotype congruency, rather than from ingroup protection[.] . . . [P]eople use such remembered

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35 *Id.* at 1190.

36 *Id.*

37 Fiske, *supra* note 4, at 369 (citing Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 461 (1979)); *see also* Krieger, *supra* note 5, at 1204-07.

38 Fiske, *supra* note 4, at 369.

> abstract summaries ("aggressive") as the basis for future interactions, rather than returning to the data on which the summaries were based, and such abstract summaries resist disconfirmation for the same reason—because they are not easily unpacked and scrutinized. Such linguistic attributional bias subtly perpetuates stereotypes . . . .[39]

Memory also sustains stereotypes in a number of ways, both creating an ingroup advantage with regard to memory (e.g., remembering same-race targets more easily than different-race targets) and an advantage in recall of stereotype-congruent information as compared to stereotype-disconfirming information.[40] Thus, "once a target individual has been perceived as a member of a particular category, people are more likely to remember the target as exhibiting attributes and behaviors commonly associated with that category," including stereotype-consistent behaviors that never actually occurred.[41] Moreover, there is even evidence for a "categorization disadvantage," such that people tend to "confuse other people they have lumped into the same category."[42] Thus, for example, people tend to "tag comments by race and gender: [e.g.,] 'I know a woman said it, but I can't recall which woman.'"[43]

At the same time, there are certain aspects of stereotyping that seem to be less automatic and more driven by utility and social pragmatism—in other words, at least in certain situations they "can help people interact more easily."[44] Categories that are physically manifest, socially significant, and salient to immediate interaction goals will tend to persist; the level at which they persist (e.g., "woman" versus "petite woman" or "blonde") will also depend on social and cognitive utility.[45] A primary and widespread example of this kind of persistence of stereotypes is "proxyism," where the perceiver uses one stereotyped trait in order to make predictions about the disposition of the target who possesses that trait. In a culture such as ours, which has been moving away from close-knittedness and localized interactions for the last century or more, the increasing likelihood that we will encounter unknown people in contexts (e.g., employment) where evaluation is important creates a strong need, or at least a desire, to make rapid inferences about people we do not know well. Thus, as Fiske explains, "to the extent that dispositional in-

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39 *Id.* at 370 (citations omitted).

40 *Id.* at 371; *see also* Krieger, *supra* note 5, at 1208-09.

41 Krieger, *supra* note 5, at 1208.

42 Fiske, *supra* note 4, at 371.

43 *Id.* at 372.

44 *Id.* at 375.

45 *Id.* at 376-77.

ferences allow perceivers the sense that they can predict the course of future encounters, traits will be central in stereotypes—and so they are[.]"[46] Moreover, stereotypes become even more "useful" to the extent that either (1) they are actually accurate,[47] or (2) stereotype-confirming behavior occurs,[48] even if such behavior is actually a self-fulfilling prophecy resulting from the stereotype itself, or if the stereotype happens to be consonant with social roles that shape behavior in other ways.

Thus, while some aspects of the stereotyping process are at least semi-deliberate and serve utilitarian purposes, social cognition theory indicates that much of stereotyping occurs outside the realm of deliberation or consciousness. People categorize other people just as they categorize everything else; unfortunately, when it comes to other people, the mistakes can be socially costly.

b. Prejudice

Just as with stereotyping, there are both automatic and nonautomatic aspects of prejudice, some of which are individual, and others systemic or social-structural. Fiske highlights three main causes of prejudice described in the current social-psychological literature—group threat, the wrong kind of direct contact, and individual hostility—all of which "share an underlying dimension of perceived threat to the core of the prejudiced person."[49] The notion of group threat grows out of the core insight of social identity and self-categorization theory: that people's sense of self extends to the ingroup as a whole. Thus, in situations where one perceives a threat to one's group, particularly in terms of a focus on the group's relative gains, jobs, or welfare, prejudice against the threatening groups is likely to result.[50] Evidence indicates that direct contact, on the other hand, can create problems even when the outgroup member presents no particular threat to the perceiver, because, as Fiske puts it, "[f]amiliarity smooths people's transactions; difference disrupts[, and s]uch disruptions cause anxiety, discomfort, and irritation."[51] And, finally, as the early authoritarian personality theorists pointed out in the 1940s and 1950s, there is a personality type that is particularly inclined to prejudice: the "right-wing authoritarian":

> [R]ight-wing authoritarians [are] submissive to authority, aggressive in an authoritarian way (i.e., down a sanc-

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46 *Id.* at 376.

47 *See id.* at 381.

48 *Id.* at 382-83.

49 *Id.* at 374.

50 *Id.* at 373; *see also* Bobo, *supra* note 12, at 448 (discussing Herbert Blumer's group position model of racial prejudice).

51 Fiske, *supra* note 4, at 373 (citations omitted); *see also* ALLPORT, *supra* note 18, at 261-62.

> tioned hierarchy), and conventional. People high on this scale are more prejudiced than mere stereotypes would explain; the evaluative implications of stereotypes (e.g., incompetent, lazy) do not explain the hostility of people high on this scale. The attitudes of high right-wing authoritarians seem to be based not on stereotypes, but on perceived value differences, and such people are more likely to act on their hostility. Conventional values and authoritarianism also predict rejection of the stigmatized.[52]

Another factor that seems to affect the evocation and degree of prejudice against stigmatized groups is that of perceived controllability. Bernard Weiner, for example, has done extensive work on the role of perceived stigma controllability in evoking negative affective responses.[53] He has demonstrated repeatedly and convincingly that people's affective responses to members of stigmatized groups vary considerably depending on the nature of the stigma and the extent to which the stigmatized trait is perceived to be within the control of the person who possesses it. As he explains,

> [J]ust as is the evaluation of an achievement outcome, reactions to stigmatized persons are in part based on moral principles. Persons with controllable stigmas are construed as responsible for their conditions and are considered moral failures. This judgment gives rise to moral-based negative affects [e.g., dislike and anger] and corresponding behavioral intentions. On the other hand, stigmatized individuals with uncontrollable "marks" are not held responsible for their stigmata and are considered "innocent victims." This construal elicits altruism-generating affects [e.g., pity] and positive behavior.[54]

Moreover, Weiner found that "[t]he degree of moral condemnation . . . directed toward stigmatized persons can be altered by communicating specific causal information."[55] Thus, for example, given two physical conditions—heart disease, the onset of which people tended to

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52 Fiske, *supra* note 4, at 373 (citations omitted).

53 *E.g.*, Ralf Schwarzer & Bernard Weiner, *Stigma Controllability and Coping as Predictors of Emotions and Social Support*, 8 J. SOC. & PERSONAL RELATIONSHIPS 133 (1991); BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY (1995); Bernard Weiner, *On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation*, 48 AM. PSYCHOLOGIST 957 (1993); Bernard Weiner et al., *An Attributional Analysis of Reactions to Stigmas*, 55 J. PERSONALITY & SOC. PSYCHOL. 738 (1988).

54 Weiner, *supra* note 53, at 960.

55 *Id.*

assume was not within the patient's control, and AIDS, for the contraction of which people *did* tend to blame the patient—Weiner found that respondents' affective responses to the patient changed markedly when they were told that the heart disease was caused by smoking, or that the patient had contracted AIDS through a blood transfusion.[56]

Lawrence, in arguing that all of racial prejudice originates in the unconscious, offers, inter alia, a Freudian-psychoanalytic perspective on the origin of prejudice. As he explains, the irrational nature of prejudices indicates "poor reality-testing" on the part of the perceiver, which, according to psychoanalytic theory, must fulfill some sort of psychological function, "usually the preservation of an attitude basic to the individual's makeup."[57] Thus, he argues, the stereotypes of outgroups like blacks as "dirty, lazy, oversexed, and without control of their instincts" imply that their Ids dominate their Egos, while those of Jews as "pushy, ambitious, conniving, and in control of business, money, and industry" imply that their Egos dominate their Ids.[58] The resulting prejudices "correspond to two of the most common types of neurotic conflict: that which arises when an individual cannot master his instinctive drives in a way that fits into rational and socially approved patterns of behavior, and that which arises when an individual cannot live up to the aspirations and standards of his own conscience."[59] In a sense, then, Lawrence's Freudian account seems to maintain that stereotypes can actually grow out of prejudice—or, more specifically, out of neurotic conflicts within the perceiver that drive him or her to label others stereotypically.

Prejudice, then, like stereotyping, is a somewhat complex and multiply determined phenomenon—or perhaps it would be more accurate to think of it as a *set* of phenomena—that is only partially within one's own awareness.[60] Without question, the kind of prejudice that would lead one to become a member of the Ku Klux Klan is intentional, and, moreover, evidence suggests that a predilection for this kind of prejudice resides within a certain personality type. (Note, however, that even a KKK

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56 *Id.*; Weiner et al., *supra* note 53, at 745-47.

57 Lawrence, *supra* note 13, at 332.

58 *Id.* at 333-34. *Cf.* Fiske, *supra* note 4, at 385 (pointing out that "[v]arious stereotypes seem to create two pragmatic types of people, those who are liked but disrespected, and those who are respected but disliked; the pragmatics lie in maintaining the status quo of the one and staving off the threat of the other.").

59 *Id.* at 333-34.

60 *E.g.*, Markus Brauer et al., *Implicit and Explicit Components of Prejudice*, 4 REV. GEN. PSYCHOL. 79, 96 (2000) (arguing that "prejudice should be conceived as a multidimensional construct that involves the automatic activation of prejudice upon perception of a member of the target group, application of these ideas in judgments about a member of a target group, and conscious beliefs and action tendencies toward members of the target group. Although these aspects are likely to be related for some individuals, it may nevertheless be the case that someone who is highly prejudiced in one sense is somewhat less prejudiced in another sense.").

member could have been exposed to hate messages at a very young age, and thus not have made a deliberate choice to adopt his/her particular stereotypes and prejudices.) Likewise, the kind of "explicit" prejudice described by Weiner, which is based on moral judgments of responsibility, requires at least a phase of deliberate evaluation, even though the perceiver's impression of whether a given stigma is controllable or not may come from implicit stereotypes or from mistaken understandings. On the other hand, the role of group threat suggests that prejudice may arise as an almost-automatic response to social-structural triggers that affect the perceiver on a level outside of his/her awareness.

C. BIAS AND DISCRIMINATION

As mentioned above, "bias" refers to beliefs and feelings about others that result from affective prejudice; discrimination is the behavioral implementation of bias. Whereas, up to this point, we have been talking about thoughts, thought processes, and feelings that occur only within the perceiver, the notion of discrimination takes these mental phenomena outside of the individual and applies them to other people.

Interestingly, several studies have shown that prejudice is a better predictor of bias, discrimination, and social distance than is stereotyping; or, put another way, that personal, affective beliefs about social groups are more closely related to discriminatory behavior than are culturally shared stereotypes.[61] However, notwithstanding these findings, Stangor et al. point out that "[a]lthough the measures of consensual social stereotyping that we collected in this study accounted for little variance in attitude, there was a significant relationship between the endorsement of negative social stereotypes and attitudes toward disliked social groups."[62] Thus, they appear to suggest that, while stereotyping does play a role in creating prejudicial behavior, it may be more informative, for the purposes of understanding discrimination, to focus on the affective component of "endorsing" such stereotypes rather than the cognitive processes that create or sustain stereotypes in the first place.

Fiske argues that there are two "types" of discrimination, "hot" and "cold."[63] "Hot" discrimination grows out of strong, affect-laden biases of the kind that would induce someone to belong to a hate group, while "cold" discrimination is based on stereotypes of an outgroup's interests, knowledge, and motivations.[64] Even though "cold" discrimination appears to be more cognitive in origin, and "hot" more affective, it should

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61 *See, e.g.*, Fiske, *supra* note 4, at 372; Charles Stangor et al., *Affective and Cognitive Determinants of Prejudice*, 9 SOC. COGNITION 359, 376-77 (1991).

62 Stangor et al., *supra* note 61, at 377.

63 Fiske, *supra* note 4, at 374-75.

64 *Id.*

be noted that this does not necessarily imply a distinction in deliberateness; for example, Fiske's examples of "cold" discrimination include "[u]sed-car dealers [ ] exploit[ing] groups they consider gullible, and teachers [ ] scold[ing] groups they consider thick-skinned."[65] Thus, the "temperature" of the discrimination really speaks to affective content, rather than to the degree of active participation of the perceiver.

There do appear to be certain contexts in which discrimination is more likely to result, even given continuity of cognitive functioning, stereotypes, and affective prejudice. Several of these contexts have already appeared in our discussion of prejudice: For example, not only are people likely to feel more prejudice against targets whose stigmas are perceived to be "their fault," but they are also more likely to act on those prejudices.[66] The "proxy" theory also predicts that discrimination is greatly exacerbated by lack of contact with or personal knowledge of the individual being assessed; where the perceiver has no actual knowledge to go on, and where, as Fiske points out, "people are pushed to be decisive and in control,"[67] as in interviewing job candidates or loan applicants, the pressure (whether or not the individual is aware of it) to discriminate is greater. Also, where stereotypic information is perceived to be particularly diagnostic, even where it may not actually be so, it has a greater tendency to be relied upon. Thus, as Fiske explains, negative information is perceived to be more diagnostic, and therefore is more often relied upon than positive information, because (a) it is relatively rare and unexpected in our culture generally, and (b) negative information tends to carry an inferential asymmetry, such that "[a] dishonest person can do honest things, but an honest person cannot do dishonest things without being reclassified."[68]

Another context that seems to evoke discriminatory assessment is where the candidates being assessed are marginally, rather than well, qualified. A study of bank lending habits, which assessed the treatment of mortgage applicants of different races with similar credit histories, revealed that "Black and Hispanic applicants with clearly good credit histories were accepted about as often as comparable white applicants.

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65 *Id.* at 375.

66 *See supra* notes 53-56 and accompanying text; *but see* Beschle, *supra* note 6, at 1168-69 (discussing study where, even when difficulty with task completion was represented as not the target's fault, subjects were still substantially less likely to provide assistance to black targets (33%) than to white targets (73%)).

67 Fiske, *supra* note 4, at 388.

68 *Id.* at 386 (citation omitted). However, with regard to other dimensions, such as abilities, Fiske points out that positive information can be the more diagnostic: "a genius can do stupid things sometimes, but a stupid person cannot be a genius sometimes." *Id.*

However, among applicants with 'marginal' credit histories, twice as many minorities were rejected as were whites."[69]

As one might—perhaps—expect, the social pressure brought to bear by the presence of a third party had the opposite effect on discriminatory conduct. In one study where subjects were asked to help black and white targets complete a task, there were substantial initial discrepancies in subjects' willingness to assist the target based on the target's race.[70] However, when a third party intervened to request the subject's help on behalf of the target, the initial discrepancy vanished, and, in fact, subjects were even slightly more likely to assist the black targets than the white targets. Thus, as Beschle explains, "in the absence of social reinforcement of the appropriateness of helping blacks who were in the same objective circumstances as whites, white subjects were much more likely to overlook a white worker's own fault for his predicament than a black worker's. This effect was eliminated when helping blacks was endorsed by a third party."[71] It is unclear whether the subjects' increased willingness to help owed more to the third party's establishment of a norm in favor of "race-blind" assistance or to individual subjects' unwillingness to manifest their own prejudices in the third party's presence, but whether for reasons of belonging or accountability, the result was significant.

Looking at the evidence as a whole, it is clear that stereotyping, prejudice, and context all play major roles in the manifestation of bias and discrimination. Discrimination results from not one, but many conjunctions of all these factors—some of which are intentional, but many more of which operate automatically and outside of the perceiver's awareness.

D. CONTROLLABILITY OF STEREOTYPES, PREJUDICE, AND DISCRIMINATION

Despite the fact that so much of stereotyping, prejudice, and discrimination often occurs unbeknownst to the individual, studies have indicated that all three are susceptible to varying degrees of control—if not by the individual directly, then by altering the social context. One way, as discussed above, is by including third parties, whether to "model" tol-

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69 Beschle, *supra* note 6, at 1169-70 (citing William C. Hunter & Mary Beth Walker, *The Cultural Affinity Hypothesis and Mortgage Lending Decisions*, Federal Reserve Bank of Chicago, Working Paper 95-8 (July 1995)).

70 *Id.* at 1168-69 (discussing David L. Frey & Samuel L. Gaertner, *Helping and the Avoidance of Inappropriate Interracial Behavior: A Strategy that Perpetuates a Nonprejudiced Self-Image*, 50 J. PERSONALITY & SOC. PSYCHOL. 1083 (1986)).

71 *Id.* at 1169. *Cf.* Fiske, *supra* note 4, at 388 ("hearing someone condemn or condone racism (implying the local norm) leads people to express more or less antiracist attitudes (citation omitted)").

erant norms or to promote accountability. Another way, as Gordon Allport pointed out in the 1950s, continues to be meaningful, safe intergroup contact within mixed neighborhoods or among friends.[72] A third mode of control is education; as the literature on perceived controllability indicates, even where people actively believe that someone is to blame for a given trait or experience, providing them with information as to the real etiology of that trait or experience tends to reduce both prejudice and discrimination.[73]

Thus, as Fiske explains, "[t]he context-driven nature of most of this work implies that most people, given the wrong context, are prone to stereotypes, prejudice, and discrimination. However, most people, given the *right* context, can avoid stereotypes, prejudice, and discrimination."[74] Now, this is *not* to say that a good-faith effort is all that is required to overcome impulses to discriminate; forcible attempts to suppress or override stereotypic categories or memories, even made with the best of intentions, can often result in "rebound" effects and even more pejorative assessments than the same person made before.[75] What is clear is that good-faith efforts do help to mitigate, while bad faith abets, stereotyping, prejudice, and discrimination; ultimately, though, most of what is occurring lies beneath the surface, and more than deliberate good intentions are thus required to change it.

E. CURRENT LAW AND THE BLAME PARADIGM: HOW TIGHT IS THE FIT?

Given this survey of what we know of how stereotyping, prejudice, and discrimination function, how well does American antidiscrimination law reflect our understanding? In short, the fit is poor at best. Insofar as our laws attempt to draw a distinction between "intentional" and "nonintentional" discrimination, to separate "blameworthy" discrimination from "innocent" or non-blameworthy discrimination, or aspire to a society that is truly difference-blind, they are responding to a notion of discrimination that does not comport with reality.

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72 Fiske, *supra* note 4, at 375; ALLPORT, *supra* note 18, at 261-82.

73 *See, e.g.*, Weiner et al., *supra* note 53, at 745 ("Perceptions of the controllability of the onset of many stigmas can be altered, given pertinent information . . . . This change in attributions tends to produce modifications of affective reactions and behavioral judgments . . . .What in part appears to be needed are procedures and methods of education that point out the array of determinants of the onsets of stigmas such as obesity and drug addiction that lessen the perceived responsibility of the stigmatized person.").

74 Fiske, *supra* note 4, at 375.

75 *Id.* at 390.

As other commentators have noted,[76] the "intent" requirement for Title VII disparate-treatment cases stands as an obvious offender against the reality of how prejudice and discrimination function. Although Title VII says nothing about intent on its face, since *Teamsters v. United States*[77] the courts have consistently required "proof of discriminatory motive" in order for a disparate-treatment plaintiff to prevail. In addition to requiring that the discrimination be both within the individual's awareness and deliberate, this paradigm seems to contemplate plaintiffs coming forward with "smoking-gun" evidence of employers saying, "I am firing you because you are a woman," or "I hate blacks and I don't want to work with them"; the further away from this model the evidence moves, the harder it becomes for the plaintiff to prove his or her case. Even without any knowledge of social psychology, common sense makes it pretty easy to understand why this kind of evidence is rare; in this day and age, an employer would have to be extremely ignorant both of the law and of prevailing social mores to make explicit statements like these. (This is not to say, unfortunately, that such employers no longer exist—simply that they are increasingly rare.) Psychology, though, offers another, deeper account of why we should not expect to see much direct evidence of this sort in disparate-treatment cases: Even if these kinds of prejudices do affect the employer's decision, there is a strong chance that the employer him- or herself may not be consciously aware of that fact. Whether the particular employer's bias is grounded more in stereotyping or in prejudice, evidence for both phenomena suggests strongly that these processes occur outside of the awareness of the perceiver. Cultural stereotypes are internalized early and run deep, and a decision based on these kinds of stereotypic judgments is likely to seem rational and sensible to the decisionmaker, even as if it were based on "experience" with these groups of people. With regard to prejudice, theories like aversive racism and cognitive dissonance suggest other reasons for the automatic operation of bias: Especially in a climate where biases like racism and sexism are generally viewed as unacceptable, someone who has these biases will probably feel at least somewhat conflicted, or at least challenged, by the widespread public opinion that condemns them. Thus, automatic decision-making processes operating at a level that is outside of the individual's awareness can provide ways for unresolved prejudices to continue.

Title VII's disparate-treatment jurisprudence does make some allowance for the lack of smoking-gun evidence through "pretext" analy-

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[76] *E.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 960 (1993); Krieger, *supra* note 5, at 1164; Lawrence, *supra* note 13.

[77] 431 U.S. 324, 335 n.15 (1977).

sis, where the plaintiff seeks to prove that some seemingly-neutral employment decision was actually just a pretext for discrimination. However, even in pretext cases, plaintiffs are still required to prove that both the discrimination and the application of the pretext were, in effect, purposeful.[78] As one commentator pointed out, as this requirement works in practice, this is often tantamount to having to prove that the employer was lying.[79] In any case, while this mode of analysis may be at least somewhat responsive to the "common-sense" concern that even the most deliberate of discriminators won't be stupid enough to admit outright what s/he is doing, the psychological critique persists. In order for a reason to be "pretextual," the implication is that there has to be some other, "real," intentional decision that the employer is trying to hide. While this may be true in some circumstances, the psychological literature reviewed above indicates that this isn't the way discrimination usually functions, at least not in the current climate.

Title VII, however, is only one part of a larger picture of American constitutional and statutory antidiscrimination law that has been, and continues to be, mostly premised on a notion of blame. Justice Powell's argument in *Wygant*, mentioned at the beginning of this article, is by no means idiosyncratic; it reflects quite accurately the stance of American law toward prejudice and discrimination. Some discrimination is *really* bad, because it is our fault; where the government endorsed and perpetrated it (e.g., slavery, women's disenfranchisement), we are clearly to blame, and a cause of action and remedy are thus required. Other kinds of prejudice and discrimination are less bad, but still bad enough to be remedied—provided that remedy doesn't go "too far" (sexual orientation, age). All other forms of discrimination (e.g., appearance) may arguably be bad, but not bad enough to warrant legal recourse, and thus those who act on these prejudices are not to be required to stop. Moreover, as Justice Powell explained in *Wygant*, even the *really* bad kind of discrimination still isn't bad enough to require a remedy that punishes "innocents" by affecting the current distribution of resources to their disadvantage.

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[78] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (holding that because ultimate burden of persuasion rested with Title VII plaintiff, trier of fact's determination that defendant's reasons were pretextual did not entitle plaintiff to judgment as a matter of law); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The requirements for an equal protection claimant proceeding under 42 U.S.C. §§ 1981 or 1983 mirror the Title VII requirements. Krieger, *supra* note 5, at 1168 n.16.

[79] Krieger, *supra* note 5, at 1163 n.8 ("Existing disparate treatment jurisprudence in many ways equates a finding of pretext in plaintiff's favor with a finding that the employer has lied about the reasons for its decision.").

Psychology makes it clear just how senseless this hierarchy is. Some groups clearly do experience more and different discrimination than others, but this doesn't make more common forms of discrimination "worse," or someone whose biases are more commonly held more to blame for them. What psychology tells us is that, because of the way we process the world around us, we are *all* prone to stereotyping and prejudice to varying degrees, and cultural stereotypes and prejudices enter our minds early and remain there long after we cease to be aware of them. When these cognitive and affective processes lead to unfair discrimination against others, the problem is not what may be going on inside our heads, but that others are being deprived of civil rights as a result. Regardless of when the original stereotype entered the cultural canon, or what government actions kept it there, all of these forms of discrimination perpetrate the same harms on target groups, and, therefore, should all be susceptible to legal remediation where appropriate.

Part of what may be underlying the "gradation" of discrimination—and this is an objection commonly voiced by those opposing new civil rights legislation[80]—is an intuition that under certain circumstances, a categorical exclusion of a group from a certain position may be legitimate. Thus, while today race is almost never a bona fide occupational qualification (BFOQ), sex can be (albeit rarely—e.g., for the proverbial wet-nurse position,[81] or for "genuineness" or "authenticity" purposes for an actor or actress playing a role[82]), and something like appearance or other physical qualities more often is (e.g, athletic ability or build for sports, thinness for high fashion models, or, more controversially, the ability to wear the clothes sold in a store where one works). However, the fact that legitimate, rational job requirements may sometimes include certain physical traits simply is not an argument for allowing irrational or invidious discrimination based on those same traits to continue, and it does not make this kind of discrimination any less morally problematic or harmful.

There are two further points to take away from this discussion of blame and remedies. First, as should be obvious, the status quo is not bias-free. Especially in the affirmative-action context, there is a tendency in the public discourse to speak about "introducing" bias, or "reverse-discrimination," into a neutral baseline—but the baseline clearly isn't neutral. Second, as Professor Beschle points out, even "if we could successfully eliminate social norms favoring prejudice, we would be left

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80 *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 3 (2000) (responses to Santa Cruz "anti-lookism" ordinance); *see also infra* notes 379-382 and accompanying text.

81 Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971).

82 *Id.*; *see also* 29 C.F.R. § 1604.2(a)(2) (2001).

not with a starting point of nondiscrimination, but still with an individual tendency to perceive differences between people and to display a bias against those perceived as different and in favor of those seen as similar to the self."[83] Thus, providing a legal remedy for discriminatory infringement of one's civil rights should not be about deciding who to blame for what we did wrong in the past, or even for what we are doing wrong now. Rather, the only meaningful purpose of such a remedy is to monitor and attempt to prevent the infliction of irrational biases on their targets.

In a recent article, Professor Post focuses on what he views as another gap in the logic of American antidiscrimination law: its aspiration to attain social "blindness" to appearance-related characteristics.[84] Insofar as this is, in fact, a goal of our antidiscrimination law, it is certainly unrealistic. The evidence from psychology indicates that, even if we make the best of good-faith efforts to blind ourselves to stereotypes, not only will we probably fail, but we may end up even more prejudiced than we started.[85] Also, as just discussed above, there are certain areas in which race, sex, and appearance are perfectly legitimate grounds for decisionmaking, ranging from "exceptions" to otherwise-protected areas like employment to the "private" arenas of friendship, dating, and marriage. Antidiscrimination law, no matter how realistic or attuned to the psychological realities of stereotyping and prejudice, will never succeed in "blinding" us in this manner—as well it should not. We are not all the same, as Post stresses, and it is not the job of the law to make us so.

However, while antidiscrimination law cannot and should not blind us to one another's appearances, it should require us to think very carefully about what criteria actually matter before making decisions that discriminate against others, and recognize that we are the "least cost-avoiders" when our irrational discrimination deprives someone else of his or her civil rights. I do not see this mandate as equivalent to "systematically effacing the social world," as Post does.[86] Certainly, antidiscrimination law does have great potential to "transform" existing social practices of gender, race, and appearance—but I would argue that what is perhaps its greatest potential lies in enabling and promoting the kinds of meaningful and useful contact that Allport and others have stressed since the 1950s as ways of overcoming prejudice. If people are allowed to hide behind rationales like "blame" or "intent" in order to isolate themselves from the groups they stereotype and judge, then the ability of the law to effectuate that transformation will be greatly hampered.

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83 Beschle, *supra* note 6, at 1168.

84 Post, *supra* note 80.

85 *See supra* note 75 and accompanying text.

86 Post, *supra* note 80, at 40.

This, then, is the ultimate harm of the poor fit between American antidiscrimination law and the behavior it seeks to regulate. Not only does it fail to extend protection in areas where it is needed, and to people who are suffering unjust discrimination, but in so doing it misses an important chance to strike at the heart of prejudice and discrimination. In speaking of "societal discrimination," people often despair, lamenting that the law can do little "if society doesn't change." But in areas where society has already begun to change, at least enough to recognize that certain types of stereotyping and prejudice are irrational, the law can move the tide of change forward. In the twentieth century, we already saw this occur with respect to race, gender, age, and disability. Now, as I will proceed to argue, we could and should see it again in the twenty-first century with other forms of discrimination.

II. WEIGHT DISCRIMINATION: A CASE STUDY

The poor fit between American antidiscrimination law and the ways in which discrimination actually works is not just an abstract theoretical point. It has profound consequences for the lives of many people in this country, who are told by the laws and by the courts that irrational discrimination against them is legally permissible because it doesn't match one of the categories we have arbitrarily chosen to regulate. The purpose of this Part is to look at one such form of discrimination in detail: weight-based discrimination. Weight-based discrimination has the potential to affect every single American, fat, average-weight, or thin, because, as we shall see below, there is no "minimum weight requirement" for discrimination—"too fat" is squarely in the eye of the beholder. Nonetheless, current medical estimates are that at least 70 million Americans—more than one third of all adults and one in five children—meet the medical standard for obesity.[87] Fifty-five percent of adult Americans—97 million—are categorized as either overweight or obese, and the numbers have only been growing since 1960.[88] For these people—that is to say, for the *majority* of adults in this country—the risk of encountering weight-based discrimination is unquestionably heightened. Yet, as we shall see below, even though overweight adults may be in the

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87 American Obesity Ass'n, *What Is Obesity?*, *at* http://www.obesity.org/what.htm (last visited Feb. 18, 2001). Obesity is "officially" defined with reference to Body Mass Index, or BMI, which is calculated by dividing a person's body weight by the square of their height. A BMI of 30 or greater is considered obese; a BMI between 25 and 29.9 is considered overweight. BMI aside, as a general rule of thumb, individuals who weigh 20% or more over their ideal body weight are considered obese; those who weigh either 100% more, or are 100 lbs. over ideal weight, are termed "morbidly" obese.

88 *Id.* However, these figures are not uncontroversial. For a critique of the AOA statistics on obesity, see LAURA FRASER, LOSING IT: FALSE HOPES AND FAT PROFITS IN THE DIET INDUSTRY 174-80 (paperback ed. 1998).

numerical majority, overweight people are at high risk for discrimination due to disempowerment because of their weight, or, more specifically, because of their weight combined with race, gender, and socioeconomic factors, which operate synergistically to disadvantage them further. Weight discrimination acts to ensure that these people do not attain positions where they could alter or resist the perpetuation of that discrimination.

This Part will proceed as follows. First, I will provide a brief overview of the cultural history of the American preoccupation with weight. Then, I will turn to a detailed analysis of the state of fat prejudice in America now: how it operates and is perpetuated, and our current scientific understanding of why and how people gain, maintain, and lose weight. Finally, I will focus on how American antidiscrimination law has dealt with weight discrimination, and how the existing legal remedies have failed to provide any meaningful protection, or even a coherent legal framework in which to address the problem. In Part III, I will turn back to the more general problem of how and why the law should remedy these kinds of omissions.

A. CULTURAL HISTORY OF WEIGHT AND WEIGHT DISCRIMINATION IN AMERICA

Although the first signs of American preoccupation with food and weight showed up with the advent of Grahamism in the Jacksonian period, the present obsession has its roots in the turn of the twentieth century, between 1890 and 1910-20.[89] This was the point at which the medical profession, an incipient commercial diet industry, and the popular culture began to link gluttony, which had previously been associated with *thinness* and other medical problems such as dyspepsia and neurasthenia, with fatness and general notions of imbalance.[90] From that point onward, "[n]ever previously an item of systematic public concern, dieting or guilt about not dieting became an increasing staple of private life, along with a surprisingly strong current of disgust directed against people labeled obese."[91] As people became more self-conscious about their weight, and society more critical, the language itself came to reflect these trends:

> [E]mbarassment blushed from language itself, as euphemisms for obesity ran thin. "Stout," once a fine word for

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89 HILLEL SCHWARTZ, NEVER SATISFIED: A CULTURAL HISTORY OF DIETS, FANTASIES, AND FAT 81 (1986); PETER N. STEARNS, FAT HISTORY: BODIES AND BEAUTY IN THE MODERN WEST 3 (1997).

90 SCHWARTZ, *supra* note 89, at 68-73, 81; STEARNS, *supra* note 89, at 27 (doctors' concern with weight as health factor).

91 STEARNS, *supra* note 89, at 3.

> all ages, had become ambiguous if not uncomplimentary. "Fat" had become an "ugly word," wrote a middle-aged woman . . .in 1907, . . ."Stout? Obnoxious adjective, barely tolerable as a noun." "Chubbiness" pertained to healthy children, "chunkiness" to runaway slaves and then to street toughs. Around mid-century, "dumpy," "pudgy" and "tubby" had emerged, none of them quite as pejorative as "porky" (1860s), "sod-packer" (1880s), "jumbo" (1880s, from the Gullah for elephant), or "butterball" (1890s). A man might have a potbelly or, after 1879, a bay window, but Thomas B. Reed, portly Speaker of the House, proclaimed: "No gentleman ever weighs more than 200 pounds." Fatty Arbuckle as Sheriff "Slim" Hoover summed up the situation just before the final curtain of *The Round-Up* in 1907: "Nobody loves a fat man."[92]

In the first decade of the twentieth century, the medical profession remained somewhat skeptical of the benefits of promoting dieting and weight loss to patients.[93] Where mainstream doctors did not step in, however, diet faddists like Horace Fletcher and John Harvey Kellogg quickly did, promoting weight-loss plans based on extremely slow chewing of food or low-protein diets. By 1910, doctors had begun to reassert control over this territory, but only after the general public had become convinced of the importance of weight loss and its connections to restrained eating.[94]

With the advent of World War I, the American anti-fat campaign intensified. Along with wartime rationing came a campaign against food waste—particularly fats and sugars, which were needed in the war effort. In this climate, "[n]utrition took on a military cast . . . . [and] reducing weight became civil defense."[95] Commentators at the time noted that "[t]here are probably a good many million people in the United States whose most patriotic act would be to get thin gradually and gracefully and then to stay thin,"[96] and that "it may become a serious question as to whether a patriot should be permitted in times of stress to carry excess body-weight, for the expense of carrying it around calls for calories that other people need."[97] Thus, a strong connection was drawn between overweight and treason and, inversely, slimness/weight loss and patriot-

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92 SCHWARTZ, *supra* note 89, at 89.

93 STEARNS, *supra* note 89, at 30-32.

94 *Id.* at 37.

95 SCHWARTZ, *supra* note 89, at 141.

96 *Id.* at 141-42 (quoting Gordon Lusk).

97 *Id.* at 142 (quoting Francis Benedict).

ism.[98] There was also a growing connection to xenophobia, since, "[d]uring the prewar era, for the first time, fatness had been specifically associated with immigrant groups, especially with Jews and Italians . . . . Americanization began to imply an actual physical change toward uniform American (Yankee) features."[99]

At the same time, doctors were by now championing slenderness and, where the patient was not slender to begin with, weight loss. Moreover, whereas the medical focus in the previous decades had been more on hereditary and glandular causes of obesity, doctors had come to recognize that "[i]n the great majority of cases, the cause is chiefly overeating"; regular, moderate exercise was also found to be essential.[100] Patients with weight problems or with a family history of obesity were advised to cut caloric intake "from the normal 3000 per day to 2200."[101] However, Stearns cautions against reading these early trends as a true "medicalization" of obesity—that is to say, "by which doctors seized on new information and used it to browbeat an innocent public into novel anxieties the treatment of which, not surprisingly, extended physicians' power and profit."[102] Rather, he stresses that the initial impetus to foreground weight and dieting came, not from doctors, but from patient pressure spurred by middle-class fashion.[103] Slenderness, particularly in women, had come into vogue by 1900 or so, and along with it had come new trends in clothing and mainstream imagery of women.[104] By the beginning of World War I, high fashion had already essentially abandoned the wearing of corsets in favor of a more natural shape,[105] and, as the clothing itself lost weight and layers, it became more revealing of the figure underneath, which then fueled the public concern with body weight and shape.[106] Moreover, the success of ready-made fashions for men (in the last quarter of the nineteenth century) and women (beginning around 1910) created another source of concern: Instead of having cloth-

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98 *Id.* at 140-45; STEARNS, *supra* note 89, at 21-24.

99 SCHWARTZ, *supra* note 89, at 143.

100 STEARNS, *supra* note 89, at 40.

101 *Id.* Note the contrast to most modern diet programs, where caloric intake is limited to, at most, 1200 per day; *see, e.g.*, FRASER, *supra* note 88, at 147.

102 STEARNS, *supra* note 89, at 43.

103 *Id.* at 45.

104 *Id.* at 12.

105 *Id.* at 13; SCHWARTZ, *supra* note 89, at 161. *But see* SCHWARTZ, *supra* note 89, at 143 (pointing out that working women during World War I were still encouraged to wear corsets); *id.* at 177-78 (noting transmutation of old-fashioned corsets into "elasticized, lightened, and softened" foundation garments between 1913 and 1930).

106 Schwartz also makes the very interesting point that eyesight was improving in the general public at this time as well, due to advances in treatment of disease, vision-correction technology, and eye safety in the industrial sector. Thus, he notes, appearance-conscious women "could no longer count on an accommodating blur in the public eye." SCHWARTZ, *supra* note 89, at 163-64.

ing made to fit the person, there was now increasing pressure for the person to fit into the clothing.[107] In the print media, the "Gibson Girl" sketches that appeared in magazines between 1895 and 1914 depicted "a distinctly thinner figure overall than any widely publicized female image in the United States since the 1830s, and the durable popularity of the sketch series literally knew no prior precedent."[108] Tall, slender, and athletic in appearance, the Gibson Girl was a reflection of the newly fashionable active lifestyle for women, as well as the new emphasis on relative thinness—the personification of "the new 'natural woman' who came into vogue at the turn of the century."[109] The Gibson Girl ideal—"so popular that any woman who could afford to was practically dutybound to buy a product that would make her look like her"[110]—"cut across class lines, creating a single national ideal of womanhood."[111]

These were some of the principal concerns that sent Americans at the turn of the century—particularly women—into their doctors' offices asking, or begging, for weight-loss advice. It did not take long for doctors to "absorb" the public's concern with weight—and to develop a "link between the growing cultural hostility to fat and physicians' often-expressed moral disdain for their obese patients."[112]

> Some medical summaries shifted terminology, calling the overweight that resulted "simply" from excessive eating and inadequate exercise "indolence obesity." Patients suffering from this should shape up, and if they could not, a character deficiency was clearly indicated. "Since overweight is essentially an index of wrong living," thought physicians, a plump businessman was not an index of financial prosperity but rather a "sign of physical bankruptcy." Of course, in many obese individuals "the malady" was "a character defect, an evidence of lack of self-control." . . . Fat patients and their concerns, including their fashion concerns, could not be avoided. They might be helped. They were not, unless they quickly reformed, well liked.[113]

By the 1920s the medical profession had fully joined the anti-fat campaign, as had the insurance industry. Between World War I and World War II, insurance companies began to adjust their height-weight-

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107 *Id.* at 160-61.

108 STEARNS, *supra* note 89, at 12-13.

109 FRASER, *supra* note 88, at 28.

110 *Id.* at 32.

111 *Id.* at 31.

112 STEARNS, *supra* note 89, at 46.

113 *Id.* at 46-47.

age tables downward; these tables, previously based on "average" weights, now reflected lower, "ideal" weights, and allowed for less variation in weight that could still be termed "healthy."[114] They also began to subtract, rather than add, pounds from the "acceptable" weights of older people, reflecting a belief that aging people should be losing, not gaining, weight.[115] In accordance with this trend toward monitoring weight, sales of private bathroom scales, which had first begun to appear just after the turn of the century, took off in the 1920s, as did sales of kitchen scales for weighing food.[116] Calorie-counting, first popularized in a best-selling book by Dr. Lulu Hunt Peters in 1917,[117] came to be a staple of dieting,[118] and surgery to remove fat from the abdomens of obese patients, which had begun in the last decade of the nineteenth century, was an accepted, if not common, practice.[119]

The 1920s also witnessed the development of a gendered approach to weight and weight loss that would continue throughout the twentieth century. The gender distinction began at childhood: From the 1920s into the 1970s, articles on childhood obesity, from *Good Housekeeping* to *Pediatrics*, generally featured girls, whereas articles on underweight children focused on boys.[120] Adult women were targeted as well, with the new fashion for slim female bodies closely tied to popular notions of women's newfound "freedoms" as sexual beings—and as consumers. The slender "flapper" ideal—standing in direct contrast to her prim and proper Victorian mother, physically voluptuous, sedentary and passive—was lively, active, young, and rebellious, and "naturally" boyishly slim (or dieted and bound her breasts to make herself more so).[121] She was also "free" to be a consumer, "keeping up with fashion and buying the latest in beauty products."[122] Thus, despite the rhetoric of freedom that surrounded the flapper ideal, this particular "freedom" brought with it what Fraser terms a kind of narcissistic masochism:[123] an obsession with the correction of one's own physical flaws. And it did not take long for advertisers to figure out how to tap into this market:

> It was during the 1920s that advertisers hit on a problem that was visible enough for women to be embarrassed about, difficult enough to require buying lots of prod-

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114 SCHWARTZ, *supra* note 89, at 157.

115 *Id.*

116 *Id.* at 168-71 (bathroom scales), 171-73 (kitchen scales).

117 FRASER, *supra* note 88, at 55.

118 SCHWARTZ, *supra* note 89, at 177.

119 *Id.* at 178-79.

120 STEARNS, *supra* note 89, at 75-77; SCHWARTZ, *supra* note 89, at 282-84.

121 FRASER, *supra* note 88, at 33-34.

122 *Id.* at 37.

123 *Id.* at 38.

> ucts, and best of all, would never go away: fat. Advertisers made women feel humiliated that they weren't as slim as the beautiful women in their illustrations . . . .Every advertisement chided women for being overweight. . . .With all these pressures . . . , women began to do anything to be slim. They starved themselves and chewed gum laced with laxatives to lose weight. Told to "Reach for a Lucky instead of a sweet," they took up smoking to lose weight; it was, as the ad said, "the modern way to diet." They followed a number of wild fad diets recommended by physicians and pseudophysicians, many of which involved fasting, purgatives, and odd combinations of foods.[124]

Thus, by the late 1920s, much of what we now know as anti-fat attitudes and the obsession with dieting was firmly in place in American culture. Despite some variation in the details of fashion and dieting over the course of the twentieth century (e.g., the "sweater girls" of the 1950s versus the "Twiggy" look of the 1960s, and the prevailing demonization of carbohydrates in the 1970s (and now) versus the prevailing demonization of fat in the 1980s and 1990s), the fundamental American cultural view of food and weight has not changed much in the last eighty years or so. With the possible exception of the 1950s, when "America had a new romance with peaceful suburban domesticity after World War II" that included Marilyn Monroe as a cultural icon (and the prototype for the "dumb blonde" stereotype),[125] the message for most Americans, and particularly for women, remained the same: The thinner you can be, the better.

As Professor Stearns points out, "[t]he most important development in the campaign against fat from the 1920s onward involved its sheer intensification."[126] This intensification phenomenon was, and continues to be, particularly strong in three main areas. The first is the "gendering" of dieting and weight—by which I do not mean that food and body concerns came to be the exclusive province of either sex, but, rather, that they were presented differently, and thus manifested themselves differently, in men and women. For *both* sexes, "[w]ith dieting established as a moral category, available to compensate for real or imagined indulgence in other facets of American society, it could be ratcheted up to attach additional moral issues posed by particular segments of the popu-

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124 *Id.* at 38-39.

125 *Id.* at 41. As Fraser notes, this is in no way a commentary on Monroe's actual intelligence, but a reference to the types of roles she played: "maternal-bodied and ooz[ing] sexuality, . . . [but] childlike, innocent, and a little dim." *Id.*

126 STEARNS, *supra* note 89, at 98.

lation."[127] However, given the profound and socially unsettling changes in women's social roles that occurred in the twentieth century, it was perhaps inevitable that the most virulent aspects of the pressure to diet and be thin would fall on them. For example, Stearns notes that between the 1920s and the 1960s, despite the fact that all the insurance data from 1910 onward indicated that overweight was a health problem for both sexes, dieting advice and exhortations were targeted disproportionately at women.[128] These discussions of dieting for women "almost invariably emphasized aesthetic factors" rather than health, such as men's lack of sexual interest in obese wives, or ability to fit into swimsuits or other fashions.[129] The level of scorn and disdain for fat women that infused popular reading matter from the 1940s onward is truly astonishing:

> Disgust had been suggested in the first decades of the dieting craze, before 1920, but it had rarely been gender-specific. Now, as the level of revulsion accumulated in the literature aimed at the very groups being insulted, women were the clear targets. Thus fat women were "lazy and undisciplined. They prefer[red] lying in bed a bit longer to actually planning, preparing and consuming a [sensible] breakfast meal." The fat woman would become evasive: "She accuses her husband of being supercritical, which makes her too nervous to plan menus or shop properly (she would be a lot more nervous if she knew her husband is running around with his slim secretary because his wife is so fat and unattractive)." "Psychiatrists have exposed the fat person for what she really is: miserable, self-indulgent and lacking in self control." And bluntly, . . . "[b]eing fat is a sickness; a fat woman's body (with fat men implicitly exempt?) was "a physical nonentity," an object of ridicule, a sign of self-hate and social failure, a woman's "resignation from society." "Are you aware that fatness has destroyed your sex appeal and made you look older, somewhat like a buffoon whom people are inclined not to take seriously in any area or on any level?"[130]

This differential condemnation of women's weight was occurring at exactly the time when other distinctions between the sexes, both essentialist (e.g., feminine passivity, emotionality, and irrationality) and more explicitly gender-role related (e.g., staying at home), were beginning to

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127 *Id.* at 71-72.
128 *Id.* at 80, 82.
129 *Id.* at 82.
130 *Id.* at 83.

be eroded or debunked. Stearns argues that this may have been, in large part, a response to cultural anxiety produced by women's growing rejection of maternalism as their ideal role: "Rigorous discipline of women's bodies helped men and women alike gain some confidence that declining maternal functions did not leave women free for every form of indulgence."[131] Weight was already present as a device for moral condemnation and control; it was invoked here—by both men and women, it should be noted—in an attempt to maintain the existing social fabric.

Controlling women's weight as a way of controlling women persisted throughout the ascendancy of the feminist movement. With more women moving into the white-collar workplace in the 1970s and 1980s, "the androgynous, dress-for-success look became popular, along with a physique that didn't look too overtly female in the workplace"; women found it easier to attain power and fit into a male-dominated world if they were thin.[132] The "in" look for women from the later 1980s through the present has been a stronger and more muscular one (particularly with the new emphasis on mainstream women's athleticism from the mid-1990s onward), but the emphasis, as we shall see below, is still very much on thinness and weight loss. Now, the socially acceptable woman in control of herself does not just have to be thin: She has to be "buff" as well. Although some feminists have characterized this trend as empowering for women[133]—which it doubtless is in some respects—viewed in the context of the twentieth-century preoccupation with controlling women through weight it could just as easily be viewed as another form of "backlash" against deeper and more economically threatening forms of women's empowerment.[134]

The "intensification" phenomenon affected men as well, but differently. From the beginning, medical concerns such as heart disease, cholesterol, and high blood pressure made up a relatively higher percentage of the discourse surrounding men's weight compared to that about women's weight—due at least in part to the fact that it became clear early on that these were greater health risks for men.[135] Aesthetic concerns for men in the twentieth century have always been of a different order than those for women; whereas looks have long been considered an integral part of a woman's social value, and crucial to her ability to get a mate, there has been a wider range of acceptable weights for men, whose social value stereotypically resides in their earning power or economic worth

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131 *Id.* at 87.

132 FRASER, *supra* note 88, at 43.

133 *Id.* at 44-45.

134 *See generally* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

135 STEARNS, *supra* note 89, at 100-01; SCHWARTZ, *supra* note 89, at 213.

rather than their looks.[136] Nonetheless, the pressure on men to lose weight grew, particularly from the 1950s onward, as a genre of diet books for men stressed weight loss as a way to "score points on [your] buddies" and gain more attention from women.[137] Dieting also allowed men to "display male character and independent initiative" and renew power in their marriages.[138] By the 1990s, the ability to keep one's weight under control had become as important an indicator of character and self-discipline for men as it was for women, and dieting articles for men had begun to appear regularly in a new crop of men's health and fashion magazines.[139]

One final note on the twentieth-century "gendering" of weight and weight loss: The extremely simplified historical account I have presented so far makes no mention of ethnic and cultural differences, which unquestionably exist. In particular, the construct of weight was somewhat different in the African-American community, especially for African-American women: The stigmatization of overweight in the mainstream white, middle-class culture never really caught on. As Stearns notes, until the 1980s, *Ebony* magazine, in marked contrast to middle-class white magazines, seldom discussed weight or dieting, even though it had a great deal to say about other beauty and fashion issues.[140] *Ebony* also featured female models of a much wider range of sizes and shapes than appeared in mainstream white magazines, and was very quick to embrace articles that "counterattacked" the national slimness trends, even as early as the 1970s.[141] To this day, social science research indicates that weight is substantially less linked to attractiveness, and less stigmatized, among African-Americans.[142] Stearns suggests that this may be related to the different configuration of gender roles in African-American culture, in that black women have, for a long time, occupied a more powerful position in their families and family economies.[143] The white middle- and upper-class norm of women not working outside the home, particularly after marriage, had never existed in African-American culture, and thus, in a sense, there was no apple cart to upset (and therefore to offset with weight obsession) in this regard. Another feature of mainstream white cultural history—the reduced cultural prestige of motherhood—was also not present in the African-American community; black birth rates re-

136 STEARNS, *supra* note 89, at 100.

137 *Id.* at 101.

138 *Id.*

139 *Id.* at 103-04.

140 *Id.* at 89.

141 *Id.* at 90-91.

142 *Id.* at 91; *but see* FRASER, *supra* note 88, at 144 (noting that weight concerns are more closely correlated with class than with race, and professional African-American and Latina women tend to be thinner and have higher rates of eating disorders than poorer women).

143 *Id.* at 92-93.

mained higher, and thus "there was less reason to apologize for a decline of maternity through body restraint."[144]

The second feature of America's weight and diet obsession that has undergone extreme intensification in the last eighty or so years is the commercialization and medicalization of weight and dieting. This is a truly vast subject, and I cannot possibly aspire to do it justice in this context; fortunately, others have already done so.[145] For the present purposes, suffice it to say that the American market for diet programs, diet foods and food replacements, diet pills, health clubs, and medical treatment for weight loss has truly exploded in the course of the twentieth century, becoming a multibillion-dollar industry. In light of this undisputed observation, it is particularly striking that the third major area of intensification has been in weight gain, which has risen steadily in the American population as a whole since 1920[146]—oddly enough, the more the weight-loss industry has failed, the more it has succeeded. Professor Stearns, after looking at medical, insurance, and other data, concluded:

> Putting these data together suggests a weight gain of about two pounds per decade from the 1940s to the 1980s (but a bit less for women), after a prior two-pound increase from 1920 to 1940. Then the late 1980s and early 1990s broke the scales with an unprecedented surge. The average American adult gained eight pounds between 1985 and 1995.[147]

Several factors are understood to have contributed to this trend. The first has been increasingly greater pressure on Americans to eat *more*, mutually reinforced by the booms in the snack-food and fast-food industries, and by extensive food-related advertising promoting over-consumption.[148] The advent of "lite" or lo-cal foods has, at a minimum, had no effect on this trend, and more likely has exacerbated it, for two main reasons. First, people often incorporate these foods into their diets without changing anything else about their eating patterns.[149] Second, the "diet" label very often induces people to consume more than they would have otherwise—either of the "diet" food itself or of other foods as a reward for eating the diet foods—and, in the case of low-fat desserts, the fat tends to be replaced with substantial amounts of sugar in order to

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144 *Id.* at 93.

145 The three principal sources in this section, particularly Schwartz's *Never Satisfied* and Fraser's *Losing It*, are excellent and exhaustive books on the subject; for more details on the development of the weight-loss industry in America, I refer the reader there.

146 STEARNS, *supra* note 89, at 129; FRASER, *supra* note 88, at 120-21.

147 STEARNS, *supra* note 89, at 133.

148 *Id.* at 134-36; FRASER, *supra* note 88, at 122.

149 STEARNS, *supra* note 89, at 135.

make the products palatable.[150] Also, as anyone who has spent time in other countries knows, the distinctly American emphasis on "value" for money has resulted in restaurants providing very large portions of food relative to what people actually need; with repeated exposure, these oversize portions have come to seem normal and expected.[151]

The second major influence on American weight gain in the twentieth century has been the increasingly sedentary nature of our lifestyles. As Stearns points out, "[t]he decades since 1920 have seen a steady trend away from agricultural and manufacturing jobs toward the service sector and, in all segments of the labor force, rural as well as urban, increased mechanization."[152] These trends in the workforce have been mirrored and reinforced in private life: The twentieth century witnessed the invention and explosion of reliance on the automobile, at first instead of walking, and now because we have structured our communities in such a way that the distances we need to travel on a daily basis (e.g., between residential and shopping areas, or between home and work) are simply too far to walk. Domestic chores have also become greatly mechanized, and the extreme popularity of television has had a profound influence on how Americans spend their recreational and leisure time.[153] Thus, as we have sought to spend less and less time and effort on routine physical tasks both at work and at home, whatever leisure time we manage to eke out thereafter has increasingly been spent sitting in our cars or in front of the TV, video games, or computers. As we have been steadily consuming more calories, we have also been moving less.

Finally, Stearns points to a third factor: the encouragement of childhood eating.[154] Despite all of the attention paid in the last decade or so to overweight children, "[c]oncern for underweight children vastly surpassed attention to childhood obesity problems until the late twentieth century."[155] For much of the twentieth century, the "bouncing baby" was the ideal, at least in part because, for newborns and very young children, the health risks of underweight were significantly greater than those associated with mild overweight.[156] Well-fed children were re-

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150 FRASER, *supra* note 88, at 126-29.

151 *See, e.g.*, Sylvia Rector, *Burden or Bargain? Heaping Restaurant Servings Weigh Down an Already Overfed Population*, CHICAGO TRIBUNE, May 16, 2001, § 7, at 3 (discussing American Institute for Cancer Research study).

152 STEARNS, *supra* note 89, at 134.

153 *See* ROBERT PUTNAM, BOWLING ALONE 221-46 (discussing trends in television watching in the second half of the twentieth century). *But see, e.g.*, D.A. Crawford et al., *Television Viewing, Physical Inactivity and Obesity*, 23 INT'L J. OBESITY 437 (1999) (concluding that, while there is a link between television viewing and obesity, that link is not as straightforward as it was once thought to be, especially in adults).

154 *Id.* at 137-46.

155 *Id.* at 142.

156 *Id.* at 142-43.

garded as mirroring the degree of their parents' love and concern for them, and, as Stearns notes, articles in family magazines from the 1930s through the 1960s or so were filled with advice about how to get recalcitrant children to eat.[157] By the time this began to change around the 1970s, other factors like the abundance of snack foods and the rise of television had reached levels that made children's eating patterns difficult to change. Since overweight and obesity in childhood do make it more difficult to maintain a healthy weight later in life,[158] these generations of children have grown up both heavier and struggling harder to lose weight.

B. WEIGHT AND FAT PREJUDICE IN AMERICA NOW

1. *Weight and Obesity: The Medical Evidence*

According to a study published last October in the *Journal of the American Medical Association*, obesity is still on the rise. Across all sociodemographic groups and regions of the United States, "[t]he prevalence of obesity increased significantly from 17.9% in 1998 to 18.9% in 1999, an increase of 5.6% in 1 year and of 57% from 1991."[159] Obesity remains substantially more prevalent among blacks (27.3%) and Hispanics (21.5%) than among whites (17.7%); the rates of obesity are also highest among those who did not graduate high school (25.3%), and lowest among those with a college degree or more (14.3%).[160]

Despite all of the time, money, and energy devoted to weight loss in this country, there remains a fair amount we still do not understand about how weight and obesity work. The basic outlines are deceptively simple, and not too controversial: If a person takes more calories in than s/he expends, the excess calories are stored as fat and weight gain will result. However, once one begins to parse this equation—especially the caloric expenditure part—on an individual level, things get quite complicated. We all know people who seem to eat whatever they want, in prodigious amounts, never go to the gym, and still stay naturally thin, and others who eat much less (and/or much healthier foods), work out regularly or

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157 *Id.* at 142.

158 *See, e.g.*, S. Rössner, *Childhood Obesity and Adulthood Consequences*, 87 ACTA PÆDIATRICA 1 (1998) (advocating aggressive treatment of childhood obesity due to, inter alia, the tendency of obese children to grow into obese adults).

159 Ali H. Mokdad et al., *The Continuing Epidemic of Obesity in the United States*, 284 J. AM. MED. ASS'N 1650 (2000) (based on data from the 1999 Behavioral Risk Factor Surveillance System, a cross-sectional telephone survey).

160 *Id.* at 1651. Interestingly, though, at least one study has suggested that family *income* is not correlated with overweight in children of any race aged two through seven, or in children of any race other than non-Hispanic whites aged eight through sixteen. Suzanne Rostler, *Food Supply May Not Explain Obesity in Poorer Kids*, REUTERS HEALTH (Oct. 15, 2001), *available at* http://www.ahealthyme.com/article/reuters/101355564 (discussing results of study published in the October 2001 issue of *Archives of Pediatric and Adolescent Medicine*).

live active lifestyles, and still weigh more. Still others become extremely, morbidly[161] obese at a very young age, and remain so all their lives. This is part of the mystery that medical researchers are currently trying to understand.

One thing is clear, however: It is more appropriate to refer to "obesities" in the plural than to "obesity" in the singular, because obesity is heterogeneous and excess fat deposition is multifactorial.[162] In other words, even individuals of the same weight can weigh what they do for totally different reasons. These reasons range from normal genetic factors and rare genetic disorders to neuroendocrine conditions, weight gains associated with certain medications (such as gluticocorticoids, widely used in treating chronic immunologic disease, some antidepressants, and progestins[163]), and lifestyle-related factors of the types discussed above.[164]

With regard to genetics, there are a number of rare, abnormal genetic conditions that result in obesity, among other symptoms. Perhaps the best-known is Prader-Willi syndrome, in which obesity first manifests itself in very young children between one and three years old; these children develop a constant, ravenous appetite and often become extremely obese, "frequently . . . in excess of 200% of their ideal body weight."[165] Other genetic conditions that result in early-onset obesity, sometimes accompanied by mild mental retardation, are Bardet-Biedl, Ahlstrom, Cohen, and Carpenter syndromes.

However, when people speak in general of weight being "genetic," the more common reference is to non-abnormal genetics. Here, too, there is evidence for strong genetic ties. Studies of adopted children have demonstrated that while biological parents' body mass indices, or BMIs,[166] are directly correlated with those of their children, there is little or no relationship between the BMIs of adopted children and their adoptive parents, suggesting that the role of environmental factors in determining these children's weight is limited.[167] The evidence from studies of identical and fraternal twins shows a marked difference between the correlation of body weights for identical twins, who share identical genetic material, and fraternal twins, who do not—the correlation is much

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161 *See supra* note 87 for discussion of what constitutes morbid obesity.

162 George A. Bray, *An Approach to the Classification and Evaluation of Obesity*, *in* PER BJÖRNTORP & BERNARD N. BRODOFF, OBESITY 294, 294 (1992) [hereinafter OBESITY]; *see also* Claude Bouchard, *Genetic Aspects of Human Obesity*, *in* OBESITY 343, 343-44.

163 Bray, *supra* note 162, at 300-01.

164 *See supra* notes 148-157 and accompanying text.

165 William H. Dietz, *Genetic Syndromes*, *in* OBESITY, *supra* note 162, at 589, 589-90.

166 *See supra* note 87.

167 Bray, *supra* note 162, at 297.

closer for identical twins.[168] Thus, "[t]he best estimates suggest that genetic and environmental factors may be of equal importance in the overall determination of body fat and that genetic factors may be more important than environmental factors in determining fat distribution."[169]

There are a number of abnormal neuroendocrine conditions that are also associated with obesity. For example, traumatic injuries or diseases (e.g., cancer or inflammatory disease) of the ventromedial region of the hypothalamus, which is responsible for integrating information about energy stores, result in uncontrolled eating and obesity in patients.[170] Ovarian diseases in women, such as Stein-Leventhal or polycystic ovary syndrome (PCOS), are also correlated with weight gain and obesity. Although the directionality of the correlation between PCOS and obesity is not well understood, the correlation itself is clear; "[PCOS] is probably the most common endocrine disorder of reproductive-age women, affecting 1.5%-6% of this population . . . .[O]bese women with PCOS form one of the most prevalent subgroups of obesity."[171]

However, as with genetics, recent research has suggested that normal neuroendocrine functioning may also be tied significantly to body weight. An article published in the *New York Times* in October 2000 reported on a new wave of research focusing on the molecular causes of appetite and satiety: various molecules that occur normally in the body and are thought to either control appetite or react to signals from the body that it is not fat enough, which in turn triggers an urge to consume high-calorie foods.[172] These researchers suggest that, while everyone's eating is controlled by these and other molecules that send signals between the brain and the body, obese people are more likely to have a different balance of them or to be less responsive to them:

> There is very strong biological evidence that the brain receives signals from the body and the brain talks back," Dr. Leibel said. And this, not conscious decisions about how many calories to take in over days or weeks, is what regulates body weight to keep it in a narrow range, he added. While acknowledging that this notion of weight

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168 *Id.*

169 *Id.* at 297-98.

170 *Id.* at 298-99; *see also* Gina Kolata, *How the Body Knows When to Gain or Lose*, N.Y. TIMES, Oct. 17, 2000, at F1, F8 (discussing early evidence indicating that "when [the hypothalamus] was destroyed, animals, and people, ate ceaselessly and grew massively obese.").

171 Andrea Dunaif, *Polycystic Ovary Syndrome and Obesity*, *in* OBESITY, *supra* note 162, at 594, 594.

172 Kolata, *supra* note 170, at F8. *See also* Merritt McKinney, *"Obesity Hormone" Gene Mutation Found in Some Obese*, YAHOO! NEWS (Oct. 31, 2001) *available at* http://dailynews.yahoo.com/h/nm/20011031/hl/obesity_10.html (reporting that researchers in the UK have discovered that certain obese people have a genetic mutation that leads to low levels of leptin, a hormone released by fat cells and other tissues that can tell the brain to curb appetite).

> runs counter to beliefs about willpower and even free will, Dr. Leibel and others said it does not surprise them because the brain signals other sorts of behavior, like drinking and excreting the right amounts of water to maintain a precise balance in the body, and even making sure that people eat to maintain their blood sugar, when necessary. "If you had an abnormally low blood sugar level, would you be surprised if you got hungry and agitated?" Dr. Leibel said. Yet, he added, few would question that such behavior is driven by the brain, independently of willpower or free will.[173]

The results of the recent research are also consistent with the notion of set-point theory, which holds that individuals are biochemically "programmed" to weigh within a certain range, and that when their weights go either above or below that range, the body automatically adjusts its metabolism to maintain the set-point weight, resulting in a concomitant increase or decrease in hunger and interest in food. Ultimately, "[t]he weight range studies lead to an inevitable conclusion, obesity experts say: if researchers want to enable fat people to lose weight permanently, they have to enable them to change their natural weight range[, which] means identifying the biochemical signals between the brain and the body that control weight."[174]

Finally, it is of course well known that lifestyle factors such as eating habits and exercise level—particularly the latter—play an important role in determining an individual's weight. However, there is increasing evidence that an individual's fitness level—i.e., in terms of cardiovascular health, strength, and endurance—is not much related to his/her weight, and that many of the health risks often touted as associated with obesity may in fact stem from inactivity, regardless of weight.[175] Moreover, other evidence suggests that some of the health risks usually thought to be associated with obesity, such as hypertension and decreased longevity, may actually be caused by weight cycling, more commonly known as yo-yo dieting.[176] Thus, not only are the effects of diet and

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173 Kolata, *supra* note 170 (quoting Dr. Rudolph Leibel, obesity researcher at Columbia Presbyterian Medical Center).

174 *Id.*

175 FRASER, *supra* note 88, at 252-55; Steven N. Blair & Suzanne Brodney, *Effects of Physical Inactivity and Obesity on Morbidity and Mortality: Current Evidence and Research Issues*, 31 MED. & SCI. SPORTS & EXERCISE S646 (1999); *see, e.g.*, Jane E. Brody, *Fat But Fit: A Myth About Obesity is Slowly Being Debunked*, N.Y. TIMES, Oct. 24, 2000, at F7.

176 *See, e.g.*, SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION 204-07 (2000); Paul Ernsberger & Richard J. Koletsky, *Biomedical Rationale for a Wellness Approach to Obesity: An Alternative to a Focus on Weight Loss*, 55 J. SOC. ISSUES 221, 229-30, 246-47 (1999).

exercise on weight limited, especially in the presence of other genetic or neuroendocrine abnormalities, but the effect of weight on overall fitness and health may be greatly overestimated. Until doctors and researchers have a better understanding of the precise mechanisms that control weight, it will be difficult to say any more than this.

One final note on diet and exercise: Without question, there are habits, which are at least partially a matter of choice, that do factor into what an individual weighs. In other words, even though we all know some people who can eat whatever they want and never seem to gain an ounce, for many people, habits such as favoring high-fat, high-sugar, low-nutrition foods, eating very large portions, eating for non-hunger-related reasons, or spending all day in the car make them heavier than they would be otherwise. However, what is crucial to realize is that many of these are *culture-wide* phenomena, and this is precisely the reason weight has increased so broadly in this country in the last seventy or eighty years. For example, as one researcher explains, overweight people are far from the only ones whose eating behavior is partially determined by environmental factors—*everyone* is influenced by external cues in how, when, and where they eat.[177] This is the whole purpose behind food advertising: to make the viewer want to eat or buy the food being advertised, regardless of whether the viewer is actually hungry at the time. Likewise, the increased availability of snack foods, the large portions at American restaurants, and the increasing number of jobs that are essentially sedentary affect everyone, not just the laziest or most gluttonous among us. Thus, while it is clearly untrue that we are powerless to change our own weight or fitness level, it is important to recognize that, of all the factors that go into determining what someone weighs, lack of individual willpower is probably the lowest on the list in terms of impact—particularly in light of the effects of cultural stigmatization, to which I will now turn.

2. *Weight Stereotyping, Prejudice, and Discrimination*

One thing *is* absolutely clear: There are deeply entrenched cultural stereotypes, prejudices, and biases surrounding weight and fat in this country. Moreover, as will be evident from some of the dates on the studies discussed below, this is not exactly news to social psychologists: Extensive research in this area since the 1960s has revealed consistent evidence of the stigmatization of the overweight at practically every stage of life, in every area of functioning. Common stereotypes of overweight people depict them as "lazy, gluttonous, and both mentally and

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177 Gloria R. Leon, *Personality and Behavioral Correlates of Obesity*, *in* PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK 15, 25 (Benjamin B. Wolman ed., 1982).

physically slow."[178] Nor are these stereotypes hard to find: "Whereas open derogation of other stigmatized groups is seen as morally objectionable—or at least in bad taste—belittling jokes directed toward the overweight can be seen any night of the week on prime-time television."[179]

Researchers have known for a long time that weight prejudice starts early. One of the foundational studies in this area, published in 1961, asked ten- and eleven-year-old children to rank-order six drawings of children according to how much they liked them or would want to be friends with them.[180] The drawings showed a child with no physical handicap, one with a leg brace and crutches, one in a wheelchair, a hand amputee, a child with a facial disfigurement, and an obese child. The experiment was repeated with different groups of children of different sexes, races, socioeconomic classes, and urban versus rural settings, and yet the results were strikingly consistent: The child with no physical handicap was always ranked first, and the drawing of the obese child was ranked last or next to last.[181] More recent work confirms these results,[182] and indicates that antifat prejudices actually form much earlier than this, some in preschool children as young as three years old.[183] At five, children would rather lose an arm than be fat.[184] By the age of six to nine years old, children have already acquired an "active dislike" of fat bod-

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178 Diane M. Quinn & Jennifer Crocker, *Vulnerability to the Affective Consequences of the Stigma of Overweight*, *in* PREJUDICE: THE TARGET'S PERSPECTIVE 125, 125 (Janet K. Swim & Charles Stangor eds., 1998).

179 *Id.* Professor Bradley Greenberg of Michigan State University is currently conducting further research, under the aegis of the Rudd Foundation, in media depictions of overweight and obese characters on popular TV shows. *Cf.* Dave Kehr, *Seeing the Outsized Outsider in a (Slightly) New Way*, N.Y. TIMES, Nov. 25, 2001, § 2, at 25 (discussing a string of recent movies, including *Shallow Hal*, that depict large characters, and observing that, notwithstanding some evolution in the treatment of such characters, "fat as a metaphor is unlikely to go away anytime soon").

180 S.A. Richardson et al., *Cultural Uniformity in Reaction to Physical Disabilities*, 26 AM. SOC. REV. 241 (1961).

181 *Id.*

182 A recent study that repeated the experiments in the 1961 study indicated that the level of stigma against the obese has intensified over the last 40 years—"females disliked the obese person more than males and thinness was chosen as more likable than when the study was first conducted back in 1961." Keith Mulvihill, *U.S. Kids' Distaste for Obese Peers Has Grown*, YAHOO! NEWS (Nov. 9, 2001) *available at* http://dailynews.yahoo.com/h/nm/20011109/hl/peers_1.html (discussing results of study by Janet Latner of Rutgers University, presented at a conference sponsored by the American Obesity Association in Washington, DC on November 8, 2001).

183 Rebecca Puhl & Kelly D. Brownell, *Obesity and Discrimination* 13 (2000) (unpublished manuscript, on file with author) (discussing P. Cramer & T. Steinwert, *Thin is Good, Fat is Bad: How Early Does It Begin?*, 19 J. APP. DEVEL. PSYCHOL. 429 (1998)). *See also* Rebecca Puhl & Kelly D. Brownell, *Obesity Stigma* (2000) (unpublished manuscript, on file with author).

184 SOLOVAY, *supra* note 176, at 25 (citing Nicole Campbell, *Weighed Down*, DAILY CALIFORNIAN, May 16, 1995, at 9 (reviewing a *20/20* television interview of several five-year-old children, who unanimously decided they would rather lose an arm than be fat)).

ies; in the case of girls, this extends not only to the bodies of other children but to their own bodies as well.[185] As one might expect, the stigmatization becomes harsher as children reach adolescence;[186] extreme cases have been documented in which peer teasing caused overweight teens to commit suicide.[187] And, it should be noted, the stigmatization that *affects* overweight children does not come only from other children; the stigmatizing messages are often reinforced by teachers, coaches, and/or poorly run physical education programs with "requirements" that may be unrealistic for heavier children, such as passing the Presidential Physical Fitness Test, or may just be deeply humiliating, like mandatory weigh-ins.[188]

There is extensive documentation of weight prejudice among American adults.[189] One strong aspect of the general dislike of and hostility toward fat people in this country appears to stem from the notion of stigma controllability, as discussed above.[190] Social-psychological experiments on the subject of fat prejudice consistently implicate the perception of weight as controllable in explaining the level and nature of American hostility toward the overweight.[191] When an overweight or obese person can offer an "excuse" for his or her weight, such as a thyroid condition, or when the person can show that s/he is in the process of losing weight successfully, subjects assess him/her far less negatively than they do an obese person with no "excuse" or who isn't "coping" better.[192] The question remains, however: Given what we know about weight—that it is not completely within the individual's control—and given that anyone who *knows* anyone with weight problems is probably

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185 *Id.* at 34-35.

186 *See, e.g., id.* at 35-37; Puhl & Brownell, *Obesity Stigma*, *supra* note 183. There is an absolutely vast literature, both academic and popular, on adolescents and body-image issues, and it would be far beyond the scope of this article to attempt to detail even a significant part of it.

187 *See, e.g.*, SOLOVAY, *supra* note 176, at 58-59.

188 *Id.* at 52-56; *see also* Esther D. Rothblum et al., *The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization*, 37 J. VOCATIONAL BEHAVIOR 251, 262 (1990).

189 *See, e.g.*, Betsy Covell Breseman et al., *Obesity and Powerlessness*, *in* APPEARANCE AND POWER 173 (Kim K.P. Johnson & Sharron J. Lennon eds., 1999); Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self-Interest*, 66 J. PERSONALITY & SOC. PSYCHOL. 882 (1994); Christian S. Crandall & Rebecca Martinez, *Culture, Ideology, and Antifat Attitudes*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1165 (1996); William DeJong, *The Stigma of Obesity: The Consequences of Naive Assumptions Concerning the Causes of Physical Deviance*, 21 J. HEALTH & SOC. BEHAVIOR 75 (1980); Cheryl L. Maranto & Ann Fraedrich Stenoien, *Weight Discrimination: A Multidisciplinary Analysis*, 12 EMPLOYEE RESPONSIBILITIES & RIGHTS J. 9 (2000).

190 *See supra* notes 53-56 and accompanying text.

191 *E.g.*, DeJong, *supra* note 189, at 85; Crandall, *supra* note 189, at 884-88; Crandall & Martinez, *supra* note 189, at 1173; Weiner, *supra* note 53, at 964; Weiner et al., *supra* note 53, at 745; WEINER, *supra* note 53, at 75-78.

192 DeJong, *supra* note 189, at 85.

at least somewhat aware that this is the case, why would the belief that weight was controllable persist? Whereas DeJong and Weiner, for example, seem to feel that educating people as to the facts of stigma controllability should change their tendencies to stigmatize the obese,[193] Crandall maintains that the problem is more entrenched than that, and argues for a parallel between symbolic racism[194] and "antifatism":

> [T]he belief that fat people got that way primarily from overeating and a lack of self-control does not properly represent the scientific data. Instead, I propose the notion that holding antifat attitudes serves a value-expressive function, reinforcing a world view consistent with the Protestant work ethic, self-determination, a belief in a just world, and the notion that people get what they deserve. If ideology leads a person to chronically attribute controllable causality to others, he or she will tend to blame fat people for their weight and stigmatize them for it. A similar argument has been made for racism in particular. Many Whites hold Blacks accountable for their relatively poor economic status. The belief that individuals and disadvantaged groups are responsible for any negative aspects of their situation is known as the "ultimate attribution error."[195]

Crandall's results were further supported in a subsequent comparative study that looked at antifat attitudes in the United States and Mexico, where Crandall and Martinez found substantial differences both in the attitudes themselves and in the ideological networks that supported them.

Antifat attitudes in the United States were part of a social ideology that holds individuals responsible for their life outcomes and may derive from attributions of controllability over life events. Attributions of controllability were significantly less important in Mexico for predicting antifat attitudes, and antipathy toward fat people showed no evidence of being part of an ideological network. Prejudice toward fat people in the United States appears to have a significant ideological component.[196]

Overweight and obese people are generally no less likely to hold negative attitudes toward obesity than are average- or underweight people.[197] Self-protective defense mechanisms often do not successfully in-

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193 *Id.*; Weiner et al., *supra* note 53, at 745-46.

194 *See supra* text accompanying note 14.

195 Crandall, *supra* note 189, at 884.

196 Crandall & Martinez, *supra* note 189, at 1165.

197 Quinn & Crocker, *supra* note 178, at 127.

sulate the overweight,[198] who are part of the same culture and raised within the same ideological networks as everyone else, from self-blame and low self-esteem. Moreover, belief in that very ideology of blame and stigma controllability induces many overweight people who do not blame *themselves* for their condition to maintain negative attitudes toward *other* overweight people, precisely because they view their own membership in the stigmatized group as temporary. "There is no reason for them to develop group consciousness or attempt to change the way society views their weight because most members believe that they will be able to leave the group through weight loss."[199]

a. Employment Discrimination

These antifat stereotypes and prejudices have led to discrimination against the overweight in a number of areas. Of these, perhaps the most conspicuous is employment; there is extensive evidence of weight-based discrimination in hiring, wages, promotion, and termination. A foundational article published in 1979 was one of the first to demonstrate unambiguous discrimination in hiring against the overweight; it reported the results of two studies based on simulated job interviews:

> [F]or each of the 22 dependent variables on which there were significant weight condition differences, the overweight were rated more negatively than the average weight. This pattern of data provides strong support for the existence of a negative overweight stereotype. Specifically, overweight persons are seen as significantly ($p < .05$) less desirable employees who, compared with others, are less competent, less productive, not industrious, disorganized, indecisive, inactive, and less successful . . . .In addition, on skills measuring the degree to which certain terms or phrases characterize the target, the descriptive labels conscientious, takes the initiative, aggressive, perseveres at work, and ambitious were seen as *less* characteristic of the overweight than the average weight, while mentally lazy and lacks self-discipline were rated as *more* characteristic of the overweight.[200]. . . .The hypothesis that the applicant's weight would influence the decision to hire for a job opening

198 *Id.* at 135 (noting that women in general, and white women in particular, are especially vulnerable in this regard).

199 *Id.* at 127.

200 Judith Candib Larkin & Harvey A. Pines, *No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preference*, 6 SOC. WORK & OCCUPATIONS 312, 315-16 (1979).

> was confirmed. The overweight applicants were significantly less highly recommended . . . for hiring than the average weight . . . applicants . . . .Furthermore, the results of this direct measure of discrimination were confirmed by the indirect, social comparison measure of hiring bias. When asked to indicate their own chances of being hired compared with the applicant's, subjects' responses showed a significantly greater expectation of being hired after observing the overweight . . . than after observing the average weight . . . applicant, . . .suggesting a lower evaluation of the overweight applicant.[201]

More recent studies in both laboratory and field settings have repeatedly confirmed these results, not only with regard to hiring, but involving discrimination at all stages of the employment relationship.[202] Overweight employees were consistently viewed by potential and actual employers as lazy or sloppy; having poor personal hygiene; lacking self-discipline or self control; less competent, conscientious, healthy, or able to get along with others; and more likely to have emotional and personal problems or to be absent from work.[203] Moreover, even where specific information, such as high test scores or demonstrations of job-related skill, was presented to dispel the stereotype as applied cognitively to a particular employee or job candidate, the bias still persisted; this was found to be consistent with the line of research suggesting that affective factors play a very strong role in constituting biases that lead to discrimination.[204] Interestingly, one study even found that it appeared to make no difference whether physical appearance was relevant to the job description (i.e., extensive public contact would be required) in terms of the bias against hiring overweight applicants.[205] A number of studies also demonstrate significant gender effects of obesity, such that overweight women suffer more employment-related discrimination and

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201 *Id.* at 321.

202 *See, e.g.*, Regina Pingitore et al., *Bias Against Overweight Job Applicants in a Simulated Employment Interview*, 79 J. APP. PSYCHOL. 909 (1994); Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 969, 971-83 (1999) (summarizing studies); Rothblum et al., *supra* note 188 (using survey data compiled from real overweight and obese people in naturalistic settings, rather than in the lab); Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 4-6 (citing approximately fifteen different studies).

203 Roehling, *supra* note 202, at 984.

204 Pingitore et al., *supra* note 202, at 915; *see also supra* text accompanying notes 61-62 (discussing evidence from studies).

205 Pingitore et al., *supra* note 202, at 915. *But see* Roehling, *supra* note 202, at 987.

greater wage effects than do overweight men.[206] One such study, based on data taken from the National Longitudinal Survey of Labor Market Experience of Youth (NLSY), revealed that:

> For women, economically as well as socially, thinner is always better, no matter how thin you already are . . . .Our estimates indicate that the wages of mildly obese white women are 5.8% lower than their standard weight counterparts, and wages of morbidly obese white women are 20.0 to 24.1% lower, depending on the definition of morbid obesity used . . . .These differences yield substantial wage penalties for women. In contrast, . . . we estimate that men who are mildly obese experience a wage *premium* (7.1% for white men and 16.0% for black men) compared to their standard weight counterparts. Remarkably, men do not experience a wage penalty until their weight exceeds standard weight by more than 100 lb . . . .Men only experience wage penalties at the very highest weight levels. The wages of white men whose weight is 100% over standard for their heights are 19.6% lower, and those of black men are 3.5% lower than their standard weight counterparts. White women suffer greater wage penalties for mild obesity (20% over standard weight) than black men do for weight that is 100% over standard weight.[207]

Another study suggests that at least part of this wage discrepancy may be due to weight-related occupational sorting of males; in other words, overweight men may not have to suffer wage penalties because of lower barriers to occupational mobility, which allow them to sort themselves more easily into either relatively high-paying occupations or jobs where they are relatively more productive. Because the stigma of obesity is greater for women, however, the effect of labor market discrimination is to foster occupational segregation in jobs where wage penalties result.[208] Thus, while overweight and obese men unquestionably face discrimination in the workplace, their experience is different than that of overweight and obese women, who suffer more of it and take far greater wage cuts as well. In fact, Rothblum concludes that the often-observed correlation between poverty and obesity for women is misunderstood:

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206 *See, e.g.*, Maranto & Stenoien, *supra* note 189; José A. Pagán & Alberto Dávila, *Obesity, Occupational Attainment, and Earnings*, 78 SOC. SCI. Q. 756 (1997); Roehling, *supra* note 202, at 985; Esther D. Rothblum, *The Stigma of Women's Weight: Social and Economic Realities*, 2 FEMINISM & PSYCHOL. 61 (1992).

207 Maranto & Stenoien, *supra* note 189, at 19.

208 Pagán & Dávila, *supra* note 206, at 757.

Whereas most people tend to assume that poverty causes obesity, her research has indicated that obesity, because of these wage effects, effects on occupational mobility, and discrimination in access to prestigious education, actually causes poverty.[209]

The range of discrimination demonstrated in the social science research is also reflected in the cases that have reached the courts. However, because of the standards of proof required in court, these cases tend to reflect situations where there is an explicit physical and/or weight-related requirement in place; the presence of such a requirement makes it incontrovertible that the employee's weight was a genuine consideration in the employer's decision, and thus enhances the plaintiff's likelihood of prevailing on a claim of weight-based discrimination. Employers who require a pre-hire physical or have height and weight requirements for their employees often use these requirements as screening mechanisms in order to refuse to hire[210] potential employees, or to refuse to promote,[211] or discipline[212] or terminate,[213] present employees, who do not comply with weight standards. Therefore, although police departments and airlines show up with particular frequency as defendants in these cases, this does not warrant a conclusion that these are the only, or even the primary, areas in which weight-based employment discrimination occurs—it may just be that the explicit weight standards make these cases more feasible to bring and to prove in court. No type of workplace seems to be categorically exempt: Other weight-discrimination cases have been brought against hospitals and nursing homes,[214] delivery and transporta-

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209 Rothblum, *supra* note 206, at 66-68. *But see* Ernsberger & Koletsky, *supra* note 176, at 244 (noting that "[o]besity can be either a cause or a consequence of poverty").

210 *E.g.*, Cook v. Rhode Island Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993); Jones v. City of Mount Vernon, 114 F. Supp. 2d 274 (S.D.N.Y. 2000); Furst v. N.Y. Unified Court Sys., No. 97-CV-1502 (ARR), 1999 WL 1021817 (E.D.N.Y. Oct. 18, 1999); EEOC v. Tex. Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996); Wolf v. Frank, Civil Action 92-76270, 1994 U.S. Dist. LEXIS 10356 (E.D. Mich.); Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993); State Div. of Human Rights v. Xerox Corp., 478 N.Y.S.2d 982 (N.Y. App. Div. 1984); Thomas J. Lipton, Inc. v. N.Y. State Human Rights Appeal Bd., 413 N.Y.S.2d 233 (N.Y. App. Div. 1979).

211 *E.g.*, Greene v. Union Pac. R.R. Co., 548 F. Supp. 3 (W.D. Wash. 1981).

212 *E.g.*, Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082 (S.D. Iowa 1997); Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996); Civil Serv. Comm'n v. Pa. Human Relations Comm'n, 591 A.2d 281 (Pa. 1991).

213 *E.g.*, Donoghue v. County of Orange, 848 F.2d 926 (9th Cir. 1987); Johnson v. City of Tarpon Springs, 758 F. Supp. 1473 (M.D. Fla. 1991); Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697 (S.D.N.Y. 1997); Polesnak v. R.H. Mgmt. Sys., No. 95-1705, 1997 U.S. Dist. LEXIS 22106 (W.D. Pa. Jan. 3, 1997); Nedder v. Rivier Coll., 944 F. Supp. 111 (D.N.H. 1996); Smaw v. Va. Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994); Gimello v. Agency Rent-A-Car Sys., 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

214 *Cook*, 10 F.3d 17; *Krein*, 415 N.W.2d 793.

tion services,[215] restaurants,[216] grocery stores,[217] and colleges,[218] to name only a few.

It should be noted that the threshold for discrimination in these cases is far below morbid obesity; while many of the plaintiffs are obese, and some are morbidly obese, others are barely even overweight. This is one area in which the airline cases, which almost exclusively involve flight attendants terminated or disciplined for exceeding weight requirements, are somewhat unusual—in these cases, individuals who are overweight (or over the maximum weight imposed by the airline) by as little as ten pounds are subject to adverse employment actions.[219] Moreover, it should be stressed that—as the airlines themselves admit, and the courts recognize—the weight and other appearance restrictions for flight attendants are in no way based on health or safety concerns, or on the ability of the individual to "greet passengers, push carts, move luggage, and, perhaps most important, provide physical assistance in emergencies."[220] Rather, the airlines explain that these standards are in place purely to promote their chosen corporate images, from "lean [and] lithe"[221] to "a quality image of the flight attendants as clean, healthy, attractive individuals who take pride in themselves and their job"[222] or even "the love airline."[223] (Although I will address the law on weight discrimination in detail below, in order to spare the reader the inevitable suspense I will note now that the courts have held—as they must, under

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215 *Tex. Bus Lines*, 923 F. Supp. 965; *Gimello*, 594 A.2d 264.

216 *Polesnak*, 1997 U.S. Dist. LEXIS 22106.

217 Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993).

218 *Nedder*, 944 F. Supp. 111.

219 *E.g.*, Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000); Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., No. 73 C 1082, 1979 U.S. Dist. LEXIS 11790 (E.D.N.Y. 1979). In one case, an individual was terminated who was over the weight limit but who was not even slightly overweight or obese—he was a male bodybuilder. Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984).

However, weight discrimination against non-obese employees is not confined to the airline industry. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997) (firefighter); Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997) (state highway patrol officers).

220 *Frank*, 216 F.3d at 855. In fact, in at least one case the weight requirements were found to positively undermine the ability of flight attendants to perform these tasks. Gerdom v. Continental Airlines, Inc. 692 F.2d 602, 604 (9th Cir. 1982). *But see* In re Nat'l Airlines, Inc., 434 F. Supp. 269, 274 (S.D. Fla. 1977) (The judge observes that a defense witness "points out an obvious conclusion: that 'tubbies' on airlines are less agile and agility is an important factor in flight attendants discharging the primary duty of providing safety for passengers." The same judge later takes judicial notice, based on his personal experience, "[t]o the extent permitted by Federal Evidence Rule 201 . . . that in southern Florida National's flight attendants enjoy a reputation for competence as well as good looks." *Id.* at 275-76 n.9).

221 In re *Nat'l Airlines, Inc.*, 434 F. Supp. at 275 n.9.

222 *Air Line Pilots Ass'n, Int'l*, 1979 U.S. Dist. LEXIS 11790, at *15-16.

223 Wilson v. S.W. Airlines Co., 517 F. Supp. 292, 294 (N.D. Tex. 1981).

current law—that these standards are legal unless they impose different burdens by sex or some other protected criterion.[224])

There have also been a few weight-based harassment suits, the facts of which can sound strikingly parallel to many sexual harassment cases.[225] For example, when Brian Butterfield began work as a corrections officer with the New York State Department of Corrections in 1989, he was 5 feet, 7 inches tall and weighed in excess of 400 pounds; in 1993 he underwent gastric bypass surgery and his weight dropped to 255 pounds.[226] Butterfield alleged that he had been "subjected to differential terms and conditions of employment on the basis of his size," including name-calling (e.g., "Butterball"),[227] since he was first hired, but the intense harassment began after he returned to work after his surgery, in the fall of 1993. Butterfield began to keep records of the harassment in May of 1994.[228] On July 5, 1994, he registered a complaint with the Office of the Inspector General; the incidents of harassment subsequently multiplied. The examples of harassment cited by Butterfield were numerous: In July through August of 1994 alone, Butterfield's coworkers put an unknown substance in his soda when his back was turned, which caused nausea and burning in his stomach; Butterfield began to receive harassing phone calls (which were traced to the correctional facility where he worked) both at work and at home; other officers refused to line up next to him as they were supposed to; and Butterfield's locker at work was sprayed with cheese.[229] Beginning in February of 1995, obscene and harassing remarks began to appear scrawled on Butterfield's time cards, and in April he found a dead rat in an envelope addressed to him in his work mailbox.[230] As the court observed,

> [T]aking his allegations as true, what he has presented in this case is graphic evidence of what appears to be an overwhelming and persistent pattern of severe harassment by department personnel, a good portion of it focused quite explicitly upon Butterfield's obesity, and—

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224 That is to say, as a matter of federal law, unless they violate Title VII or the ADA. Thus, as one judge explained, "Even assuming that [the airline] may impose different weight standards on female and male flight attendants, [it] may not impose different and more burdensome weight standards without justifying those standards as BFOQs." *Frank*, 216 F.3d at 855.

225 Butterfield v. New York, 96 Civ. 5144 (BDP) (LMS), 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y. 1998); *see also* Sharlene A. McEvoy, *Tipping the Scales of Justice: Employment Discrimination Against the Overweight*, 21 HUM. RTS. 24 (1994) (discussing harassment case where plaintiff's coworker "poked, pinched, and ridiculed her in the presence of customers, saying that fat people lie and stink").

226 *Butterfield*, 1998 U.S. Dist. LEXIS 18676, at *9-12.

227 *Id.* at *21.

228 *Id.* at *13-14.

229 *Id.* at *14-17.

230 *Id.* at *18.

> most importantly—a striking failure on the part of management to effectively investigate or stop the harassment, or even to punish any particular individuals who participated in it, or any officers who observed it and failed to stop it.[231]

The *Butterfield* case and the others discussed above have very important legal and precedential value, and I will turn to the legal aspects of these cases in Section C below. For our immediate purposes, though, the cases provide strong evidence of weight-based employment discrimination that occurs in the real world, reflecting and confirming the results obtained in the social science studies.

b. Discrimination in Provision of Goods and Services

The overweight and obese are also discriminated against on the consumer end of the marketplace. For example, in the clothing industry, as Breseman et al. note,

> It is puzzling that there are not more stores catering to obese women because popular sources of fashion and apparel information such as trade and fashion publications report that approximately 31 per cent of all American women nationwide are size 16 or larger and spend over $10 billion on clothing annually. Furthermore, at least 45% of such women are 24 to 35 years old, making them the "most powerful clothes-purchasing segment of the U.S. population."[232]

Despite the obvious potential for moneymaking in this market, the attitudes of many top apparel companies that regard plus-sized clothing as "fashion poison" have served to restrict greatly plus-sized women's choices in the clothing market; such clothing is more likely to be available in places like New York City than elsewhere.[233] Moreover, studies have indicated that overweight and obese customers are subject to disparate treatment by sales staff in retail stores, who are slower and more reluctant to wait on them.[234]

Although not much research has been done in this area, there is substantial anecdotal evidence (some of it from legal cases) that overweight and obese people also experience discrimination in public accom-

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231 *Id.* at *42.

232 Breseman et al., *supra* note 189, at 180-81.

233 *Id.* at 181.

234 *Id.*

modations such as restaurants,[235] movie theaters,[236] and transportation services,[237] where seats are often too small for them. Businesses are often reluctant to make substantial changes that would accommodate the obese, often due to the financial costs involved.[238] However, there is something more going on here than a simple cost-benefit analysis: Even where accommodation can be made without costly structural changes, and where it is in fact made for non-obese people, some businesses still refuse to do so for the obese. Thus, for example, "if a woman is nine months pregnant, an airline will not force her to purchase two seats because she does not fit in one seat. The airlines make accommodations for travelers using wheelchairs, and do not question a pregnant woman's right to occupy [more than] one seat, while they [insist that] obese people [ ] buy two seats."[239] And the public humiliation and deliberate mockery that accompanies some of these incidents owes nothing to financial considerations.[240]

One small study also found evidence of landlords' discrimination against obese college students seeking to rent apartments. When normal-weight and obese testers were sent out to eleven different properties advertised for rent in a small college town, it was found that five out of the eleven landlords would not rent to the obese tester, whereas all eleven offered their apartments to the non-obese tester; of the five who refused, three increased the rent, and two claimed that the apartment was "practically rented to another college student."[241] Moreover, the landlord's weight did not have any apparent effect on whether or not s/he rejected the tester.[242]

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235 *E.g.*, Sellick v. Denny's Inc., 884 F. Supp. 388 (D. Or. 1995).

236 *E.g.*, Birdwell v. Carmike Cinemas, No. 2940014 (M.D. Tenn. 1994), *cited in* Milena D. O'Hara, Note and Comment, *"Please Weight to be Seated": Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations*, 17 WHITTIER L. REV. 895, 903-04 (1996).

237 *E.g.*, Hollowich v. S.W. Airlines Co., No. BC035389 (Cal. 1991), *cited in* O'Hara, *supra* note 236, at 904-05; Green v. Greyhound, No. 92VS55226H (N.D. Ga. 1992), *cited in* O'Hara, *supra* note 236, at 905.

238 O'Hara, *supra* note 236, at 906.

239 *Id.* at 907. The same problem appears to persist in Canada. The Canadian Transport Agency recently held that obesity, "as a general case," is not a disability requiring accommodation under the Canada Transport Act. *Canadian Tribunal Rules Obesity Isn't a Disability*, REUTERS HEALTH (Dec. 13, 2001) *available at* http://hvlib.integris-health.com/HealthNews/reuters/NewsStory1213200132.htm (last visited Jan. 12, 2002).

240 *See, e.g.*, Sellick v. Denny's Inc., 884 F. Supp. 388, 391-92 (D. Or. 1995) (open mockery of morbidly obese customer by staff); Hollowich v. S.W. Airlines Co., No. BC035389 (Cal. 1991), *cited in* O'Hara, *supra* note 236, at 905 (morbidly obese passenger "pulled out of line by Southwest employees in the presence of a large group of people and told that she was obliged to buy another seat. If she refused, they warned her that they would take her off the plane with armed guards.").

241 Lambros Karris, *Prejudice Against Obese Renters*, 101 J. SOC. PSYCHOL. 159, 160 (1977).

242 *Id.*

Health insurance remains another area in which the obese often encounter problems. Puhl and Brownell point out that it is common for health insurance plans explicitly to exclude obesity treatment from coverage, and for physicians to encounter difficulty in receiving reimbursement for their services.[243] Until December of 2000, the IRS had excluded weight loss programs "not for the purpose of curing any specific ailment or disease, but for the purpose of improving the individual's appearance, health, and sense of well being" as a medical deduction, even when prescribed by a doctor.[244] In December 2000, the IRS changed its policy so that weight-loss programs "undertaken at a physician's direction to treat an existing disease (such as heart disease)" are now deductible, but "if the purpose of the weight control is to maintain your general good health," the cost of the program is still not deductible.[245] Also, in October of 1999 the Social Security Administration eliminated obesity as a separate listing from its list of impairments used to determine eligibility for disability payments; it is now to be listed as a "medically determinable impairment" to be considered as an aggravating factor along with other causes of disability (e.g., musculoskeletal, respiratory, or cardiovascular).[246] The SSA made this change "on the grounds that the listing was too difficult to administer in the old form and led to decisions that were undeservedly favorable."[247]

As to why coverage for obesity treatment persists in being inadequate, Puhl and Brownell suggest that the notion of obesity as a problem of willful behavior may once again be to blame[248]; also, obesity treatments are relatively expensive, and their success rate is generally low.[249]

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243 Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 10.

244 Rev. Rul. 79-151, 1979-1 C.B. 116 (1979).

245 American Obesity Ass'n, *A Taxpayer's Guide on IRS Policy to Deduct Weight Control Treatment* (Dec. 2000), *at* http://www.obesity.org/taxguide.htm (last visited Mar. 27, 2001). The AOA Guide notes that the IRS made this change in response to a petition filed by the AOA and nine other organizations, among them the American Association of Bariatric Physicians, Jenny Craig, Inc., Knoll Pharmaceutical Co., Obesity Law and Advocacy Center, and Weight Watchers Int'l, Inc.

246 Clara W. Dworsky, *A Weighty Problem: Obesity and Social Security Changes*, 10 EXPERIENCE 37, 37 (Winter 2000).

247 *Id.* Note, however, that the case law seems more inconsistent than undeservedly favorable. *See, e.g.*, Stone v. Harris, 657 F.2d 210 (8th Cir. 1981) (holding that no underlying physical cause was required to establish obesity as a disability, and that "[t]he notion that all fat people are self-indulgent souls who eat more than anyone ought appears to be no more than the baseless prejudice of the intolerant svelte"); Valdez v. Heckler, 616 F. Supp. 933 (N.D. Cal. 1985) (holding that "[i]mpairments that can be reasonably remedied by treatment cannot function as the basis for a finding of disability[, and] a claimant who willfully fails to follow prescribed treatment [i.e., to lose weight] which could be expected to restore her ability to work, is not under a disability").

248 Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 11 (citing A. Frank, *Conflicts in the Care of Overweight Patients: Inconsistent Rules and Insufficient Money*, 5 OBESITY RESEARCH 268 (1997)).

249 *Id.*; *see also infra* note 268.

The result is that obese patients are often denied access to beneficial treatment to an extent disproportionate to the standards of health insurance otherwise available in the United States.[250]

c. Discrimination in the Medical Field

Another major trouble area lies in the very profession that purports to be most concerned with Americans' weight: medicine. Despite the fact that health care professionals, if anyone, should be familiar with the scientific and medical facts about overweight and obesity, as Solovay explains,

> There are three fundamental beliefs about fat held by the medical establishment all of which have profound implications not only for the health and well-being of fat people, but also for the law. These rarely challenged assumptions are: that weight is mutable, that weight loss is a benign procedure, and that fat is unhealthy. Medicine's failure to examine these basic assumptions critically has resulted in the development of a field riddled by bias.[251]

Scholars and critics of medicine's approach to obesity have focused on two main areas: health care professionals' prejudices regarding obese or overweight patients, and the medical profession's hostile, "epidemiological" approach to the general problem of obesity in America. As to the former, several studies have documented significant anti-fat attitudes, prejudice, and bias among doctors, nurses, and other health care professionals. For example, in one study of over 400 physicians, over one third of the respondents listed obesity as a condition that aroused feelings of discomfort, reluctance or dislike, and associated it with poor hygiene, non-compliance, hostility, and dishonesty.[252] In another study of 318 family physicians, two-thirds of those surveyed reported that "their obese patients lacked self control and 39% stated that their obese patients were lazy."[253] And a study that focused on nutritional specialists found that 87% characterized obese persons as indulgent, 74% as having family problems, and 32% as lacking willpower; moreover, 88% characterized obesity as a form of compensation for lack of love or attention, and 70%

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250 Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 11 (citing Frank, *supra* note 249, at 270).

251 SOLOVAY, *supra* note 176, at 189.

252 Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 7 (citing D. Klein et al., *Patient Characteristics that Elicit Negative Responses from Family Physicians*, 14 J. FAM. PRAC. 881, 883 (1982)).

253 *Id.* (citing J.H. Price et al., *Family Practice Physicians' Beliefs, Attitudes, and Practices Regarding Obesity*, 3 AM. J. PREVENTIVE MED. 339, 342 (1987)).

attributed it to emotional problems.[254] Studies of nurses obtained similar results, finding that nurses were far more likely to blame patients than the ineffectiveness of current weight loss programs for unsuccessful weight loss,[255] and that nurses viewed obese persons as deficient in self control, less successful, overindulgent, lazy, and experiencing unresolved anger.[256] Forty-eight percent of nurses indicated that they felt uncomfortable caring for obese patients, and 31% would prefer not to care for them at all.[257]

Other studies have indicated that these prejudices and negative attitudes on the part of health care providers have the unfortunate result of causing overweight and obese patients to avoid seeking health care.[258] And still other evidence suggests that, once overweight people do seek medical treatment, their health problems are more likely to be misdiagnosed because doctors are quick to attribute symptoms like amenorrhea, fatigue, pain, or headaches to the patient's weight rather than to another medical condition, such as pregnancy, mononucleosis, cancer, or eye problems.[259]

These tendencies to misdiagnose fat patients are consistent with the medical profession's current general outlook on obesity, which can only be described as hysterical. Although those of us outside the medical profession tend to think of medical research as a purely scientific endeavor whose goal is to elucidate the "truth" about how human biology and biochemistry works, there are many conflicting interests within medicine that, unfortunately, have serious effects on how medical data and medical advice are presented to the general public.[260] There is a large subset of

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254 *Id.* (citing L.A. Maiman et al., *Attitudes Toward Obesity and the Obese Among Professionals*, 74 J. AM. DIETETIC ASS'N 331, 332 (1979)).

255 *Id.* (citing R. Hoppe & J. Ogden, *Practice Nurses' Beliefs About Obesity and Weight Related Interventions in Primary Care*, 21 INT'L J. OBESITY 141, 143 (1997)).

256 *Id.* (citing D. Maroney & S. Golub, *Nurses' Attitudes Toward Obese Persons and Certain Ethnic Groups*, 75 PERCEPTUAL AND MOTOR SKILLS 387, 389 (1992)); *see also* SOLOVAY, *supra* note 176, at 219.

257 Puhl & Brownell, *Obesity and Discrimination*, *supra* note 183, at 7-8.

258 *Id.* at 9-10.

259 SOLOVAY, *supra* note 176, at 220-22.

260 Conflicts of interest in medicine and public health are by no means limited to obesity research. Another well-known example is the controversy surrounding the USDA's most recent set of dietary guidelines, including the "Food Guide Pyramid," which is supposed to indicate graphically how many daily servings of various types of foods are recommended for healthy eating. The last version of the Pyramid was published in 1996, U.S. DEP'T OF AGRIC., THE FOOD GUIDE PYRAMID (1996), and was reviewed in 2000 amidst a firestorm of criticism and allegations of conflict of interest. One organization, the Physicians Committee for Responsible Medicine, filed a lawsuit against the USDA and HHS, charging that six of the eleven panel members who were to review the guidelines had "inappropriate financial ties" to the dairy, meat, and egg industries. Sam Fulwood III, *Diet Guidelines Prompt Food Fight*, L.A. TIMES, Jan. 9, 2000, at A22. The physicians' organization was particularly concerned with the guidelines' stress on milk and dairy foods as important sources of calcium, given that many

the current medical literature that stresses the characterization of obesity itself as a disease, and focuses on its "epidemiology" and causal relationship to other "comorbidities" such as heart disease and decreased longevity.[261] This literature also tends to focus on the health costs of obesity to the nation at large, presenting enormous statistics about how much obesity costs the economy in medical services, lost productivity, and so forth.[262] While this trend might at first seem to reflect a diminution of antifat prejudice, in that physical "diseases" are generally viewed as less controllable by the individual afflicted with them (and therefore less stigmatizing), the result has been the waging of an all-out "war" on obesity within the medical profession, where obesity is viewed, plague-like, as something to be stamped out at any cost.

If the evidence for the causal relationship between weight and "comorbidities" is as unclear and controversial as it seems to be,[263] then why are so many medical researchers so quick to interpret ambiguous medical findings as clear evidence of the health harms and economic costs of obesity? The reasons may partially relate to the antifat prejudices and stereotypes discussed above, but several authors have suggested another reason: conflicts of interest "manifested by [ ] physicians' personal, professional, emotional, and financial stakes in the determination that obesity is an evil."[264] For example, Ernsberger and Koletsky point out that

> The National Institutes of Health frequently convene panels of experts to discuss important and controversial

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dark, leafy green vegetables are viable alternative calcium sources, and that non-Caucasian populations are far more likely than Caucasians to be lactose-intolerant. *Id.* In the course of the same review, controversy also arose over the USDA's dietary guideline on sugar: While the original wording had urged Americans to "limit" their intake of sugar, vigorous lobbying from the sugar industry and a letter signed by 30 senators, mostly from sugar-farming states, resulted in a change in language. Raja Mishra, *Food Guidelines Go Softer on Sweets Industry, Senators Influenced Wording*, BOSTON GLOBE, May 27, 2000, at A1. Now, the guideline urges Americans to "choose beverages and foods to *moderate* your intake of sugar." *Id.* (emphasis added).

261 *E.g.*, Ali H. Mokdad et al., *The Continuing Epidemic of Obesity in the United States*, 284 J. AM. MED. ASS'N 1650 (Oct. 4, 2000); Aviva Must et al., *The Disease Burden Associated with Overweight and Obesity*, 282 J. AM. MED. ASS'N 1523 (Oct. 27, 1999). *But see* A. Tremblay & E. Doucet, *Obesity: A Disease or a Biological Adaptation?*, 1 OBESITY REVIEWS 27, 33 (2000).

Ernsberger and Koletsky also note the problem of selective citations of these kinds of studies. Their citation analyses indicate that studies emphasizing a strong upward trend of mortality with increasing body weight are cited far more frequently than studies with contrary results, even with all other factors (e.g., prestige of the journal or of the researcher) being equal. Ernsberger & Koletsky, *supra* note 176, at 248.

262 *E.g.*, *The Cost of Obesity in the U.S.*, 2 AM. OBESITY ASS'N REP. 1 (Oct. 19, 1999), *at* http://www.obesity.org/obesity_costs.htm (last visited Feb. 18, 2001).

263 *See* Section B.1 *supra*.

264 SOLOVAY, *supra* note 176, at 211.

> issues in medicine and to arrive at compromise or consensus statements that are almost universally agreed upon. This process has worked well for many topics, as experts representing a spectrum of opinion are brought together and reach agreement on the current state of knowledge in their field. A major problem with consensus panels, however, is that many of the experts represent special interest groups . . . . This is clearly a problem with NIH panels on obesity, on which the multibillion-dollar interests of the weight loss industry have been well represented.[265]

Thus, a number of mainstream medical precepts agreed upon by consensus panels serve to favor the growth and profitability of the weight-loss industry: Exaggeration of the ill effects of obesity sends more people running to doctors and weight-loss programs and facilitates third-party payments for such services; setting body weight standards as low as possible expands the client base for such services, as more people become "too fat" by definition; and de-emphasizing the negative health consequences of weight cycling encourages repeat utilization of weight-loss services.[266] This phenomenon is even less surprising given that many of the "experts" on these panels are either funded by pharmaceutical companies or are active participants in the weight-loss industry themselves, running diet clinics, publishing diet books, or working for weight-loss companies such as Weight Watchers International.[267] The unfortunate result is that, for all people of above-average weight, and especially for the obese, the medical establishment is quick to refer them to diet pills and programs that fail in the vast majority of cases[268]— and thereby to imply that any subsequent failure is entirely the patient's fault.

d. The Legal System: Juries and Prisons

There is also evidence from legal cases that demonstrates the operation of weight discrimination within the legal system itself—particularly juries and prisons. As the Ninth Circuit Court of Appeals noted in

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265 Ernsberger & Koletsky, *supra* note 176, at 249.

266 *Id.*

267 *See, e.g., id.* at 252 (table summarizing conflicts of interest among members of the National Task Force on the Prevention and Treatment of Obesity); SOLOVAY, *supra* note 176, at 211-12; FRASER, *supra* note 88, at 214-17.

268 *See, e.g.*, C. Ayyad & T. Andersen, *Long-Term Efficacy of Dietary Treatment of Obesity: A Systematic Review of Studies Published Between 1931 and 1999*, 1 OBESITY REVIEWS 113 (2000) (finding a 15% success rate for dietary treatments, with very broad definition of "success"); FRASER, *supra* note 88, at 182 (quoting Yale obesity researcher Kelly Brownell's observation that "most people stand a better chance of recovering from most forms of cancer than losing weight and keeping it off").

United States v. Santiago-Martinez, *Batson v. Kentucky*'s prohibition on race-based peremptory challenges does not apply to weight-based challenges, since "no court has yet held that discrimination on the basis of obesity is subject to 'heightened scrutiny' under the Equal Protection Clause."[269] However, the result of obesity's exemption from heightened scrutiny has been to give antifat prejudice and discrimination free play.

In a California murder case, *People v. Galbert*,[270] one of the defendant's grounds for appeal was that the prosecutor had used his peremptory challenges to strike black women from the jury in violation of *People v. Wheeler* (the California state law equivalent of *Batson*). The prosecutor's response with regard to two of the three jurors was that he had not struck them because of their race, but because of their weight; the language is worth reproducing at some length:

> [After explaining that he dismissed the first juror because she wore a nose ring and had long, braided hair,] [t]he prosecutor's objections to the second juror, Ms. L., were similar: "Ms. L. also is a person, a younger person . . . . She's grossly overweight . . . .She's got on a little tiny skirt that doesn't fit her and she's got on a sweat shirt . . . .She looked like someone who gave very little attention to how she came into this courtroom and how she looked . . . .The problem with that is a person who comes into a courtroom looking like that, with a skirt that's hiked halfway up her thighs when she sits, when she stands, and then when she sits you can see everything God gave the woman, I'm very uncomfortable taking a case of this seriousness to someone whose attire is so sloppy and inappropriate for the kind of proceedings that we're involved in." The prosecutor excused the third juror, Ms. A., for related reasons: "Braids, obesity, size, manner of dress. Ms. A. had very large, very thick braids. She had a dark blue pant suit on with very large gold-plated buttons and very long dangling earrings, which are just to me signs of, I won't say ostentatious dress because in other circumstances they may be important, but to me the way a person comes into a courtroom tells me a lot about what I may have to deal with down a line. And a person who is that young, who is that big, who dresses in such a manner to draw that kind of attention to herself, I'm just very uncomfort-

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269 United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995).

270 People v. Galbert, No. A064486, 1995 WL 108696, at *1 (Cal. Ct. App. Jan. 30, 1995).

> able in bringing a case to her whether she is white or . . . black or whatever."[271]

A federal case, *Torcasio v. Murray*,[272] involved a morbidly obese inmate who alleged that the Virginia correctional facility where he was incarcerated did not do enough to accommodate his size and disabilities. All of his claims were dismissed on the grounds of qualified immunity for the prison officials, which effectively means that, if the rule articulated in this case were to be followed across the nation, prisons could more or less completely refuse to accommodate obese inmates at all, as long as this could be construed not to conflict with other federal laws (which the judge in *Torcasio* believed to be the case).[273]

e. Family Law and Child Custody

Finally, some family law cases, particularly those involving custody of overweight children, can implicate issues of weight-based discrimination. In particular, childhood obesity is sometimes viewed as per se evidence of poor or neglectful parenting, and it has been used to remove children from their parents' custody or to subject some aspect of their lives to ongoing control by a court or agency. Thus, for example, in *Fillingim v. Fillingim*,[274] the Alabama court essentially elected to manage the child's weight itself, requiring that the child be placed on a weight reduction program and that his weight be reported monthly to the court. When the mother "diminished the size of her son's meals and [ ] eliminated some objectionable foods therefrom, but [did not place] him on a diet,"[275] the trial court placed her in contempt of court, and the appeals court upheld the trial court judgment. In another case, an Iowa appeals court upheld the trial court's adjudication of a girl as a "child in need of assistance," because, despite the mother's obtaining medical and psychological help for her daughter, the child continued to gain weight and the mother was reluctant to place her in a residential program.[276]

In one highly-publicized California case, when Christina Corrigan died at the age of 13, weighing 680 pounds, her mother was prosecuted criminally. Christina had been extremely, disproportionately heavy since infancy, and despite constant medical attention and participation in medically supervised diet programs, she continued to gain weight rapidly throughout her life.[277] She stopped attending public school in middle

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271 *Id.* at *2.
272 Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) (Luttig, J.).
273 *Id.* at 1353.
274 388 So.2d 1010 (Ala. Civ. App. 1980).
275 *Id.* at 1012.
276 *In re* the Interest of L.T., 494 N.W.2d 450 (Iowa Ct. App. 1992).
277 SOLOVAY, *supra* note 176, at 14-16.

school, in part because the school was not able to accommodate her physical limitations, and in part because of the relentless harassment she received from other children and adults.[278] Finally, one day, when Christina's mother, Marlene, went out briefly to buy some iced tea, she came home to find her daughter dead. The cause of Christina's death was never determined, because, despite Marlene's request, a full autopsy was never done,[279] but eight months later Marlene was charged with felony child abuse/endangerment. While the precise nature of the criminal charges was never quite clear, "[i]t was widely reported that overfeeding and 'allowing' Christina's weight gain were factors."[280] Marlene opted for a bench trial, and the judge found her guilty of a misdemeanor, sentencing her to community service, counseling, and probation—all for having a child whose weight she could not control.

3. *The Size-Acceptance Movement*

Despite the intense stigma and shame associated with overweight and obesity in this country, the last 30+ years have seen the beginnings of a size-acceptance movement aimed at combating weight-based discrimination and securing full civil rights for overweight and obese people. NAAFA, the National Association to Advance Fat Acceptance, was founded as a nonprofit human rights organization in 1969; currently with approximately 5000 members worldwide,[281] its mission is "to eliminate discrimination based on body size and provide fat people with the tools for self-empowerment through public education, advocacy, and member support."[282] Its political and legal activities include participating in rallies and demonstrations, serving as a national legal clearinghouse for attorneys challenging size discrimination, fighting offensive advertising and negative media representation through letter-writing campaigns, representing the interests of the fat population at conferences of the National Institutes of Health (NIH) and obesity research conferences, and representing consumers in legislative hearings to regulate the commercial weight loss industry.[283] NAAFA also works to educate the public on size- and weight-related issues through discussion groups, conventions, and working with the media, and provides support for fat people.

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278 *Id.* at 16-18.

279 *Id.* at 20-21.

280 *Id.* at 19.

281 E-mail from Ann Rollinson, Administrative Office Assistant, NAAFA National Headquarters, to author (Apr. 2, 2001) (on file with author).

282 NAAFA, *National Association to Advance Fat Acceptance Home Page*, *at* http://www.naafa.org (last visited Mar. 27, 2001).

283 NAAFA, *NAAFA Information*, *at* http://www.naafa.org/documents/brochures/naafa-info.html (last visited Mar. 27, 2001).

At the same time, as the information presented in this article so far reflects, the size-acceptance movement is still very much in its infancy. Its views are far outside the American mainstream, and, as I explain below, we are far away from a legal regime that successfully protects people from weight-based discrimination. Although advocates have often been left, for lack of a better option, to pursue claims of weight discrimination under disability statutes, I argue that the kinds of severe stigmas that attach to body weight bear a much closer resemblance to race- and gender-based discrimination than to disability or age.[284] In most situations, as we have seen, the concern on the part of the discriminator is not that obese people are impaired beyond competence because of their obesity; rather, it is that obese people are lazy, stupid, lack willpower and self-control, and are "disgusting." If I had to choose a single analogous form of discrimination, however, the best parallel would probably be to sexual orientation. In the case of sexual orientation, as with weight, the "etiology" problem is not yet fully understood or solved; yet, as the gay and lesbian civil rights movement has illustrated, the less a stigmatized condition is culturally constructed as a "choice," the further the stigmatized group can advance into protection and subsequently into the mainstream. At this point, the size-acceptance movement is a decade or two behind gay and lesbian rights, and the notion of weight as self-controlled is still strong.

One might like to think that, with increased education and research, changing our cultural understanding of weight will further the cause of size-acceptance; however, under the current statutory scheme, size-acceptance has an additional hurdle to jump. In a very real sense, sexual orientation discrimination has been able to benefit somewhat from being "sexual"; it has been able, albeit very slowly and incrementally, to piggyback itself onto the jurisprudence and statutory law of sex discrimination because of its nexus with gender, already a protected category.[285] Individual instances of weight and weight discrimination, however, are usually not gendered (or raced) enough to be able to capitalize in this way. Thus, as will be illustrated below, despite all the evidence, all the studies, and all the money being spent on weight research loss in America, this is a form of discrimination that the current logic of antidiscrimination law has left more or less out in the cold. Like the stigmatized individuals who hang their hopes on losing weight and thus removing themselves from the stigmatized group, the legal and medical professions have

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284 *Cf.* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987) (arguing that "appearance, like race and gender, is almost always an illegitimate employment criterion, and that it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than actual merit.").

285 *See, e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (harassment).

largely chosen to hang their hopes on "curing" obesity rather than doing anything about the quality of the lives of overweight and obese people now. And, given the current legal regime, there is not that much that can be done about it.

C. SOURCES OF PROTECTION IN THE LAW: STATUTORY AND CASE LAW

Plaintiffs claiming weight-based discrimination can bring suit at the federal, state, and/or local levels; many pursue multiple options, alleging federal and state claims in the same lawsuit. Their likelihood of success, as we will see, depends on several factors; overall, however, it is fairly low. At the federal level, there is no specific protection against weight-based discrimination, so the plaintiff must attempt to fit his or her claims into a more general statute: either Title VII, the Americans with Disabilities Act of 1990, or the Rehabilitation Act of 1973. (In theory, the federal plaintiff could also try to bring a constitutional suit as well, but, as will soon become clear, this is rarely attempted because the probability of prevailing is extremely low.) At the state level, the situation is often similar, since only one state—Michigan—and the District of Columbia have antidiscrimination statutes that explicitly cover weight-based claims; in all other states,[286] weight-discrimination plaintiffs must bring suit under the state constitution or state human rights or public accommodations laws. Finally, there are currently two local ordinances—in Santa Cruz and San Francisco—that prohibit weight-based discrimination, but these are of very recent vintage and do not yet appear to have engendered much litigation.

1. *Federal Law*

Under current federal law, the weight-discrimination plaintiff has an uphill battle to fight. The relatively few cases[287] that have raised constitutional claims (and where such claims have lasted long enough to be mentioned in a judicial opinion) have done so based on the Equal Protection Clause and 42 U.S.C. § 1983, and, as anyone familiar with the jurisprudence of the Fourteenth Amendment might expect, these plaintiffs have all failed. First of all, the state action requirement of the Fourteenth Amendment means that such suits could only be brought against either

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286 In 1994, the New York state legislature considered a bill that would have prohibited discrimination on the basis of height and weight in employment, housing, and public accommodations; that bill failed to pass, as did subsequent bills in 1999. However, there are currently new bills pending in both houses of the New York state legislature that would prohibit height- and weight-based discrimination. S.B. 1323, 224th Ann. Legis. Sess. (N.Y. 2001); A.B. 4106, 224th Ann. Legis. Sess. (N.Y. 2001).

287 *E.g.*, United States v. Santiago-Martinez, 58 F.3d 422 (9th Cir. 1995); Johnson v. City of Tarpon Springs, 758 F. Supp. 1473 (M.D. Fla. 1991).

governmental[288] or quasi-governmental[289] entities; they cannot reach purely private conduct under any circumstances. However, even when the defendant is a state actor, under the Fourteenth Amendment, discriminatory policies that do not deprive someone of a fundamental right, create a suspect or quasi-suspect classification, or operate to disadvantage a suspect or quasi-suspect class only receive the mildest standard of review: rational basis review. The list of suspect classes is now strongly enshrined in our constitutional law, shows no signs of changing, and, as the court in *United States v. Santiago-Martinez*[290] noted, does not include obesity: It is limited to classes based on race and national origin, while the sole quasi-suspect classes are those based on gender and illegitimacy.[291] Because weight or appearance is not a suspect or quasi-suspect classification, under the current state of the doctrine the discriminatory policy would merely have to be *conceivably* rationally related to a legitimate governmental interest in order to pass constitutional muster—a test that, in practice, almost always amounts to little more than a rubber stamp. Finally, even if a plaintiff were suing a state actor, and even if the claim could somehow be construed to implicate disadvantaging a suspect class, cases like *Washington v. Davis*[292] and *Personnel Administrator of Mass. v. Feeney*[293] have made it clear that discrimination claims under the Fourteenth Amendment must be intentional; "disparate impact" claims of the type recognized by Title VII are not cognizable under the Equal Protection Clause. With the bar set this high, it is unsurprising that weight-discrimination plaintiffs have not had much success with constitutional claims.

a. Title VII

Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. § 2000e *et seq.*, prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[294] Thus, like the Equal Protection Clause of the Fourteenth Amendment, Title VII operates categorically; discrimination based on anything other than the five enumerated categories is not pro-

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288 Either the federal government, see The Civil Rights Cases, 109 U.S. 3 (1883), or state governments, under 42 U.S.C. § 1983 (1994) (amended 1996).

289 That is to say, those private entities that nonetheless satisfy the state action requirement. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (nexus test); Terry v. Adams, 345 U.S. 461 (1953) (public function doctrine).

290 *Santiago-Martinez*, 58 F.3d at 423.

291 Clark v. Jeter, 486 U.S. 456, 461 (1988).

292 426 U.S. 229, 238-46 (1976).

293 422 U.S. 256, 271-74 (1979).

294 42 U.S.C. § 2000e-2(a)(1) (1995).

hibited. Unlike the Equal Protection Clause, though, Title VII recognizes both purposeful "disparate treatment" and, as of 1991,[295] facially neutral (I will not go so far as to say unintentional[296]) "disparate impact" claims. In the case of Title VII claims involving weight, those that succeed tend be brought as disparate treatment, rather than disparate impact, claims. While a disparate impact claim involving weight certainly would not be beyond the realm of logic,[297] such claims can end up extremely difficult to prove—especially in cases involving relatively small employers, such as local police departments, where evidence of "class-wide" disparate impact simply may not be available.[298]

Since weight is not one of the statutory categories, the usual theory of a Title VII disparate-treatment weight discrimination case is that the employer's weight requirements are significantly different, either facially or as applied, for men and women. Height-weight charts that follow the Met Life tables in allowing a man and a woman of the same height to weigh different amounts, standing alone, never constitute a violation of Title VII; as long as the requirements are equivalent, rather than equal, for men and women, and enforced at the same rate, the courts will not find a Title VII violation.[299] Violations, then, tend to be found in two

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295 Disparate impact claims enjoyed a highly variable fate in the case law prior to Congress's passage of the Civil Rights Act of 1991, which added an allowance for disparate impact claims to the statute itself: 42 U.S.C. § 2000e-2(k) (1995).

296 As Professor Willborn points out, it is not entirely clear how "divorced" from intent disparate impact really is. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), maintains that disparate impact theory is not intent-based, but the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), found that severe disparate impact can in fact justify a finding of motive. Another view, reflected in Justice O'Connor's plurality decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), is that disparate impact is in fact the functional equivalent of pretext analysis—it may not quite *be* intent, but it functions more or less as if it were. This latter formulation is actually probably closer to how the bulk of discrimination functions, but O'Connor emphasizes the difference from "intentional" discrimination. Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799 (1985), *quoted and discussed in* ROBERT BELTON & DIANNE AVERY, EMPLOYMENT DISCRIMINATION LAW 174-75 (6th ed. 1999).

297 For example, Roehling cites an EEOC decision in which an African-American woman was denied a hostess-trainee position because her hip measurements exceeded the maximum allowed by the employer. The applicant claimed disparate-impact discrimination because the employer's facially neutral measurement chart had a disproportionate effect on African-American women; however, the EEOC held that she had failed to establish the existence of a disparate impact, and thus found no violation of Title VII. Roehling, *supra* note 202, at 990.

298 *E.g.*, Donoghue v. County of Orange, 848 F.2d 926 (9th Cir. 1987) (finding plaintiff was not able to adduce enough evidence to show a significant disparate impact on a protected *class*, as opposed to herself); *see also* Wolf v. Frank, Civil Action 92-76270, 1994 U.S. Dist. LEXIS 10356 (E.D. Mich. Apr. 28, 1994) (determining evidence that one obese male was hired where plaintiff, an obese female, was not, insufficient to make prima facie claim of sex discrimination); Maranto & Stenoien, *supra* note 189, at 20 (observing that challenges to employer weight limits based on disparate impact theory have generally failed).

299 *E.g.*, Jarrell v. E. Airlines, Inc., 430 F. Supp. 884, 891 (E.D. Va. 1977) ("There is virtual unanimity among the Circuit Courts of Appeals that an employer may impose reasona-

sets of circumstances: when the requirements are not equivalent, or when the formal requirements are equivalent, but they are not enforced at the same rate.

Disparate weight requirements have been involved in many of the flight-attendant sex-discrimination cases that have been brought since the 1970s: Like the rest of the culture, airlines have tended to be far more concerned with the slimness of their female flight attendants than with that of men. From the mid-1970s onward, there usually *was* a height-weight chart for male flight attendants, but the charts were often substantially more generous for men, either allowing them more latitude for weight gain before disciplining or terminating them, or using different standards entirely (for example, a common practice was basing the requirements for men on the men's "large-frame" Met Life tables, but those for women on the women's "medium-" or "small-frame" tables).[300] Disparate enforcement claims were also raised in many of the flight-attendant cases, as in some of the more recent cases involving female applicants for law-enforcement positions; in these cases, men are not disciplined at all, or are given a slap on the wrist, for exceeding the maximum allowable weight, while women are rejected as job applicants, disciplined, or terminated for equivalent infractions.[301]

Once the Title VII plaintiff makes a prima facie case of disparate treatment, if the employer cannot produce evidence of a legitimate non-discriminatory reason for the different and more burdensome weight standards, the employer then has to prove that the discriminatory standards can be justified as bona fide occupational qualifications "reasonably necessary to the normal operation of that particular business or

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ble personal appearance requirements upon its employees and such standards need not be identical for males and females. Such practices are said to be non-sexually discriminating."). *See also* Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COMMERCE 203, 212-15 (1996).

300 *E.g.*, Frank v. United Airlines, Inc., 216 F.3d 845, 848 (9th Cir. 2000) (chart for men based on "large-boned" tables; chart for women based on medium-frame tables); Air Line Pilots Ass'n, Int'l v. United Airlines, Inc., No. 73 C 1082, 1979 U.S. Dist. LEXIS 11790 (E.D.N.Y. 1979) (tables based on different frame sizes, plus different standards for exceptions); Laffey v. N.W. Airlines, Inc., 366 F. Supp. 763, 773 (D.D.C. 1973) (no real requirements for male cabin attendants at all). *But see Jarrell*, 430 F. Supp. 884 (holding that use of different body-frame charts by sex does not constitute a violation of Title VII).

301 *E.g.*, *Donoghue*, 848 F.2d at 932-33 (holding that summary judgment on disparate treatment claim was improper because "[t]he facts tend to suggest that Donoghue was . . . penalized with memoranda, push-ups and laps more frequently, that her weight was the basis for negative evaluations when overweight males were not so evaluated, that she was not warned of a need to improve, and that she was not given the opportunity to repeat the training."); *Air Line Pilots Ass'n*, 1979 U.S. Dist. LEXIS 11790, at *29 (male flight attendants not disciplined for exceeding weight maxima). *But see* Jones v. City of Mount Vernon, 114 F. Supp. 2d 274 (S.D.N.Y. 2000) (finding no violation despite fact that female, non-obese plaintiff rejected for exceeding weight maximum demonstrated that overweight and even obese men were not rejected).

enterprise" under 42 U.S.C. § 2000e-2(e). This is a fairly onerous burden for an employer to meet: Under *Diaz v. Pan American World Airways, Inc.*, the customer-preference rationale that employers often use to justify having appearance standards at all will not justify a *sex-discriminatory* standard unless "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[302] Thus, a Title VII plaintiff who can establish irrebuttable disparate requirements or enforcement based on sex (or any of the other protected categories[303]) is in a fairly strong position. Without such proof, however, Title VII affords the weight-discrimination plaintiff little. As discussed above,[304] the courts have been consistent in holding that weight- and appearance-based requirements and restrictions, even if the rationale is purely cosmetic and inherently gendered, do not violate Title VII so long as they are implemented in a gender-equitable manner. Thus, while Title VII claims are often "thrown into" weight-discrimination lawsuits among other claims, they seldom succeed, and advocates in these cases have largely turned to other statutes, especially the ADA and the Rehabilitation Act.

b. The ADA and the Rehabilitation Act

The Rehabilitation Act of 1973 [hereinafter RA] and the Americans with Disabilities Act of 1990 were both enacted in response to concerns regarding discrimination against individuals with physical and mental disabilities. The RA prohibits discrimination against the disabled by all departments and agencies of the federal government, by entities under contract with federal departments and agencies to provide goods and services valued at more than $2500, and by any program or activity receiving federal financial assistance.[305] The ADA extends and amplifies the protections of the RA to the private sector: In broad outline, Title I prohibits employment discrimination by private employers, employment agencies, labor organizations, and joint labor-management committees, and requires employers to make reasonable accommodations to otherwise qualified disabled individuals[306]; until the Supreme Court's recent decision in *Garrett*,[307] it also covered state governments. Title II prohib-

302 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

303 In the case of other categories, it only gets harder. For race, there is no BFOQ or business necessity defense, period.

304 *See supra* notes 220-224 and accompanying text.

305 29 U.S.C. §§ 791, 793, 794 (2001).

306 42 U.S.C. §§ 12111-17 (1995); *see also* 29 C.F.R. § 1630 app. (2001) ("When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.").

307 531 U.S. 356 (2001) (holding that Congress failed validly to abrogate state sovereign immunity with regard to Title I in light of the lack of sufficient evidence of underlying discrimination by the states).

its discriminatory exclusion of qualified disabled individuals from "services, programs, or activities of public entities," including public transportation.[308] Title III prohibits discrimination by privately owned public accommodations.[309] Title IV amended the Communications Act of 1934 to require telecommunications providers to provide relay services for those with hearing or speech impairments.[310] Finally, Title V, entitled "Miscellaneous Provisions,"[311] includes, inter alia, construction provisions to the effect that "nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title,"[312] and that "[n]othing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."[313] Both statutes, as well as their implementing regulations, indicate that the legal standards for finding unlawful discrimination on the basis of disability are essentially the same under the ADA and the RA.[314] Thus, for the purposes of the following discussion, the ADA and RA will mostly be treated together, unless explicitly indicated otherwise; I will also be focusing on the definitional and employment-discrimination provisions of both statutes, as these have by far spawned the most administrative interpretation, case law, and commentary.[315]

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employ-

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308 42 U.S.C. §§ 12131-65 (1996). Interestingly, the *Garrett* Court observed explicitly in dicta that the evidentiary record was much stronger with regard to discrimination by the states under Titles II and III of the ADA. 531 U.S. at 371-72 & n.7. The logical inference to be drawn is that the holding in *Garrett* does not compel the same conclusion with regard to these other statutory provisions; it remains to be seen whether the current Court will sustain this logic.

309 42 U.S.C. §§ 12181-89 (1996).

310 47 U.S.C. § 401 (1996).

311 42 U.S.C. §§ 12201-13 (1996).

312 42 U.S.C. § 12201(a) (1996).

313 42 U.S.C. § 12201(b) (1996).

314 E.g., 29 U.S.C. §§ 791(g), 793(d), 794(d) (2001) (providing that the ADA standards are to apply to the RA); 29 C.F.R. app. § 1630.2(g) (2001) (noting that Congress intended all RA caselaw on what constituted a disability to apply to the ADA); *see also* BELTON & AVERY, *supra* note 296, at 663-64.

315 For a discussion of the problem of obesity discrimination in public accommodations and Title III of the ADA, *see generally* O'Hara, *supra* note 236.

ment."[316] Unlike Title VII, which nowhere defines discrimination, the ADA contains an exhaustive definition of discrimination that covers a wide range of employment practices, including both disparate-treatment and disparate-impact theories.[317] Thus, in suits brought under the ADA, it is often quite clear what kinds of activities on the employer's part constitute discrimination; the contention, particularly with regard to weight-based discrimination claims, tends to surround the "qualified individual with a disability" provision. Here, too, the ADA itself is not silent, and the EEOC has also provided extensive guidance and insight in the ADA implementing regulations as to how these statutory terms are to be construed. Thus, before moving into looking at what the courts have done with weight-based discrimination claims brought under the ADA and RA, it will be useful to look at what Congress and the EEOC have had to say on the matter.

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[318] The statute and the regulations then break this definition down into its component parts, and provide further clarification on each. "Disability," for example, has a three-pronged definition under the ADA: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[319] The administrative regulations then define the "physical or mental impairment" component as:

> (1)Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[320]

The EEOC Interpretive Guidance also notes,

> It is important to distinguish between conditions that are impairments and physical, psychological, environmental,

316 42 U.S.C. § 12112(a) (1995).
317 42 U.S.C. § 12112(b) (1995).
318 42 U.S.C. § 12111(8) (1995).
319 42 U.S.C. § 12102(2) (1995).
320 29 C.F.R. § 1630.2(h) (2001).

> cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left- handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease.[321]

"Major life activities" are considered to be "those basic activities that the average person in the general population can perform with little or no difficulty[, . . . including] caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[322] However, this list is not exhaustive; the EEOC also notes that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching."[323] As to "substantially limits," the regulations stress that it is not enough to simply have a physical or mental impairment; there is a threshold degree of limitation:

> (1) The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[324]

Thus, with regard to the life activity of working, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a

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321 29 C.F.R. app. § 1630.2(h).

322 29 C.F.R. §§ 1630.2(i), app. 1630.2(i).

323 29 C.F.R. app. § 1630.2(i).

324 29 C.F.R. § 1630.2(j)(1)-(2).

substantial limitation in the major life activity of working."[325] Ultimately, the regulations counsel that determination of whether an impairment in a particular individual rises to the level of a substantial limitation should be made on a case-by-case basis;[326] however, the EEOC does expressly note in the Interpretive Guidance that "except in rare circumstances, obesity is not considered a disabling impairment."[327]

Part C of the statutory definition of disability, being "regarded as" having a disabling impairment, is an extremely significant provision in weight-based discrimination cases; in cases where the plaintiff is not overweight enough to be considered disabled, or where the court rejects entirely the notion of obesity as a disability, this is the sole potential avenue for relief under the ADA. As the regulations explain, "regarded as" having a disabling impairment can mean any of three things:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment; (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.[328]

In the regulations, examples are given to illustrate each of these possibilities.[329] The example for (1) is an employee who has controlled high blood pressure that is not substantially limiting, but whose employer reassigns him or her to less strenuous work because of fears that s/he will have a heart attack. That for (2) is an employee with a prominent facial disfigurement or nervous tic, where the employer discriminates against that employee because of customers' negative reactions to him or her. And (3) is illustrated by an employer who fires an employee on the basis of an untrue rumor that the employee has AIDS.

As to why the ADA would provide coverage for someone who is not actually disabled under the terms of the statute, the EEOC explains in the Interpretive Guidance that the rationale is drawn from that in *School Board of Nassau County v. Arline*,[330] where the Court described the reasoning behind Congress's amending the RA to include such coverage:

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325 29 C.F.R. § 1630.2(j)(3)(i).

326 29 C.F.R. app. § 1630.2(j).

327 *Id.*

328 29 C.F.R. §§ 1630.2(l), app. 1630.2(l).

329 29 C.F.R. app. § 1630.2(l).

330 480 U.S. 273 (1987).

> The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." . . . Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit a person's ability to work as a result of the negative reactions of others to the impairment.[331]

Echoing *Arline*, the Interpretive Guidance lists some common attitudinal barriers that frequently result in exclusion by employers of individuals with disabilities: concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.[332] Thus, the EEOC, like Congress and the Supreme Court, recognizes that these "myths, fears, and stereotypes" about the disabled can function as major barriers to equal opportunity even where no actual disabling impairment is present.[333]

For disparate-treatment types of charges, the implementing regulations note the availability of the "legitimate, nondiscriminatory reason" defense, as under Title VII.[334] With regard to disparate-impact claims, the main defense available to employers under the ADA is set forth in 42 U.S.C. §12113(a): An employer's qualification standards, tests, or selection criteria that screen out or tend to screen out individuals with disabilities may be permissible if such standards, tests or criteria are job-related and consistent with business necessity. The regulations note that such criteria must be related to an essential function of the job that the employee cannot perform, even with a reasonable accommodation.[335]

What have the courts made of weight-discrimination claims under the RA and Title I of the ADA? The results have been fairly inconsistent,

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331 480 U.S. at 278-79, 283 (citation omitted).
332 29 C.F.R. app. § 1630.2(l).
333 *Id.*
334 29 C.F.R. § 1630.15(a).
335 29 C.F.R. § 1630.15(b)(1).

even with regard to the most basic questions. Thus, for example, there has been no consistent answer to whether obesity alone falls within the statutory definition of "disability," or whether some other physiological condition that *causes* the obesity is also required. In *Cook v. Rhode Island*,[336] one of the first major weight-discrimination cases to reach the federal courts, the First Circuit took the former position. Plaintiff-appellee Bonnie Cook had worked as an institutional attendant at a state residential facility for the mentally retarded from 1978 to 1980, and again from 1981 to 1986, both times departing voluntarily and "leaving behind a spotless work record."[337] When she reapplied for the same position in 1988, she was 5'2" tall and weighed 320 pounds. The nurse who conducted her pre-hire physical found no limitations that would have affected Cook's ability to do her job, but the state agency balked at hiring her, claiming that her weight "compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments . . . [that] would promote absenteeism and increase the likelihood of workers' compensation claims."[338] Cook sued the state in federal court under RA section 504, and a jury ultimately found in her favor and awarded her $100,000 in compensatory damages.

On appeal, Rhode Island contended, inter alia, that because morbid obesity was both "mutable" and voluntary—i.e., within the patient's control—it could not qualify as a disability under the RA; that Cook's rejection from this one job was not sufficient to constitute widespread perception of a substantial limitation; and that the limitations of her physical condition actually disqualified her for the position she sought. The First Circuit rejected all of these claims. It had no problem with the trial court's willingness to accept the characterization of morbid obesity itself as a disabling impairment, remarking that the plaintiff "presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems."[339] The *Cook* court also held that being unable, or regarded as unable, to work at a particular class of job within a given field constituted a substantial limitation for the purposes of the statute:

> [A]n applicant need not subject herself to a lengthy series of rejections at the hands of an insensitive employer to establish that the employer views her limitations as

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336 10 F.3d 17 (1st Cir. 1993).

337 *Id.* at 20.

338 *Id.* at 21.

339 *Id.* at 23; *see also* Polesnak v. R.H. Mgmt. Sys., Inc., No. 95-1705, 1997 U.S. Dist. LEXIS 22106, at *12 (W.D. Pa. 1997).

> substantial. If the rationale proffered by an employer in the context of a single refusal to hire adequately evinces that the employer treats a particular condition as a disqualifier for a wide range of employment opportunities, proof of a far-flung pattern of rejections may not be necessary. Put in slightly more concrete terms, denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation[ ] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, *viz.*, working.[340]

Other courts, however, have subsequently adopted positions inconsistent with *Cook* (while usually avoiding outright disagreement). For example, the court in *Smaw v. Virginia Department of State Police* took a much broader view of the plaintiff's "field" in determining whether her weight constituted a substantial limitation on her ability to work, holding that, because she could still work in "the field of law enforcement as a whole," she was not disabled under the statute.[341] In *Morrow v. City of Jacksonville*, the district court cited the Fourth Circuit's decision in *Torcasio* for the proposition that "neither the statutes, nor the caselaw, nor the applicable regulations clearly establish that the ADA or the Rehabilitation Act apply to the obese."[342] And the Second and Sixth Circuits have both held that obesity, standing alone, cannot constitute a disabling impairment without some further underlying physiological disorder.[343]

The courts in these subsequent cases have usually distinguished *Cook* by explaining its holding as limited to morbid obesity,[344] to obesity with an underlying physiological disorder, or to situations where the obesity is so great that it constitutes more of an "impairment" than in the case at bar. However, while the plaintiff in *Cook* did perhaps weigh more than some of the plaintiffs in these other cases, there was nothing else substantively different about her obesity or her job-related limitations; it was not as if she suffered from a disorder like Prader-Willi syn-

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340 *Cook*, 10 F.3d at 26.

341 862 F. Supp. 1469, 1475 (E.D. Va. 1994).

342 941 F. Supp. 816, 827 (E.D. Ark. 1996) (citing Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), notwithstanding the fact that *Torcasio* was not an employment discrimination case, but a prison conditions case involving Title II, not Title I, of the ADA).

343 Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997).

344 This despite the fact that, "[a]ccording to settled mainstream medical thought, [nonmorbid] obesity is a physiological condition or disorder that involves and affects the musculoskeletal, respiratory, cardiovascular, digestive, skin, or endocrine systems—the definition of impairment under the ADA." SOLOVAY, *supra* note 176, at 149.

drome or hypothyroid, and she was far from unable to perform the duties of her job (in fact, the issue of "accommodation" does not even seem to have arisen). Rather, the real distinction turned on the First Circuit's opinion that "[t]his pathbreaking 'perceived disability' case presents a textbook illustration of the need for, and the operation of, the prohibition against handicap discrimination contained in section 504 of the Rehabilitation Act of 1973 . . . ,"[345] while the other circuits did not share the same view.

As may have already become evident, many of the ADA/RA weight-discrimination cases founder on the "substantial limitation in a major life activity" requirement. The ways in which the courts have construed this requirement often result in plaintiffs finding themselves between the proverbial "rock and a hard place" of the "qualified individual" and the "disability." On the one hand, if they are not capable of performing the essential functions of the job, they are not "qualified" and thus don't qualify for protection under the statute; on the other, if they are not so disabled that they can't perform not only *their* job but any other job within their field (however broadly or narrowly the court construes "field"), then they are not "disabled" enough to qualify for protection under the statute.[346] For many employment-discrimination plaintiffs, not just those bringing weight-based claims, their ability to do their jobs as well as anyone else is understandably a point of pride (and the basis for their lawsuit in the first place), and in depositions or in-court testimony, overweight and obese plaintiffs often insist truthfully that they

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345 *Cook*, 10 F.3d at 20.

346 This catch-22 was further exacerbated for many ADA plaintiffs by a trio of Supreme Court decisions handed down in June of 1999: Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, 527 U.S. 471 (1999); and Albertson's v. Kirkingburg, 527 U.S. 555 (1999). In *Murphy* and *Sutton*, the Court held that the determination of whether an individual is disabled under the ADA must be made with reference to, and taking into account, all corrective and mitigating measures used by the individual. In *Kirkingburg*, the Court emphasized that the existence of disabilities must be determined on a case-by-case basis, and thus a given physical condition is not per se enough to establish disability. Taken together, as one commentator notes, these decisions significantly narrow the scope of protection under the ADA, and increase the likelihood of "the bizarre situation that a person is disabled enough to be refused a job, but not disabled enough to seek protection under the ADA." SOLOVAY, *supra* note 176, at 136 (discussing *Sutton*).

However, Solovay continues, these decisions may not actually have much of a direct negative impact on fat-as-disability cases; in fact, she suggests that they may even be somewhat beneficial, in two respects. First, she suggests, under *Sutton*, people who are on diets or other weight-loss programs and experiencing physical side-effects "may suddenly have an argument for coverage under disability law." *Id.* at 137. Second, *Sutton* may help in those cases where an overweight litigant is questioned about his/her efforts to lose weight, due to its holding that "[t]he use *or nonuse* of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting." *Id.* at 137 (quoting *Sutton*, 527 U.S. at 488) (first emphasis added).

can perform the full range of tasks associated with their jobs.[347] However, by being honest about their competence, these plaintiffs usually succeed in convincing the courts that they do not fall within the statutory definition of "disability," and thus seldom prevail. Or, some courts have held that job-related tasks (such as lifting a certain amount of weight), despite being job-related, are not "major life activities," and thus the impairment is insufficient to qualify for protection.[348] This was, in fact, the position just adopted by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, where the Court held unanimously that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[349]

One might think that the availability of the "perceived disability" theory under § 12102(2) would help obese and overweight employment-discrimination plaintiffs to get around some of these problems. After all, the core of a "regarded as" claim is not that the individual actually is disabled, or is substantially limited with regard to a major life activity, but that the individual is so perceived. However, as construed by the courts, the shift from an actual to a perceived disability theory has not proved to be all that helpful for plaintiffs, because the thorny definitional problems of actual disability are simply transferred to someone else's perspective. Thus, instead of having to prove that one suffers from a substantially limiting physical or mental impairment, the "perceived" plaintiff has to prove that his/her employer perceives him/her as suffering from such an impairment. The question of what is an impairment, and what is substantially limiting, still remains.

In particular, substantial confusion persists as to whether the perceived disability is required to be one that, if it existed, would qualify as an "actual" disability. Thus, to take the example of controlled high blood pressure from the EEOC Interpretive Guidance,[350] the condition itself would not qualify as an actual disabling impairment, but because the employer perceives it as disabling, according to the EEOC it constitutes

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347 *E.g.*, Furst v. N.Y. Unified Court Sys., No. 97-CV-1502 (ARR) 1999 WL 1021817, at *4 (E.D.N.Y. 1999); Nedder v. Rivier Coll., 944 F. Supp. 111, 117-18 (D.N.H. 1996); Wolf v. Frank, Civil Action 92-76270, 1994 U.S. Dist. LEXIS 10356, at *9 (E.D. Mich. 1994).

348 *E.g.*, Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 703-04 (S.D.N.Y. 1997); *Wolf*, 1994 U.S. Dist. LEXIS 10356, at *14.

349 Toyota Motor Manuf., Ky., Inc. v. Williams, ___ U.S. ___ , 122 S. Ct. 681, 693 (2002). Thus, the Court went on to explain, the Sixth Circuit should have focused on the fact that the respondent was able to "tend to her personal hygiene [and] carry out personal or household chores," and taken this into account in assessing whether she was substantially limited in performing manual tasks at work. *Id.*

350 *See supra* text following note 329.

sufficient grounds for a perceived disability claim. The question of obesity's relationship to this example has plagued the courts: Is obesity like controlled high blood pressure, or is it more like hair or eye color, characteristics that do not constitute bases for disability claims regardless of the employer's perception of them? Many courts have essentially opted for the latter analogy,[351] with the result that a perceived-disability plaintiff is practically required to be actually disabled in order to prevail under the ADA; at least one circuit court has indicated its *categorical* skepticism of perceived-disability claims based on obesity.[352]

This is not to say that no weight-discrimination plaintiffs ever prevail under the ADA/RA: Some do. However, those who do tend to be the "easier" cases that circumvent the difficulties inherent in defining "disability" under the statute—morbidly obese plaintiffs with substantial enough "impairments" to seem obvious to a lay person (i.e., a judge or juror), who also have strong evidence of their employer's perception of them as undesirable because of their disabilities. Thus, for example, the plaintiff in interest in *EEOC v. Texas Bus Lines* was a morbidly obese woman who applied for a driver position with the defendant, had a very strong interview and passed the driver's test, but failed the pre-hire physical because the doctor felt that she "would not be able to move swiftly in the event of an accident."[353] Both the doctor's report and his testimony revealed that inability to move swiftly was not on the Department of Transportation's list of disqualifying conditions for drivers, and thus that "Texas Bus Lines made the decision not to hire Manuel because of a perception of disability based on 'myth, fear or stereotype.' . . . Texas Bus Lines regarded Manuel as disabled and, therefore, unable to work as a driver based on her alleged impaired mobility without the benefit of objective medical testing or findings."[354]

Thus, if one is morbidly obese, *and* if one's particular physical impairments are neither too great nor too minor, *and* sufficiently relevant to one's job without being so narrow as to be irrelevant to a "major life activity," *and* one has strong, direct evidence of bias on the part of one's employer, the ADA and RA may afford relief for weight-based discrimination. In other words, the vast majority of weight-based discrimination in employment remains out of the reach of these statutes. However, this may not be an entirely nonsensical result, particularly in light of the cen-

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351 E.g., Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082 (S.D. Iowa 1997); Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996).

352 Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 665 (3d Cir. 1999) (noting that "[w]e have not recognized a cause of action against an employer who discriminates against an employee because it perceives the employee as disabled by obesity.").

353 923 F. Supp. 965, 967 (S.D. Tex. 1996).

354 *Id.* at 979.

tral purpose of the ADA and RA: to ensure "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[355] As noted previously,[356] one of the provisions of the ADA that Title VII lacks is the requirement of "reasonable accommodation," which reflects the understanding that some disabled individuals are truly "differently abled" than the nondisabled, and must be allowed to perform to the full extent of their abilities where possible. The concept of accommodation would make little sense in the Title VII context, where the logic underlying the statute is precisely that race and gender almost never create material differences in how an employee performs his or her job.

In looking at the problem of weight-based discrimination in employment, then, the question becomes: Is an overweight (or obese, or morbidly obese) individual more like the intended beneficiary of the ADA, or like that of Title VII? This is admittedly a difficult question to answer, particularly in light of the fact that even individuals covered under the ADA do not necessarily require accommodation (e.g., the person with a prominent facial scar or controlled high blood pressure). However, on the whole, the intuition of the EEOC and of many of the judges considering these cases seems to be that most instances of weight discrimination are not quite the same as discrimination against the disabled. Where an individual is overweight or "simply," rather than morbidly, obese, the nature of the discrimination they suffer often seems to have more to do with appearance, and the stereotypes and prejudices associated with that appearance, than with a judgment that the person is less capable because of a disability.[357] Although this can certainly be true of some discrimination against morbidly obese individuals as well, the courts and the EEOC also acknowledge that there is a much stronger perception of extremely obese[358] individuals as "impaired" within the meaning of the ADA.

Moreover, while there is no question in my mind that all victims of weight discrimination deserve protection, I do question whether we

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355 42 U.S.C. § 12101(8) (2001).

356 *See supra* text accompanying note 306.

357 *See* Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 19 (1991) ("Coverage of a person based on weight depends on whether the person's weight is simply a physical characteristic or a physiological disorder . . . . [S]ome individuals may be so obese that their obesity is a recognizable physiological disorder. Because the obesity of such individuals usually interferes with walking or breathing, these individuals would be covered under the first prong of the [ADA] definition.").

358 *See, e.g.*, Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 42-43 (1997). It is not clear, however, that the actual threshold for this degree of disabling obesity necessarily corresponds to "morbid" obesity. As Korn points out, drawing the line at morbid obesity is both arbitrary and itself "grounded on group-based assumptions rather than on the kind of individual consideration mandated by the ADA."

would like the results if all such victims were included within the scope of the ADA. A judgment that all individuals who are above, or even 20% above, the ideal weight for their height are "disabled" plays squarely into the stereotypes and prejudices against the overweight that perpetuate weight-based discrimination in the first place. There is a reason, beyond history, why a phenomenon like race-based discrimination should not have been covered under a disability statute even though employers and others "perceived" nonwhites as less intelligent and having poorer impulse control: because nonwhites are in no way "differently abled" than whites—just like the vast majority of overweight and obese people. Requiring all weight-discrimination plaintiffs to come into court and present a litany of physical complaints in order to prevail just reinforces the message—to judges, to juries, and to the broader culture—that the ramifications of extra body weight run far deeper than they actually do. For anyone who truly aspires to put an end to weight-based discrimination, this cannot be the best solution.

Thus, the ADA should be available for any plaintiff who is obese enough to require accommodation or who is actually sufficiently impaired to fall within the statutory definition of disability.[359] However, for those who suffer weight-based discrimination at lower levels of obesity or impairment, the ADA does not, cannot, and probably should not provide a sufficient remedy.

2. *State Law*

Only Michigan and the District of Columbia currently have laws specifically prohibiting discrimination on the basis of weight. Michigan's Elliott-Larsen Civil Rights Act declares that "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right."[360] D.C.'s human rights law provides:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sex-

359 *But see id.* at 44 (arguing that "protecting only those who are morbidly obese has an intrinsic gender bias [because] [s]tudies indicate that fat women, unlike obese men, suffer discrimination at weights below the level of morbid obesity").

360 MICH. STAT. ANN. § 3.548(102) (Michie 2000).

> ual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[361]

The D.C. statutory definition of "personal appearance" is:

> the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.[362]

Neither statute has spawned much in the way of weight-related litigation. Art Stine, Ombudsman of the Michigan Department of Civil Rights, has explained that this may have to do with the tolerant attitudes in his state that allowed for easy passage of the legislation in the first place:

> Michigan added height and weight to the Civil Rights Act in 1975, and its passage was very easy. Given that certain height and weight characteristics tend to be linked to certain ethnic groups or to women, state legislators decided it was all the more appropriate to include body size as part of a comprehensive antidiscrimination policy. There wasn't even much debate about it. Since then, I'd estimate that eight or ten weight-related cases have come before our commission for a decision. Overall, . . . people simply haven't had a big problem with it.[363]

In other states, victims of weight-based discrimination have sought relief under more general antidiscrimination laws, usually human rights or civil rights statutes. Here, as might be expected, the results have been extremely mixed. Where suits have been brought under state disability statutes (each, it should be noted, with its own definition of disability), a

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361 D.C. CODE ANN. § 2-1401.01 (2001).

362 D.C. CODE ANN. § 2-1401.02 (2001).

363 SOLOVAY, *supra* note 176, at 245.

few state courts have found that obesity qualifies as a disability;[364] more have held that even morbid obesity, without an "underlying physiological cause," does not.[365] As early as 1967, one state court recognized that the denial of a teaching license on grounds of obesity was arbitrary and capricious,[366] other cases, however, reflecting exactly the kinds of stereotyped judgments discussed by the EEOC in the Interpretive Guidance to the ADA, have added to the state caselaw on obesity discrimination. Thus, the court in *Greene v. Union Pacific R.R. Co.* found that "the defendant could reasonably believe . . . that [a morbidly obese] applicant would be less apt to be an efficient, safe, illness-free, and claims-free employee than one not having those conditions. I find that a person with plaintiff's weight and blood pressure would be significantly more apt to suffer a heart attack or a stroke than one not having those conditions."[367] Likewise, in *Metropolitan Dade County v. Wolf*, the court held that a weight requirement for a communications operator in the fire alarm division of the county fire department was grounded in business necessity under *Griggs*, since "there is reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is thereby more likely to become disabled during employment, to the detriment of the county financially and otherwise."[368]

Plaintiffs in state cases also often run afoul of the same "disabled but not too disabled" problem that arises in federal court: The more they maintain that they are as capable of doing their job as anyone else, the less likely they are to be found disabled. This was the case in *Cassista v. Community Foods, Inc.*, where the court observed, in finding the plaintiff insufficiently impaired, "Indeed, plaintiff alleged in her complaint and maintained at trial that despite her weight she is a healthy, fit individual."[369] And the decision in *Philadelphia Electric Co. v. Commonwealth* relates that:

> The physician who examined Ms. English . . . testified that [she] had no gastrointestinal problems, no cardio-

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364 *E.g.*, Gimello v. Agency Rent-A-Car Sys., 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991); State Div. of Human Rights v. Xerox Corp., 478 N.Y.S.2d 982 (N.Y. App. Div. 1984).

365 *E.g.*, Greene v. Union Pac. R.R. Co., 548 F. Supp. 3 (W.D. Wash. 1981) (obesity not a handicap under Washington law because condition not "immutable"); Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987); Civil Serv. Comm'n v. Commonwealth, 591 A.2d 281 (Pa. 1991); Philadelphia Elec. Co. v. Commonwealth, 448 A.2d 701 (Pa. Commw. Ct. 1982).

366 Parolisi v. Bd. of Examiners of New York, 285 N.Y.S.2d 936, 940 (N.Y. Sup. Ct. 1967) ("[O]besity, standing alone, is not reasonably and rationally related to the ability to teach or maintain discipline. It may be noted that there is no record of a teacher being denied appointment because of underweight; or of a male teacher, because of overweight.").

367 548 F. Supp. at 5.

368 Metro. Dade County v. Wolf, 274 So.2d 584 (Fla. Dist. Ct. App. 1973).

369 856 P.2d at 1154.

> vascular disease or history, no hypertension, no pulmonary disease and no peripheral edema. The physician concluded by saying that there was nothing physically wrong with Ms. English that would prevent her from performing any of the duties of the job she was seeking.
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> As we have already noted, Ms. English said in her deposition that she was perfectly able to do a regular day's work at all times and that work had never bothered her. PECO has admitted that Ms. English could perform the duties of Customer Service Representative.
>
> On the basis of this summary of the evidence we must conclude that . . . Joyce English had no non-job related disability or handicap whatsoever.[370]

Meanwhile, as Solovay points out, a plaintiff's choice to depict him- or herself as a helpless victim can really pay off: Thus, in the *Rossi* case, the plaintiff, fired from his job for weighing over 400 pounds, sued for wrongful dismissal, claiming that he was disabled by a physiological disorder and was seeking weight-reduction treatment—and the jury awarded him $1 million.[371] Even this approach, however, is far from failsafe: In *Sellick v. Denny's Inc.*,[372] a public accommodations case, a severely obese man (weighing more than 400 lbs.) sued after (a) the restaurant was not able to accommodate him with an appropriate chair or bench and (b) a waitress then rudely pointed and shouted at him in front of a restaurant more than half full of patrons. The court found for Denny's on all claims, holding that the waitress's conduct did not amount to intentional infliction of emotional distress because it "did not constitute extraordinary transgression of the bound of socially tolerable conduct,"[373] and noting that the Oregon disability-discrimination statute did not even mandate a "reasonable accommodation" requirement.[374]

Thus, despite the fact that the states generally have greater legislative latitude, particularly in the area of civil rights, than the federal courts, it appears that most of them are not using that latitude to provide broader protection against weight-based discrimination, either under a disability paradigm or otherwise. The landscape of state weight-discrimination law is mostly just as confused and as underprotective as in federal law, and in several cases the courts and/or legislatures have explicitly

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370 448 A.2d at 707.

371 SOLOVAY, *supra* note 176, at 154.

372 884 F. Supp. 388 (D. Or. 1995).

373 *Id.* at 391.

374 *Id.* at 393.

looked to the federal disability paradigm of the ADA and RA as a model.[375]

3. *Local Ordinances*

Only two cities—San Francisco and Santa Cruz, California—have ordinances prohibiting discrimination based on physical appearance.[376] The amendment to San Francisco's preexisting Police Code that incorporated height and weight as characteristics protected against discrimination in employment, housing, and public accommodations was passed in May 2000. Santa Cruz passed its ordinance prohibiting arbitrary discrimination on the basis of "age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight, or physical characteristic" in 1992. ("Physical characteristic" was defined as "a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms."[377])

What has been most striking about both of these ordinances has not been their legal impact—in fact, as Santa Cruz City Attorney John G. Barisone explained, as of 1999, "[t]o my knowledge, there have been no private enforcement actions taken pursuant to the ordinance and the City has not been required to take any formal enforcement actions as a result of ordinance violations."[378] Rather, the most substantial ripples created by the passage of these statutes appear to have been in the popular media. As Marc Slavin, a deputy city attorney in San Francisco, put it, "Much of the coverage of this ordinance has been of the 'another crazy idea from a crazy city' variety."[379] His observation is completely consistent with the media reaction not only to the San Francisco ordinance, but to the Santa Cruz ordinance eight years earlier. Despite the fact that, as Professor Post has observed, from its earliest draft the Santa Cruz law had "specifically permitted employment decisions to be based on appearance if 'relevant to job performance,'"[380] the immediate reaction was hysteria on the part of outraged employers and nightmare scenarios about being required to hire cross-dressing journalists.[381] One journalist, in responding to the

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375 *E.g.*, Cassista v. Cmty. Foods, Inc., 856 P.2d 1143, 1149 (Cal. 1993); Civil Serv. Comm'n v. Commonwealth, 591 A.2d 281, 282-83 (Pa. 1991).

376 SAN FRANCISCO, CA., POLICE CODE art. 33 (2000); SANTA CRUZ, CA., MUNICIPAL CODE ch. 9.83 (1992).

377 SANTA CRUZ, CA., MUNICIPAL CODE § 9.83.02(13) (1992).

378 SOLOVAY, *supra* note 176, at 244.

379 Mark Lisheron, *The BIG Issue; Cars Cramp, Seats Squeeze, Ads Taunt. Life is Hard if You're Fat. Should We Have Laws to Make it Easier?*, AUSTIN AMERICAN-STATESMAN, May 27, 2000, at D1.

380 Post, *supra* note 80, at 4.

381 *Id.* at 3.

passage of the San Francisco ordinance, fretted that "doctors now can be hauled into court if they suggest while removing a corn that an obese patient should lose some weight."[382]

Eight years into the life of the Santa Cruz statute, and a year after the passage of San Francisco's, none of the doomsday scenarios have come to pass. However, other cities and towns do not seem to have followed suit, nor do they seem likely to do so anytime soon.[383] Perhaps the journalist who observed that these ordinances "scare the pants off of the rest of America" was right. If he was, though, this is exactly why these laws, and others at the federal and state levels, are so desperately needed in the first place.

D. WEIGHT DISCRIMINATION AND THE REMEDY PROBLEM

At the end of this Part, two basic points should be very clear. First, weight-based discrimination in this country is not a joke: It is a very real phenomenon and has far-reaching negative effects similar to those of discrimination based on protected categories like race and gender. Second, we do not have adequate remedies for this form of discrimination in place at any level: federal, state, or local. The very few states and cities that have subject-specific weight-based antidiscrimination provisions are, perforce, those where the general communities are probably the most receptive to these kinds of measures, and the local ordinances in particular have evoked responses that indicate just how strong anti-fat stereotyping and prejudice continue to be elsewhere.

At the present time, a majority of commentators and advocates to address the subject push for expansion or construction of existing disability-discrimination laws to cover weight-based discrimination.[384] While it

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382 Rowland Nethaway, *San Francisco Cracks Down on Menace to Civil Rights: The Fat Joke*, COX NEWS SERVICE, May 10, 2000. This same author, in his short (628-word) commentary full of terms like, "San Francisco's hefties," "oversized residents," "beefy Bay-area residents," and "stamp[ing] their ponderous feet," also noted one supporter's opinion of the ordinance: "'It's important that this law passed because it can have far-reaching implications outside of San Francisco,'" and observed that "[t]hat scares the pants off the rest of America."

383 *See* Christopher J. Martin, *Protecting Overweight Workers Against Discrimination: Is Disability or Appearance the Real Issue?*, 20 EMPLOYEE RELATIONS L.J. 133 (1994).

384 *E.g.*, Korn, *supra* note 358; Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans With Disabilities Act*, 31 CAL. W. L. REV. 41 (1994); O'Hara, *supra* note 234; Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans With Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563 (1996); Jeffrey Garcia, Note, *Weight-Based Discrimination and the Americans With Disabilities Act: Is There An End in Sight?*, 13 HOFSTRA LAB. L.J. 209 (1995); Note, *Facial Discrimination*, *supra* note 282. *But see* Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000); Karol V. Mason, Note, *Employment Discrimination Against the Overweight*, 15 U. MICH. J. L. REF. 337 (1982).

is certainly true that, under existing laws, weight-discrimination plaintiffs probably fare better under disability statutes than anywhere else, ultimately this avenue is inadequate as a solution to the problem. First, attempts to characterize varying degrees of overweight and obesity as a disability have mostly fallen flat, not only with the courts and legislatures, but with overweight individuals and the general public themselves. The definitional problems occur not only at the level of convoluted statutory language and contradictory medical evidence, but with the common-sense notions of disability that will govern, for many jurors, the outcomes of cases that attempt to characterize an overweight or obese person as disabled. With so many Americans overweight or obese, it is a safe bet that just about everyone knows someone who falls into either category; and my intuition is that if one were to ask anyone whether they, or their Uncle Bob who has about fifty pounds to lose, were disabled, the answer would usually be a quick "no." (If Uncle Bob had a hundred and fifty pounds to lose, or had trouble standing or walking because of his weight, the answer would probably be different.)

The common-sense intuition with regard to weight and disability here is important not because of any inherent primacy to common-sense intuitions (many of which are mistaken), but because in this case it happens to reflect what we know of medical and functional reality: Different people respond differently to the same degree of overweight and obesity, but overall, some levels of obesity are disabling and others are not. Where an individual's weight does rise to the level of a genuine functional impairment, and/or where accommodation is required, it should be covered under statutes designed to protect disabled individuals from discrimination. But attempts to label every overweight person in this country as disabled, well-meaning though they may be in terms of securing protection against discrimination, are destined to founder, or, worse, to create a backlash on the part of juries and employers—and they probably should.

The majority of weight-based discrimination operates in ways very similar to discrimination based on characteristics like race. By this, I do not mean that obesity discrimination is "like" racial discrimination in general, or that the magnitudes are comparable. What I do mean, however, is that antifat stereotypes and prejudices are usually based in the kind of animus and disapproval that have surrounded race-based discrimination throughout its history. Few people "hate" the disabled or condemn them morally, because most disabling conditions are widely recognized to be outside the individual's control; the stereotypes surrounding disability generally have more to do with discomfort, unfamili-

arity, and underestimating the capabilities of disabled individuals.[385] While it is true that the stereotypes and prejudices surrounding race in this country have also involved unfamiliarity and underestimation, they have also been laced with a strong dose of moral condemnation and animus that was used to rationalize slavery and other subordinating phenomena. In this sense, antifat prejudice is more like race than like disability, and while it may not have anything near the same degree of institutional history, it does show up extensively in modern social science research and in the popular culture.

As the current jurisprudence of the Fourteenth Amendment and Title VII makes clear, however, there are no better options than the disability paradigm present in current American law. This is precisely because antidiscrimination law in America is shackled by a needlessly formalistic, categorical and intent-based approach to protection from discrimination. Certainly, a subject-specific remedy for weight-based discrimination would help, but lopping off this Hydra's head would only result in others growing into its place. Rather, as I shall argue in the next Part, we need to reconceive antidiscrimination law to reflect more closely and accurately how prejudice and discrimination function.

III. TOWARD A MEANINGFUL REMEDY: BROADENING THE REACH OF FEDERAL ANTIDISCRIMINATION LAW

For good or evil, private employers are generally free to be arbitrary and even capricious in determining whom to hire, unless the employer somehow discriminates on the basis of race, national origin, alienage, age, sex, or handicap status, considerations which Congress has determined to be prohibited.[386]

The formalistic concept of antidiscrimination law enshrined in our constitutional jurisprudence has deep roots in American law, and continues to permeate it to the present day. Its influence is so strong that, even in a statute like the ADA—passed by Congress in 1990 on the basis of extensive, long-term findings of discrimination against the disabled—the drafters still felt compelled to argue explicitly as justification for the statute that the disabled meet the *Carolene Products* definition of a suspect class:

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385 As one scholar notes, this distinction was also observed by the United States Commission on Civil Rights: "In 1983 the United States Commission on Civil Rights observed that, while most disability rights laws were explicitly modeled on prior civil rights statutes and are part of 'the general corpus of discrimination law,' '[h]andicap discrimination and, as a result, its remedies differ in important ways from other types of discrimination and their remedies.'" Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 429-30 (1991).

386 Tudyman v. United Airlines, Inc., 608 F. Supp. 739, 746-47 (C.D. Cal. 1984).

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[387]

The inclusion of this language in the ADA illustrates just how profound its impact remains—all the more so because, to be blunt, much of it is either absolutely or relatively incorrect as applied to the disabled. The thorny definitional problems and the hundreds of pages of ink spilled on defining "disability" seem to belie any characterization of the disabled as "discrete and insular." While the disabled have certainly faced unjustified restrictions and limitations, their "history of purposeful unequal treatment" arguably pales in comparison to that of racial minorities and women.[388] How the disabled have been "relegated to a position of political powerlessness" is unclear, since voting rights were never contingent on being free of disability, as they were on race or gender; to the extent that their lack of power might stem from economic factors, this is no less true of some non-disabled populations, and moreover has never been held to rise to the level of a constitutional violation. The rest of the language about characteristics beyond the individuals' control and stereotypic assumptions is certainly accurate with respect to the disabled (as well as a lot of other groups), but not present in the *Carolene Products* formulation.

Let's be honest: The reason we have laws like the ADA is not because we have suddenly "discovered" a new group whose experience is "just like" that of women and racial minorities. The reason is that, in spite of the entrenched, formalistic logic of American antidiscrimination law, on some level Congress knew better. Faced with extensive evidence of a stigmatized group's routine deprivation of equal opportunity and human rights, Congress decided to transcend constitutional formalism

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387 42 U.S.C. § 12101(7) (2001).

388 At least, as far as facial, statutory subordination on the federal level is concerned. *But see* Bd. of Trustees v. Garrett, 531 U.S. 356, 377-82 (Breyer, J., dissenting) (discussing extensive congressional findings of unjustified discrimination against the disabled by state governments and officials); Buck v. Bell, 274 U.S. 200 (1927) (upholding constitutionality of a Virginia statute authorizing involuntary sterilization of institutionalized "feebleminded" individuals); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the AntiDiscrimination Mandate of the Americans with* Disabilities Act, 52 ALA. L. REV. 91, 133 (2000) (observing that documentation exists with regard to historical practices such as forced sterilization and inappropriate institutionalization).

(even as it paid it lip service) and create a remedy in the present for a problem in the present. To be sure, the disabled had been suffering from unequal opportunity in this country for some time, but anyone who seeks to argue that past, facial, intentional governmental action is the sole acceptable rationale for antidiscrimination law in this country must be constrained to argue that laws like the ADA are a mistake.

For those of us (including Congress) who feel that laws like the ADA are not a mistake, the next step is to recognize that the logic underlying them is not mistaken, either. While the *Carolene Products* conception embodies one example of a stigmatized group in need of civil rights protection, it is not the only legitimate model. Another equally legitimate model is that embodied in the ADA: a group not necessarily discrete, insular, or politically disempowered by the state, but one that experiences constant widespread, harmful, irrational discrimination that can be extensively documented on a systemic level. This model, which includes the disabled, must also include the victims of other equivalent forms of discrimination—such as discrimination on the basis of weight.

The case study of weight-based discrimination in Part II of this article thus serves a couple of purposes. First, it provides a detailed illustration of another form of discrimination that should be amenable to remediation by American antidiscrimination law—if not on the *Carolene Products* model, then certainly on that of the ADA. Second, it demonstrates the profound negative consequences of trying to wedge a blatant, harmful form of discrimination under preexisting statutes that do not fit and that reflect a different model of discrimination. The result is not only that the victims of such discrimination are left without a remedy, but that the statutes, enacted to remedy other problems, come to be seen as abused and exploited, and their credibility ultimately becomes undermined.

There are broader points to take away from the discussion on weight-based discrimination, however. Most importantly, the discussion in Part I of how prejudice, stereotyping, and discrimination function serves to illustrate that, just as different kinds of cancers are all cancer, weight discrimination is fundamentally no different from any other form of discrimination—race, gender, national origin, or disability; the sole difference is in where it manifests itself. Weight-based discrimination is not "special" in any etiological sense, although it may be with regard to its extensive social harms. Thus, the remedy I have described here should be available not just for weight discrimination, but for *any* form of irrational discrimination that can meet the ADA/weight standard of documentation and proof. Moreover, because "intent" is not special or distinct either, as other commentators have urged before me, disparate-

impact theories of discrimination should be widely available on the same terms as they are under the ADA.

Perhaps the most common and immediate objection to an argument of this sort is the "line-drawing problem": why won't this mean a flood of legal claims for "whiny-voice" discrimination, or "grouch discrimination"?[389] Effective though the dreaded "slippery slope" may sometimes be as a rhetorical device, here the traction is easily sufficient to forestall the descent. As the statutes in Michigan and D.C., and the ordinances in San Francisco and Santa Cruz, illustrate perfectly, recognizing a broader range of discrimination than the federal status quo does not automatically imply recognizing every conceivable type of irrational decision as grounds for legal action. In addition to defenses like business necessity and the BFOQ requirement, which would screen out genuinely job-related claims once such a provision was in place, statutory coverage of "new" types of discrimination would also require extensive factual findings and demonstration that the form of discrimination in question exists and is widespread. And, in the end, if a form of discrimination can be proven to be intensely problematic, then the fact that it seems funny or trivial to some is hardly a substantive argument for excluding it from coverage.

A note on form is warranted here: Although it may be useful analytically to think of this approach as the "expansion" of Title VII to cover additional categories of discrimination, in practical terms the actual amendment of Title VII is both descriptively unlikely and, normatively, probably undesirable. As one commentator, who was intimately involved in the drafting of the ADA, explains:

> Attempts to amend the 1964 Civil Rights Act to include people with disabilities continued periodically through the mid-1980s. Such efforts were opposed, privately at least, by traditional civil rights groups who feared that opening up the 1964 statute to any substantive amendments might also risk reopening the bill to weakening changes by opponents of civil rights, and thereby endanger previous hard-fought legislative victories.[390]

If we were starting from scratch, and/or with a different legislative process, overhauling and expanding Title VII would be the most logical place to start, but as Burgdorf and others have acknowledged, in the real world of American politics it is probably most important to preserve what protections we have. Thus, working within the categorical framework of current American antidiscrimination law, the best hope for

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389 Post, *supra* note 80, at 8.

390 Burgdorf, *supra* note 385, at 429.

broadening its coverage is probably the same approach as that taken with the ADA: new statutes that could be presented in Congress as "[simple completion of] the path taken in the 1964 Civil Rights Act, which prohibited discrimination on the basis of race, color, and national origin, and later, gender."[391] As the presence of the *Carolene Products* language in the ADA illustrates, this firm grounding of statutory change in preexisting civil rights statutes, no matter how strained the details may actually be, often proves to be crucial to the passage of a new law, both in practical terms and in terms of creating the moral imperative to overcome the inertia of the status quo.[392]

While my argument certainly applies to the states as well as to the federal government, it is particularly important that the federal legislature be able to set the standard of acknowledging previously underprotected forms of discrimination. Experience with the ADA and other civil rights statutes has shown that federal law can have a profound top-down influence on state law.[393] In particular, it often functions not only as a direct model for various aspects of state laws, but as a "floor" lower than which the states cannot go. The states would still be free to experiment with differing degrees of protection, but where a problem is nation- and culture-wide, it is important that the solution be so too.

IV. CONCLUSION: A FINAL NOTE ON BLAME

Pace Justice Powell,[394] societal discrimination, where it is severe and clearly documented, is already enough to justify remediation, and, where new forms of it can be proven, it should continue to be enough. This is not because people who stereotype and discriminate are "bad" and deserving of punishment, but because those who are unfortunate enough to possess traits that are the targets of irrational stigmas do not deserve to shoulder the whole burden of being stigmatized.

In our culture, we are generally much happier when we can isolate a cause-effect relationship, point a finger at the cause, blame it, and act

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391 Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 536 (2001). This line of presentation becomes even more important in the context of statutory amendment. *See* Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 LAB. LAW. 1, 3 (1991) (discussing the Fair Housing Amendments Act of 1988, a successful amendment of Title VIII of the Civil Rights Act of 1968 to prohibit discrimination on the basis of disability).

392 *See* Mayerson & Yee, *supra* note 391, at 535-36 ("There can be no doubt that [the American] civil rights tradition was used as a strong moral imperative in advocating for a comprehensive civil rights statute for people with disabilities.").

393 *See supra* text accompanying note 375.

394 And Judge Friedman, the Michigan district court judge who authored the recent opinion in *Grutter v. Bollinger*, declaring unconstitutional the University of Michigan Law School's race-conscious admissions policy. Grutter v. Bollinger, 137 F. Supp. 2d 821, 869 (E.D. Mich. 2001).

accordingly.[395] We are a lot less comfortable with situations we do not understand, where there is a problem and we do not have anyone (not even ourselves) to blame. Who or what is to blame for prejudice? In terms of what *causes* it, psychology has multiple answers, and while overt, "hot" bigots are certainly part of the problem, they are not responsible for creating the predilection or for sustaining it. Stereotyping, prejudice, and discrimination are a part of how we all function: a fact of life that we all have to deal with. Who or what is to blame for obesity in America? The problem is extremely complex—if we really knew the answer, we would be further along on a solution—but the evidence indicates that individual lack of willpower or moral failings are probably the *least* to blame.

American antidiscrimination law needs to develop a better way of handling situations where there may be no discrete person, group, or period of history to blame, but where we still desperately need a solution. The current battle raging over race-based affirmative action provides a stark example of the conflict between the blame-based model of antidiscrimination law, which resists "introducing" biases into a status quo presumed to be neutral, and one that understands the status quo as *inherently* biased and seeks to redistribute the consequences of that bias more equitably. As this article has argued, the controversy over weight-based discrimination provides another such example. While there is no question whatsoever that the subordinating practices of the past may have been extremely severe, and perhaps even "blameworthy," Professor Siegel is correct in warning that we should not allow them to serve as an excuse for perpetuating the subordinating practices of today. Regardless of whether we are all aware that we are participants in "societal" discrimination, no meaningful remedy will be possible until we can acknowledge that we all need to participate in the solution.

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395 *See* Crandall & Martinez, *supra* note 189, at 1173 (observing that American culture is a "culture of blame," in which "Americans strongly believe in the metatheoretical assumptions . . . that make causality, controllability, and responsibility so important for blame and its attendant consequences.").