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Help Wanted: 23.5 Million Unemployed Americans Need Not Apply

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ABSTRACT

Fifteen years ago, a Note in the Harvard Law Review presented a thought-provoking discussion on the jobless and their place, or lack thereof, in discrimination theory.¹ The Note advocated that “[b]eing jobless makes one a member of a large and disparate social class, one that has heretofore often gone unrecognized.”² In the ensuing fifteen years, no additional articles have considered whether the jobless deserve a place in

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1. Note, *Finding a Place for the Jobless in Discrimination Theory*, 110 HARV. L. REV. 1609 (1997).

2. *Id.* at 1609.

discrimination theory,³ eerily confirming that the “invisibility of the jobless causes them to be virtually disregarded.”⁴

This Article extends that investigation into the current controversy surrounding employers’ refusal to hire unemployed workers in the midst of a massive unemployment crisis.⁵ Although the unemployed as a class have historically experienced covert discrimination, in 2010, employers across the country began to boldly include in jobs ads that candidates “must be currently employed.”⁶ As a result of this alarming practice, federal, state, and local legislatures across the country responded by proposing legislation prohibiting unemployment discrimination.⁷

Looking at unemployment discrimination through the lens of cognitive psychology, this Article supports the notion that unemployment discrimination should be prohibited. Employment status is an arbitrary and unfair hiring criterion and current antidiscrimination law fails to adequately protect the unemployed, a vulnerable and powerless group. The Article argues that federal, state, and local governments should amend their employment discrimination laws to include protection for the unemployed.

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3. A recent article published in summer 2012 did briefly discuss the issue of unemployed job applicants in the context of the future of the protected class approach. Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 473 (2012).

4. See Note, *supra* note 1, at 1617. See also PERCY ALDEN, THE UNEMPLOYED, A NATIONAL QUESTION 4 (1905) (“The great complexity of the unemployed problem causes it to be neglected by many of the very men who would be most inclined to help if they only saw the way out.”).

5. See Press Release, EEOC, Out of Work? Out of Luck? EEOC Examines Employers’ Treatment of Unemployed Job Applicants at Hearing (Feb. 16, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>.

6. Chris Isidore, *Looking for Work? Unemployed Need Not Apply*, CNNMONEY (June 16, 2010, 4:25 AM), http://money.cnn.com/2010/06/16/news/economy/unemployed_need_not_apply/index.htm.

7. See discussion *infra* Part IV.

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INTRODUCTION

Most people know the saying, "it is easier to get a job when you already have one."⁸ A similar adage is "the longer you're out of work, the harder it is to find work."⁹ Such truisms reflect America's deep stigmatization and historical discrimination against the unemployed.

Economists have studied the reasons why employers discriminate against the jobless.¹⁰ A popular reason is that employers shun the jobless because of the perceived deterioration of their skills.¹¹ Rational choice

8. Suzanne Lucas, *Unemployed? Then Don't Bother Applying*, CBS NEWS (June 7, 2010, 6:15 AM), http://www.cbsnews.com/8301-505125_162-44940438/unemployed-then-dont-bother-applying/ ("Everyone knows it's easier to find a job when you have a job.")

9. James Surowiecki, *No End in Sight*, THE NEW YORKER (Apr. 30, 2012), http://www.newyorker.com/talk/financial/2012/04/30/120430ta_talk_surowiecki ("The longer people are unemployed, the harder it is for them to find a job . . .").

10. Ben Lockwood, *Information Externalities in the Labour Market and the Duration of Unemployment*, 58 REV. ECON. STUD. 733, 734 (1991) ("[T]he period of unemployment of a worker . . . will convey information to other firms about his productivity. Hence, other firms may wish to 'free-ride' on this by conditioning their hiring policies on the workers' unemployment history: in particular, they may wish only to hire the worker if his period of unemployment is short enough.")

11. See *infra* note 348; Geoffrey C. Ho, Margaret Shih, Daniel J. Walters & Todd L. Pittinsky, *The Stigma of Unemployment: When Joblessness Leads to Being Jobless* 3 (Inst. for Res. on Lab. & Emp., UCLA, Working Papers 2011-08, 2011), available at <http://escholarship.org/uc/item/7nh039h1> (citing Dorothea Kubler & Georg Weizsacker, *Information Cascades in the Labor Market*, 80 J. ECON. 211, 211-12 (2003) ("When a worker applies for jobs at different employers sequentially, current employers can infer something about the worker's ability or 'type' by observing previous employers' decisions. . . . While good jobs in the past imply that previous employers received favorable signals about the abilities of the worker, unemployment spells are attributed to the fact that applications failed, i.e., potential employers chose not to hire the worker."))

theory, an approach to analyzing human judgment and decision-making, explains this theory.¹² Rational choice theory provides that humans are “unboundedly rational,” meaning they consider all options before making decisions.¹³ Thus, if an employer perceives unemployment as an indication of skill decay, under rational choice theory, discriminating against the jobless could be a rational choice.

A recent empirical study, however, demonstrates that unbounded rationality does not properly explain unemployment discrimination; instead, the study indicates that the unemployment stigma attaches to the jobless *instantaneously*, before their skills have had an opportunity to decline.¹⁴ The moment an individual becomes unemployed, he or she is stigmatized and devalued.¹⁵ Instead of proving unbounded rationality, this study links employers’ *bounded rationality* and the historic discrimination experienced by the jobless.

The term, bounded rationality, describes limitations on human cognitive abilities.¹⁶ It describes the fact that we are limited in our judgment, making decisions without fully analyzing problems or comprehending all risks.¹⁷ Bounded rationality asserts that, “because of human cognitive and emotional architecture,” we sometimes fail in important decisions.¹⁸ Behavioral decision theory, a competing approach to rational choice theory, emerged from this concept of bounded rationality and took away credence from rational choice theory.¹⁹

Hiring biases resulting from employers’ bounded rationality harm the jobless in many ways, including excluding them from the job market.²⁰ Prior to 2011, unemployment discrimination was legal in every jurisdiction. However, in 2010, one year after the Great Recession officially ended, such discrimination became an overt practice when employers across the country started posting job advertisements unabashedly proclaiming that applicants “must be currently employed.”²¹ In addition, employers started requiring that recruiters present “currently employed” candidates.²²

12. See Ho, Shih, Walters & Pittinsky, *supra* note 11, at 3.

13. See discussion *infra* Part V.A.1.

14. See Ho, Shih, Walters & Pittinsky, *supra* note 11, at 11.

15. *Id.*

16. See discussion *infra* Part V.A.2.

17. *Id.*

18. Bryan Jones, *Bounded Rationality*, 2 ANN. REV. POL. SCI. 297, 297 (1999), available at www.princeton.edu/~smeunier/JonesBounded1.pdf.

19. See discussion *infra* Part V.A.2.

20. See discussion *infra* Part V.C-D.

21. See discussion *infra* Part II.B.

22. See discussion *infra* Part II.B-C. See, e.g., Transcript of EEOC Hearing to Examine Employers’ Treatment of Unemployed Job Applicants, EEOC *15 (Feb. 16, 2011), <http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm>. Christine Owens, Director of the National Employment Law Project, related four accounts from workers who had been directly excluded from job

Because of these practices blatantly excluding unemployed applicants, many people took notice of unemployment discrimination for the first time. After all, millions of Americans were still unemployed because of the Great Recession, the worst financial disaster since the Great Depression of the 1930s.²³ Incensed by these job ads, federal, state, and local legislatures across the country responded by proposing legislation.²⁴

Some proposed legislation narrowly targets ads, imposing civil penalties for employers who post ads indicating that an applicant's employment status is a hiring criterion.²⁵ New Jersey was the first state to pass a law prohibiting these types of job ads.²⁶ Other proposed legislation broadly prohibits discrimination against the jobless, elevating the jobless to protected class status.²⁷ The District of Columbia and the City of New York are the only jurisdictions to adopt such legislation thus far.²⁸

In total, twenty states and the District of Columbia considered unemployment discrimination bills during the 2012 legislative session.²⁹ Employment lawyers deem unemployment discrimination bills a "hot topic."³⁰

There are moral and social policy arguments supporting these pieces of legislation. Morally, unemployment discrimination offends our country's notions of fairness and equal opportunity. Millions of Americans lost their

opportunities because they were unemployed. *Id.* The first example involved a 53-year old woman from Illinois named Michelle. *Id.* After successfully working in IT for nineteen years as an IT help supervisor, she was laid off in 2008. *Id.* A headhunter saw Michelle's resume and contacted her, believing she may be qualified for a position he was seeking to fill. *Id.* But once he found out that she had been unemployed for over a year, he related that "he could not recommend her because his client . . . expressly had advised him not to refer anyone who'd been unemployed for six months or more." *Id.*

23. See Marilyn Geewax, *Did the Great Recession Bring Back the 1930s?*, NPR (Sept. 10, 2012), <http://www.npr.org/2012/07/11/155991507/did-the-great-recession-bring-back-the-1930s>; Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI> ("Gross domestic product has shrunk 3.9 percent in the past year . . . indicating the worst slump since the Great Depression.").

24. See discussion *infra* Part IV.

25. See discussion *infra* Part IV.A.

26. See Assemb. B. 3359, 2010-2011 Leg., Reg. Sess. (N.J. 2011) (enacted).

27. See discussion *infra* Part IV.C.

28. D.C. CODE § 32-1362 (2012); Int. 0814, 2012 City Council (N.Y.C. 2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID%257> (enacted).

29. See discussion *infra* Part IV.

30. See Daniel Schwartz, *New Penalties for Wage Claims, Unemployment Discrimination, Payroll Cards on Hearing Agenda*, CONN. EMP. L. BLOG (Feb. 12, 2012), <http://www.ctemploymentlawblog.com/2012/02/articles/new-penalties-for-wage-claims-unemployment-discrimination-payroll-cards-on-hearing-agenda/> (referring to unemployment discrimination bill as "the newest hot topic"); Ira S. Newman, *Unemployment Discrimination in New York a Hot Topic in a Bad Economy*, N.Y. BUS. LITIG. ATT'Y BLOG (Oct. 21, 2011), <http://www.newyorkbusinesslitigationattorneyblog.com/2011/10/unemployment-discrimination-in.html> (discussing hot topic of unemployment discrimination bills being considered by both New York City Council and state legislators in New York).

job in the Great Recession through no fault of their own and excluding them from the job market is unfair and unconscionable. Furthermore, employers' bounded rationality has harmful social effects on society. For example, a protracted unemployment crisis depreciates skilled labor and human capital.³¹

This Article uses cognitive psychology and behavioral decision theory to buttress these moral and social policy arguments banning unemployment discrimination. Boundedly rational conduct is a normal human process, but when others are harmed, government should prohibit such conduct.

Part I of this Article details the long-term unemployment crisis that the U.S. is currently experiencing.

Part II provides a contextual frame for unemployment discrimination from its historical beginnings to the present, post-Great Recession climate.

Part III explains the existing legal remedies for unemployment discrimination.

Part IV discusses the varied legislative proposals that federal, state, and local governments are considering in addressing the unemployment discrimination problem.

Part V looks at antidiscrimination law through the lens of cognitive psychology. This section presents the social-cognitive context in which unemployment discrimination exists, providing an understanding of key concepts, such as stereotypes, stigmas, prejudice, and discrimination, and how these concepts intersect with the purpose of antidiscrimination law. This section discusses the actual stereotypes and stigmas of the jobless, presents research on employers' bounded rationality and bias in hiring, and analyzes the resulting harms on individuals, families, and society arguing that unemployment discrimination is a social problem warranting statutory protection.

Finally, Part VI proposes a legal framework for federal, state, and local governments to consider when enacting unemployment discrimination statutes. This section also responds to criticisms of the unemployment discrimination statutes.

I.

RAGING UNEMPLOYMENT: A U.S. SOCIAL CRISIS

A. Official Rates of Unemployment

The Great Recession, recognized as the most devastating financial crisis since the Great Depression,³² began in December 2007 and officially

31. See discussion *infra* Part V.D.1-2.

32. See DON PECK, PINCHED 13 (2011) (characterizing the Great Recession as "the decade's second and more severe recession; the economy shrank by more than 4 percent and more than 8 million

ended in June 2009.³³ One month prior to the beginning of the Great Recession, in November 2007, the official unemployment rate was 4.7%.³⁴ In June 2009, however, it was a whopping 9.5%.³⁵ Although June 2009 marked the official end of the recession, unemployment continued to climb, reaching 10.1% in October 2009, a rate twice as much as before the recession began.³⁶ By November 2009, a ratio of 6.2 unemployed persons per job opening remained,³⁷ compared to 1.8 unemployed persons per job opening at the start of the recession.³⁸

The Great Recession and its aftermath claimed approximately 8.7 million jobs.³⁹ This drastic job loss has had a profound effect on the length of time Americans search for a job.⁴⁰ With one out of every ten Americans unemployed in 2010, the length of time it took for the jobless to successfully find a job increased from 5.2 weeks in 2007 to 10.4 weeks in 2010.⁴¹ In addition, 11% of successful jobseekers spent more than a year searching for a job, whereas in 2007, less than 3% of successful jobseekers

people lost their job. The average house fell 30 percent in value, and the typical household lost roughly a quarter of its net worth. The Dow, from peak to trough, shed more than 7,000 points. One hundred and sixty-five commercial banks failed in 2008 and 2009, and the investment banks Bear Stearns and Lehman Brothers ceased to exist.”)

33. The National Bureau of Economic Research determined the official begin and end of the recession that began December 2007. *US Business Cycle Expansions and Contractions*, NAT'L BUREAU OF ECON. RES., (Apr. 23, 2012), <http://www.nber.org/cycles/cyclesmain.html>.

34. See Michael Reich, *High Unemployment After the Great Recession: Why? What Can We Do?* 1 (Ctr. on Wage & Emp't Dynamics, Policy Brief 2010), available at irle.berkeley.edu/cwed/wp/2010-01.pdf.

35. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., THE EMPLOYMENT SITUATION—JUNE 2009 1 (July 2, 2009), http://www.bls.gov/news.release/archives/empisit_07022009.pdf.

36. See Randy E. Ilg & Eleni Theodosiou, Bureau of Lab. Stat., *Job Search of the Unemployed by Duration of Unemployment*, MONTHLY LABOR REVIEW 42 (Mar. 2012), available at <http://www.bls.gov/opub/mlr/2012/03/art3exc.htm>; see also Mark deWolf & Katherine Klemmer, Bureau of Lab. Stat., *Job Openings, Hires, and Separations Fall During the Recession*, MONTHLY LABOR REVIEW 36 (May 2010), available at www.bls.gov/opub/mlr/2010/05/art3full.pdf (“The unemployment rate reached a peak of 10.1 percent in October 2009, having climbed from 5.0 percent in December 2007.”).

37. See deWolf & Klemmer, *supra* note 36, at 39.

38. See BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., JOB OPENINGS AND LABOR TURNOVER MAY 2012 (July 10, 2012), http://www.bls.gov/news.release/archives/jolts_07102012.pdf.

39. See *Chart Book: The Legacy of the Great Recession, Economic Recovery Watch*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 7, 2012), (printed version on file with author) [hereinafter “*Chart Book*”]; see also deWolf & Klemmer, *supra* note 36, at 36 (“Nonfarm employment reached a low of 130 million in December 2009 after having fallen from a high of 138 million in December 2007, a net employment loss of approximately 8 million.”).

40. See Randy Ilg, Bureau of Lab. Stat., *How Long Before the Unemployed Find Jobs or Quit Looking?*, ISSUES IN LAB. STAT. (May 2011), available at http://www.bls.gov/opub/ils/summary_11_01/unemployed_jobs_quit.htm.

41. See Ilg & Theodosiou, *supra* note 36, at 42 (“In sharp contrast that emphasizes the severity of the 2007-2009 economic downturn, the median length of time for a successful job search doubled . . .”).

looked for a job for more than a year.⁴² The length of time that unsuccessful jobseekers looked for work before giving up and leaving the workforce also increased sharply, from 8.7 weeks in 2007 to 21.4 weeks in 2011.⁴³

Finally, data also supports the axiom that “the longer you’re out of work, the harder it is to find work.” Researchers have found that the likelihood of finding a job decreases the longer one is unemployed.⁴⁴ For example, in 2010, a person unemployed for less than five weeks had a 31% chance of becoming employed in a subsequent month.⁴⁵ However, for those unemployed for twenty-seven weeks or more, the “long-term unemployed,” the chance of becoming unemployed plummeted to only 10%.⁴⁶ “During the recession, the share of the labor force unemployed for more than twenty-six weeks rose higher than at any point in the past six decades.”⁴⁷ Currently, 5.2 million or 40.7% of unemployed Americans face long-term unemployment, a significant concern.⁴⁸

In early 2011, although mass layoffs decreased, job growth remained stagnant.⁴⁹ The economy has only recovered about 4 million of the 8.7 million jobs lost.⁵⁰ Although parts of the economy have slowly recovered, today’s official unemployment rate—8.3% or 12.8 million people—is still staggering.⁵¹ The economy still faces a long and difficult climb out of the jobs hole created by the recent recession.⁵²

B. Alternative Measures of Unemployment

The official unemployment rates do not tell the entire story. The official rates “mask . . . important dimensions of labor market distress”⁵³

42. See Ilg, *supra* note 40.

43. See Ilg & Theodossiou, *supra* note 36, at 42.

44. See Ilg, *supra* note 40.

45. See *id.*

46. See *id.*

47. *Chart Book*, *supra* note 39.

48. BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., THE EMPLOYMENT SITUATION—FEB. 2012 (Mar. 9, 2012), http://www.bls.gov/news.release/archives/empsit_03092012.htm (“EMPLOYMENT SITUATION—FEB. 2012”). See also *Chart Book*, *supra* note 39 (“Long-term unemployment remains a significant concern: two-fifths (40 percent) of the 12.5 million people who were unemployed in August 2012 had been looking for work for 27 weeks or longer.”).

49. See PECK, *supra* note 32 at 14.

50. See *Chart Book*, *supra* note 39 (“As a result nonfarm payroll employment was 2.2 percent (3.0 million jobs) lower in August 2012 than it was at the start of the recession.”); see also PECK, *supra* note 32, at 23 (“More than half of all the jobs lost in the Great Recession were lost forever.”).

51. EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48; see also PECK, *supra* note 32 at 13 (“[F]or many Americans, the recession has not really ended.”).

52. *Chart Book*, *supra* note 39.

53. JOSH BIVENS, FAILURE BY DESIGN, THE STORY BEHIND AMERICA’S BROKEN ECONOMY 19 (2011).

because they only capture unemployed individuals who have looked for work full-time within the past four weeks.⁵⁴ Yet other categories of workers must be considered to comprehend the full magnitude of this social crisis. These individuals are known as the nation's "underemployed."⁵⁵

The term underemployed includes involuntary part-time workers, marginally attached workers, and discouraged workers.⁵⁶ In July 2012, there were 8.2 million involuntary part-time workers.⁵⁷ These are workers who are employed part-time for economic reasons because either their hours have been cut back or they have been unable to find full-time work.⁵⁸ There were also 2.5 million marginally attached workers, meaning workers who "were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months."⁵⁹ Finally, of the marginally attached workforce, there were 852,000 discouraged workers in July 2012.⁶⁰ "Discouraged workers are persons not currently looking for work because they believe no jobs are available for them."⁶¹

When these numbers are added to the official unemployment rate, it reveals a "real" unemployment rate of 15%, or 23,500,000 workers, in July 2012.⁶² In stark contrast, there were only 3,664,000 job openings at the end of July 2012,⁶³ which reflects approximately ten unemployed workers for every three openings. In other words, "if every available job were filled by an unemployed individual, about seven of every ten unemployed workers would still be unemployed."⁶⁴

54. See EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48 (referring to the marginally attached workforce, "[t]hey were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey").

55. See Andrew Sum & Ishwar Khatiwada, Bureau of Lab. Stat., *The Nation's Underemployed in the "Great Recession" of 2007-09*, MONTHLY LABOR REVIEW (Nov. 2010), available at <http://www.bls.gov/opub/mlr/2010/11/art1exc.htm>.

56. EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-15 U-6 (Alternative Measures of Labor Underutilizations).

57. See EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48.

58. See *id.*

59. *Id.* (noting that marginal workers "were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey").

60. See *id.* ("The remaining 1.7 million persons marginally attached to the labor force in July had not searched for work in the 4 weeks preceding the survey for reasons such as school attendance or family responsibilities.").

61. *Id.*

62. See EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-15 U-6 (Alternative Measures of Labor Underutilizations). To achieve the "real" unemployment rate, the number of unemployed workers, involuntary part-time workers, and marginally attached workers are added together and divided by the civilian labor force. See *id.*

63. See BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., JOB OPENINGS AND LABOR TURNOVER SURVEY—JULY 2012 (Sept. 11, 2012), http://www.bls.gov/news.release/archives/jolts_09112012.pdf.

64. *Chart Book, supra* note 39.

C.A National Jobs Crisis

According to Federal Reserve Chairman Ben Bernanke, current unemployment is a “national crisis.”⁶⁵ The percentage of working-adult Americans is at its lowest point in nearly thirty years, reflecting the highest number of unemployed Americans.⁶⁶ “In its origins, its severity, its breadth, and its social consequences, the current period resembles only a few others in American history—the 1890s, the 1930s, and in more limited respects the 1970s.”⁶⁷

The “Congressional Budget Office and the Federal Reserve both warn that unless the pace of economic growth and job creation picks up dramatically, it will be several years before the unemployment rate returns to normal levels.”⁶⁸ In the past thirty months, the private sector, on average, has created about 154,000 jobs a month.⁶⁹ However, on average, 195,000 jobs must be created each month over the next two years just to return the economy to pre-recession levels of employment.⁷⁰ Even more jobs are needed to restore the economy to full employment since the population and labor force have grown.⁷¹

II.

UNEMPLOYMENT DISCRIMINATION: THE NEW OLD KID ON THE BLOCK

A. Unemployment Discrimination Defined

Refusing to hire individuals on the basis of race, color, religion, disability or sex is illegal.⁷² Historically, however, refusing to hire individuals on the basis of employment status has not only been legal, but it

65. See Joshua Zumbun & Vivien Lou Chen, *Bernanke Says High U.S. Unemployment Poses ‘National Crisis,’* BLOOMBERG (Sept. 28, 2011), <http://www.bloomberg.com/news/2011-09-29/bernanke-says-u-s-facing-national-crisis-as-high-unemployment-persists.html>.

66. See Surowiecki, *supra* note 9. Comparing these numbers to the Great Depression, there are more people unemployed now. See Council of Economic Advisors, *Economic Report of the President* 21 (1971). At the height of the Depression in 1933, 24.9% of the civilian labor force was unemployed at 11,385,000 people. *Id.*

67. PECK, *supra* note 32, at 14.

68. *Chart Book*, *supra* note 39.

69. See *id.* In August 2012, only 96,000 jobs were added, far short of the 141,000 jobs that were predicted. See BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., *THE EMPLOYMENT SITUATION—AUGUST 2012* (Sept. 7, 2012), <http://www.bls.gov/news.release/empsit.nr0.htm>; *Economic, Nonfarm Payrolls*, BRIEFING.COM (Sept. 7, 2012), <http://www.briefing.com/investor/calendars/economic/releases/employ.htm> (“Nonfarm payrolls increased by a lackluster 96,000 in August following a downwardly revised 141,000 (from 163,000) increase in July.”).

70. See *Chart Book*, *supra* note 39.

71. See *id.*

72. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2012)).

has been a commonly-accepted practice.⁷³ Although there are no formal studies on the prevalence of unemployment discrimination, those seeking employment have long known that it's easier to find a job if you already have one.

Our society's tolerance of this discrimination stems from Americans' longstanding obsession with productivity and work.⁷⁴ As early as the eighteenth century, prominent philosophers like Benjamin Franklin began to shape societal ideals about the importance of work.⁷⁵ By the nineteenth century, the idea of work was exalted to that above religion or ethics.⁷⁶ Once mass production and industrialization arrived in the twentieth century, the "work ethic took hold as the national ethos."⁷⁷

Our national preoccupation with work, coupled with the perceived non-productivity of the jobless, formed and justified unemployment discrimination.⁷⁸ "To be jobless is to be a disappointment to the American conception of the good life."⁷⁹ As a result, both society and the jobless themselves view the jobless as second class citizens.⁸⁰

Unemployment discrimination, however, is now under intense scrutiny. This shift occurred after employers started to place job ads boldly stating that the "unemployed need not apply" in a climate where 23.5 million people remain jobless and underemployed.⁸¹ Incensed by this practice, federal, state, and local lawmakers are now considering laws to prohibit such discrimination.⁸²

73. See Levit, *supra* note 3, at 473 (discussing the "long-standing prejudice against hiring unemployed job applicants").

74. See Note, *supra* note 1, at 1612 ("In America, productive work is narrowly and arbitrarily defined as that work which creates a 'direct monetary reward,' and which contributes in some way to the national economy.").

75. See BENJAMIN FRANKLIN, *THE WAY TO WEALTH* (1848). Benjamin Franklin's collection of adages and advice was first presented in Poor Richard's Almanac during its first twenty-five years of publication. The entertaining essay advocates for hard work, earning and saving money, and avoiding debt. Some of the quoted phrases are still popular today. For example: "Early to bed, and early to rise, makes a man healthy, wealthy, and wise" and "There are no gains without pains." See *id.* at 2.

76. See Note, *supra* note 1, at 1611.

77. *Id.*

78. See *id.* at 1613.

79. *Id.* at 1612.

80. See *id.* at 1612-13; see also RICHARD H. HALL, *DIMENSIONS OF WORK* 11 (1986) (arguing that Americans have a narrow, restrictive definition of work; to be employed means to be paid in some monetary form); PETER KELVIN & JOANNA E. JARRETT, *UNEMPLOYMENT, ITS SOCIAL PSYCHOLOGICAL EFFECTS* 53 (1985) ("He may not put it in precisely these words, though some come close to it, but the unemployed individual sees his situation as essentially that of second-class citizen.").

81. See discussion *infra* Part II.B.

82. See discussion *infra* Part IV.

*B. Discriminatory Job Ads Surface: The Perverse Catch 22*⁸³

Sony Ericsson, a multinational mobile phone manufacturer, is widely credited as being the first company to post a job ad excluding the jobless.⁸⁴ In May 2010, the company announced it was relocating its North American headquarters from Research Triangle Park, North Carolina to Atlanta, Georgia.⁸⁵ Wooed by \$4 million in state tax credits, the company planned to hire 180 new workers.⁸⁶ The company quickly gained the local media's attention when an ad for a marketing position provided: "NO UNEMPLOYED CANDIDATES WILL BE CONSIDERED AT ALL."⁸⁷ Soon after, due to the media scrutiny, the company's spokesperson issued a statement claiming that the ad was a mistake.⁸⁸

Unfortunately, this was not the only job posting openly discriminating against the jobless. Over the past two years, advocacy organizations, government agencies, and media representatives have documented hundreds of similar ads.⁸⁹ The ads are for jobs across the nation, including Seattle, Washington; Dallas, Texas; and New York, New York.⁹⁰ There is also a wide range of jobs represented, including blue collar, white collar, and service positions ranging from mechanics to financial advisors to accountants.⁹¹

The ad language is often explicit. Common language indicates that candidates must: "be currently employed," "currently working," "actively employed," or "currently/recently employed."⁹² Some employers are even more imprudent in their ads. For example, one recruiter's ad stated, "Client

83. This term refers to "limiting jobs to those already working." Christine L. Owens, *Room for Debate—Exclusion Hurts Everyone*, N.Y. TIMES, July 27, 2011, <http://www.nytimes.com/roomfordebate/2011/07/26/the-hiring-bias-against-the-unemployed/excluding-the-unemployed-hurts-the-economy>.

84. Briefing Paper, Nat'l Emp't L. Project, *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed from Job Opportunities, as Discriminatory Ads Persist 2* (July 12, 2011), available at http://nelp.3cdn.net/b4ade339e970088d72_alm6blqx8.pdf.

85. See Urvaksh Karkaria, *Sony Gets \$4M to Move Unit HQ to ATL*, ATLANTA BUSINESS CHRONICLE (May 21, 2010), <http://www.bizjournals.com/atlanta/stories/2010/05/17/daily53.html?page=all>.

86. See *id.*; *Job Listing: Unemployed Need Not Apply*, 11 ALIVE NEWS (May 31, 2010), <http://www.11alive.com/news/local/story.aspx?storyid=144719>.

87. See *id.* (reporting that the ad was for a marketing position); see also PECK, *supra* note 32, at 23.

88. Adam Cohen, *Jobless Discrimination? When Firms Won't Even Consider Hiring Anyone Unemployed*, TIME, May 23, 2011, <http://www.time.com/time/nation/article/0,8599,2073520,00.html> ("The cell-phone giant later said the listing, which produced a media uproar, had been a mistake.").

89. See Briefing Paper, *supra* note 84, at 2 (reporting that when the National Employment Law Project ("NELP") conducted a four-week review in 2011, 150 ads were found).

90. See *id.*

91. See *id.*

92. *Id.* at 3, 8.

will not consider/interview anyone NOT currently employed regardless of reason.”⁹³

Many of the postings are found on highly trafficked job posting websites like Career Builder.com and Monster.com.⁹⁴ In spring 2011, the National Employment Law Project (“NELP”) conducted a four-week review of prominent job listing websites, including CareerBuilder.com, Monster.com, Indeed.com, and Craigslist.com.⁹⁵ NELP’s research identified more than 150 unique ads that excluded candidates based on jobless status; 125 of these ads identified specific companies by name.⁹⁶ Some of these entities were of national prominence like Allstate Insurance and John Hopkins University.⁹⁷

Outraged by these ads, in July 2011, a coalition of advocacy organizations including USAction, Change.org, ColorofChange.org, and CREDO Action launched an online campaign against the discriminatory ad practices.⁹⁸ A few months later, the advocacy organizations, in conjunction with NELP, collected 250,000 signatures asking Congress to pass legislation “to ban hiring discrimination against the jobless.”⁹⁹ The coalition, along with U.S. Senate Democrats Sherrod Brown of Ohio, Richard Blumenthal of Connecticut, and Kirsten Gillibrand of New York, also demanded that job listing websites stop publishing the exclusionary job ads.¹⁰⁰ Indeed.com immediately complied,¹⁰¹ while CareerBuilder.com refused.¹⁰²

93. Arianna Huffington, *THIRD WORLD AMERICA: HOW OUR POLITICIANS ARE ABANDONING THE MIDDLE CLASS AND BETRAYING THE AMERICAN DREAM* 216 (2011).

94. See Briefing Paper, *supra* note 84, at 1.

95. See *id.* at 1. NELP is an advocacy group that supports low-wage workers and the unemployed. *About Us, Background, NAT'L EMP'T L. PROJECT*. http://www.nelp.org/index.php/content/content_about_us/background/ (last visited Mar. 11, 2013).

96. See Briefing Paper, *supra* note 84, at 1. To put this number in perspective, there are millions of new and duplicate job listings posted each month in electronic and non-electronic forms. According to The Conference Board Help Wanted OnLine Data Series (HWOL), there were 4,423,300 online advertised vacancies in February 2012. See News Release, The Conference Board, Online Labor Demand Rises 39,900 in February, The Conference Board Reports 1 (March, 5, 2012), http://www.conference-board.org/pdf_free/press/PressPDF_4420_1330884885.pdf. HWOL “measures the number of new, first-time online jobs and jobs reposted from the previous month on more than 1,000 major Internet job sites and smaller job sites that serve niche markets and smaller geographic areas.” *Id.* at 9.

97. See Briefing Paper, *supra* note 84, at 8-9.

98. See, e.g., Ross Wallen, *Stop Hiring Discrimination Against the Unemployed? “Indeed” We Can!*, USACTION (Sept. 8, 2011), <http://usaction.org/2011/09/stop-hiring-discrimination-against-the-unemployed-%E2%80%9Cindeed%E2%80%9D-we-can/>.

99. Ross Wallen, *Videos and Photos: USAction Pres. William McNary: 250,000 Signatures to End Unemployment Discrimination*, USACTION (Sept. 22, 2011), <http://usaction.org/2011/09/video-and-photos-usaction-pres-william-mcnary-250000-signatures-to-end-unemployment-discrimination/>.

100. See Jennifer Liberto, *Democrats: Don't Discriminate Against Unemployed*, CNNMONEY (OCT. 19, 2011), http://money.cnn.com/2011/10/19/news/economy/discrimination_unemployed/index.htm.

An informal, on-line search at the time this article was written revealed that little has changed since the 2011 NELP study. There are still a wide range of employers using employment status as a hiring criterion for positions across the U.S. The sampling from this informal search disclosed the following job ads:

Manager Medical Staff, St. David's HealthCare, Austin, TX: "Must be currently employed in a medical services profession . . ."¹⁰³

Police Officer, City of Mesquite, Mesquite, NV: "Must be currently employed as a Police Officer . . ."¹⁰⁴

Restaurant Managers, Anonymous Posting, Cincinnati, OH: "Must be currently employed."¹⁰⁵

Customer Service Supervisor, Oasis Staffing, Jacksonville, FL: "For this one you must be currently employed or recently employed with no large gaps of employment. Must have job stability with no more than 3 jobs in the last 5 years."¹⁰⁶

Tool Room Machinist, Anonymous Posting, Milwaukee, WI: "Must be currently employed."¹⁰⁷

Sales Executive, Porter Group, Inc., Philadelphia, PA: "Qualified candidates must be currently employed . . ."¹⁰⁸

101. See Jess Kutch, *Jobs Site Blocks Ads that Discriminate Against the Unemployed*, CHANGE.ORG (Aug. 31, 2011), available at http://www.alternet.org/newsandviews/article/661953/jobs_site_blocks_ads_that_discriminate_against_the_unemployed ("Indeed.com strives to provide the best job search experience for job seekers. Our policy is to exclude job listings that do not comply with federal or local laws related to discriminatory hiring practices as well as job listings that discriminate against the unemployed." (quoting Sophie Beurpere, Indeed.com's spokesperson)).

102. See Doug Foote, *Despite Pressure, CareerBuilder.com Continues Unemployment Discrimination*, MAIN ST. BLOG (Sept. 21, 2011, 9:30 PM), <http://blog.workingamerica.org/2011/09/21/despite-pressure-careerbuilder-com-continues-unemployment-discrimination/>.

103. CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?IPath=QHKCV0A&ecview=exp&words=%22must+be+currently+employed%22&ff=21&APath=2.21.0.0.0&job_id=J3I4P56P9X2YRD14W86 (posted March 7, 2012) (printed version on file with author).

104. CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?IPath=QHKCV0B&ecview=exp&words=%22must+be+currently+employed%22&ff=21&APath=2.21.0.0.0&job_id=JHN8725ZTS19WW3DGH3 (posted March 5, 2012) (printed version on file with author).

105. CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?IPath=QHKCV0C&ecview=exp&words=%22must+be+currently+employed%22&ff=21&APath=2.21.0.0.0&job_id=J8E1L26S74HBR00LS31 (posted March 5, 2012) (printed version on file with author).

106. CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?IPath=QHKCV0D&ecview=exp&words=%22must+be+currently+employed%22&ff=21&APath=2.21.0.0.0&job_id=JHN6036SLFKP9QS34G5 (posted March 1, 2012) (printed version on file with author).

107. MONSTER.COM, <http://jobview.monster.com/Machinists-Tool-Room-Job-Milwaukee-WI-107051787.aspx> (last visited March 7, 2012) (printed version on file with author).

C. Prevalence of Unemployment Discrimination

In November 2010, in the midst of the negative publicity garnered by the ads, fifty-eight members of Congress sent a letter to the Equal Employment Opportunity Commission (“EEOC”) “with serious concern regarding . . . blatant discrimination against the unemployed.”¹⁰⁹ Congress urged the EEOC to investigate the matter further.¹¹⁰

A few months later, on February 16, 2011, the EEOC conducted a hearing to investigate “the emerging practice of excluding unemployed persons from applicant pools.”¹¹¹ While the overt discrimination of the job ads troubled the EEOC, the covert discrimination caused concern as well.¹¹² Recruiters and human resource professionals had reported to the media that discrimination was also taking place “behind closed doors” as employers were asking recruiters to exclude the jobless from applicant pools.¹¹³

In its investigation, the EEOC focused on determining the prevalence of unemployment discrimination.¹¹⁴ The agency also wanted to determine whether the discriminatory practice violated federal antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), or the Americans with Disabilities Act of 1990 (ADA).¹¹⁵ According to Fatima Goss Graves, Vice President for Education and Employment at the National Women’s Law Center, the practice of excluding the jobless from applicant pools could be causing an adverse impact on protected classes, and if so, would be an unnecessary barrier to employment.¹¹⁶

To examine these issues, the EEOC invited a diverse panel of employment experts to testify at the hearing, including an assistant secretary from the Department of Labor, four labor rights advocates, a law professor, an attorney representing employer interests, and a human

108. CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?APath=2.21.0.0.0&job_id=J8F0296TDWHLR41QHHY&IPath=QHKV0A (posted Aug. 12, 2012) (printed version on file with author).

109. Mitchell Hirsch, *Members of Congress Urge Investigation into Discrimination Against the Unemployed*, UNEMPLOYEDWORKERS.ORG (Nov. 21, 2010), http://unemployedworkers.org/sites/unemployedworkers/index.php/site/blog_entry/members_of_congress_urge_investigation_into_discrimination_against_the. See also Press Release, Rep. Hank Johnson, Rep. Johnson Urges Investigation into Discrimination Against Unemployed (Nov. 17, 2010), <http://hankjohnson.house.gov/press-release/rep-johnson-urges-investigation-discrimination-against-unemployed> (last visited Sept. 11, 2012).

110. See *id.*

111. Press Release, *supra* note 5 (quote from Chair Jacqueline Barrien).

112. See Transcript, *supra* note 22, at *3, *50.

113. See *id.* at *3 (“[E]ven where bans were not included in ads, the practice may be taking place behind closed doors when employers [ask] . . . that unemployed candidates be excluded from [applicant] pools.”).

114. See *id.* at *2-6.

115. See *id.* at *21-22, *24, *38.

116. See *id.* at *36-37.

resources professional.¹¹⁷ The employer and human resources representatives claimed that unemployment discrimination is not widespread,¹¹⁸ while the labor rights advocates stressed that unemployment discrimination is a “growing practice.”¹¹⁹

Ultimately, the testimony regarding the prevalence of unemployment discrimination was indeterminate.¹²⁰ There is no data nor have any studies been conducted to determine how pervasive the practice is. Because discrimination against the jobless is not illegal, the EEOC does not track such data.¹²¹

Even though there is no official data to substantiate the prevalence of the practice, states remain concerned that the “disturbing and growing trend among employers” does not become widespread.¹²² As stated by Democratic Assemblyman Michael Allen of California, who introduced a bill banning the ads, “It’s better to be proactive rather than to let this become a common practice.”¹²³

With millions of people unemployed through no fault of their own amid a major unemployment crisis, legislators are particularly concerned

117. The expert panel included William E. Spriggs, Assistant Secretary for Policy, U.S. Department of Labor; Christine Owens, Executive Director, National Employment Law Project; Fatima Goss Graves, Vice President for Education and Employment, National Women’s Law Center; Algernon Austin, Director of the Race, Ethnicity, and the Economy Program, Economic Policy Institute; Joyce Bender, Chief Executive Officer, Bender Consulting Services; Helen Norton, Associate Professor of Law, University of Colorado Law School; Fernan R. Cepero, Vice President for Human Resources, The YMCA of Greater Rochester, Society for Human Resource Management; and James S. Urban, Partner, Jones Day. *Id.* at *1-2.

118. Mr. Cepero claimed that he was “unaware of any trend in excluding the unemployed from consideration for jobs.” *Id.* at *19. Mr. Urban agreed, stating that “it’s my experience and belief that there is not . . . a widespread practice among employers to disqualify applicants on the basis of unemployment.” *Id.* at *21.

119. *Id.* at *16 (Statement of Christine Owens, Director of the National Employment Law Project) (“[T]here is no official data on this, [sic] I wish there were . . . But I think it’s particularly significant that these representatives of staffing agencies have said, ‘There seems to be a growing practice.’” One HR consultant from New Jersey said that the first question every recruiter asked her is, “Is your candidate currently employed?” And if the person isn’t, she says they’re not interested. . . . In sum, while we don’t have hard and fast data, the anecdotal evidence from job postings and ads; the accounts of unemployed workers who’ve talked to us; and I think significantly, the comments from these staffing firm representatives, suggest that there may be a disturbing and growing trend of excluding jobless workers from consideration for job openings, regardless of their qualifications.”).

120. See Transcript, *supra* note 22, at *50.

121. The EEOC and the Department of Labor do not collect such data because unemployment discrimination is not prohibited. See *id.* at *7, *16.

122. Press Release, Nat’l Emp’t L. Project, Discrimination Against Jobless on the Rise (Feb. 16, 2011), available at http://nelp.3cdn.net/586fef7ad31dc004dc_6em616fbu.pdf (quoting Christine Owens, executive director of the National Employment Law Project).

123. Ariel Edwards-Levy, *California Considers Outlawing Discrimination Against Unemployed*, HUFFINGTON POST, Jan. 23, 2012, http://www.huffingtonpost.com/2012/01/23/california-unemployment-discrimination_n_1224464.html.

that this practice might become common.¹²⁴ The next section discusses whether there are any available existing remedies for this growing trend.

III.

EXISTING LEGAL REMEDIES FOR UNEMPLOYMENT DISCRIMINATION ARE INADEQUATE

A. Brief Overview of Antidiscrimination Remedies

The most important federal antidiscrimination laws include Title VII of the 1964 Civil Rights Act (Title VII),¹²⁵ the Age Discrimination in Employment Act of 1967 (ADEA),¹²⁶ and the Americans with Disabilities Act of 1990 (ADA).¹²⁷ These laws make it unlawful for an employer to make an adverse employment decision because of an individual's race, color, religion, sex, national origin, age, or disability.¹²⁸ When bringing a civil claim alleging employment discrimination under these laws, a plaintiff has two possible causes of action: disparate treatment and disparate impact.¹²⁹

1. Disparate Treatment

The most straightforward claim under antidiscrimination law is one alleging "disparate treatment, or intentional, or invidious discrimination."¹³⁰ Disparate treatment occurs when an employer "treats certain people less favorably than others" on the basis of a protected classification, such as race, color, religion, sex, age, or disability.¹³¹ Disparate treatment cases require proof that an employer intended to discriminate against a plaintiff.¹³²

124. See MARIE JAHODA, *EMPLOYMENT & UNEMPLOYMENT: A SOCIAL-PSYCHOLOGICAL ANALYSIS* 2 (1982).

125. 42 U.S.C. §§ 2000e to e-17. The Civil Rights Act of 1964 is "perhaps the most prominent civil rights legislation enacted in modern times." JODY FEDER, *CONG. RESEARCH SERV., RL33386, FEDERAL CIVIL RIGHTS STATUTES: A PRIMER* 1 (2008).

126. 29 U.S.C. §§ 621-34 (2012).

127. 42 U.S.C. §§ 12101-12213 (2012).

128. EVAN BERMAN ET AL., *HUMAN RESOURCE MANAGEMENT IN PUBLIC SERVICE: PARADOXES, PROCESSES, AND PROBLEMS* 65 (2009).

129. See *id.* at 65, 116.

130. See *id.* at 65.

131. See *Carter v. Ball*, 33 F.3d 450, 456 n.7 (4th Cir. 1994) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); see also Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 *AKRON L. REV.* 813, 815 (2004) (explaining that in a disparate treatment claim, "plaintiffs allege that an employer intentionally discriminated against a member or members of a protected group").

132. See *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

Proving intent is a critical element of a disparate treatment claim¹³³ and it can be shown by direct¹³⁴ or circumstantial evidence.¹³⁵

McDonnell Douglas Corp. v. Green is the seminal Title VII disparate treatment case.¹³⁶ In *McDonnell Douglas*, the Supreme Court employed a three-step, burden-shifting framework to evaluate a disparate treatment claim.¹³⁷ First, a plaintiff must establish a prima facie case, which includes showing (1) that the plaintiff belongs to a protected class; (2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite the plaintiff's qualifications, the plaintiff was rejected; and (4) that after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.¹³⁸

Once a plaintiff establishes a prima facie case by a preponderance of the evidence, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."¹³⁹ If the employer does this, the employee has the opportunity to prove that the employer's stated reason was merely a pretext to camouflage discrimination.¹⁴⁰

When compared to disparate impact claims, disparate treatment cases appear to be more favored by the courts.¹⁴¹ In addition, as Title VII was originally enacted, all successful plaintiffs could recover back and front pay,¹⁴² declaratory and injunctive relief,¹⁴³ and attorney's fees,¹⁴⁴ but not compensatory or punitive damages.¹⁴⁵ In 1991, finding that "additional remedies under Federal law are needed to deter . . . intentional discrimination in the workplace,"¹⁴⁶ Congress amended Title VII of the

133. See *id.*

134. BERMAN ET AL., *supra* note 128, at 65 ("In [the direct evidence] approach, plaintiffs rely on statements that demonstrate mental bias by the decision maker at the time of an adverse employment decision. An example would be a supervisor calling an employee a 'black radical' while firing him.").

135. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000); BERMAN ET AL., *supra* note 128, at 79 (explaining that with circumstantial evidence, "the employee relies on actions by the employer to support an inference of unlawful motive").

136. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

137. See *d.* at 802-05.

138. See *id.* at 802.

139. *Id.*

140. See *id.* at 804.

141. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734 (2006).

142. 42 U.S.C. § 2000e-5(g) (2012).

143. *Id.*; see also MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.30 (4th ed. 2010) (explaining that equitable remedies include hiring, reinstatement, and back pay).

144. 42 U.S.C. § 1988(b) (2000).

145. ROTHSTEIN ET AL., *supra* note 143, § 2.31.

146. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071, 1071 (1988) (codified at 42 U.S.C. § 1981 note (2012)).

Civil Rights Act.¹⁴⁷ With the passage of the Civil Rights Act of 1991, Congress made punitive¹⁴⁸ and compensatory damages available to plaintiffs claiming intentional discrimination.¹⁴⁹

2. Disparate Impact

The second possible cause of action under antidiscrimination law is disparate impact. In 1971, two years before *McDonnell Douglas*, the Supreme Court confirmed the disparate impact theory under Title VII in the landmark case, *Griggs v. Duke Power Co.*¹⁵⁰ In *Griggs*, an employer required that applicants have a high school diploma and pass testing requirements to obtain desirable jobs within the company.¹⁵¹ These standards, however, were not significantly related to successful job performance¹⁵² and they excluded black applicants at a higher rate than whites, resulting in significantly more promotions and preferences for whites.¹⁵³ Finding a lack of intent to discriminate against the black employees, the lower courts ruled in favor of the employer.¹⁵⁴

The Supreme Court reversed the lower courts and held that an employer could be liable for employment practices that are “neutral on their face, and even neutral in terms of intent” if the employment practice is not related to job performance¹⁵⁵ and excludes members of a protected class.¹⁵⁶ The Court further held that an employer could avoid liability if the employment practice had a “manifest relationship to the employment in question.”¹⁵⁷ The Court, noting that “[t]he touchstone is business necessity,”¹⁵⁸ provided:

147. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C. (2012)).

148. Punitive damages are available to those plaintiffs who demonstrate that an employer engaged in a discriminatory practice with malice or reckless indifference of the plaintiff’s federally protected rights. 42 U.S.C. §1981a(b)(1) (2012).

149. Civil Rights Act of 1991, 42 U.S.C. §1981a(a)(1) (2012).

150. 401 U.S. 424 (1971).

151. *See id.* at 424, 425-26.

152. *See id.* at 431 (noting that a vice president of the Company testified that the requirements were instituted to “improve the overall quality of the work force”).

153. *See id.* at 426 (noting that plaintiffs showed that large disparities existed in the statewide graduation rates of blacks and whites and in each race’s pass rate on the written test).

154. *See id.* at 432 (“The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.”).

155. *See id.* (“Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.”).

156. *See id.* (holding that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘build in headwinds’ for minority groups and are unrelated to measuring job capability”).

157. *Id.*

158. *Id.* at 431.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force *unless they are demonstrably a reasonable measure of job performance*. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used *must measure the person for the job and not the person in the abstract*.¹⁵⁹

Thus, unlike disparate treatment claims, disparate impact claims do not require proof of discriminatory intent.¹⁶⁰ Rather, disparate impact occurs when employers use “employment practices that are facially neutral in their treatment of different groups,” but that in fact, have an adverse impact on a protected class, without business justification.¹⁶¹

Ever since its application in *Griggs*, the disparate impact theory has been controversial.¹⁶² Although there is a debate in the literature about the proper function of the disparate impact doctrine,¹⁶³ it is clear that the doctrine aligns with the underlying purpose of antidiscrimination law—to promote hiring on the basis of job qualifications, rather than on the basis of arbitrary, non-job related criteria.¹⁶⁴

Congress codified the disparate impact theory in the Civil Rights Act of 1991,¹⁶⁵ providing that a plaintiff establishes a prima facie violation by showing that an employer used a particular employment practice causing a disparate impact on the basis of a protected characteristic, like race, color, religion, sex, or national origin.¹⁶⁶ An employer may defend against liability by demonstrating that the employment practice is “job related for

159. *Id.* at 436 (emphasis added).

160. *See Int'l Bhd. of Teamsters*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.”).

161. *See id.*

162. ROTHSTEIN ET AL., *supra* note 143, § 2.21; Selmi, *supra* note 141, at 701 (“The disparate impact theory long has been viewed as one of the most important and controversial developments in antidiscrimination law.”); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 624-25 (2011) (discussing the disparate impact theory, its uncertainties, and advocating for the theory to be modified or abolished).

163. There is tension between two competing views on the disparate impact doctrine. “[O]ne view sees disparate impact as an ‘evidentiary dragnet designed to discover hidden instances of intentional discrimination,’ while the other views the doctrine as a ‘more aggressive attempt to dismantle racial (and other) hierarchies.’” Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 779 (2009) (quoting Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 518 (2003)).

164. *See* 110 CONG. REC. S. 7247 (daily ed. Apr. 8, 1964) (statement of Sen. Case) (stating the purpose of Title VII).

165. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C. (2012)).

166. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

the position in question and consistent with business necessity.”¹⁶⁷ Even if the employer establishes business necessity, a plaintiff may still prevail by showing that an alternative employment practice has a less discriminatory effect and the employer refused to adopt it.¹⁶⁸

After Congress codified the theory,¹⁶⁹ plaintiffs and their attorneys were initially excited at the notion that this theory would alleviate some of the difficulties associated with proving intentional discrimination.¹⁷⁰ However, the theory is a “complicated and confusing doctrine.”¹⁷¹ Whether asserting a disparate impact claim under Title VII, the ADEA, or the ADA, plaintiffs face several challenges that are not typical in an intentional discrimination claim.¹⁷²

For example, maintaining a disparate impact case is costly.¹⁷³ To establish a prima facie case of disparate impact liability, a showing of a “significant statistical disparity” is a threshold issue.¹⁷⁴ Thus, statistics are critical to establish a prima facie disparate impact claim¹⁷⁵ and plaintiff’s counsel must often retain statistical and vocational experts to develop the

167. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Ricci*, 557 U.S. at 578. See also Peresie, *supra* note 163, at 778 (arguing that the business necessity standard is “rather deferential to employers”).

168. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C); *Ricci*, 557 U.S. at 578.

169. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k)(1)).

170. See Selmi, *supra* note 141, at 768 (discussing that the “principal justification” for the disparate impact theory—that it is easier to establish than intentional discrimination—is incorrect). See also R. Henry Pfutzenreuter IV, *The Curious Case of Disparate Impact Under the ADEA: Reversing the Theory’s Development Into Obsolescence*, 94 MINN. L. REV. 467, 467 (2009) (“The recognition of disparate impact liability . . . has been heralded as ‘the single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers’” (quoting H.R. Rep. No. 102-40, pt. 1, at 23 (1991))); BERMAN ET AL., *supra* note 128, at 65 (“[P]roving an employer’s state of mind is difficult; it cannot be observed, so it must be inferred from statements and actions.”).

171. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 964 (2005).

172. Sandra F. Sperino, *Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly*, 13 ELDER L.J. 339, 360 (2005).

173. *Lanning v. Se. Pennsylvania Transp. Auth.*, Nos. Civ. A. 97-0593, 97-1161, 1998 WL 341605, at *73 n.21 (E.D. Pa. June 25, 1998) (noting the “expensive litigation under the disparate impact theory”), *rev’d on other grounds and remanded*, 181 F.3d 478 (3d Cir. 2007).

174. *Ricci*, 557 U.S. at 587 (“[A] prima facie case of disparate-impact liability . . . [under Title VII] is essentially, a threshold showing of a significant statistical disparity, and nothing more . . .”) (citations omitted).

175. See Peresie, *supra* note 163, at 774; *Muñoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000) (“[C]laims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof.”).

statistical evidence.¹⁷⁶ Evidence involving statistical data and experts can be very expensive, making disparate impact claims unattractive.¹⁷⁷

A related obstacle to the high cost of developing statistics is the difficulty in developing accurate and relevant statistics.¹⁷⁸ Courts know this and carefully scrutinize statistical evidence in disparate impact claims.¹⁷⁹ As such, courts commonly dismiss disparate impact cases on the basis of statistical error.¹⁸⁰

176. Sperino, *supra* note 172, at 360 (“From a practical perspective, litigants and attorneys arguing a disparate impact case face significant initial costs that are either absent or are less significant in a disparate treatment case. These costs are a direct result of the evidence that a plaintiff is required to establish in a disparate impact case.”).

177. See, e.g., Michael Connett, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1049-50 (discussing the “notoriously complex and costly statistical analyses that have made disparate impact claims so unattractive to plaintiff attorneys”); *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 522 & n.8 (M.D. Tenn. 2002) (noting how “very expensive” this disparate impact case was because “[f]or example, the preliminary injunction hearing alone involved expert witness testimony and statistical analyses, deposition testimony and thousands of pages of exhibits. . . . This case has been pending since March 12, 1998. There have been 518 docket entries, seven Complaints, numerous discovery disputes, various dispositive motions supported by exhibits, and an interlocutory appeal. . . . Plaintiffs have had to go to 14 states to obtain drivers’ license information and have had to litigate in five states, plus hire experts to analyze the data.”); Shari Engels, *Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMP. LAB. L.J. 340, 363 (1994) (noting the “high costs of disparate impact claims that typically require the use of expensive experts and statistical analysis”).

178. See *Hill v. Mississippi St. Emp’t. Serv.*, 918 F.2d 1233, 1238 (5th Cir. 1990) (“[S]oundly compiling and assessing statistics is ‘a task both complex and arduous.’”) (quoting *Wilkins v. Univ. of Houston*, 654 F.2d 388, 410 (5th Cir. 1981), *vacated*, 459 U.S. 809 (1982)). The Supreme Court has rejected a rigid mathematical formula for disparate impact, mandating that whatever method of statistical evidence is proffered, it must be sufficiently substantial to raise an inference of causation. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). Two of the more popular methods by which statistics are compiled in disparate impact cases include the “four-fifths rule” and the “statistical significance test.” Under the four-fifths rule, “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. § 1607.4(D) (2008). In other words, hiring or promoting members of protected classes at less than 80% of the rate for the majority group may be a potential violation. See *Wax*, *supra* note 162 at 628-29. Statistical significance tests, like multiple regressions, t-tests, Z-tests, the chi-square test, and the Fisher exact test, “calculate the probability that the observed disparity is due to chance.” Peresie, *supra* note 163, at 785. “[A] disparity is actionable when we can be confident at a specified level—generally ninety-five percent—that the observed disparity is not due to random chance.” *Id.* at 774 (citing RAMONA L. PAETZOLD, STEVEN L. WILLBORN & DAVID C. BALDUS, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES*, § 2.04 (2006)).

179. *Hill*, 918 F.2d at 1238 (“[A] finding of disparate impact requires statistically significant disparities.”).

180. See, e.g., *Flicker v. Clinton*, 841 F. Supp. 2d 85, 91 (D.D.C. 2012) (holding plaintiff’s 58 year-old methodology flawed in disparate impact case where statistics failed to offer any measure of statistical significance to demonstrate that age was the reason for non-selection); *Aliotta v. Bair*, 614 F.3d 556, 563 (D.C. Cir. 2010) (“[C]lass members’ flawed statistical evidence is fatal to their claims under either framework [disparate impact or disparate treatment] since it fails to establish any adverse

Another problem inherent with disparate impact is that it is a class-based theory¹⁸¹ and therefore is often contemplated as class-based litigation.¹⁸² Because of the high costs associated with this type of litigation,¹⁸³ it is considerably more difficult for private plaintiffs to maintain a class action, unless a very large damage award is possible.¹⁸⁴ When a private plaintiff's attorney considers the disparate impact alternative, "she may be daunted by the costs of the proof process and the procedural barriers to filing a class action."¹⁸⁵

Plaintiffs also have less incentive to bring disparate impact claims because Congress granted disparate treatment litigants substantive rights not granted to disparate impact litigants.¹⁸⁶ Although Congress amended Title VII to make punitive and compensatory damages available to plaintiffs claiming intentional discrimination, it did not amend the statute to provide punitive and compensatory damages for successful disparate impact claims.¹⁸⁷ In fact, Congress explicitly provided that punitive and compensatory damages did not apply to the disparate impact theory.¹⁸⁸ Plaintiffs, therefore, have an incentive to frame their claims as intentional discrimination instead of disparate impact.¹⁸⁹

effect on older employees"); *Paige v. California*, 233 F. App'x 646, 648-49 (9th Cir. 2007) (holding statistical evidence is insufficient to show state highway patrol's promotional process had disparate impact on minorities where plaintiff's "statistical results showing a disparity of greater than 1.96 standard deviations" was relevant but methodologically "flawed").

181. See, e.g., Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004); Donna Meredith Matthews, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 383-84 (1997) ("When bringing a disparate impact claim, a plaintiff represents a class of those affected by the discrimination.").

182. Sullivan, *supra* note 171, at 982 (referring to this as "the class problem").

183. Charles Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471, 478 (2008) ("Individual lawsuits are cheaper than class actions, which entail expensive procedures like certification hearings, notice, interlocutory appellate review, and judicial approval of settlements and fees.").

184. Shoben, *supra* note 181, at 598.

185. Sullivan, *supra* note 171, at 982 (citations omitted). Federal Rule of Civil Procedure 23(a) governs the certification of class actions in federal court. To bring a class action, plaintiffs must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

186. See Hart, *supra* note 131, at 813.

187. See 42 U.S.C. §1981a(a)(1).

188. See *id.* (the Act provides that the right to recover compensatory and punitive damages extends to "a respondent who engaged in unlawful intentional discrimination, (not an employment practice that is unlawful because of its disparate impact)"); ROTHSTEIN ET AL., *supra* note 143, § 2.31.

189. Shoben, *supra* note 181, at 598. Selmi, *supra* note 141, at 735 n.142 ("Many of the recent large class action claims have proceeded under an intentional discrimination theory, even though many of their core allegations sound in traditional disparate impact language."); Sperino, *supra* note 172, at 359 ("[L]itigants prefer to combat discrimination through other frameworks" than disparate impact).

Finally, an empirical analysis of disparate impact cases shows the difficulty of prevailing in these cases.¹⁹⁰ The author analyzed 301 cases spanning the 1983 to 2002 timeframe.¹⁹¹ There were a total of 130 appellate decisions and 171 district court cases.¹⁹² At the appellate level, plaintiffs' success rate was only 19.2%.¹⁹³ In contrast, defendants prevailed in 80.8% of cases.¹⁹⁴ At the district court level, plaintiffs succeeded in only 25.1% of disparate impact cases,¹⁹⁵ while defendants' victories were secure at 74.9%.¹⁹⁶ Such statistics have led critics to observe "broader judicial hostility" to the disparate impact theory.¹⁹⁷

B. Jobless Workers in Already-Protected Classes Have No Available Remedy Under Disparate Treatment Theory and Only Limited Remedy Under Disparate Impact Theory

1. Disparate Treatment

When bringing a civil claim alleging unemployment discrimination under the major antidiscrimination laws, a plaintiff has two possible causes of action: disparate treatment and disparate impact.¹⁹⁸ As will be discussed in the next section, with the exception of Washington, D.C. and New York City, it is currently legal for employers to discriminate against individuals based on their jobless status.¹⁹⁹ Even in those states where discriminatory job ads are now prohibited, employers can still legally consider an individual's jobless status in deciding whether to hire or even interview an

190. See Selmi, *supra* note 141, at 738-40 (discussing why many disparate impact "cases fail"); see also, Peresie, *supra* note 163, at 774 ("[P]laintiffs' success in litigated disparate impact cases is relatively low.").

191. See Selmi, *supra* note 141, at 738-39.

192. *Id.*

193. *Id.* at 738 (clarifying that sixty percent of those cases were remands, not outright wins).

194. *Id.* (detailing that most of the defendants' wins, 59%, affirmed successful motions for summary judgment, while 36.1% preserved defendants' victories on trial).

195. *Id.* at 739 (noting that if plaintiffs' wins were just restricted to the cases in which the plaintiff won on the merits, the rate of success was even lower at 16.9%).

196. *Id.* (observing that plaintiffs had a number of successes in 1983 that they did not experience otherwise. If 1983 is excluded from the sample, defendants' success rate raises to a whopping 87%).

197. See Connett, *supra* note 177, at 1032; see also Ricci v. DeStefano, 557 U.S. 557, 594 (Scalia, J., concurring) (noting the Court's decision postpones the inevitable determination of whether the disparate impact provisions of Title VII are consistent with the Constitution's equal protection guarantee (citing Primus, *supra* note 163)); Sperino, *supra* note 172, at 359 ("[T]he disparate impact theory itself has not proven to be an attractive avenue for combating discrimination [I]n a legal reality . . . disparate impact claims appear to be disfavored.").

198. See discussion *supra* Part III A.

199. See D.C. CODE § 32-1362 (2012); Int. 0814, 2012 City Council (N.Y.C. 2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID%257> (enacted).

individual.²⁰⁰ Thus, because “jobless status” is not a protected criterion in most jurisdictions, with the exception of New York City,²⁰¹ there is no basis upon which an individual can bring a disparate treatment claim at this time.

2. Disparate Impact

Disparate impact is a possible remedy for unemployment discrimination. Unemployed workers who are members of a protected class might be able to maintain a successful disparate impact suit if they can demonstrate that excluding the jobless from applicant pools, a facially neutral practice, has an adverse impact on their protected class. To date, there has been no suit filed claiming disparate impact on behalf of the jobless.

To establish a prima facie disparate impact claim, jobless workers will need to demonstrate adverse impact. While unemployment affects all sectors of society, historically, its impact has been concentrated on particular social groups.²⁰² For instance, Blacks or African Americans currently have an unemployment rate of 13.84%, nearly double that of whites at 7.2%.²⁰³ Hispanics have an unemployment rate of 10.3%,²⁰⁴ while disabled Americans are currently at 13.3%.²⁰⁵ And although the unemployment rate of older workers²⁰⁶ is much lower than other protected

200. *E.g.*, Assemb. B. 3359, 2010-2011 Leg., Reg. Sess. § 1(c) (N.J. 2011) (enacted).

201. *See* Int. 0814, 2012 City Council (N.Y.C. 2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID%257> (enacted).

202. SUE GLYPTIS, LEISURE & UNEMPLOYMENT 60-61 (1989) (“By and large, they are the groups who, even when in employment, enjoy lower than average levels of income, living standards, health, education and access to community resources. Unemployment compounds their disadvantages.”).

203. EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-6 (Employment Status of the Civilian Population by Race, Sex, and Age). The unemployment rate for Blacks surged to 16.7% in August 2011, the highest in twenty-seven years. *See* U.S. Dep’t of Lab., *The African-American Labor Force in the Recovery* (Feb. 29, 2012), <http://www.dol.gov/sec/media/reports/BlackLaborForce/BlackLaborForce.pdf>; Annalyn Censky, *Black Unemployment: Highest in 27 Years*, CNN MONEY, Sep. 2, 2011, http://money.cnn.com/2011/09/02/news/economy/black_unemployment_rate/index.htm (“Black unemployment has been roughly double that of whites since the government started tracking the figures in 1972.”); BIVENS, *supra* note 53, at 23 (“The unemployment rate for African Americans has been lower than 8.5% for only 45 of the 369 months since 1979, or roughly 12% of the time.”).

204. EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-3 (Employment Status of the Hispanic or Latino Population by Sex and Age).

205. EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-6 (Employment Status of the Civilian Population by Sex, Age, and Disability Status).

206. In this context, “older workers” are defined as those 55 and older. THE EMPLOYMENT SITUATION—FEB. 2012, *supra* note 48, at tbl. A-10 (Selected Unemployment Indicators, Seasonally Adjusted).

classes at 6.0%, this group disproportionately makes up the ranks of the long-term jobless.²⁰⁷

These statistics show that a significant proportion of unemployed workers with protected characteristics—including African Americans, Hispanics, the disabled, and older workers—are grossly and disproportionately overrepresented in the ranks of the jobless.²⁰⁸ Thus, it seems plausible that the practice of excluding the jobless from applicant pools could have a disparate impact on unemployed workers with protected characteristics.

3. Disparate Treatment v. Disparate Impact

Although disparate impact may be a *potential* remedy, a more important concern is whether it is a *likely* remedy. As previously discussed in Part III.A.2, disparate impact claims are rife with problems and are unlikely to bring actual relief to harmed plaintiffs.²⁰⁹ Although unemployed workers in protected classes may have a viable disparate impact claim, disparate impact claims are costly and difficult.²¹⁰

The challenges of an unemployed worker maintaining a successful disparate impact claim for unemployment discrimination are considerable. Many of these challenges are in stark contrast to a case for disparate treatment. First, it is unlikely that a plaintiff who has been unemployed for a significant amount of time would have the financial resources to sustain a disparate impact claim.²¹¹ The cost of employing experts to obtain the requisite statistical evidence would be prohibitive for a large number of

207. *Long-term Unemployment: A National Crisis for Older Workers*, HUFFINGTON POST, Sept. 5, 2012, http://www.huffingtonpost.com/2012/09/05/long-term-unemployment-a_n_1857516.html (“Older workers make up more than half of the long-term unemployed.”). According to President Barack Obama in an interview with *AARP The Magazine*, “When you lose your job in your 50s, it’s a lot tougher, because a lot of employers say to themselves, ‘Well, I might have to pay those people more. I may have to retrain them. I may not keep them as long. Their health care costs may be higher.’” *President Barack Obama Opens Up About Father’s Day, Why Fuel Prices are so High and Opportunities for Older Workers in the June/July Issue of AARP The Magazine*, AARP (May 24, 2012), <http://www.aarp.org/about-aarp/press-center/info-04-2012/President-Barack-Obama-Opens-Up-About-Fathers-Day-Why-Fuel-Prices-are-so-High-and-Opportunities-for-Older-Workers.html>.

208. BIVENS, *infra* note 53, at 16 (“While the Great Recession was in many ways a broad-based catastrophe, affecting all racial and socioeconomic groups adversely, it continued the familiar pattern of inflicting the most damage on those who were most vulnerable and had been suffering the most even before the recession. For example, the unemployment rate for African Americans has risen more than 50% faster than the rate for white workers, and incomes for typical African American families have fallen much further between 2007 and 2009 than incomes for white families.”).

209. See *infra* Part III.A.2.

210. Sperino, *supra* note 172, at 359 (discussing challenges of litigants seeking to bring claims under disparate impact).

211. See *supra* note 177 and accompanying text.

unemployed workers. Statistical evidence, by contrast, is not required in a disparate treatment case, thus, potentially lowering plaintiffs' costs.²¹²

Second, there is a risk that the court would find error when analyzing an unemployed plaintiffs' statistical evidence and, thus, dismiss the case.²¹³ This is a common occurrence in disparate impact cases.²¹⁴ Again statistical evidence is used in disparate treatment cases, but it is not required.²¹⁵ Thus, this potential risk could be mitigated if disparate treatment were an option.

Third, the rigorous process of filing a class-based suit and its high costs could be daunting, especially when compared to the filing requirements of a non-class, private plaintiff in a disparate treatment claim. The EEOC, with its resources and expertise, would be a more likely candidate to file a disparate impact claim on behalf of a large class of unemployed workers. Class actions are difficult, if not impossible, for private plaintiffs to undertake, unless they involve the possibility of very large damage awards.²¹⁶

Furthermore, Congress' preclusion of punitive and compensatory damages for successful disparate impact claims severely limits the incentive to file this type of suit. The more lucrative option for unemployed workers would be a disparate treatment suit because punitive and compensatory damages are available for intentional discrimination.

Finally, it appears that disparate impact cases are disfavored by the courts. Plaintiffs do not achieve much success in disparate impact cases.²¹⁷ Instead, the courts lean towards employers, who are likely to win such suits by a ratio of 5 to 1 in appellate cases and 4 to 1 at trial.²¹⁸ Thus, the odds are against unemployed workers prevailing on this theory in court.

Disparate treatment, by contrast, is not wholly without its own challenges. For example, intent, the central element of a disparate treatment case, can be very difficult to prove.²¹⁹

Nevertheless, in comparing the advantages of disparate treatment over disparate impact, disparate impact is a very difficult theory on which to

212. See *infra* note 215 and accompanying text.

213. Sperino, *supra* note 172, at 362 ("If a plaintiff's counsel or expert witness has made mistakes in developing the statistical basis, the court will dismiss the disparate impact claims.").

214. *Id.* (noting that "dismissal for statistical error is common in disparate impact cases").

215. Hill, 918 F.2d at 1238 ("[C]ircumstantial evidence of disparate treatment often includes (but need not) statistical evidence.").

216. Brief for the California Employment Law Council as Amicus Curiae Supporting Respondents, at * 16; *Smith v. City of Jackson*, 544 U.S. 228 (2005) (No. 03-1160), 2004 WL 1905737 ("And even if it were true that defendants usually would win on the merits, litigation is costly, and class litigation can be ruinously so.").

217. See discussion, *supra* note 171-97 and accompanying text.

218. See Selmi, *supra* note 141, at 738-39.

219. See *id.* at 734 ("[I]ntent is often difficult to establish through circumstantial evidence.").

succeed.²²⁰ As such, there is little incentive for unemployed workers to pursue this theory.²²¹ Disparate impact is advantageous for employers, but rife with pitfalls for plaintiffs.²²² Because of this, most employment discrimination actions maintained are disparate treatment claims.²²³ Compared with intentional discrimination, disparate impact has become a “less vital tool.”²²⁴

Hence, unemployed workers with protected class status are unlikely to find appreciable relief filing a disparate impact claim. The sole disparate impact option is insufficient to provide an adequate legal remedy. Unemployed workers with protected class status should not be limited to a failing theory, especially when faced with such blatant and intentional discrimination by employers. Rather, these unemployed workers should have a viable method by which to obtain relief.

C. Jobless Workers with No Protected Class Status Have No Available Remedy

Millions of unemployed workers do not belong to a protected class and have no recourse for intentional discrimination against them. For example, white male college graduates between the ages of twenty-one and twenty-four are a group who could fall into this category. Young college graduates, in general, have seen a dramatic decline in their job prospects since the beginning of the Great Recession.²²⁵ Research shows that young college graduates entering the labor market during a jobs crisis like the present experience long-lasting economic consequences.²²⁶ “[E]ntering the labor market in a severe economic downturn can lead to reduced earnings,

220. *Id.* at 701.

221. Sperino, *supra* note 172, at 363; Shoben, *supra* note 181, at 607 (“Disparate impact analysis is not a heavily litigated theory of discrimination . . .”).

222. Shoben, *supra* note 181, at 598 (offering suggestions on how plaintiffs’ difficulties with disparate impact could be attenuated).

223. Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has Smith v. City of Jackson Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALB. L. REV. 143, 148 (2006).

224. Shoben, *supra* note 181, at 597 (“[D]isparate impact litigation is not making a major impact in this new century.”); *see also* Sullivan, *supra* note 171, at 968-69 (discussing the “paucity” of claims filed under disparate impact theory); Primus, *supra* note 163, at 499 (“As a practical matter, disparate impact litigation now plays a much smaller role than it once did in increasing employment opportunities for nonwhite workers.”).

225. Heidi Shierholz et al., *The Class of 2012, Labor Market for Young Graduates Remains Grim*, ECON. POL’Y INST. BRIEFING PAPER #340, at 8 (May 3, 2012), <http://www.epi.org/publication/bp340-labor-market-young-graduates/>.

226. *Id.* at 2 (“For the next 10 to 15 years, the Class of 2012 will likely earn less than they would have if they had graduated when job opportunities were plentiful.”).

greater earnings instability, and more spells of unemployment over the next 10 to 15 years.”²²⁷

Although unemployment rates could not be found for young white male college graduates, in 2011, the unemployment rate for young male college graduates was 9.5%, and for young white college graduates, the unemployment rate was 9.4%.²²⁸ Young white male college graduates experiencing discrimination because of their status as unemployed have no available remedy under the law.

IV.

WAVE OF FEDERAL, STATE, & LOCAL LEGISLATION PROPOSING TO BAN UNEMPLOYMENT DISCRIMINATION

From 2010 to 2012, shocked legislators across the country responded to media reports of unemployment discrimination with a spate of legislation proposing to ban discriminatory treatment against the jobless. In 2010, New Jersey was the first state to consider such legislation²²⁹ and in 2011, others followed suit, including five states, the District of Columbia, and the U.S. Congress.²³⁰ In the first two months of 2012, fourteen states introduced similar bills²³¹ and some cities, including New York City, have considered anti-discrimination laws as well.²³² As one employment lawyer blogged, unemployment discrimination bills are the “newest hot topic.”²³³

227. *Id.* at 14.

228. *Id.* at 8-9.

229. Assemb. B. 3359, 2010-2011 Leg., Reg. Sess. (N.J. 2011) (enacted).

230. In addition to D.C., the five states include Florida, Illinois, Michigan, New York, and Wisconsin. S.B. 518, 2012 Leg., Reg. Sess. (Fla. 2011); S.B. 2153, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); H.B. 4675, 2011 Leg., Reg. Sess. (Mich. 2011); S. 5151-2011, 2011 Leg., Reg. Sess. (N.Y. 2011); S.B. 249, 2011 Leg., Reg. Sess. (Wis. 2011). *See also* Fair Employment Opportunity Act of 2011, H.R. 2501, 112th Cong. (2011); Fair Employment Opportunity Act of 2011, S. 1471, 112th Cong. (2011); Fair Employment Act of 2011. H.R. 1113, 112th Cong. (2011); American Jobs Act of 2011, H.R. 12, 112th Cong. §§371-379 (2011).

231. These states include Arizona, California, Colorado, Connecticut, Iowa, Maryland, Minnesota, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, South Dakota, and Tennessee. H.B. 2660, 50th Leg., 2nd Reg. Sess. (Ariz. 2012); A.B. 1450, 2011 Leg., Reg. Sess. (Cal. 2012); H.B. 12-1134, 68th Gen. Assemb., 2nd Reg. Sess. (Colo. 2012); S.B. 79, Gen. Assemb., Feb. Sess. (Conn. 2012); S.F. 2028, 84th Gen. Assemb., Reg. Sess. (Iowa 2012); S.B. 966, 2012 Leg., Reg. Sess. (Md. 2012); H.F. 1866, 2012 Leg., 87th Sess. (Minn. 2012); H.B. 1279, 96th Gen. Assemb., 2nd Reg. Sess. (Miss. 2012); L.B. 866, 102nd Leg., 2nd Sess. (Neb. 2012); S.B. 261, 129th Gen. Assemb., Reg. Sess. (Ohio 2012); S.B. 1548, 2012 Leg., 76th Sess. (Or. 2012) (enacted); H.B. 2157, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012); S.B. 184, 2012 Leg. Assem., 87th Sess. (S.D. 2012); S.B. 3130, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

232. Int. 0814, 2012 City Council (N.Y.C. 2012), *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID%257> (enacted).

233. *See* Schwartz, *supra* note 30.

There are three categories of proposed unemployment legislation: 1) Advertising-Only Prohibition, 2) Protected Class Status for the Jobless with No Private Cause of Action, and 3) Protected Class Status for the Jobless with Private Cause of Action.

A. Advertising-Only Prohibition

Two states, New Jersey and Oregon,²³⁴ ban job advertisements overtly discriminating against the jobless, and four other states are considering adopting this model.²³⁵ This model provides that employers and their agents may not knowingly or purposefully publish a job posting that includes any of the following criteria:

- 1) current employment is a job qualification;
- 2) currently unemployed candidates will not be considered; or
- 3) only currently employed job applicants will be considered.²³⁶

Although employers can no longer post job ads discriminating against the jobless, the bill does not prohibit employers from giving preference to employed candidates.²³⁷

The New Jersey law provides that employers that violate the ad prohibition are subject to a civil penalty of up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for subsequent violations.²³⁸ The law also specifies that it does not create a “private cause of action by an aggrieved person against an employer.”²³⁹

B. Protected Class Status for the Jobless with No Cause of Action

Some jurisdictions are considering, or have considered, legislation prohibiting employers from overtly discriminating in job ads and granting the jobless protected class status.²⁴⁰ Protecting unemployment as a status

234. See Assemb. B. 3359, 2010-2011 Leg., Reg. Sess. (N.J. 2011) (enacted); S.B. 1548, 76th Leg., Reg. Sess. (Or. 2012).

235. These include California, Michigan, Missouri, and Ohio. Assemb. B. 1450, 2011-2012 Gen. Assemb., Reg. Sess. (Cal. 2012); H.B. 4675, 96th Legis., Reg. Sess. (Mich. 2011), H.B. 1279, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H.B. 424, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).

236. See, e.g., Or. S. 1548.

237. See *id.*

238. N.J. Assemb. B. 3359, § 2(c). The fines are collectible by the Commissioner of Labor and Workforce Development. *Id.* One employer in New Jersey has already been fined. See Shelly Banjo, *Measures Aim to End Bias Against Long-term Jobless*, WALL ST. J., Feb. 24, 2012, http://online.wsj.com/article/SB10001424052970204778604577241693309654990.html?mod=googlene_ws_wsj.

239. N.J. Assemb. B. 3359 § 2(b).

240. The jurisdictions include D.C., Colorado, Florida, Minnesota, Nebraska, New York, and South Dakota. D.C. CODE § 3232-1362 (2012); H.B. 12-1134, 68th Gen. Assem., 2nd Reg. Sess. (Col. 2012); HB 815 (Fla. 2012); S.F. 1919, 87th Leg. Sess. (Minn. 2011-2012); L.B. 866 (Neb. 2012); S.B. 184, 87th Sess., Leg. Assemb. (SD 2012). The legislation has failed or died in three of these states—Colorado, Florida, and South Dakota. Where the legislation has failed, it has failed along party lines.

would grant unemployed job seekers facing hiring discrimination protections on the same level as racial minorities, women, senior citizens, and the disabled. Unlike those protected classes, however, this model does not provide a private cause of action.²⁴¹ The District of Columbia is the only jurisdiction to adopt this scheme as law.²⁴²

Civil penalties are the potential liability for offending employers and employment agencies under this model.²⁴³ The penalties range from \$1,000 to \$10,000 per violation.²⁴⁴ In addition, in many of these jurisdictions considering or using this model, the bona fide occupational qualification (“BFOQ”) defense is reserved for employers. This extremely narrow exception will be discussed in Part VI.B.2.

C. Protected Class Status for the Jobless with Private Cause of Action

The third kind of legislation is that which would elevate the jobless to protected class status and provide aggrieved individuals a private cause of action to sue employers. Although several jurisdictions are considering this model,²⁴⁵ which mirrors Title VII, so far, New York City is the only jurisdiction that has adopted this variation.²⁴⁶

The United States Congress is also considering this model. The Fair Employment Opportunity Act of 2011 (“FEOA”) includes two companion bills that propose broad anti-discrimination protections for the jobless.²⁴⁷ The FEOA would make it unlawful for an employer with fifteen or more employees, or an employment agency, to refuse to hire or consider for hire

241. See, e.g., D.C. CODE § 32-1366(b) (2012) (“Nothing set forth in this chapter shall be construed as creating, establishing, or authorizing a private cause of action by an aggrieved person against an employer or employment agency who has violated, or is alleged to have violated, the provisions of this chapter.”).

242. D.C. CODE § 32-1362 (2012).

243. See, e.g., *id.*

244. A popular scheme for civil penalties mirrors the New Jersey model—\$1,000 for the first offense, \$5,000 for the second offense, and \$10,000 for subsequent offenses. Assemb. B. 3359, 2010-2011 Leg., Reg. Sess. § 2(a) (N.J. 2011) (enacted).

245. The eight states include Arizona, Connecticut, Illinois, Iowa, Maryland, Pennsylvania, Tennessee, and Wisconsin. H.B. 2660, 50th Leg., 2nd Reg. Sess. (Ariz. 2012); S.B. 79, Gen. Assemb., Feb. Sess. (Conn. 2012); S.B. 2153, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); S.F. 2028, 84th Gen. Assemb., Reg. Sess. (Iowa 2012); S.B. 966, 2012 Leg., Reg. Sess. (Md. 2012); H.B. 2157, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012); 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); S.B. 249, 2011 Leg., Reg. Sess. (Wis. 2011). In its provision, Pennsylvania provides: “An individual who in good faith alleges a violation of this section may bring a civil action in a court of competent jurisdiction against an employer or employment agency within two years from the date upon which the violation occurs.” H.B. 2157, 196th Gen. Assembl., Reg. Sess. (Pa. 2012).

246. Int. 0814, 2012 City Council (N.Y.C. 2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID%257> (enacted).

247. Fair Employment Opportunity Act of 2011, H.R. 2501, 112th Cong. (2011); Fair Employment Opportunity Act of 2011, S. 1471, 112th Cong. (2011).

an individual based on his or her employment status.²⁴⁸ “Employment status” would be broadly interpreted to include present and past unemployment, regardless of the length of time.²⁴⁹ The FEOA also would ban job advertisements indicating employment status as a hiring criteria.²⁵⁰

Notably, Congress’s FEOA would also allow affected individuals²⁵¹ to bring civil actions against private employers alleging discrimination.²⁵² Individuals alleging they were not considered or hired because of their jobless status could sue an employer in state or federal court for actual damages, equitable relief, attorney’s fees, costs, and interest.²⁵³ Punitive damages and liquidated damages, in an amount equal to actual damages plus interest, would also be available unless an employer could prove that it violated the law in good faith.²⁵⁴ The potential liability could be substantial.²⁵⁵ The Secretary of Labor could also sue employers and employment agencies in any court of competent jurisdiction.²⁵⁶

The only instance where an employer could legally consider a person’s unemployed status would be when the individual’s employment in a similar

248. H.R. 2501, 112th Cong. § 4(a)(1) (2011); S. 1471, 112th Cong. § 102(a)(1) (2011) (“It shall be an unlawful practice for an employer to . . . fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee, because of the individual’s status as unemployed. . .”).

249. H.R. 2501, § 3(4); S. 1471, § 101(6). By contrast, President Obama’s Act, as will be discussed later in this section, limits “status as unemployed” to those individuals who do not have a job, are available for work, and are searching for work at the time of application for employment or at the time of action alleged to violate the Act. American Jobs Act of 2011, H.R. 12, 112th Cong. § 373(7) (2011).

250. H.R. 2501, § 4 (a)(2)(A); S. 1471, § 102 (a)(2)(A).

251. Congress’s proposed act defines “affected individual” as “any person who was not considered for employment, or was not hired by an employer, as an employee, because of the person’s current employment status (current as of the date of the decision concerning consideration or hiring), or any person who was not considered, screened, or referred for an employment opportunity, as an employee, by an employment agency because of the person’s current employment status (current as of the date of the decision concerning consideration, screening, or referral).” S. 1471, § 101(1); *see also* H.R. 2501, § 3(3).

252. H.R. 2501, § 5(a); S. 1471, § 103(a).

253. S. 1471, § 103(a).

254. H.R. 2501, § 5(a)(1)(A)(iii); S. 1471, § 103(a)(1)(iii).

255. Section 103 of Senate Bill 1471 provides: “Any employer or employment agency that violates [the statute] shall be liable to any affected individual—(A) for actual damages equal to—(i) the amount of—(I) any wages, salary, employment benefits, or other compensation denied or lost to such individual by reason of the violation; or (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the individual, any actual monetary losses sustained by the individual as a direct result of the violation or an amount of \$1,000 per violation per day, whichever is greater; (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), and any punitive damages . . . ; and (B) for such equitable relief as may be appropriate, including employment. S. 1471, § 103.

256. H.R. 2501, § 4(b); S. 1471, § 103(b).

job for a period of time reasonably proximate to the hiring is a BFOQ.²⁵⁷ Again, this defense will be examined in Part VI.B.

President Obama also proposed unemployment discrimination legislation in his American Jobs Act.²⁵⁸ The President's proposed legislation offers many of the same provisions as Congress's FEOA,²⁵⁹ and several states have modeled their legislative bills after the President's model.²⁶⁰

V.

LOOKING AT ANTIDISCRIMINATION LAW THROUGH THE LENS OF COGNITIVE PSYCHOLOGY

Employers often argue that unemployed job applicants' skills have atrophied during their time away from work, thereby supporting their refusal to consider unemployed applicants. Economists view this as a rational judgment.²⁶¹ New research, however, empirically proves that an immediate and instantaneous hiring bias develops against individuals as soon as they separate from their jobs, prior to the decline of any skills, thereby proving the existence of a hiring bias against the jobless.²⁶² Such a bias, reflecting negative stereotypes of the jobless, can lead to harmful inequities.

This section, Part V, will establish a framework for looking at discrimination through the lens of cognitive psychology, providing a discussion of two competing theories relevant to the problem of unemployment discrimination: rational choice theory and behavioral decision theory. With this basic understanding of the social-cognitive context²⁶³ in which unemployment discrimination exists, I will analyze the actual stereotypes and stigmas associated with jobless individuals and also discuss the research confirming the existence of a hiring bias. This section will also explore the resulting harms to individuals, families, and society

257. H.R. 2501, § 4(d); S. 1471, § 102(d) ("Notwithstanding any other provision of this Act, consideration by an employer or employment agency of an individual's status as unemployed shall not be an unlawful employment practice where an individual's employment in a similar or related job for a period of time reasonably proximate to the hiring of such individual is a bona fide occupational qualification reasonably necessary to successful performance of the job that is being filled.").

258. American Jobs Act of 2011, H.R. 12, 112th Cong. §§ 371-379 (2011), <http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/american-jobs-act.pdf>.

259. *See id.*

260. *E.g.*, S. File 2028, 84th Gen. Assemb., Reg. Sess. (Iowa 2012).

261. Ho, Shih, Walters & Pittinsky, *supra* note 11, at 3.

262. *Id.* at 10-11.

263. Social cognition is "the study of the mental processes involved in perceiving, attending to, remembering, thinking about, and making sense of the people in our social world." GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 3 (2005).

and conclude with arguments that the jobless deserve statutory protection to effectuate the purposes of antidiscrimination law.

A. Models of Human Behavior

1. Rational Choice Theory

Rational choice theory is the conventional, dominant model of human behavior.²⁶⁴ This theory views humans as “acting purposively and rationally in the pursuit of goals and objectives.”²⁶⁵ Unbounded rationality, the cornerstone of this influential theory, assumes that people are rational actors who research and consider all options prior to making decisions and judgments.²⁶⁶ According to rational choice theory, people are self-interested individuals who act to maximize their expected utility.²⁶⁷ This theory “traces its origins to utilitarian thought reaching as far back as Adam Smith’s microeconomics” in 1776.²⁶⁸ Although still dominant, scholars from various disciplines have criticized it in recent years.²⁶⁹

2. Behavioral Decision Theory

Recent cognitive and social psychology research is the foundation of criticism of the rational choice theory. In the 1970s and 1980s, cognitive scientists Amos Tversky and Nobel laureate Daniel Kahneman brought attention to a new approach—behavioral decision theory²⁷⁰—dramatically departing from the prevailing rational choice theory.²⁷¹ Pulling from other disciplines, such as psychology, neuroscience, and sociology,²⁷² the two scientists empirically determined that people do not always estimate

264. Michael P. Vandenberg, Amanda R. Carrico & Lisa Schultz Bressman, *Regulation in the Behavioral Era*, 95 MINN. L. REV. 715, 730 (2011) (“Rational choice theory (RCT) underlies the dominant model for analysis of regulatory policy alternatives, including those that affect individuals and households.”).

265. DAVID INGLIS & CHRISTOPHER THORPE, AN INVITATION TO SOCIAL THEORY 129 (2012).

266. See Vandenberg, Carrico & Bressman, *supra* note 264, at 730 (“RCT [rational choice theory], at its core, assumes that individuals hold stable preferences and seek out the necessary information regarding their set of options prior to making a decision.”).

267. See *id.*

268. D. F. PILARIO, BACK TO THE ROUGH GROUNDS OF PRAXIS 104 (2005); see also ADAM SMITH, THE WEALTH OF NATIONS (3d ed. 1784).

269. For a thorough discussion by category of the criticisms that rational choice theory has received, see Kojo Yelapaala, *Legal Consciousness and Contractual Obligations*, 39 MCGEORGE L. REV. 193, 213-24 (2008).

270. See Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1501 (1998).

271. See KEITH E. STANOVICH, DECISION MAKING AND RATIONALITY IN THE MODERN WORLD 52 (2010) (detailing the contributions and accomplishments of Tversky and Kahneman in cognitive psychology).

272. Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the 21st Century*, 38 LOY. U. CHI. L.J. 513, 527 (2007).

probabilities appropriately nor make decisions rationally based upon all available evidence.²⁷³

Instead, the two scientists discovered that humans are “boundedly rational,”²⁷⁴ meaning humans are limited in their decision-making ability and make decisions without fully analyzing problems.²⁷⁵ Scientists and legal scholars frequently use the term “boundedly rational” to describe these limitations on our cognitive abilities.²⁷⁶

Such limitations result, in part, because we lack the mental capacity needed to process the large amounts of information often involved in decision making.²⁷⁷ When confronting the thousands of decisions and judgments that we must make on a daily basis, we often experience “cognitive overload” and resort to mental shortcuts and rule-of-thumb strategies known as “heuristics.”²⁷⁸

A heuristic is a mental shortcut that allows people to make decisions and judgments quickly and efficiently.²⁷⁹ Ordinarily, heuristics reduce the complex task of decision-making into simpler operations.²⁸⁰ But sometimes, heuristics lead to systematic, predictable errors.²⁸¹ These errors, known as *cognitive biases*, describe the various influences on human thought that impair “a person’s decisions, judgments, perceptions, motivations, and expectations.”²⁸² Cognitive biases are “a normal part of human behavior.”²⁸³ Stereotypes, a popular cognitive bias, result from this normal cognitive process.²⁸⁴ Stereotypes may be conceptualized as “sets of beliefs about the characteristics, attributes, and behaviors of members of a

273. STANOVICH, *supra* note 271, at 52.

274. Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN L. REV. 1471, 1477 (1998) (citing Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955)).

275. Thomas Gilovich & Dale Griffin, *Introduction—Heuristics and Biases: Then and Now*, in HEURISTICS AND BIASES, THE PSYCHOLOGY OF INTUITIVE JUDGMENT 2 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

276. See Jolls, Sunstein & Thaler, *supra* note 274, at 1477; Daniel Kahneman & Amos Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 458 (1981).

277. Baruch Fischhoff, *Cognitive Liabilities and Product Liability*, 1 J. PROD. LIAB. 207, 207-08 (1977).

278. See Wing Hong Loke, *Models of Judgment and Decision Making: An Overview*, in PERSPECTIVES ON JUDGMENT AND DECISION-MAKING 8 (Wing Hong Loke ed., 1996)); see also ROY F. BAUMEISTER & BRAD J. BUSHMAN, *SOCIAL PSYCHOLOGY AND HUMAN NATURE* 407 (2010) (“[P]eople use a variety of heuristics to help them understand the world in clear, simple ways.”).

279. Loke, *supra* note 278, at 8-9.

280. *Id.*

281. Nigel Harvey, *Use of Heuristics: Insights from Forecasting Research*, 13 THINKING & REASONING 5, 6 (2007).

282. Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of Circumstances Framework)*, 37 CAP. U. L. REV. 965, 1021 (2009).

283. ROBERT KENNEDY, *OF KNOWLEDGE AND POWER: THE COMPLEXITIES OF NATIONAL INTELLIGENCE* 90 (2008).

284. See MARGARET W. MATLIN, *THE PSYCHOLOGY OF WOMEN* 63-64 (2008).

particular group or category.”²⁸⁵ In other words, stereotypes are the “qualities perceived to be associated with a particular social group” or its members.²⁸⁶ How we perceive, process, and respond to groups are affected by stereotypes.²⁸⁷

Stereotypes are a natural method that we use to simplify the process of thinking about other people.²⁸⁸ The human tendency to divide the people we meet into social groups seems inevitable.²⁸⁹ Studies have determined that people rely on stereotypic preconceptions in judging others when their “motivation or ability to process information systematically is diminished.”²⁹⁰ Accordingly, this mental shortcut helps to simplify our world by creating categories.²⁹¹ “It is difficult and tiring to get to know each individual on his or her own merits, starting with a completely open mind, and to form a valid, carefully tested impression of each person.”²⁹² Instead, it is much easier to assume that people will “fit general stereotypes based on quickly recognizable categories”²⁹³ Such stereotypical beliefs “may be activated both implicitly (automatically and without awareness) and explicitly (consciously, deliberately, and controllably).”²⁹⁴

285. JEFFREY S. NEVID, *PSYCHOLOGY, CONCEPTS AND APPLICATIONS* 627 (2003).

286. John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in, 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 1084, 1084 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010); see also Margaret Wetherell, *Group Conflict and the Social Psychology of Racism*, in *SOCIAL PSYCHOLOGY: IDENTITIES, GROUPS AND SOCIAL ISSUES* 175, 189 (Margaret Wetherell ed., 1996) (“A stereotype associates traits or attributes with groups of people.”); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 *U. KAN. L. REV.* 591, 613 (2011) (“A stereotype may also be conceptualized as ‘a cognitive structure that contains sweeping concepts of the behaviors, traits and attitudes associated with the members of a social category.’” (quoting Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 *B.U. L. REV.* 155, 187 (2005))).

287. See John F. Dovidio, Miles Hewstone, Peter Glick & Victoria M. Esses, *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, in *THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION* 8 (John F. Dovidio, Peter Glick, Miles Hewstone & Victoria M. Esses eds., 2010).

288. BAUMEISTER & BUSHMAN, *supra* note 278, at 408.

289. MATLIN, *supra* note 284, at 64 (“We categorize people as females or males, White people or people of color, people with high occupational status or people with low occupational status, and so forth.”).

290. Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 *PSYCHOL. SCI.* 319, 319 (1990); see also BAUMEISTER & BUSHMAN, *supra* note 278, at 408 (“People use stereotypes when their ability to judge is diminished.”).

291. MATLIN, *supra* note 284, at 64 (“This process of categorizing others . . . is habitual and automatic.”); BAUMEISTER & BUSHMAN, *supra* note 278, at 408 (“[P]eople use stereotypes to conserve effort and energy.”).

292. BAUMEISTER & BUSHMAN, *supra* note 278, at 407.

293. *Id.*

294. John F. Dovidio & Michelle R. Hebl, *Discrimination at the Level of the Individual: Cognitive and Affective Factors*, in *DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES* 11, 14 (Robert L. Dipboye & Adrienne Colella eds., 2005). See also Stone, *supra* note 286, at 614 (arguing that stereotypes occur on “conscious and subconscious or unconscious levels”).

The problem, however, is that stereotyping is often the product of faulty thought processes.²⁹⁵ Rarely do our categorical judgments of people have a foundation in high probability.²⁹⁶ Stereotypes are often exaggerations and entirely untrue²⁹⁷ because rather than “an individualized investigation into a particular person’s abilities or circumstances,”²⁹⁸ people “tend to depend more on group-based impressions when forming judgments or opinions than they do on individuating attributes, leading them to socially categorize others as group members rather than individuals and to take note of whether others are members of their own groups or not.”²⁹⁹

This results in what is known as in-group and out-group classifications.³⁰⁰ We tend to view those outside our group more negatively than we do members inside our group.³⁰¹ From this proclivity—distinguishing in-group members favorably and out-group members unfavorably—arise stigmas, which lead to prejudice, and ultimately, to discrimination.³⁰²

The process by which stereotypes lead to negative outcomes is called stigmatization.³⁰³ A stigma “refers to a mark or sign of some sort that is seen as disqualifying individuals from the full social acceptance of a society.”³⁰⁴ This results when society categorizes people and assesses

295. See Dovidio & Hebl, *supra* note 294, at 13 (“A stereotype is a generalization of beliefs about a group or its members that is unjustified because it reflects faulty thought processes or overgeneralizations, factual incorrectness, inordinate rigidity, misattributions, or rationalizations for prejudiced attitudes or discriminatory behaviors.”).

296. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 8 (2d ed.1979) (“Ordinarily our judgments of natural happenings are based on firmer and higher probabilities than our judgments of people. Only rarely do our categorical judgments of nations or ethnic groups have a foundation in high probability.”).

297. *Id.* at 104 (“Any stereotype concerning any people is usually thought to mark the entire group, . . . but the ascription is an exaggeration, and may be wholly false.”).

298. Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L.J. 291, 298 (2004); see also Dovidio & Gaertner, *supra* note 286, at 1085 (“In general, stereotypes produce a readiness to perceive behaviors or characteristics associated with the stereotype; when stereotypes are activated, individual group members are judged in terms of group-based expectations or standards.”).

299. Stone, *supra* note 286, at 614.

300. See Arthur Brief, Rebecca M. Butz & Elizabeth A. Deitch, *Organizations as Reflections of Their Environments: The Case of Race Composition*, in *DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES* 119, 128 (Robert L. Dipboye & Adrienne Colella eds., 2005).

301. *Id.* (“[S]tereotypes of outgroups typically have more negative connotations than those of ingroups.”).

302. Dovidio & Hebl, *supra* note 294, at 15 (“People categorized as members of one’s own group are evaluated more favorably than are those categorized as members of another group.”).

303. Susan T. Fiske, *Interpersonal Stratification, Status, Power, and Subordination*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 941, 942 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).

304. Charles Stangor & Christian S. Crandall, *Threat and the Social Construction of Stigma*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 63 (Todd F. Heatherson, Robert E. Kleck, Michelle R. Hebl & Jay G. Hull eds., 2000); see also Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*

which attributes are ordinary and natural within those categories.³⁰⁵ If someone possesses a perceived socially devalued characteristic, society marks the stigmatized person and others within his or her group as inferior.³⁰⁶

Once a person is stigmatized, prejudice often results. Prejudice is "an unfair negative attitude toward a social group or a person perceived to be a member of that group."³⁰⁷

Discrimination, on the other hand, is the "behavioral manifestation of prejudice."³⁰⁸ It has been "defined as the unjustified negative actions that deny 'individuals or groups of people equality of treatment.'"³⁰⁹ Discrimination "eventually leads to devaluation or the loss of status and social acceptance."³¹⁰

Although a natural cognitive process, stereotypes and their resulting injurious consequences are antithetical to antidiscrimination laws, which "compel the evaluation and treatment of employees in the workplace in a manner that is individualized and free of animus, prejudgment, or bias."³¹¹ The next subsection provides a discussion of such antidiscrimination laws and their purpose.

B. Purpose of U.S. Antidiscrimination Law: Protect Against Effects of Cognitive Bias, Stereotypes, Stigmas, & Prejudice

In his description of American antidiscrimination law, Robert Post posited that the "tendency to stereotype people is at the root of some of the social ills that afflict [this] country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so

1 (1963). The Greeks originated the word "stigma" to refer to bodily signs that were cut or burned into a person's skin to visibly identify and expose something "unusual and bad about the moral status" of that person. Stigmatized individuals included criminals, slaves, or traitors. *Id.*

305. Stangor & Crandall, *supra* note 304 at 63.

306. Fiske, *supra* note 303, at 942 ("Stigma overlaps with being low status and low power.").

307. Dovidio & Hebl, *supra* note 294, at 13.

308. 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).

309. Dovidio & Hebl, *supra* note 294, at 11 (citing ALLPORT, *supra* note 296, at 51).

310. Fiske, *supra* note 303, at 942.

311. Stone, *supra* note 286, at 620. See Hannah Fleener, Note, *Look Sell, But Are They Worth the Cost?: How Tolerating Looks-Based Discrimination Leads to Intolerable Discrimination*, 83 WASH. U. L.Q. 1295, 1313 (2005) ("Discrimination occurs in part as a result of a natural cognitive mechanism—stereotyping-turned to prejudice, or judgments based on negative stereotypes about a group.").

that people would be judged by their intrinsic worth."³¹² Such basic morals are the foundation of antidiscrimination law in this country.³¹³

The problem that exists in the U.S., and which antidiscrimination laws attempt to disable, is the irrational prejudice that results from such stereotyped characterizations.³¹⁴ As discussed in Part V.A., prejudice against stigmatizing characteristics, like race, manifest through our "faulty" judgments, or cognitive bias, and lead to harmful discrimination.³¹⁵ Thus, a primary purpose of antidiscrimination law is to eliminate the effects of cognitive bias, unfair and arbitrary stereotypes, and prejudice³¹⁶ that cause a variety of social ills, like high unemployment in certain social groups.³¹⁷

Antidiscrimination laws are the primary means by which the U.S. attempts to protect individuals from this type of injurious treatment.³¹⁸ It is important to note that "the law does not, because it cannot, eliminate the impulse to discriminate . . . on the basis of stereotypes."³¹⁹ As discussed in Part V.A., prejudice and stereotypes emerge, in part, because of the social-cognitive processes of categorization and group differentiation in

312. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10 (2000) (citing *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972)).

313. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976) ("The antidiscrimination principle rests on fundamental moral values that are widely shared in our society."); Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Régulations Économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 467 (2004) ("U.S. laws establishing standards for . . . equal employment opportunity clearly are based on moral and social considerations.").

314. See *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1563 (9th Cir. 1994); ALLPORT, *supra* note 296, at 8 ("[O]ften we form judgments on the basis of scant, even nonexistent, probabilities."); Post, *supra* note 312, at 8 ("Antidiscrimination law in America . . . springs from a firm sense of the social reality of prejudice.").

315. See Brest, *supra* note 313, at 6, 8 (noting that irrational prejudice causes unfair infliction of injury and stigmatic harm).

316. Post, *supra* note 312, at 10-11 (citing *Miller v. C.A. Muer Corp.*, 362 N.W.2d 650, 553-54 (1984)). See also *W. Air Lines v. Criswell*, 472 U.S. 400, 410 (1985) (finding that arbitrary qualifications, like age and disability, "have a devastating effect on the dignity of the individual and result in a staggering loss of human resources vital to the national economy." (citing President Lyndon B. Johnson, H. Doc. No. 90-40, at 7 (1967))); Kenneth Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 132-33 (1995) ("A victim of discrimination 'suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw.'" (quoting *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1232 (3d Cir. 1994), *rev'd in part on other grounds*, 65 F.3d 1072 (3d Cir. 1995))).

317. See Post, *supra* note 312, at 10.

318. Brest, *supra* note 313, at 6 ("the law has tended to reflect the result-oriented concerns of the antidiscrimination principle . . . by disfavoring particular classifying traits that tend to be especially harmful and have little social utility").

319. See Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 573 (1998).

humans.³²⁰ Instead, the law strives to protect and insulate individuals from the harmful effects of these inevitable and enduring human processes.³²¹

To accomplish its goal, the U.S. has committed itself to a public policy based on equal employment opportunity, which means that each individual is guaranteed an equal opportunity to be considered under non-biased hiring criteria.³²² In other words, the law requires that employers judge and evaluate employees on the basis of criteria that are relevant, rational, and legitimate—the employee's skills, abilities, and qualifications to perform the job in question.³²³

C. Unemployment: A Stereotyped & Stigmatized Condition in the U.S.

1. Stereotypes & Stigmas of the Jobless

Unemployed workers are plagued with a deluge of stereotypes and stigmas unrelated to their job-related skills or abilities, which greatly influence how the jobless are perceived and treated.³²⁴ A "central psychological phenomena of unemployment" is society's ambivalence toward the jobless.³²⁵

One widely-held stereotype about the jobless is that they are lazy.³²⁶ Many people associate unemployment with idleness³²⁷ and feel the jobless could obtain a job if they earnestly sought one.³²⁸ As one author notes, "[r]ecruiters seem to hold stereotypical views of the jobless as justly-fired incompetents or as shiftless."³²⁹ This belief derives from America's

320. See discussion *supra* Part V.A.2.

321. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) ("More generally, rules and institutions might be, and frequently are, designed to curtail or even entirely block choice in the hope that legal outcomes will not fall prey to problems of bounded rationality.").

322. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 COLUM. HUM. RTS. L. REV. 443, 461-62 (referencing "the centrality of equality embodied in the Equal Employment Opportunities Act").

323. See *W. Air Lines, Inc., v. Criswell*, 472 U.S. 400, 409-10 (1985) (finding that age limits were abolished as hiring criterion because they were arbitrary and unrelated to worker's ability).

324. KELVIN & JARRETT, *supra* note 80, at 94.

325. *Id.* at 93.

326. Note, *supra* note 1, at 1619 ("The common thread running through these stereotypes is the notion that jobless people are lazy.").

327. JOHN HAYES & PETER NUTMAN, UNDERSTANDING THE UNEMPLOYED 6 (1981).

328. GLYPTIS, *supra* note 202, at 69.

329. KATHERINE S. NEWMAN, FALLING FROM GRACE 66 (1999). One job hunter noted, "Once I was out of work three or four months, employment agencies and companies would get very suspicious. [They'd think] 'You're in this hot field and you haven't been able to get a job for four months? There must really be something wrong with you,' and they wouldn't touch you with a ten-foot pole." *Id.*

longstanding obsession with productivity and work,³³⁰ as well as the notion that we should be able to “pull ourselves up by our boot straps.”³³¹ In America, we firmly believe that anyone can achieve prosperity and success through hard work.³³² Thus, the jobless are responsible for their own plight.³³³

A second stereotype of the jobless is that something must be wrong with them.³³⁴ Unemployment broadcasts that “there is something not quite right about this person.”³³⁵ As a social status, unemployment signals to others that there is a “flaw hiding below.”³³⁶ One author surmising this stereotype proffers, “The broad assumption is that if job candidates are unemployed, they must be damaged goods. Companies think that the individuals wouldn’t have been laid off if they had added value to their company; they weren’t part of the cream of the crop who survived.”³³⁷

330. See *supra* Part IIA. See also JOSHUA HOLLAND, THE FIFTEEN BIGGEST LIES ABOUT THE ECONOMY AND EVERYTHING ELSE THE RIGHT DOESN’T WANT YOU TO KNOW ABOUT CORPORATE AMERICA 37 (2010) (“Almost anyone can get rich if they put their mind to it.” (quoting Jeffrey M. Jones, *Most Americans Do Not Have a Strong Desire to be Rich: Men Have Stronger Desire Than Women to be Rich*, GALLUP, Dec. 11, 2006, <http://www.gallup.com/poll/25846/Most-Americans-Strong-Desire-Rich.aspx>)).

331. The origin of this phrase is unknown. See Gary Martin, *Pull Yourself Up by Your Bootstraps*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/290800.html> (last visited Mar. 10, 2013) (clarifying that the old adage means to “[i]mprove your situation by your own efforts. . . . It refers . . . to boots and their straps (laces) and to the imagined feat of lifting oneself off the ground by pulling on one’s bootstraps”).

332. HOLLAND, *supra* note 330, at 37 (“The belief that our chances of moving up the economic ladder are limited only by our innate abilities and our appetite for hard work is almost universal in the United States.”).

333. KELVIN & JARRETT, *supra* note 80, at 95 (“In effect, the unemployed individual always seems somehow to be suspect: at best he is seen as probably in part to blame for his unemployment. . . .”).

334. See NEWMAN, *supra* note 329 at 273 n.46 (“Negative attitudes toward the unemployed are hardly new. During the Depression, it was commonly believed that there was something wrong with a man who couldn’t find a job and epithets such as ‘pampered poverty rats’ were spoken loudly, particularly to those opposed to government programs.”).

335. *Id.* at 57.

336. See *id.* See also Gerald Mayer & Linda Levine, *Long-Term Unemployment and Recessions*, CONGRESSIONAL RESEARCH SERVICE, REPORT 7-5700 21-22 (2010) (“Employers may rank job applicants by their duration of unemployment and hire from the front of the queue (i.e., the short-term unemployed) because they consider lengthy unemployment to be a signal of poor worker quality (i.e., low productivity). In effect, long-term unemployment stigmatizes workers.”); Martin Biewen & Susanne Steffes, *Unemployment Persistence: Is There Evidence for Stigma Effects?*, CENTRE FOR EUROPEAN ECONOMIC RESEARCH, DISCUSSION PAPER NO. 08-057 (2010), available at <ftp://ftp.zew.de/pub/zew-docs/dp/dp08057.pdf> (“unemployed individuals face difficulties finding a new job because employers interpret unemployment as a negative signal”).

337. Wendy Powell, *How Can You Help the Unemployed? Support the Companies that Hire Them*, HUFFINGTON POST, Oct. 23, 2011, http://www.huffingtonpost.com/wendy-n-powell/how-can-you-help-the-unem_b_1027652.html. See also Cindy Krischer Goodman, *Jobless Discrimination Ban Gains Steam*, CHICAGO TRIBUNE, Feb. 29, 2012, <http://www.chicagotribune.com/classified/jobs/ct-tribune-jobless-discrimination-ban-20120229,0,2659407.story> (last visited Sept. 11, 2012) (reporting that Angel Gallinal, a partner for an executive search firm, reflected a similar sentiment: “Some employers understand that finding senior level jobs can be challenging, and that’s why they don’t penalize someone

Another author noting the “socially damaged” perception that the jobless experience writes:

... unemployed managers begin to realize with horror that the stigma of having lost their jobs, and the fact that they are applying for new ones as “unemployed persons,” outweighs their many years of experience, formal credentials, and specialized expertise. Instead of being treated as experienced applicants ready for work, they are shunned as “spoiled goods.”³³⁸

A third stereotype unfairly characterizing the jobless is that they would rather remain jobless so that they may obtain unemployment insurance benefits from the state. Some of the latest character attacks on the jobless have come, not only from employers, but also from politicians. Lawmakers depict the jobless as lazy, drug addict hobos.³³⁹ In particular, Republicans have alleged that the jobless remain unemployed, not because of a huge job deficit, but because unemployed people prefer to remain without a job so that they can collect meager unemployment insurance benefits.³⁴⁰

These comments and views are often used to denigrate those without a job and justify unsympathetic treatment of the jobless.³⁴¹

who has been out of work for about a year. After a year, some employers start to wonder if the person isn't trying or if there's another reason they're out of work. They start thinking maybe they're not that good.”).

338. See NEWMAN, *supra* note 329, at 56.

339. See *infra* note 340.

340. As an example, following are some recent quotes from conservatives:

Republican Sharron Angle, running for senate in Nevada: “[W]e have put in so much entitlement into our government that we really have spoiled our citizenry and said, you don't want the jobs that are available.”

Sen. Jon Kyl (R-Arizona): “[C]ontinuing to pay people unemployment compensation is a disincentive for them to seek new work.”

Rep. Steve King (R-Iowa): “We shouldn't turn the ‘safety net’ into a hammock. It should actually be a ‘safety net.’”

Rep. Dan Heller (R-Nevada): “Is the government now creating hobos?”

Sen. Orrin Hatch (R-Utah): “You know, we should not be giving cash to people who basically are just going to blow it on drugs.”

The Rachel Maddow Show, *Conservatives Hate the Unemployed*, THE MADDOW BLOG (June 25, 2010, 8:52 AM), http://maddowblog.msnbc.com/_news/2010/06/25/4560854-conservatives-hate-the-unemployed?lite (“One of the most surprising things about politics since the crash happened and since unemployment spiked is how many politicians apparently hate people for being unemployed . . . After you pay for unemployment insurance when you have a job, a bunch of politicians apparently think that you are a leech and a bad person for taking those benefits when you need them.”). See also HOLLAND, *supra* note 330, at 36 (reasoning that the argument that unemployment compensation is a disincentive for people to seek new work is a tenable argument in other countries where decent unemployment benefits are offered; whereas “in the United States, a married worker with kids will get half of his or her wages replaced on unemployment, one of the lowest rates in the developed world”).

341. CRAIG MCGARTY, *Stereotype Formation as Category Formation*, in STEREOTYPES AS EXPLANATIONS: THE FORMATION OF MEANINGFUL BELIEFS ABOUT STEREOTYPES 23 (Craig McGarty, Vincent Yzerbyt, & Russell Spears, eds. 2002) (“[B]elieving that the unemployed are lazy (and have brought the condition on themselves) also justifies a relatively harsh treatment of them.”).

Thus, "the stigma of unemployment becomes a self-fulfilling prophecy: the more a person is in need, the less deserving he or she appears to be."³⁴² Consequently, the jobless experience widespread prejudice and animosity from various sectors across society, including employers, politicians, and the public. "Being unemployed is clearly a stigmatized condition in this country."³⁴³ Whether unemployment is high or low, the jobless must contend with what a job loss reveals about their character.³⁴⁴

The next section presents recent research demonstrating that the stigma of unemployment occurs at the onset of unemployment ultimately leading to hiring discrimination.

2. Research Proves Employers' Bounded Rationality: The Stigma of Unemployment Occurs Instantaneously & Leads to Hiring Discrimination

The duration of unemployment is inversely related to the probability of finding work.³⁴⁵ The longer a person is out of work, the less likely it is that he or she will ever find work.³⁴⁶ There has been some debate among economists as to the reasons underlying this association.³⁴⁷ Some theorize that the long-term jobless have difficulty finding a job because employers perceive a decline in their skills.³⁴⁸

342. NEWMAN, *supra* note 329, at 83.

343. *Id.* at 57. *But cf.* Irena Reszke, *Stereotypes of the Unemployed in Poland*, POLISH SOC. REV. 253, 253 (1996) (finding that stereotypes of the unemployed in Poland are "positive").

344. NEWMAN, *supra* note 329, at x ("In the midst of coping with an unexpected reversal in their material fortunes, the downwardly mobile must contend with the meaning of their fall, with the way it reflects on themselves and the larger society within which they live. This remains true whether the economy is in the doldrums, with unemployment high and the stock market crashing (as it was in the 1980s), or growing at great speed with record highs on the Dow Jones (as . . . at the end of the 1990s).").

345. See Lee Dye, *Unemployment: UCLA Study Shows Stigma of Joblessness is Immediate*, ABC NEWS, (Apr. 6, 2011), <http://abcnews.go.com/Technology/unemployment-stigma-begins-quickly-makes-job-search-harder/story?id=13302693>.

346. See Daniel Aaronson, Bhashkar Mazumder & Shani Schechter, *What is Behind the Rise in Long-term Unemployment?*, 34 ECON. PERSP. 28, 43 (2010) ("For example, at 0-4 weeks of unemployment, the average probability of finding a job in the following month is 34 percent, but at 25-29 weeks, it is only 19 percent.").

347. See Namkee Ahn & J. Ignacio García Pérez, *Unemployment Duration & Workers' Wage Aspirations in Spain* 15-16 (UPF Econ. & Bus., Working Paper No. 426, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=224546 (referencing the "recent theoretical debate of whether there exists stigma or skill depreciation effects in explaining the empirical findings of a decreasing exit rate from unemployment with unemployment duration").

348. Meg Sullivan, *Out of Work? Your Resume is No Good Here*, UCLA NEWS, Mar. 31, 2011, <http://newsroom.ucla.edu/portal/ucla/out-of-work-your-resume-is-no-199510.aspx> ("Economists have tended to chalk up long-term unemployment to the probability of skill decay or discouragement, or employers' perception of skill decay." (quoting Margaret Shih, Professor in Management and Organizations at the UCLA Anderson School of Management)); Mayer & Levine, *supra* note 336, at 22 ("Firms may . . . be reluctant to hire the long-term unemployed because they believe the group's skills have atrophied during their lengthy time away from the workplace.").

The underlying basis for this theory is the rational actor model, that employers are making calculated decisions considering the length of unemployment in assessing an applicant's "hirability."³⁴⁹ As provided earlier in Part V.A., the rational actor theory promotes that humans are unboundedly rational.³⁵⁰ That is, we make decisions considering all options.

Recent studies, however, have found empirical evidence contradicts this rational actor explanation.³⁵¹ Specifically, in the first study of its kind to empirically examine whether a stigma against the jobless exists and when it begins, researchers at the University of California, Los Angeles ("UCLA") and the State University of New York at Stony Brook ("Stony Brook") found that there is a psychological stigma against the jobless that *instantaneously* occurs at the onset of unemployment, not months or years after skills may have begun to decay.³⁵² In other words, the stigma of unemployment begins "the minute the person walks out the door."³⁵³ Thus, instead of finding that employers rationally base their judgments on the skill decay of the jobless, researchers found that an unemployment stigma exists *instantaneously* at the onset of unemployment, ultimately leading to employers' biases and discrimination against the jobless.³⁵⁴

According to Margaret Shih, a co-author of the study, "[W]e're finding that when there's no evidence that skills have deteriorated, out-of-work job applicants are still at a disadvantage. The stigma may help explain why the jobless have systematically lower chances of reconnecting to work."³⁵⁵ Another co-author of the study, Geoffrey Ho,³⁵⁶ reflected

349. Ho, Shih, Walters, & Pittinsky, *supra* note 11, at 3-4 (using the term "hirability" to determine the likelihood of a study participant to hire an applicant for the job).

350. See discussion *supra* Part V.A.1.

351. Ho, Shih, Walters & Pittinsky, *supra* note 11.

352. *Id.* at 11.

353. Dye, *supra* note 345.

354. See *id.*; see also Ho, Shih, Walters & Pittinsky, *supra* note 11. The resumes of each applicant were equivalent in qualifications. *Id.* at 15 n. 2. The only distinguishing factor was employment status; the dates of employment showed that candidates were either employed or unemployed for one month. *Id.* at 5, 6, 8, 15 n. 4. The participants were asked to rate the applicants on perceived competence, warmth, and "hirability." *Id.* at 4, 6. The results revealed that even short-term unemployed candidates retaining their same skills were consistently rated as less competent, less warm, and less hireable than their employed counterparts. *Id.* at 6. Such findings "stand in contrast to economic theories stating that individuals rationally base their judgments of the unemployed on the skill deterioration of the unemployed." *Id.* at 10.

355. Sullivan, *supra* note 348.

356. Geoffrey Ho is a candidate in Management and Organizations at the UCLA Anderson School of Management. His research "examines how different social identities (e.g., gender, employment status, sexual orientation) can affect important organizational outcomes (e.g., leadership emergence, hiring decisions, and performance)." Geoffrey Ho, UCLA ANDERSON SCHOOL OF MANAGEMENT, <http://www.anderson.ucla.edu/x20506.xml> (last visited Mar. 20, 2013).

these same sentiments: “We found bias against the jobless . . . virtually from the outset of employment.”³⁵⁷

Although it has long been theorized that there is a stigma against the jobless,³⁵⁸ the UCLA study empirically proves that a stigma exists independent of qualifications and duration of unemployment.³⁵⁹ The study further demonstrates that such a bias leads to hiring discrimination against the jobless.³⁶⁰

For this reason, and not lack of skills or expertise, many of the jobless remain jobless.³⁶¹ This study demonstrates the boundedly rational nature of employers’ refusal to consider the jobless in applicant pools.³⁶² When boundedly rational conduct causes social problems, a common strategy of government is to prohibit such conduct.³⁶³ As the next subsection demonstrates, unemployment discrimination resulting from employers’ bounded rationality is potentially harming millions of unemployed workers.

D. Unemployment Harms Individuals, Families, & Society

1. The Effects of Unemployment on Individuals & Families

“People who lose jobs, even if they eventually find new ones, suffer lasting damage to their earnings potential, their health and the prospects of their children. And the longer it takes to find a new job, the deeper the damage appears to be.”³⁶⁴

Financially, the private cost of losing a job can be staggering.³⁶⁵ In the short term, it can be extremely difficult for individuals to manage their financial obligations.³⁶⁶ One study found the jobless are six times more

357. Dye, *supra* note 345 (statement of Geoffrey Ho) (“We’re finding that people actually judge the unemployed as not good people compared to the employed.”).

358. ALDEN, *supra* note 4, at 4 (discussing how the unemployed, upon receiving government assistance, face the “stigma of pauperism”).

359. Ho, Shih, Walters & Pittinsky, *supra* note 11, at 11.

360. *See id.* at 10.

361. *See id.*

362. *See id.* at 10 (“[U]nemployment stigma leads to hiring biases against the unemployed.”).

363. *See* Jolls & Sunstein, *supra* note 321, at 200 (“Boundedly rational behavior might be, and often is, taken to justify a strategy of insulation, attempting to protect legal outcomes from people’s bounded rationality.”). *See also* E. Ericka Kelsaw, *Out of Our Right Minds: The Effects of Cognitive Bias on Social Problems and How Taking the Middle Road Can Help*, 16 MICH. ST. U. J. MED. & L. 167, 172 n.12 (“An example of an outright ban on boundedly rational conduct includes states’ banning of text messaging for drivers.”).

364. Binyamin Appelbaum, *The Enduring Consequences of Unemployment*, N.Y. TIMES, Mar. 28, 2012, <http://economix.blogs.nytimes.com/2012/03/28/the-enduring-consequences-of-unemployment/>.

365. Aaronson, Mazumder & Schechter, *supra* note 346, at 28 (“In the long run, permanent earnings losses can be large.”).

366. *Id.* at 28. A national random survey of the Heldrich Center at Rutgers The State University of New Jersey found that financial losses have been so severe that 80% of unemployed respondents were forced to reduce spending on at least one essential—either food, housing, or health care; more than half

likely to have difficulty meeting their household expenses than those who are employed.³⁶⁷ The loss of a steady income and the security it brings is one of the greatest hardships of unemployment.³⁶⁸

In the long term, earning losses can be permanent³⁶⁹ and/or result in poverty.³⁷⁰ A 2009 study “found that workers who lost jobs during the recession of the early 1980s were making 20 percent less than their peers two decades later.”³⁷¹ Another study found that graduating in a recession leads to earnings losses that last up to ten years.³⁷² Younger workers who experience unemployment soon after completing school are also more likely to experience future episodes of unemployment.³⁷³ These young adults are “acquiring a stigma . . . that will be hard to shed.”³⁷⁴ But even worse than reduced earnings is the threat of poverty, which “predictably rises as the labor market deteriorates.”³⁷⁵

Researchers have also found that being jobless is hazardous to one’s health and well-being.³⁷⁶ The condition of unemployment progressively

(54%) also said the recession contributed to more stress in family relationships. See Carl E. Van Horn & Cliff Zukin, *Unemployed Workers and the Great Recession: Highlights from the Heldrich Center’s Work Trends Reports, 2009-2010*, JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS U., 8 (2011), www.heldrich.rutgers.edu/sites/default/files/content/Unemployed_Workers_Great_Recession.pdf.

367. *Economic Downturn Taking Toll on Americans’ Mental Health*, NAT’L ALLIANCE ON MENTAL ILLNESS, Oct. 6, 2009, http://www.nami.org/Template.cfm?Section=top_story&template=/contentmanagement/contentdisplay.cfm&ContentID=87100&title=Economy’sTollonMentalHealth.

368. See NICK KATES, BARRIE S. GREIFF & DUANE Q. HAGEN, *THE PSYCHOSOCIAL IMPACT OF JOB LOSS* 81 (1990); see also Nicola Pavoni, *Optimal Unemployment Insurance, with Human Capital Depreciation, and Duration Dependence*, 50 INT’L ECON. REV. 323, 323 n.2, available at www.ucl.ac.uk/~uctnpa/humancap2.pdf (“Many authors consistently find that displaced US workers face a large and persistent earnings loss upon re-employment.”).

369. Aaronson, Mazumder & Schechter, *supra* note 346, at 28.

370. BIVENS, *supra* note 53, at 26.

371. Appelbaum, *supra* note 364.

372. Philip Oreopoulos, Till von Wachter & Andrew Heisz, *The Short-and Long-term Career Effects of Graduating in a Recession: Hysteresis and Heterogeneity in the Market for College Graduates* 3 (Nat’l Bureau of Econ. Res., Working Paper No. 12159, 2006), http://www.nber.org/papers/w12159.pdf?new_window=1.

373. KATES, GREIFF, & HAGEN, *supra* note 368, at 61; see also *Employment: OECD Sees High Jobless Rates Continuing—More Must Be Done Urgently to Boost Job Creation and Help Jobseekers*, ORG. FOR ECON. COOPERATION AND DEV. (July 11, 2012), <http://www.oecd.org/newsroom/employmentoecdseeshighjoblessratescontinuing-moremustbedoneurgentlytoboostjobcreationandhelpjobseekers.htm> (“The young are at most risk of long-term damage to their careers and livelihoods.” (quoting Angel Gurría, Secretary General for the Organisation for Economic Cooperation and Development (OECD), a Paris-based think tank)).

374. PECK, *supra* note 32, at 14.

375. BIVENS, *infra* note 53, at 26 (“The increase in poverty among the working age population that has occurred since the start of the Great Recession ties for the largest on record.”).

376. Appelbaum, *supra* note 364 (“Losing a job . . . is literally bad for your health. A 2009 study found life expectancy was reduced for Pennsylvania workers who lost jobs during the same period. A worker laid off at age 40 could expect to die at least a year sooner than his peers.”).

damages our physical³⁷⁷ and mental health³⁷⁸ and decreases our life expectancy.³⁷⁹ Health complications from unemployment include cardiovascular disease, stress, depression, and anxiety.³⁸⁰ Premature death is also a risk of unemployment.³⁸¹ With millions of Americans either unemployed or underemployed, experts predict that the recession will have extensive and severe consequences, “not just on bank accounts, but on the health and longevity of the jobless.”³⁸²

“Joblessness not only leaves deep scars on people—financially and psychologically—but [it] also has enduring effects on families, communities, and societies.”³⁸³ For example, research shows that spouses are likely to experience many of the same negative effects as their partners who have lost their jobs, including depression and anxiety.³⁸⁴

The impact of unemployment on children is also financially and psychologically damaging.³⁸⁵ One study showed that sons of men who lost their jobs eventually earned nine percent less than sons of comparable workers who remain employed.³⁸⁶ Children of the jobless are also “likely to

377. See Aaronson, Mazumder & Schechter, *supra* note 364, at 28 (“Health consequences can be severe.”); KATES, GREIFF, & HAGEN, *supra* note 368, at 51 (“Changes in physical health have been documented by both presence of illness or symptoms and an increased utilization of health services.”).

378. See KATES, GREIFF, & HAGEN, *supra* note 368, at 53 (“A consistent finding of studies of the impact of job loss has been an increase in emotional problems and symptomatology among jobless workers.”).

379. See Mike Berry, *Unemployment Damages Physical and Mental Health*, PERSONNEL TODAY (Sep. 7, 2006, 8:48 AM), <http://www.personneltoday.com/articles/2006/09/07/37084/unemployment-damages-physical-and-mental-health.html>; KATES, GREIFF, & HAGEN, *supra* note 368, at 57 (discussing positive correlation between unemployment and suicide rates).

380. See KATES, GREIFF, & HAGEN, *supra* note 368, at 51-54.

381. Dye, *supra* note 345 (“Researchers at McGill University . . . found that unemployment increased the risk of premature death by 63 percent, based on research covering 20 million persons in 15 countries over the last 40 years. And that wasn’t because they could no longer afford adequate health care. . . . Similarly, researchers at the University of Michigan found that the loss of a job can lead to a ‘downward spiral of depression and poor health.’”).

382. See Laura Bassett, *Study: Longterm Unemployment Has Disastrous Effects on Health and Longevity*, HUFFINGTON POST, Nov. 5, 2010, http://www.huffingtonpost.com/2010/11/05/study-longterm-unemployme_n_779743.html (last updated May 25, 2011); William A. Darity & Arthur H. Goldsmith, *Social Psychology, Unemployment and Macroeconomics*, 10 J. ECON. PERSP. 121, 124 (1996) (“There is evidence that those who are underemployed . . . suffer psychological damage as well.”).

383. Carl E. Van Horn, *Jobless and Hopeless in America*, CNN (Jan. 7, 2011), <http://www.cnn.com/2011/OPINION/01/07/vanhorn.unemployment.jobs.study/index.html>.

384. KATES, GREIFF, & HAGEN, *supra* note 368, at 55.

385. JAHODA, *supra* note 124, at 29 (discussing “widespread agreement that the impact of unemployment on children . . . might be psychologically most damaging and require[s], therefore, special measures”).

386. Appelbaum, *supra* note 364 (“[A] particularly depressing paper, published in 2008, reported that children also suffer permanent damage when parents lose jobs. The study followed the earnings of 39,000 Canadian fathers and sons over 30 years beginning in the late 1970s. The study found the sons of men who lost their jobs eventually earned about 9 percent less than the sons of otherwise comparable workers.”).

be of lower birth weight, to be smaller, to have more health problems early in life, and to do worse on tests of cognitive development.”³⁸⁷ Furthermore, children of unemployed, single mothers are likely to show declines in emotional well-being and an increased chance of dropping out of school.³⁸⁸

While the toll of unemployment on individuals and families is often evident, it is also essential to examine the broader ramifications of unemployment and unemployment discrimination.³⁸⁹ Such societal implications will be examined next.

2. *The Deleterious Effects of Unemployment on Society*

Unemployment imposes significant costs on society. One consequence of a prolonged unemployment crisis is the depreciation of skilled labor. A Swedish study gauging the role of skill depreciation between work interruptions found that respondents’ ability to read and make practical use of printed information declined during unemployment.³⁹⁰ This atrophy in workers’ skills holds true for American workers and can weaken the American labor force³⁹¹ and its production potential.³⁹² According to one study, the presence of skill deterioration during unemployment is a source of inefficiency, and thus, “calls for policy intervention.”³⁹³

387. KATES, GREIFF, & HAGEN, *supra* note 368, at 56. See also Michael Luo, *Job Woes Exacting a Toll on Family Life*, N.Y. TIMES, June 15, 2009, http://nytimes.com/2009/11/12/us/12families.html?pagewanted=all&_r=0 (reporting that children in families where the head of the household is unemployed are more likely to repeat a grade, and “adolescent children of low-income single mothers who endured unemployment had an increased chance of dropping out of school and showed declines in emotional well-being”).

388. See Ariel Kalil & Kathleen M. Ziol-Guest, *Single Mothers’ Employment Dynamics and Adolescent Well-Being* 26 (Nat’l Poverty Ctr., Working Paper No. 04-10, 2004), http://www.npc.umich.edu/publications/working_papers/ (finding that “having a [low-income single] mother who is continually unemployed or who loses more than one job” is predictive of an adolescent dropping out of school).

389. KLAUS SERR, THINKING ABOUT POVERTY 99 (2006).

390. See, Per-Anders Edin & Magnus Gustavsson, *Time Out of Work and Skill Depreciation*, 61 INDUS. & LAB. REL. REV. 163, 163 (2008) (examining the depreciation of individuals’ skills as a function of time out of work found that a full year of non-employment was associated with a five-percent decrease in skill distribution); Michael P. Keane & Kenneth I. Wolpin, *The Career Decisions of Young Men*, 105 J. POL. ECON. 473, 500 (1997), available at <http://www.jstor.org/stable/2138849> (estimating an annual human capital depreciation rate for white U.S. males during one year of unemployment of 9.6% for blue collar workers and 30.5% for white collar workers).

391. PECK, *supra* note 32, at 155 (“Every year that goes by while masses of people are trapped and idled due to . . . high unemployment is not merely one lost year—it’s a loss that’s paid forward into future years as well, an accumulating deficit of skill, character, and regenerative ability.”).

392. See Lien Laureys, *Skill Erosion During Unemployment as a Source of Inefficiency 2* (Search & Matching Res. Grp, Univ. of Cyprus, Sess. 5, 2012), available at http://sam2012.ucy.ac.cy/wp-content/uploads/2012/05/lien_laureys_March_15_2012.pdf. (“[D]uring recessions, the labor force’s production potential decreases because the relative share of workers with eroded skills increases.”).

393. See *id.* at 28.

Long-term unemployment physically and psychologically affects the labor force.³⁹⁴ “The rise in joblessness damages the cognitive, motivational and emotional status of those laid off, ultimately leading to deterioration in the psychological state of the labor force.”³⁹⁵

Depreciation of human capital foreshadows one of the most menacing consequences of persistently high unemployment—a widening gap between a privileged employed class of workers and a marginalized permanently unemployed/underemployed class of workers. Skill erosion during unemployment creates a workforce that is no longer homogenous; the workforce contains both workers who have and have not lost skills.³⁹⁶ Unemployment discrimination contributes to this “dual-class society” because the longer the jobless remain unemployed while the employed play “musical chairs” between jobs, the skill variance between the two classes expands.³⁹⁷ This could lead to a class of people who are left behind as the economy recovers³⁹⁸ encouraging a new and higher natural rate of unemployment.³⁹⁹ There is thus, a national interest in circumventing a large class of permanently unemployed people.⁴⁰⁰

Finally, the loss of vital human resources has a boomerang effect on society. The costs for public assistance mount, tax bases decline,⁴⁰¹ and

394. See Darity & Goldsmith, *supra* note 382, at 132.

395. *Id.*

396. Laureys, *supra* note 392, at 2.

397. See Jennifer Peltz, *Unemployed Complain They Need a Job to Find a Job*, U.S. NEWS & WORLD REP., Feb. 22, 2013, <http://www.usnews.com/news/us/articles/2013/02/22/unemployed-complain-they-need-a-job-to-find-a-job> (quoting New Yorker Jennifer Falk, “My personal view is that hiring is like musical chairs, and if only the people who are already on the dance floor are playing, then the long-term unemployed can’t get in the game . . .”).

398. Robert Pear, *Obama Proposes Protecting Unemployed Against Hiring Bias*, N.Y. TIMES, Sept. 26, 2011, <http://www.nytimes.com/2011/09/27/us/politics/obama-proposes-adding-unemployed-to-protected-status.html> (“Skills often atrophy when a person is out of work, and White House officials said that [unemployment] discrimination could worsen the problem, creating a class of people who could be left behind as the economy recovers.”).

399. Economists are estimating whether the Great Recession will cause the natural rate of long-term unemployment to shift permanently higher. See, e.g., Murat Tasci & Saeed Zaman, *Unemployment After the Recession: A New Natural Rate?*, FEDERAL RESERVE BANK OF CLEVELAND (2010), available at <http://www.clevelandfed.org/research/commentary/2010/2010-11.cfm> (finding that the natural rate of unemployment has shifted higher, but less than suggested by other economists). But see PECK, *supra* note 32, at 13 (Many, including Mark Zandi, the chief economist at Moody’s Analytics, believe that the unemployment rate will remain permanently higher.). The natural rate of unemployment is defined as “the unemployment rate that arises from all sources other than fluctuations in demand associated with business cycles. The natural rate is determined by the rate at which jobs are simultaneously created and destroyed, the rate of turnover in particular jobs, and how quickly unemployed workers are matched with vacant positions.” David Brauer, *The Natural Rate of Unemployment 1* (Cong. Budget Off., Working Paper Series 2007-06, 2007), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/80xx/doc8008/2007-06.pdf>.

400. See Owens, *supra* note 83 (“We thus have a national interest in ensuring that all qualified applicants—working or not—have fair employment opportunities.”).

401. See Surowiecki, *supra* note 9 (“Jobless workers, having no income, aren’t paying taxes, which adds to the budget deficit.”).

consumer demand for goods and services stagnates.⁴⁰² All of these effects hinder economic recovery.

“The greatest treasure of any modern society is its human capital, but long, deep slumps slowly drain that away.”⁴⁰³ Unemployment discrimination could be contributing to the long, deep slump that has characterized America’s post-Great Recession recovery. Much of the condition of the economy and of society depends on the reemployment of the jobless.⁴⁰⁴ Deleterious effects on society, including human capital depreciation and the creation of a permanently unemployed class of people, should prompt policies that retard such effects. Barring unemployment discrimination could be a key component of governments’ policy intervention.

The next section will discuss the harmful effects of stereotyping on the jobless and establish that moral and social policy arguments justify legally prohibiting unemployment discrimination.

*E. Prohibiting Unemployment Discrimination Resulting from
Employers’ Bounded Rationality Will Effectuate Purpose of
Antidiscrimination Law*

Biases appear in the workplace when, consciously or unconsciously, employers make employment decisions using traits that are not job-related as a weak proxy link for traits that are job-related.⁴⁰⁵ Proxies like this that are not evidence-based are irrational and have undesirable social consequences.⁴⁰⁶

As shown by the UCLA/Stony Brook study, unemployment discrimination is an example of irrational proxy discrimination.⁴⁰⁷ Based upon the stigma of unemployment, employers make decisions using the

402. See Owens, *supra* note 83.

403. PECK, *supra* note 32, at 155. See also Owens, *supra* note 83 (“This perverse catch-22, limiting jobs to those already working, has exacerbated the unemployment crisis, lengthening unemployment spells and diminishing the human capital of jobless Americans in ways that hurt them and their families as well as prospective employers and the economy overall.”); Surowiecki, *supra* note 9 (“[W]hen a substantial portion of the workforce is sitting on its hands, the economy is going to grow more slowly than it could. After all, people doing something to create value, rather than nothing, is the fundamental driver of growth in any economy.”).

404. See KELVIN & JARRETT, *supra* note 80, at 92.

405. See Bandsuch, *supra* note 282, at 1021-22 (“For example, employers may relate hairstyle, jewelry, eye-wear, and clothing with characteristics like intelligence, honesty, and loyalty.”); E. John Gregory, *Diversity is a Value in American Higher Education, But it is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929, 944 (2000) (“[A] ‘stereotype’ is merely a synonym for a weak characteristic/proxy link. In this sense, whenever an assumption about a group is called a ‘stereotype,’ a conclusory judgment is being drawn as to the strength of the proxy.”).

406. Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 170 (1992).

407. See Ho, Shih, Walters & Pittinsky, *supra* note 11, at 11; see also *infra* note 408.

inaccurate and bias-driven stereotypes of the jobless (traits that are not job-related) as a weak proxy link for characteristics like ability and work ethic (traits that are job-related).⁴⁰⁸

According to Professor Alexander, a constitutional law scholar, “irrational proxy discrimination, based upon inaccurate stereotypes or generalizations, is morally troublesome because it imposes unnecessary social costs. . . . [It] represents preferences premised on factual errors. And if significant social costs accompany irrational proxy discrimination, it may be morally wrong to engage in it.”⁴⁰⁹

Furthermore, per Professor Alexander, “Proxy discrimination based upon inaccurate and usually bias-driven stereotyping [is] intrinsically immoral for the same reasons as are the biases with which they are intimately linked.”⁴¹⁰ “Where harmful social effects will ensue from bias, given the numbers and group characteristics, there is probably a case for legally prohibiting biased choices in certain realms otherwise left to private choice, particularly in the economic realm.”⁴¹¹

Considering that there are 23.5 million unemployed and underemployed workers in America and that it may be “several years before the unemployment rate returns to normal levels,”⁴¹² the social costs and harmful effects ensuing from employers’ inaccurate and bias-driven stereotypes are immense. Such social costs and harmful effects are both psychological and material.⁴¹³ For example, one harmful effect of inaccurate stereotypes and bias is discrimination in the job market.⁴¹⁴ The individual, familial, and social costs of unemployment are detailed above in Part V.D. Unemployment, a result of discrimination in the job market, is a “social issue of large proportions”⁴¹⁵ causing a number of injurious consequences including health complications in unemployed workers and a dual-class society.

408. See Jeffrey Hirsch, *The Résumé is Relevant*, N.Y. TIMES, July 27, 2011, <http://www.nytimes.com/roomfordebate/2011/07/26/the-hiring-bias-against-the-unemployed/why-employment-status-matters> (“[M]any employers still use employment status as a proxy for ability.”).

409. Alexander, *supra* note 406, at 169.

410. *Id.* at 193.

411. *Id.* at 163 (arguing that there is “less reason to believe there is a moral right to make biased choices when they produce harmful consequences”).

412. *Chart Book*, *supra* note 39.

413. See Alexander, *supra* note 406, at 162.

414. See *id.* at 162 (reasoning that discrimination against disfavored groups in the job market is a natural consequence of bias); Brest, *supra* note 313, at 8 (regarding stigmatic harm, “the most obvious harm is the denial of the opportunity to secure a desired benefit, [like] a job”); Note, *supra* note 1, at 1609.

415. Compare JAHODA, *supra* note 124, at 27 (opining that when unemployment is so extensive as to have mass psychological affects, as in a depression, it is no longer a “matter for private lives”).

Another harmful effect associated with inaccurate stereotypes and bias is its psychic and motivational effect on members of a disfavored group.⁴¹⁶ Unemployed workers often feel stigmatized and inferior or insulted and angry, thus reducing their sense of well-being.⁴¹⁷ Additionally, they may start to believe they are not valuable employees. If they begin to identify with the unemployment stigma, this could “freeze the culture in its present state,” a devastating effect.⁴¹⁸

Another social cost is a type of “bystander effect.” Discriminating on the basis of some kinds of traits often reinforces others’ biases, immoral ideals, aversions, and inaccurate stereotypes.⁴¹⁹ If employers are allowed to post ads overtly discriminating against the jobless, others may feel their biases and prejudices against the jobless are acceptable and justified. Governments’ failure to respond to this discrimination may reinforce stereotypes of the jobless.⁴²⁰

Finally, employers’ inaccurate stereotypes and bias may result in the social cost and harmful effect of prolonging the unemployment crisis.⁴²¹ Employers’ “hiring decisions affect workers’ job finding probability” thereby affecting the average duration of unemployment.⁴²²

Fundamental principles of antidiscrimination law guarantee workers an equal opportunity to be considered under hiring criteria that are “free of animus, prejudice or bias.”⁴²³ But instead of individually assessing unemployed workers on relevant criteria, employers are prejudging unemployed workers’ abilities based on unfair, arbitrary, and inaccurate stereotypes and biases.

As the data in Part II supports, the U.S. is in a severe jobs crisis. Many of the current jobless are unemployed through no fault of their own. Tens

416. See Alexander, *supra* note 406, at 194.

417. Cf. *id.* at 162 (maintaining that the well-being of groups who face irrational proxy discrimination is reduced).

418. See *id.* at 194-95 (“For example, if because of accurate predictions of women’s childbearing preferences, employers fail to promote them to certain jobs, women may tend to be reinforced in their childbearing preferences, thus freezing the cultural pattern, perhaps at great social cost in terms of lost productivity.”).

419. See *id.* at 194.

420. Kenji Yoshino, *A Foolish Stigma, Worth Discouraging*, N.Y. TIMES, June 27, 2012, <http://www.nytimes.com/roomfordebate/2011/07/26/the-hiring-bias-against-the-unemployed/the-stigma-against-the-unemployed-is-self-defeating>.

421. See Owens, *supra* note 83 (arguing that excluding the unemployed from job openings does more than harm the individual unemployed person, it hurts the growth of the overall economy and prolongs the unemployment crisis); Bassett, *supra* note 420 (“A company’s choice to ignore unemployed applicants and recycle the current workforce ignores the effect of the recession on millions of highly-qualified workers and could prolong the unemployment crisis.”).

422. Laureys, *supra* note 292, at 2.

423. See Stone, *supra* note 286, at 620; see also Fleener, *supra* note 311, at 1313 (“Discrimination occurs in part as a result of a natural cognitive mechanism—stereotyping-turned to prejudice, or judgments based on negative stereotypes about a group.”).

of millions of Americans are unemployed, not because they are “lazy” or “something is wrong with them,” but because there are 23,500,000 workers available and only 3,664,000 available jobs.⁴²⁴ Many unemployed workers in America are qualified, “highly motivated and immediately available for work.”⁴²⁵

Certainly, some employers may have taken advantage of the recession to “get rid of some ‘dead weight.’”⁴²⁶ And there are surely some unemployed workers for whom the stereotypes are accurate and justified. However, as the unemployment data plainly indicates, the issue “comes down to much more than poor employee performance.”⁴²⁷

Although the decision to discriminate against the jobless has traditionally been left to employers’ discretion and private choice, considering that some employers have decided to discriminate against *all* unemployed workers in a severe jobs crisis, this decision may be morally wrong given the ensuing social costs and harmful effects. Although employers’ bounded rationality is a natural process, under principles of antidiscrimination law, governments must protect and insulate individuals from the harmful effects of these human processes.⁴²⁸ Thus, governments should legally prohibit employers from such boundedly rational conduct.

VI.

PROPOSED FRAMEWORK FOR UNEMPLOYMENT DISCRIMINATION STATUTES

A. Unemployment Discrimination Should be Legally Prohibited and Jobless Workers Should Have a Private Right of Action

Prohibiting discrimination based on a person’s jobless status is the most direct route for individuals to obtain relief from intentional discrimination.⁴²⁹ Therefore, employers should be expressly prohibited from using employment status as a hiring criterion unless such status is a bona fide occupational qualification. A statute banning discriminatory job ads is insufficient because employers can still legally refuse to consider or

424. See *infra* notes 62-63 and accompanying text.

425. See Owens, *supra* note 83.

426. Sharon L. Florentine, *Uninterested in the Unemployed*, THELADDERS.COM (Jan. 2011), <http://www.docstoc.com/docs/131126775/Uninterested-in-the-Unemployed-January>.

427. See *id.*

428. See Jolls & Sunstein, *supra* note 321, at 200 (“More generally, rules and institutions might be, and frequently are, designed to curtail or even entirely block choice in the hope that legal outcomes will not fall prey to problems of bounded rationality.”).

429. See BERMAN ET AL., *supra* note 128, at 65 (“The most straightforward claim under antidiscrimination law is one alleging “disparate treatment, or intentional, or invidious discrimination.”); Yoshino, *supra* note 420 (“Congress and the states have a role in protecting the unemployed through legal reforms—not just because markets are imperfect but also because some dignitary claims should not be left to market valuation.”).

offer employment to individuals based on their jobless status. Disparate treatment, a straight-forward mode of relief, is the legal construct that is most likely to protect the jobless.⁴³⁰

In addition, governments should provide plaintiffs with a private cause of action using similar evaluation standards as those afforded to other protected classes.⁴³¹ Furthermore, successful plaintiffs should be awarded back and front pay, declaratory and injunctive relief, attorney's fees, as well as compensatory and punitive damages, identical to other disparate treatment claims.

Finally, enforcement of the unemployment discrimination statutes, through government and private causes of action, will be paramount in effectively protecting this vulnerable class. The procedures for enforcing the statute, including for the enforcing authority, should be clearly delineated.

This proposal does not naïvely suggest that unemployment discrimination laws will eradicate unemployment discrimination as it is deeply entrenched in this country. Nor does this proposal tout that unemployment discrimination statutes will return the unemployment rate to its pre-Great Recession levels. The statutes are only part of a larger strategy to help Americans get back to work.

Prohibiting unemployment discrimination will, however, educate employers and increase public awareness about the injustice historically experienced by the jobless. Importantly, it will also provide the jobless an opportunity to compete in the job market and attempt to restore stability, value, hope, and dignity to their lives.

The author notes that there is a meaningful body of scholarship debating the notion of whether unconscious bias is actionable under either a disparate treatment or disparate impact construct.⁴³² As noted earlier, stereotypical beliefs "may be activated both implicitly (automatically and without awareness) and explicitly (consciously, deliberately, and controllably)."⁴³³ The focus of this Article is on employers' explicit bias. Thus, the issue of whether an unemployment discrimination statute supports an action for unconscious bias is not analyzed here.

430. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748 (2001) ("The legal construct used most consistently to address discrimination is 'intentional disparate treatment.'").

431. Cf. Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 220 (2000).

432. See, e.g., Chamallas, *supra* note 430, at 749 ("There is currently a debate as to whether 'unconscious disparate treatment' is actionable under [Title VII] in cases in which the plaintiff proves that . . . some . . . prohibited factor causes the unequal treatment, even if the decisionmaker did not desire or was not fully aware of the impact of his or her conduct."); Bandsuch, *supra* note 282 (promoting an alternative "totality of the circumstances" approach).

433. Dovidio & Hebl, *supra* note 294, at 14. See also Stone, *supra* note 286, at 614.

*B. Employers' Rights & The BFOQ Defense: An Appropriate Balance
Between Employers & Unemployed Workers*

1. Employers' Rights to Review Qualifications

Unemployment discrimination statutes should provide employers with the right to ask about gaps on applicants' resumes. In fact, this furthers the purpose of antidiscrimination laws because, to fairly evaluate applicants' qualifications, employers will need to ask applicants a variety of questions. As an example:

An employer has two applicants. Applicant A works at Company X and Applicant B was fired from Company X. The employer may wish to hire Applicant A believing that he will be a better employee based on the reasoning that Company X retained A. But this would no longer be a legitimate reason upon which to hire Applicant A. Instead, the employer would need to review the qualifications of each candidate, which permits an inquiry into Applicant B's termination, and make a hiring decision on that basis.

Antidiscrimination law does not guarantee a job; it simply guarantees that individuals have a right to unbiased consideration of a job.

2. BFOQ Defense

In addition, there may be some jobs where "currently employed status" is warranted.

In consideration of this, proposed laws addressing unemployment discrimination should include the bona fide occupational qualification ("BFOQ") exception.⁴³⁴ This defense allows employers a limited right to intentionally discriminate on the basis of a protected characteristic if the protected characteristic is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.⁴³⁵ The bona fide occupational qualification was first enacted by Congress in Title VII.⁴³⁶

434. See Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. Rev. 473, 476 (2001) (arguing that by introducing the BFOQ defense, "Congress . . . recognized that sometimes discrimination . . . was not only morally acceptable, but also made sound economic sense.").

435. Katie Manley, *The BFOQ Defense Title VII's Concession to Gender Discrimination*, 16 Duke J. Gender L. & Pol'y 169, 172 (2009) (citing *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 297 (N.D. Tex. 1981) (quoting 110 Cong. Rec. S. 7212, 7213 (1964))). The relevant provision of the BFOQ defense states: "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [the protected characteristic] in those certain instances where [the protected characteristic] is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ." 42 U.S.C. § 2000e-2(e).

436. 42 U.S.C. §§ 2000e to e-17.

Congress later “extended this same protection to employers covered by the Age Discrimination in Employment Act (‘ADEA’).”⁴³⁷

Interpreted narrowly by the courts,⁴³⁸ the BFOQ defense ordinarily involves a “case-by-case, fact-intensive inquiry.”⁴³⁹ Once a plaintiff establishes a prima facie disparate treatment claim, an employer has the opportunity to raise the BFOQ as an affirmative defense, which is a very difficult burden for the employer to meet.⁴⁴⁰ Employers’ efforts to establish the BFOQ defense are typically rejected.⁴⁴¹ As a result, the BFOQ defense is seldom employed.⁴⁴²

According to the Supreme Court, the BFOQ defense is worded with several restrictions indicating that it only applies to special situations.⁴⁴³ Specific terms within the defense—“certain,” “normal,” “particular,” and “occupational”—all indicate objective, verifiable, job-related skills.⁴⁴⁴ For this reason, the courts do not extend BFOQ protection to stereotypes.⁴⁴⁵ Instead, an employer’s BFOQ defense must be based on facts.

Courts have annunciated a two-prong test to determine whether the BFOQ defense applies.⁴⁴⁶ To successfully assert a BFOQ defense, an employer must prove by a preponderance of the evidence:

1. that the job qualification justifying the discrimination is reasonably necessary to the essence or mission of its business, and

437. See 42 U.S.C. §§ 2000e to e-17. For example, under the Age Discrimination in Employment Act of 1967 (ADEA), differential treatment of airline pilots based on age is not unlawful because age is a bona fide occupational qualification reasonably necessary to the normal operation of an airlines’ particular business. See *EEOC v. Exxon Mobil Corp.*, No. CIV A 306-CV-1732-K, 2008 WL 1958992, at *6 (N.D. Tex., April 28, 2008), *vacated*, 344 F. App’x 868 (5th Cir. 2009).

438. See *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (“We are persuaded—by the restrictive language . . . , the legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination . . .”).

439. *Frank*, *supra* note 434, at 477 (“The employer bears the burden of establishing the defense, which usually involves a case-by-case, ‘fact-intensive inquiry.’”) (citing *Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993)).

440. *Dothard*, 433 U.S. at 333 (finding that an employer who is asserting the BFOQ defense “faces a difficult burden in light of the public policy furthered by” antidiscrimination law).

441. *Manley*, *supra* note 435, at 176. There are, however, three areas where employers have found some success in maintaining the BFOQ defense—privacy, safety, and authenticity. *Id.* at 176-82.

442. See *BERMAN ET AL.*, *supra* note 128, at 79 (“Today, BFOQs are seldom utilized because they are difficult to defend.”).

443. See *Int’l Union*, 499 U.S. at 201.

444. *Id.*

445. *Manley*, *supra* note 435, at 183 (arguing that where the primary function of an airline was to safely transport passengers, defendant-airline could not defend its exclusion of male attendants and maintain sex as a BFOQ based upon the stereotyped belief that “female attendants . . . were superior in such non-mechanical aspects of the job as ‘providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible . . .’” (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387-88 (5th Cir. 1971))).

446. See *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-17 (1985).

2. that the protected characteristic is a legitimate proxy for the qualification because (a) the employer has a substantial basis for believing that all or substantially all of the excluded class are unable to perform the duties of the job, or (b) that it is impossible or highly impractical to determine by individual testing each applicant's qualifications for the job.⁴⁴⁷

The first prong of the defense is commonly called the "essence of the business test,"⁴⁴⁸ because to justify discrimination, an employer must demonstrate that an essential function of its business would be undermined by hiring the class of people the employer desires to exclude.⁴⁴⁹ "Mere peripheral qualifications that make an individual a more desirable employee generally do not concern the essence of an employer's business and thus are not 'occupational,' even though the qualifications might make the business more competitive."⁴⁵⁰ Courts note that the BFOQ standard is also one of "reasonable necessity," not reasonableness.⁴⁵¹

The second prong of the defense is known as the "all or substantially all" test.⁴⁵² "One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding . . . efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class."⁴⁵³

Both prongs focus on the ability of excluded class members to perform the job.⁴⁵⁴ "The 'essence of the business' test considers whether the employee's desired trait is essential for the business to run successfully,

447. *Id.* (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)). Some courts consider a third analysis as well—whether there are any reasonable, less discriminatory alternatives to discrimination. See *Manley, supra* note 435, at 174 ("[C]ourts often consider whether any reasonable alternatives exist to forgo discriminatory practices."); *Frank, supra* note 434, at 483 ("Courts look to see if reasonable alternatives to discrimination might equally serve the relevant business purposes.").

448. *Manley, supra* note 435, at 175.

449. *Diaz*, 442 F.2d at 388 (invalidating an employer's policy of refusing to hire males as airline cabin attendants because the policy was "tangential to the essence of the business" and the airline's primary function, which was "to transport passengers safely from one point to another").

450. *Frank, supra* note 434, at 480 (citing *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 297 (N.D. Tex. 1981)).

451. See e.g., *W. Air Lines*, 472 U.S. at 419 (rejecting airline's argument that refusal to employ flight engineers upon reaching age 60 was "reasonable in light of the safety risks." Instead, the Court required the trier of fact to determine whether the discriminatory employment practice was "reasonably necessary" to the operation of the business).

452. *Manley, supra* note 435, at 174.

453. *Id.* at 174-76.

454. See *Hayes v. Shelby Memorial Hosp.*, 546 F. Supp. 259, 264 (N.D. Ala. 1982) ("Both aspects of the test focus upon job performance; therefore, in order to successfully assert a BFOQ defense, the defendant must show a nexus between pregnancy risks and impaired ability to perform the job. Potential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the BFOQ issue.").

while the 'all or substantially all' test focuses on whether a class-based ban is the only feasible method of revealing those unable to perform the job."⁴⁵⁵

Under the first prong, in order to exclude the jobless from consideration, an employer would need to show that hiring an unemployed person for that position would undermine the essence or central mission of the employer's business. It is not sufficient that the employed person is more desirable. This could be foreseeable, for example, in some rapidly-evolving, high-tech markets. For most positions, however, employment status will likely not be related to the essence or central mission of most employers' businesses. Thus, for the majority of job openings, employers will likely be unable to satisfy this prong.

Furthermore, under the second prong, employers seeking to exclude the jobless from openings would need to prove that all or substantially all jobless individuals are unable to perform the duties of the position in question. Alternatively, an employer would need to show that it is impossible or highly impractical to determine each applicant's qualifications on an individual basis. In other words, the employer must show that, when considering all unemployed candidates, "it would have been impracticable to weed out ineffective employees on an individual basis."⁴⁵⁶

Most employers wanting to exclude the jobless will have difficulty meeting the second prong. Employers will not be able to rely on the current stereotypes and biases. In some limited situations, for example high-tech, fast-evolving jobs, employers may be able to show that all or substantially all unemployed individuals are unable to efficiently perform the requisite job responsibilities. However, the alternative standard would be difficult to meet because, for most positions, employers are still able to determine each applicant's qualifications on an individual basis without summarily dismissing all unemployed individuals from consideration.

For example, consider the job listings in Part I.B. above requiring currently employed status—medical staff manager, police officer, restaurant manager, customer service supervisor, tool room machinist, and sales executive. In none of these instances does it seem that the BFOQ defense could be maintained.

Looking, however, at one of these positions further, let's assume that the currently employed status for a police officer is reasonably necessary to the normal operation of the police department, and thus, meets the first prong of the test. Even if the employer meets this burden, it will be highly unlikely that the police department will be able to demonstrate that there are no unemployed people who could efficiently perform the responsibilities

455. Manley, *supra* note 435, at 175-76.

456. Frank, *supra* note 434, at 481-82.

associated with the job of police officer. It is also unlikely that the police department would be able to show that it is impossible or highly impractical to determine each applicant's qualifications on an individual basis. On the contrary, it would seem simple that the police department could determine each applicant's qualifications by interviews and testing.

This example demonstrates that most employers will be unable to satisfy the high burden of the BFOQ. It is appropriate, however, to set such a high burden like BFOQ for unemployment discrimination because one's current employment status is not a valid proxy of one's ability to successfully perform the requirements of most jobs. Instead of discriminating against millions of unemployed people, employers should devise hiring criterion and testing methods by which to determine each applicant's qualifications in a nondiscriminatory manner.⁴⁵⁷ For those employers, however, looking to fill unique positions, the BFOQ defense is a good option.

BFOQ should be included in unemployment discrimination statutes as the defense provides an appropriate balance between employers' interests in conducting their business, employees' interests in having the opportunity to fairly compete for employment, and governments' interests in eliminating discrimination in employment.⁴⁵⁸

C. Response to Criticisms of Unemployment Discrimination Statutes

Critics oppose unemployment discrimination statutes for a variety of reasons. A common argument is the threat of frivolous litigation. Critics argue that there are 12.8 million potential plaintiffs and, in a poor economy, the plaintiffs' bar will attempt to prosper from such litigation.⁴⁵⁹ However, if plaintiffs' claims have merit, the jobless are victims of intentional discrimination and have no remedy for their harm. Attorneys' fees provisions in the unemployment discrimination statutes should adequately discourage frivolous lawsuits.

457. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

458. See Manley, *supra* note 435, at 209-10 (defending the BFOQ defense as an appropriate balance between employers and employees).

459. See, e.g., Mary Swanton, *Legislators, EEOC Scrutinize Employment Ads*, INSIDE COUNSEL (Oct. 4, 2011), <http://www.insidecounsel.com/2011/10/04/legislators-eeoc-scrutinize-employment-ads> ("To focus on putting yet another burden on employers that will yield lawsuits that have to be paid for strikes me as an incredibly bad idea. It will end up becoming a tax on businesses." (quoting Dennis Brown, a shareholder at Littler Mendelson P.C.)); Lee Miller, *Will a Provision in Obama's Jobs Bill to Protect the Unemployed Help? Career Experts Respond*, N.J.COM (OCT. 16, 2011, 9:10 AM), http://www.nj.com/business/index.ssf/2011/10/will_a_provision_in_obamas_job.html (This law will not "increase employment opportunities for anyone other than the lawyers who will benefit by having more potential lawsuits to file."); Pear, *supra* note 398 ("This will help trial lawyers who are not having enough work." (quoting Republican Texas Representative Louie Gohmert)).

Critics also argue that unemployment discrimination statutes will dilute existing class protections, and current laws like Title VII will be undermined.⁴⁶⁰ Having historically endured bias and discrimination in the job market, the jobless are equally as worthy of protection as other members of existing classes. As demonstrated in Part IV.B. above, the current disparate impact framework has several problems that make it difficult for unemployed plaintiffs in protected classes to obtain relief. A disparate treatment claim for intentional discrimination will not dilute existing protections.⁴⁶¹ Instead, it opens a more direct avenue for all unemployed workers to obtain relief.⁴⁶²

Another common response by employers is that the government is overreaching and offending businesses' autonomy.⁴⁶³ These same arguments were made prior to the enactment of the Civil Rights Act of 1964.⁴⁶⁴ Many times, the goals of businesses, often focused on revenue and profits, may be antithetical to the normative standards that a community and nation has established for itself. It is especially on these occasions that government should protect applicants and employees from employers' bounded rationality.

460. See Louis W. Bach, Conn. Bus. & Indus. Assoc., Testimony before the Commerce Comm. of the Conn. Gen. Assemb. (2012), available at <http://www.cga.ct.gov/2012/CEdata/Tmy/2012SB-00079-R000221-Louis%20Bach,%20CBIA-TMY.PDF> ("A decision to elevate employment status to the same degree of protection as race, religion, or gender in civil rights statutes dilutes the significance of existing protections and works to open the door for an ever-expanding list of protected characteristics having less to do with preventing truly discriminatory hiring practices and more to do with removing an employer's legitimate discretion in hiring decisions.").

461. See Note, *supra* note 1, at 1623 (advocating that recognizing the jobless in discrimination theory "would not lessen or invalidate claims based on other forms of discrimination. To the contrary, it would enrich the antidiscrimination discussion, because it acknowledges and contextualizes the complex nature of the experiences of the downtrodden").

462. According to EEOC Commissioner Chai R. Feldblum: "This seems like a perfectly reasonable policy step for the administration to suggest. It would allow people to bring a claim directly under this provision if they have been refused a job because of being unemployed, without having to go through the whole 'disparate impact' analysis." Pear, *supra* note 398.

463. See, e.g., Jim Sanders, *California Bill Would Ban Employers From Screening Out Long-term Unemployed*, SACRAMENTO BEE, Jan. 23, 2012, <http://www.sacbee.com/2012/01/23/4207274/dont-have-a-job-california-bill.html> (reporting that opponents of a proposed unemployment discrimination statute in California "counter that lawmakers have no business interfering in companies' internal affairs . . ."); Ed Sealover, *House Panel Kills Unemployment Discrimination Bill*, DENV. BUS. J., Feb. 22, 2012, <http://www.bizjournals.com/denver/news/2012/02/22/house-panel-kills-unemployment.html> ("I do think it is somewhat of a stigma that you get if you haven't had a job in a long time. But I don't know that we can fix it. . . I feel it is my responsibility to represent my constituents who say [to state government to] 'Please stay out of my business.'" (quoting Colorado State Rep. David Balmer (R))).

464. See Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996) ("The debates over the passage of Title VII of the 1964 Civil Rights Act were marked by passionate disagreement: conservatives objected to the legislation as an unwarranted interference with employers' freedom of contract, while liberal supporters considered it a first step toward racial justice.").

Because many of our existing protections extend to classes where members have immutable characteristics, sometimes opponents argue that the government should not extend protection to classes whose characteristics may not be immutable.⁴⁶⁵ Unemployment may be a temporary condition in which the jobless could, and will, give up protected class membership once they become employed, thus it is not an immutable trait. Although many laws target discrimination against immutable characteristics, like age and race, antidiscrimination laws also attempt to ameliorate prejudice against mutable traits that are within our control, like marital status and religion.⁴⁶⁶ Furthermore, many scholars persuasively argue that even some of the so-called "immutable" characteristics, like race, are "social constructs rather than anthropological or biological facts of life."⁴⁶⁷ Moreover, Title VII does not require "immutable" characteristics to be a protected class, nor does the law provide that "mutable" characteristics are inappropriate for the protected class designation.⁴⁶⁸

Opponents also argue that the skills of the jobless have atrophied.⁴⁶⁹ This argument reflects the same unemployment stigma that researchers found occurs instantaneously against the jobless, even before their skills have had a chance to decline.⁴⁷⁰ These arguments are also very similar to those offered by employers, prior to the ADEA, regarding alleged atrophy in older workers' skills.⁴⁷¹ Congress, however, passed the ADEA to alleviate harm from "inaccurate and stigmatizing stereotypes about older workers' productivity and competence."⁴⁷² In response to this criticism, under the goals of antidiscrimination law, employers are never required to

465. See Hirsch, *supra* note 408 ("Most protected classes have been the basis of serious historical discrimination and are nearly impossible to change. Employment status is different. Even now, unemployment is a temporary condition for most individuals; it is frequently a voluntary one as well. Our employment discrimination laws are not designed to protect this type of trait.")

466. See Post, *supra* note 312, at 8 ("The unfairness of prejudice is particularly manifest when it is directed against immutable traits, like race or sex. But prejudice can be unfair even if it is directed against traits that are within the control of a person. American antidiscrimination laws, for example, typically prohibit discrimination based upon religion and marital status, even though neither trait is "immutable."). See also Alexander, *supra* note 406, at 152 (discussing the "implausibility" of limiting wrongful discrimination to only those instances involving immutable traits).

467. Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules As the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1369-70 (1997).

468. See *id.* at 1369.

469. See, e.g., Miller, *supra* note 459 ("Being unemployed may also sometimes 'be a legitimate reason for not hiring someone, if their skills have become antiquated.'" (quoting Lisa J. Stamatelos, an adjunct professor of human resources management at Pace University)).

470. See Ho, Shih, Walters & Pittinsky, *supra* note 11, at 11.

471. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.")

472. *Id.* ("Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.")

hire an individual who is not qualified for an opening.⁴⁷³ Unemployment discrimination laws would simply guarantee that employers evaluate unemployed candidates on their merits in a fair and non-biased manner without taking into account their employment status.⁴⁷⁴ If, during the assessment of an unemployed worker, the worker's skills or qualifications are found to be deficient, an employer is not required to hire that individual.

Finally, for each position that an employer seeks to fill, employers fear being inundated with hundreds of resumes.⁴⁷⁵ Employers insist they are able to save time and money by not having to peruse resumes of the jobless.⁴⁷⁶ In reply, our highest principles of antidiscrimination law do not support the application of such arbitrary and unfair criteria for the purpose of business efficiency. Any short-run costs that an employer may save from ignoring resumes of the jobless are outweighed by the social benefits of the jobless getting back to work and employers getting the best employees for the job.

CONCLUSION

"A man willing to work, and unable to find work, is perhaps the saddest sight that fortune's inequality exhibits under this sun." – Thomas Carlyle (1840s)

"The people who have been laid off and cannot find work are generally people with poor work habits and poor personalities." – Ben Stein (2010)

These two quotes exemplify the dichotomy of unemployment in the U.S. On the one hand, there are millions of victims of the economy experiencing a crippling and stigmatizing social condition of catastrophic proportions. On the other hand, there are people who hold distorted, bias-driven stereotypes ultimately resulting in unfair prejudice and injurious discrimination to the victims. And a moral and social dilemma is the result.

473. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

474. See *id.*; *Hazen Paper Co.*, 507 U.S. at 610 ("[E]mployers are to evaluate . . . employees . . . on their merits and not their age." (quoting *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985))).

475. See James Hayes & Rebecca Hirschklau, *Unemployed Status—The New Protected Class*, LAB. & EMP. L. BLOG (Mar. 7, 2012), <http://www.laboremploymentlawblog.com/california-employment-legislation-unemployed-status-the-new-protected-class.html> ("When unemployment rates are high, employers invariably become inundated with candidates for the limited openings that may become open and available.").

476. Sharon L. Florentine, *Uninterested in the Unemployed*, THELADDERS.COM (Jan. 2011), <http://www.docstoc.com/docs/131126775/Uninterested-in-the-Unemployed-January> (explaining that disqualifying unemployed candidates is the "easiest way for overwhelmed recruiters to reduce their workload 'Companies and recruiters are simply being overrun with applications, and the easiest way to address that is to convince unemployed job seekers to not even bother applying [or disqualifying their resumes at submission]. . . . It's a pretty simple metric that can easily reduce their workload" (quoting Matt Deutsch, communications coordinator for TopEchelon.com, an online network of recruiters)).

Our natural human processes group individuals into in-groups and out-groups, stereotyping the marginalized outliers. Unfortunately, such human bounded rationality is responsible for a number of social ills, including unemployment. Fortunately, our laws strive to protect and insulate individuals from the harmful effects of these inevitable human processes.

Employers' bounded rationality in excluding the jobless from applicant pools may be morally wrong given the high social costs and harmful effects, not only on 23.5 million unemployed and underemployed Americans, but on our entire society. Regrettably, our current framework of antidiscrimination laws does not adequately provide the jobless with a remedy to fight these long-held stereotypes and biases that are destroying lives.

Consequently, governments should prohibit the invidious discrimination against this vulnerable and powerless group. A ban against intentional disparate treatment of the jobless will effectuate the purposes of antidiscrimination law. Every person should have the equal opportunity to be fairly reviewed and assessed on their own qualifications and merits without stereotype, bias, or other discriminatory non-job related measures.

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