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Workplace Discrimination: Truthfulness and the Moral Imagination

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INTRODUCTION

In this article, I offer a suggestion for making non-discrimination laws applicable to the workplace more effective. I judge effectiveness both in terms of the influence of non-discrimination laws on the decision-making behavior of employers and also by their capacity to provide meaningful legal remedies for contemporary workplace discrimination. I advocate the use of truthfulness and the moral imagination to achieve my objective.

I am interested in practical approaches to eliminating discrimination in the workplace. I am a person with a professional background in civil rights law, as well as administrative experience respecting personnel decisions, organizational behavior, and policies prohibiting workplace discrimination.[1] I have a continuing interest in why, and in what forms, workplace discrimination persists, and in practical strategies for minimizing that discrimination.

I have found that my practical orientation is strengthened, rather than compromised or weakened, by relying on strategies associated with what I call the moral imagination. In making use of the moral imagination, I am not engaged in a conventional jurisprudential exercise. Rather, I want to find ways to enlist the vitality of the moral imagination in the practical struggle against work-

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Professor, University of Colorado School of Law; B.A. 1966, M.A. 1967, Texas Tech University; J.D. 1971, University of Texas School of Law. I wish to thank the women of the University of Colorado faculty for their contributions to how I think about discrimination. I owe special personal and professional thanks to my colleague, Professor Marianne Wesson.

1. Because of my background, my ideas frequently are informed by personal observation and experience as a civil rights attorney, an employee, and a university administrator. I am a faculty member of 14 years, have been the subject of department personnel decisions in two different universities, and have participated as a faculty reviewer in personnel decisions affecting other faculty. I have served as chairperson of a faculty council at a major, four-campus university system. I have served on a faculty privilege and tenure committee with jurisdiction over disputes arising out of faculty personnel decisions. As a university administrative officer from 1986-89, I had responsibility for maintaining general faculty personnel policies, as well as affirmative action programs, and for administering a review of salary inequities for women and minority faculty. Thus, a variety of types of information—statistical, ethnographic, and anecdotal—is brought to bear in this article.

place discrimination. I am interested in how an employer's decisions about women and minorities can be affected when approached with the moral imagination. I am interested in interpretations of non-discrimination laws that provide meaningful legal remedies for contemporary forms of workplace discrimination.

Much contemporary workplace discrimination stems from subtle or careless behavior that does not seem to fit within conventional non-discrimination analysis. Once, most persons knew with certainty what gender or racial discrimination was and why it was wrongful. It was overt. It was implemented through rules or practices that directly excluded women and minorities from jobs or opportunities. This is no longer true. Contemporary discrimination is frequently not a byproduct of formal or informal rules applied consistently throughout the workplace.[2] Rather, it consists of cumulative, unconscious prejudice or careless conduct of people who seem to be (and who think of themselves as) "good" people. It is arbitrary and unpredictable in its specific manifestations.[3]

Although there is a strong societal consensus that overt and patterned forms of discrimination are wrongful, there is no similar consensus about the wrongfulness of more subtle and unpredictable forms of discrimination. For example, when facially neutral carelessness in the evaluation of merit—carelessness that is intrinsic to evaluations of all employees—puts women and minorities at a greater disadvantage than white males, we do not have a common language of discrimination with which to discuss the problem. Women and minorities will have experienced the injustice of carelessness, but careless employers and other decision-makers will be reluctant to characterize themselves as "real" discriminators, those who consciously and maliciously seek to exclude women and minorities from the workplace. Our current language of discrimination does not bridge the experiences of women and minorities and

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2. *See, e.g.*, N. BENOKRAITIS & J. FEAGIN, MODERN SEXISM: BLATANT, SUBTLE, AND COVERT DISCRIMINATION chs. 5-6 (1986); B. RESKIN & H. HARTMANN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 37-87 (1986); Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1752-53 (1989) (overt sexism and racism has been supplanted by far more cruel discrimination carefully masquerading as a judgment on the merits); Price Waterhouse v. Hopkins, 490 U.S. 228, 261 (1989) (O'Connor, J., concurring). Especially illuminating is B. NENNO, FACULTY SEARCH COMMITTEES AND AFFIRMATIVE ACTION POLICY 112-66 (1989) (dissertation on file, University of Colorado Norlin Library), a comprehensive account of how attempts to remedy hiring discrimination systemically, without sufficient regard to the role of individuals, run into difficulty.

3. *See, e.g.*, C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

the actions of employers.

I use the moral imagination to respond to this reality of contemporary workplace discrimination in a practical and constructive way. I attempt to provide an alternative to conventional modes of thinking and talking about discrimination, an alternative that will influence employer behavior and give judges a more meaningful tool for responding to discrimination.

The following discussion of workplace discrimination focuses on individual decisions and decision-makers.[4] This focus differs slightly from much contemporary analysis of the problem of discrimination and from conventional wisdom that gives primary place to group impacts and structural causes of discrimination.[5] Structural and group perspectives can, of course, provide important insights into the problem of workplace discrimination, and there are understandable explanations for these analyses. Contemporary forms of discrimination frequently make it difficult to pin down the wrongfulness of individual conduct. Some critics, frustrated by the persistence of discrimination that results from unconscious prejudice or careless conduct, have argued that, to be effective, non-discrimination mandates have no alternative but to shift their focus away from the individual decision-maker.[6] Others have advocated a focus on structures or institution to avoid potentially divisive assertions of personal culpability.[7] In many instances, however, these structural and group perspectives provide insufficient practical guidance to the elimination of workplace discrimination.

A doctrinal focus on individual decisions and decision-makers reaffirms an important principle of personal accountability. Princi-

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4. *See infra* section IB (discussing the moral imagination as a methodology of decision-making).

5. Respecting gender discrimination, *see, e.g.*, the analyses in C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207; Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987).

6. Occasionally, this view may be limited to the proposition that a focus on the individual decision-maker tends to promote the misleading notion that discrimination is aberrational. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1518-21, 1522 n.7 (2d ed. 1988). Tribe believes that if the "battle against racism is conceived not as an assault on an endemic social malady, but as culling out of the herd those blameworthy individuals who account for the remaining, isolated acts of discrimination in an otherwise color-blind society"—i.e., if we adopt this "fault concept"—non-discrimination mandates will be ineffective. *Id.*

7. *See, e.g.*, Thornburgh v. Gingles, 478 U.S. 30, 44 (1986); *cf.* L. TRIBE, *supra* note 6, at 1509 (distinguishing *Hunter v. Underwood* from other progeny of *Washington v. Davis*).

ples of personal accountability that might be enforced through litigation should not be rejected simply because they may cause some discomfort additional to that inherent in the situation that gives rise to a lawsuit.[8] Instead, non-discrimination mandates should be interpreted to foster consistent and probative scrutiny of the conduct of those individuals whose decisions actually effect discrimination. At the least, this interpretational effort should be made before the analytical field is ceded entirely to non-discrimination doctrines that obscure (and thus weaken) principles of personal accountability and that tend to place the problem of workplace discrimination within the realm of policy, where collective or institutional interests frequently assume primary significance.

Most important, the interpretational effort should be made in order to preserve an understanding of the wrongfulness of discrimination that will have meaning to ordinary people confronting subtle forms of workplace discrimination. Recently, attempts have been made to replace highly theoretical and abstract intellectual analyses of discrimination with concepts that have meaning to ordinary individuals. However, these attempts have tended to focus on the individual victim of discrimination, rather than on the persons whose decisions may lead to discrimination. They have concentrated on establishing the perspective of the victim as a valid and necessary component of legal analysis.[9] The importance of these analyses must not be underestimated, but they are incomplete. They place insufficient emphasis on the person whose choices effect discrimination. They do not look at the dynamic of the personal relationship that is at the root of a discriminatory decision. Moreover, they provide no rationale or compelling reason for decision-makers to adopt the perspective of the individual victim of discrimination.[10]

The moral imagination can remedy current deficiencies in our

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8. Reinhold Niebuhr counsels that avoiding divisive allegations of wrongdoing is an effective political tactic for securing change. *See* R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932). But when one is speaking of substantive definitions of discrimination that will affect either prospective employer decisions or the conduct of litigation that usually ensues only after conflict surfaces and divisiveness is unavoidable, this concern carries little weight.

9. *See, e.g., Legal Storytelling* (Symposium), 87 MICH. L. REV. 2073 (1989); Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135 (1989); Minow, *The Supreme Court 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); *see also*, K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

10. *See, e.g., Legal Storytelling* and Minow, *supra* note 9 (arguments of the narrative theorists in both sources).

understanding of the problem of discrimination, and it can do so with significant positive effects for women and minorities. It can suggest substantive definitions that will enable courts to meaningfully address subtle, contemporary forms of discrimination. It can compel persons to make choices in a way that will minimize discrimination. It can help ensure that non-discrimination mandates directly appeal to (and exploit) every latent moral capacity and possibility in every individual decision-maker.[11] It can have significant practical as well as theoretical impact.

In the following pages I describe my conception of the moral imagination, and suggest how it generally promotes the development of meaningful concepts of non-discrimination.[12] I then identify a principle that has its methodological roots in the moral imagination—the principle of truthfulness—and discuss how that principle is a forceful vehicle for enhancing the effectiveness of non-discrimination mandates applicable to the workplace.[13] A commitment to truthfulness is implicit in most personnel systems, but so far the concept has been largely neglected when the problem of workplace discrimination is discussed.[14] Because an employer's failure to meet the obligation of truthfulness will inevitably lead to discrimination against women and minorities, I propose that a strong definition of employment discrimination will necessarily incorporate the concept of truthfulness.[15] I offer a tentative suggestion for how incorporation might practically strengthen the mandates of Title VII of the Civil Rights Act of 1964 as they apply to discrimination against upper level or professional employees.[16]

I emphasize here two assumptions. First, because truthfulness is implicit in most personnel systems, employers will have little theoretical reason to object to, and considerable reason to be comfortable with, non-discrimination principles rooted in a commitment to truthfulness. Second, because a failure of truthfulness is the way in which many women and minorities experience workplace discrimination,[17] judicial interpretations of non-discrimina-

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11. R. NIEBUHR, *supra* note 8, at xxiv.
12. *See infra* section I.
13. *See infra* section IIA.
14. *See infra* sections IIB, IIC, and III.
15. *See infra* section III and IVA.
16. *See infra* section IVB.
17. As a new university administrator, I was surprised when I first encountered a faculty member who resisted my attempts to translate her concern for truthfulness into the conventional language of discrimination. Subsequently, I came to expect the reaction and to

tion laws that incorporate the principle of truthfulness will be compatible with the experience of women and minorities. In other words, truthfulness—a methodology of the moral imagination—can give us a language of discrimination that will bridge the conduct of decision-makers and the experience of women and minorities in the workplace.

I. The Moral Imagination and Its Relationship to the Problem of Discrimination

An understanding of the practical orientation of my argument requires some acquaintance with the more abstract concept of the moral imagination. For purposes of this article, I define the moral imagination in terms of two salient characteristics.[18] First, the moral imagination embodies a way of thinking about, and an attitude toward, individual decisions. It does not presuppose a commitment to a particular set of substantive moral principles. Rather, it focuses on the individual who must make choices when there are no substantive principles that clearly dictate the correct choice. Second, and as a consequence, the moral imagination is interested in how individual choice is made. It imposes unique methodological, rather than substantive, constraints on choice. Because of these characteristics, the moral imagination is uniquely suited to developing concepts of discrimination that are meaningful in the contemporary workplace, where discriminatory conduct is informal, unpredictable, and subtle, and when there is no agreement as to its wrongfulness.

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adjust my analysis of workplace discrimination accordingly.

18. My ideas have been generally influenced by a variety of discussions of the imagination and moral reasoning. The most important include: J. Murphy & J. Coleman, The Philosophy of Law: An Introduction To Jurisprudence (1984); S. Hampshire, Innocence and Experience (1989); R. Coles, The Call of Stories: Teaching and the Moral Imagination (1989); M. Greene, The Dialectic of Freedom (1988); R. Unger, Knowledge and Politics (1975); R. Neibuhr, *supra* note 8; W. Stevens, The Necessary Angel (1951); Moore, *Moral Reality*, 1982 Wis. L. Rev. 1061. My approach shares the objective and some of the methods of revitalizing legal standards for decision-making discussed in Burton, *Law as Practical Reason*, 62 S. Cal. L. Rev. 747 (1989).

The term "moral imagination" is not new; for example, Niebuhr uses it. *See* R. Niebuhr, *supra* note 8, at 257. I wish especially to acknowledge the influence of Coles for his explication of the importance of the moral imagination to the understanding of, and knowledge about, those who differ from ourselves in small or insignificant ways. Of course, in acknowledging these influences, I in no way intend to suggest that these writers would agree with my arguments.

A. The Attitude of the Moral Imagination

The moral imagination[19] assumes that it can provide valuable assistance to a person concerned with the rightness or wrongness of a decision that will affect others. The assistance is valuable despite—or, more accurately, because of—an absence of substantive principles that clearly dictate individual choice.[20] For example, contemporary theorists reject arguments that moral decision-making is useless unless there is agreement on a set of substantive, universal, moral, first principles.[21] In a more positive fashion, they tend to argue that the preservation of diversity in substantive moral principles is a positive good, inherently worthwhile and important.[22] They also generally reject arguments that moral decision-making is futile unless one can say with certainty that a particular decision is the "right" decision.[23] For them, answers produced through moral decision-making are no less certain than those typically accepted as valid in the scientific realm.[24] They may argue that the decision-making process itself is valid for the insights—if not the answers—it provides.[25] Alternatively, they may argue that moral decision-making is simply an activity required of all individuals.[26] Finally, these theorists also reject arguments that moral decision-making is any less rigorous, any more subjective, than scientific reasoning: both are heavily dependent on inductive methodologies,[27] and both are necessarily limited by the uncertainties and subjectivities inherent in ascertaining facts or acquiring knowledge.[28]

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19. It is important to understand that the moral imagination does not necessarily bear an affinity to all moral theories. Moral theorizing encompasses the discussion of substantive principles that give primary place to individual rights, as well as theories like utilitarianism that are primarily concerned with collective good. Insofar as the moral imagination is defined as a practical tool for individuals making decisions about other individuals, it has a greater affinity to the former theories.

20. *Cf.* Burton, *supra* note 18, at 789 (practical reasoning assumes indeterminacy).

21. *E.g.*, Moore, *supra* note 18, at 1106-08.

22. *E.g.*, S. HAMPSHIRE, *supra* note 18 (arguing that diversity in moral principles can be enhanced by a process of decision-making).

23. *Id.* In contrast, see the discussion of Ronald Dworkin's position in J. MURPHY & J. COLEMAN, *supra* note 18, at 48-52 (although Dworkin promotes a process of decision-making, it appears that the end being sought through the process is an answer that is "right").

24. *See, e.g.*, Moore and S. HAMPSHIRE, *supra* note 18.

25. *See, e.g.*, R. UNGER, *supra* note 18.

26. *See, e.g.*, *infra* note 52.

27. Moore and S. HAMPSHIRE, *supra* note 18; *see infra* section IB.

28. It is important to understand that these persons, *e.g.*, Moore and Hampshire, do not argue that moral decision-making is worthless in sharing uncertainties and imperfec-

As a proponent of the importance of the moral imagination, I accept these arguments and share these attitudes.[29] To me, the value of the moral imagination generally advanced by traditional arguments is magnified when the moral imagination is brought to bear on the problem of discrimination.

The intrinsic methodological value of the moral imagination increases significantly in three situations relevant to discrimination. The moral imagination is engaged in the art of fine distinctions in individual choice. Thus, it is uniquely suited to case-by-case decision-making when substantive moral principles cannot or do not dictate practical, individual choice because either: (1) there is not a firm consensus regarding abstract, substantive principles of right and wrong; (2) a particular dilemma calls into question generally agreed upon substantive principles; or, (3) a particular dilemma brings different substantive principles into conflict.

These three situations characterize contemporary discussions of non-discrimination mandates, especially those that apply to contemporary forms of workplace discrimination. As noted earlier, contemporary forms of discrimination are subtle. Individuals who make decisions that have adverse consequences for women and minorities are not in agreement as to when these consequences and subtle influences constitute wrongful discrimination and when they do not. For example, it is not entirely clear when an employer must avoid neutral practices that have a disparate impact on minorities and women, and when he must only avoid disparate treatment.[30] It is not clear whether the carelessness that leads to adverse consequences for minorities and women is wrongful discrimination.[31] It is not clear when reliance on gender or race in only a portion of a complex decision-making process is wrongful.[32]

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tions with scientific reasoning. *Compare*, C. MACKINNON, *supra* notes 3 and 5.

29. I have one additional argument regarding the importance of the methodology of the moral imagination: moral decision-making is, in certain contexts, an effective agent of change. *See infra* notes 46-55 and accompanying text, and *infra* note 152.

30. Recent Supreme Court decisions have only further confused this issue. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). For further discussion of this issue, see *infra* notes 117-20 and accompanying text.

31. Compare the opinions of Justice O'Connor and Justice Kennedy in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also infra* notes 61-65 and accompanying text.

32. *See, e.g.*, the conflicting opinions in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Compare the proposed language of the Civil Rights Act of 1990, S.2104, sec. 4(k) (February 7, 1990). President Bush vetoed this proposed legislation on October 20, 1990. Simultaneously, he submitted his own legislative proposal to "cure" what he called the

It is not even clear whether explicit reliance on gender or race in decision-making is wrongful because it is simply irrational,[33] because it has intolerable consequences for women and minorities,[34] because it interferes with expectations,[35] or because it entails a qualitative judgment about abilities or roles that is unacceptable for some other reason.[36] In other words, the rightness and wrongness of conduct that arguably constitutes discrimination is debatable.

In addition, a practical dilemma calls into question the validity of absolute non-discrimination mandates in many instances. For example, the slow and uneven pace of change for women and minorities in the workplace generates demands for affirmative responses to the problem of discrimination, demands that seem to be at odds with the generally approved substantive principle that race or gender should never be the reason for an employment decision.[37] A practical dilemma thus challenges the validity of a prohibition on discrimination for which there is usually a strong consensus.

Finally, non-discrimination mandates at times seem to require reconciliation with the substantive principle that qualitative merit should determine employment opportunity. Non-discrimination mandates in theory seek to prohibit all forms of discrimination, including those that are subtle or subconscious.[38] However, when employers are required to take steps to eradicate subtle or unconscious forms of discrimination, important aspects of merit evalua-

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"critical defects" of the act as originally proposed. 1990 U.S. CODE CONG. & ADMIN. NEWS D35.

33. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971).

34. *See, e.g.*, L. TRIBE, *supra* note 6, at 1518-21 (discrimination leads to subjugation); D. KIRP, M. YUDOF, M. FRANKS, GENDER JUSTICE 29-45 (1986) (discrimination deprives women of autonomy); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (discrimination puts women in cages, effectively treating them as slaves).

35. *See* United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 201 (1979); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 638 (1987) (affirmative action cases discussing reverse discrimination); *cf.* J. MURPHY & J. COLEMAN, *supra* note 18, at 19-21 (discussing social contract philosophers). It is interesting to note that this argument does not play a prominent place in judicial discussions of discrimination against women and minorities, although it is clearly relevant to discrimination in the denial of opportunity. *See infra* note 142 and accompanying text.

36. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (rejecting stereotypes that assume women have no abilities); Mississippi University for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (rejecting stereotypical view that men cannot be good nurses).

37. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) (argument that affirmative action plan conflicted with merit principle). *Cf.* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

38. *See, e.g.*, Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988).

tions are arguably put at risk.[39]

The moral imagination is well-suited to helping employers (whose practical choices will or will not discriminate) and judges (whose rulings will or will not provide redress for discrimination) resolve these dilemmas and issues because of its focus on how choice is made in the absence of substantive principles that dictate choice.

B. The Methodology of the Moral Imagination

Consistent with the justifications for its role, the moral imagination's importance to non-discrimination lies in the methodological realm. It is premised on forthright acknowledgement that societal commitment to non-discrimination is confined to quite general principles that provide little practical guidance to decision-makers. It does not pretend that traditional non-discrimination mandates are effective constraints on contemporary forms of discrimination. The moral imagination tends to favor a concept of discrimination that is responsive to the critical role of the individual decision-maker in eliminating discrimination. It tends to favor legal non-discrimination mandates that embody a methodology of individual choice.

To appreciate how decision-making behavior and substantive non-discrimination mandates might be influenced by a methodology of individual choice, one needs a more concrete understanding of the methodology of the moral imagination. Concerned with choice made in the absence of substantive moral principles that clearly dictate choice, the methodology is highly inductive. As a consequence, it insists on self-scrutiny as well as self-transcendence.

Especially useful discussions of the inductive nature of the

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39. This idea is the heart of the argument about the proposed section 4(k) of the Civil Rights Act of 1990 which the present administration and other critics argued would have the effect of requiring employers to engage in "quota" hiring. *See supra* note 32. This argument recurs when employers adopt affirmative action measures intended to counteract subtle or unconscious discrimination. *See* Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988). It is important to recognize that the argument can arise regardless of how an employer defines merit. Formal merit concepts can be altered so that activities and experiences of minorities and women will be deemed worthwhile rather than suspect. *See infra* note 70 (sources cited therein). Even if this is done, subtle and unconscious forms of discrimination will not be eliminated without affirmative employer actions. Some will argue that these affirmative employer actions threaten the concept of merit as newly defined.

moral imagination's methodology, both of which compare moral reasoning to scientific reasoning, are Stuart Hampshire's *Innocence and Experience*,[40] and Michael Moore's *Moral Reality*.[41] Taking scientific reasoning as an appropriate norm, both Moore and Hampshire argue that many scientific truths are indeterminate. These indeterminate truths can be validated only by observation of particular events that seem to fit within the construct presupposed by the indeterminate truth. In other words, scientific truths are frequently justified by a process of inductive rather than deductive reasoning. Moore and Hampshire argue that the methodology of the moral imagination similarly makes use of inductive reasoning.

Validation of choice through inductive reasoning rather than through deduction from first principles, in either the scientific or moral realm, is critically dependent on the integrity of the reasoner's observations and thought processes. The scientific reasoner is at the mercy of imperfect technology and the shortcomings of prior observers; he also risks letting his own predispositions (or hypotheses) color his observations and interpretations. Similarly, the moral reasoner must contend with imperfection, uncertainty, and personal bias.

The moral imagination imposes two special methodological demands on individual choice that are intended to protect the inductive process against its inherent uncertainties, imperfections, and biases. These are the requirements of self-scrutiny and self-transcendence. I find that these requirements can be best understood in personal rather than theoretical terms, by briefly considering what happens when an individual attempts to resolve inner moral conflict when there is no clearly right or wrong answer.[42]

Most persons who try to resolve inner moral conflict exert considerable effort to avoid careless or unreflective choice. In order to

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40. *See* S. HAMPSHIRE, *supra* note 18.

41. *See* Moore, *supra* note 18.

42. I am assuming the presence of a person who forthrightly confronts inner dilemma and conflict, just as I assume that most individuals responsible for interpreting and implementing non-discrimination mandates attempt to resolve real dilemmas in good faith and to the best of their ability. My suggestions are intended to help them—and others whose choices will affect the vitality of non-discrimination mandates—bring that good faith to bear in a way that is invigorated by the moral imagination. Some will undoubtedly argue that the latter assumption should not pertain, that it is unrealistic and politically naive. If they are right, and good faith on the part of most judges and employers cannot generally be assumed, my observations are unimportant.

avoid careless choice, rigorous scrutiny of one's own perceptions, motives, and interpretations of the conflict is necessary. In other words, self-scrutiny is essential. In addition, inner moral conflict always involves—by definition—at least two contending voices. In order to avoid careless, unreflective choice, one must ensure that all contending voices are acknowledged as initially valid, that all possible resolutions of a dilemma are given due consideration. Thus, self-transcendence is essential.[43] Self-scrutiny looks inward at one's own motives, biases, perceptions, and interpretations. Self-transcendence looks outward, at other's perspectives and interpretations. The two activities are mutually reinforcing.[44]

The moral imagination is unrelenting in its methodological insistence on self-scrutiny and self-transcendence by decision-makers,[45] but these demands are not normative. Rather, they are necessary adjuncts of the type of information considered through the moral imagination.

When the methodology of the moral imagination is used to determine choice, each possible choice out of a theoretically unlimited set of choices must be assessed in terms of rich, complex, and broad information.[46] That information may include, for example, prior experiences, memories, emotions, aspirations, and values; knowledge of prior events; understanding of personal, social, legal, historical or political contexts; and, the consequences anticipated as a result of each possible choice. Self-scrutiny ensures that this

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43. To recognize alternative voices and possible resolutions of conflict necessitates an ability to abstract oneself from one's own way of life. *Cf.* S. HAMPSHIRE, *supra* note 18, at 59 (discussing the reasons why some persons eventually recognized slavery as wrongful). This is the essence of self-transcendence.

44. *Cf.* S. HAMPSHIRE, *supra* note 18, at 121 (using the analogy of a compost heap to explain this aspect of the imaginative reasoning process).

45. These factors also distinguish my argument from other theorists who focus on the individual in their analysis of discrimination. *Compare, e.g.*, R. COLES, *supra* note 18, and the narrative theorists represented in *Legal Storytelling*, *supra* note 9. All writers are similarly interested in incorporating the perspectives of others (e.g., of non-majority communities) into their analysis, but the latter do not talk about self-scrutiny and self-transcendence. They are committed to claiming as valid their own experiences, and not to challenging others—except indirectly—to scrutinize the validity of their own. In fact their claims sometimes seem to deny the importance of self-scrutiny and self-transcendence. *Cf.* C. MACKINNON, *supra* notes 3 and 5.

46. An important tenet of much feminist analysis is the proposition that moral decision-making is enhanced when the context for the decision is expanded. *See, e.g.*, MAPPING THE MORAL DOMAIN (C. Gilligan, J. Ward, and J. Taylor, eds. 1988); WOMEN AND MORAL THEORY (E. Kittay & D. Meyers, eds. 1987); and M. BELENKY, B. CLINCHY, N. GOLDBERGER, AND J. TARULE, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986).

information has integrity; self-transcendence ensures that the information encompasses, to the extent possible, the perspective[47] of persons other than the decision-maker, including those who will be affected by a particular choice. It helps decision-makers incorporate values into decision-making while avoiding the human propensity to identify self-interest with universal values.[48]

The methodological demands of self-scrutiny and self-transcendence have obvious practical implications for specific decisions that affect women and minorities. In the workplace, for example, self-scrutiny and self-transcendence may serve as a potent antidote to unconscious prejudice or other subtle forms of discrimination. Similarly, they may cause a decision-maker to take affirmative steps to counteract adverse impacts of continued adherence to unnecessary (albeit traditional) employment practices and criteria that affect decisions. They may cause a decision-maker to conceive of decisions in personal terms and to avoid automatically substituting institutional ethics and collective, group interests for the ethic that tends to govern person-to-person relationships.[49]

Contemporary non-discrimination theory frequently dismisses arguments for moral decision-making as worse than irrelevant or meaningless, a product of discredited doctrine that diverts attention from the real causes of discrimination and that advocates an ethic of powerlessness that perpetuates discrimination.[50] This convention underestimates what happens to a decision-maker subjected to the methodological demands of self-scrutiny and self-transcendence. The decisions of persons who exercise the moral imagination will differ significantly from decisions of persons who do not.[51]

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47. Perspective is defined broadly here to include values, feelings, aspirations, and all similar sorts of information.

48. Burton, *supra* note 18, at 789; R. NIEBUHR, *supra* note 8, at 250.

49. *See infra* note 77, for a discussion of how collective interests may—in practice—obscure individual ethical principles; *see* J. MURPHY & J. COLEMAN, *supra* note 18, at 71, for a discussion of how some moral theories, such as utilitarianism, do the same.

50. *E.g.*, the feminist jurisprudence represented by C. MACKINNON, *supra* notes 3 and 5. I simply do not agree that the moral viewpoint (or an ethic that is concerned with individual relationships) must be associated with powerlessness. *See, e.g.*, E. PAGELS, ADAM, EVE, AND THE SERPENT (1989), for an analysis of the Christian ethic that posed a severe threat to Roman government.

51. The effects, as I describe them, are primarily behavioral rather than psychological, although it is also possible to argue that the methodology of the moral imagination has individually transformative effects. *See, e.g.*, R. UNGER, *supra* note 18; *infra* notes 46-55 and accompanying text; and *infra* note 152.

The most important practical difference is that self-scrutiny and self-transcendence will necessarily compel a decision-maker to fully acknowledge and treat with seriousness the reality, experiences, and interests of all persons (including women and minorities) who will be affected by a particular choice. In other words, self-scrutiny and self-transcendence will lead to forms of engagement that minimize discrimination.

Decision-making that satisfies the methodological demands of the moral imagination fosters engagement and connection between persons whose lives intersect.[52] As Hampshire stresses, moral reasoning is not argumentative or isolating; it

> is the kind of thought that issues in the ability to choose the right word in a translation of a poem from one language to another . . . . It is the kind of thought which good actors undertake in the course of deciding in detail how to play their parts . . . . It is the kind of thought which a historian gives to representing, on the basis of the evidence, the combination of motives that led the statesman to take his fateful decision.[53]

Moral reasoning by definition engages individuals actively, at the most personal level.[54] It creates conditions that through self-scru-

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52. It is important to emphasize that engagement is a consequence of methodological demands that derive from the nature of inductive moral reasoning. *See supra* notes 40-45 and accompanying text. One might also, of course, make a number of traditional normative arguments that an affected person is entitled to have a decision-maker pursue engagement through the moral imagination. For example, some might argue that individuals are proper subjects of moral concern because of a unique status (typically but not always associated with the capacity to reason and to make moral decisions) that distinguishes human beings from other living things. Others might assert that the decision-maker must enter the realm of moral decision-making in order to satisfy an obligation to himself (for example, the obligation to become the most virtuous or complete individual possible). Still others might avoid obvious philosophical (and logical) difficulties associated with these arguments by positing, as a descriptive matter of simple fact, that individuals do make choices and derive satisfaction from asserting some control of their lives through choice. Thus, individuals are proper subjects of moral concern when the conduct of a decision-maker may affect their choices or control of their lives. *See generally* J. MURPHY & J. COLEMAN, *supra* note 18, at 37-38 and 75-80.

53. S. HAMPSHIRE, *supra* note 18, at 47. *See generally id.* at 38-41. It is important to note here that justification of decisions reached reflectively may assume an argumentative form. The justification is, however, only an artifact rather than a faithful, chronological description of all possibilities and information considered through the moral imagination.

54. The active role played by the moral imagination distinguishes the concept of engagement discussed in this article from the appeal to a decision-maker to accept the perspectival validity of women and minorities that characterizes some other discussions of discrimination. *See, e.g.*, Minow, *supra* note 9; and Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1537 (1988)(urging decision-makers to listen—a passive act—to voices from the margins to insure political freedom).

tiny promote reflective deliberation and through self-transcendence promote an active search for and serious consideration of the reality, experiences, and interests of others.[55]

Clearly, the engagement fostered by the methodology of the moral imagination will have consequences for decision-makers that will minimize discrimination. In addition, the engagement fostered by the moral imagination is an objective that judges might reasonably seek to achieve through statutory interpretations of non-discrimination mandates.

There is a correspondence between the methodological effects of the moral imagination and the objectives of non-discrimination laws that can be illustrated in many ways, but I find one example particularly telling. A portion of the concurring opinion of Mr. Justice Daniel in *Scott v. Sanford*[56] sets forth a particular understanding of the difference between the essential attributes of slaves and the "character and capacities" of citizens.[57] The critical difference, according to Justice Daniel, lies in the capacity to enter into, and to participate in, relationships. While the term "citizen" is associated with connection to, and participation in, the larger community, a slave can enter into no pacts, can "be no party to, or actor in, the association of those possessing free will, power, [and] discretion."[58] The fundamental condition of slavery is, thus, a status of profound isolation. State-sanctioned slavery not only denies individual freedoms that can be exercised independently of others, it also authorizes others to refuse to enter into normal political and civil relationships with those persons designated as slaves.[59] In

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55. It is important to understand that the claim of a right to engagement and connection does not presuppose social cooperation or a need to reach consensus. *Cf.* J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1981, Eng. tr. 1984). Moreover, it does not entail reciprocity in a tit-for-tat mode. *Cf.* J. RAWLS, A THEORY OF JUSTICE (1977). It is more accurately stated simply as a right to conditions that will promote serious and reflective deliberation. The moral imagination places a discussion in a special procedural realm insofar as individual perspective is concerned. All perspectives are presumed equally valid in the indeterminate arena of the moral imagination. The point of view of women and minorities cannot be dismissed as presumptively biased, merely self-serving, or unworthy of consideration because it may run counter to another group's expectations or to well-entrenched habits of conduct. Those whose choices contribute to the problem of discrimination must make decisions that take into account the point of view of others through self-scrutiny and self-transcendence.

56. 60 U.S. (19 How.) 393, 469-93 (1856) (Daniel, J. concurring).

57. *Id.* at 475-76.

58. *Id.* at 477.

59. For a discussion of the importance of isolation to both the wrongfulness and maintenance of slavery, see R. FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 396-400 (1989).

other words, slavery denies the slave any entitlement to political engagement.

In the political realm, this feature of discrimination is addressed through non-discrimination mandates that secure an entitlement to engagement with the broader political community through rights to vote in primary and general elections, to run for political office, and to form political associations. These rights help minorities exert pressure on the larger political community and require response from that community. They generate demands, formulated from the perspective of the minority community, that must be taken seriously by others. In other words, they require engagement.[60]

The wrongfulness of discrimination which falls short of slavery partakes of the same type of isolation from, and lack of engagement with, certain groups. Thus, non-discrimination mandates that extend beyond the political realm should similarly seek, as a normative matter, non-isolation and engagement. As in the political realm, non-discrimination mandates must seek engagement indirectly, through procedural devices that create conditions under which engagement will occur.

The methodological demands of the moral imagination reinforce this normative objective of non-discrimination mandates. They encourage the development of non-discrimination mandates that formally prohibit practices and customs of individual choice used by decision-makers to isolate minorities and women. For these reasons, it is worthwhile to seek ways in which self-scrutiny, self-transcendence, and engagement can be used to formulate substantive definitions of the types of discrimination that affect individual decisions. Such a project is especially important given the lack of fit between historical concepts of non-discrimination and contemporary forms of discrimination.

One of Justice O'Connor's decisions implicitly suggests how methodologies and demands of the moral imagination might be incorporated into substantive non-discrimination mandates. In *Price Waterhouse v. Hopkins*,[61] she asserts that one critical object of Ti-

60. For an excellent discussion of the importance of engagement to securing effective political rights, see Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988).

61. 490 U.S. 228 (1989).

tle VII's non-discrimination mandates is to deter discriminatory conduct.[62] She argues that this objective can be achieved by adopting analytical rules that cause employers to examine and evaluate their employment practices.[63] Although she shows deference to employer decisions respecting the "structure of the workplace," she effectively extends only a qualified privilege to employers, a privilege conditioned on a certain degree of self-scrutiny.[64] Her apparent, practical concern is avoiding careless and unconsciously prejudiced decisions.[65]

The remainder of this article pursues the suggestion embodied in O'Connor's *Price Waterhouse* concurrence,[66] and provides an extended example of how substantive non-discrimination mandates are strengthened when they incorporate the methodologies and attitudes of the moral imagination. The use of this example limits discussion to non-discrimination mandates in merit-based personnel systems affecting professional and upper-level employees.

II. Truthfulness, the Moral Imagination, and Merit-Based Personnel Systems[67]

A. *Truthfulness and the Moral Imagination*

Truthfulness is a principle that can infuse conventional non-

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62. *Id.* at 264-65.

63. *Id.* at 270-79.

64. *Id.*

65. The significance of her analysis stands out when it is contrasted with Justice Kennedy's dissenting opinion. Price Waterhouse v. Hopkins, 490 U.S. 228, 279-95 (1990). Kennedy neither discusses a deterrence objective for Title VII, *id.* at 289-90, nor accepts the derivative principle that employer carelessness or failure to engage in self-scrutiny constitutes grounds for Title VII liability. *Id.* at 293-95. As a result, he rejects the majority (and O'Connor's) analytical framework in mixed motive cases.

66. The suggestion appears elsewhere, as well. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)(prospect of backpay awards provides incentive to employers to "self-examine" and "self-evaluate" practices); *cf.* Owen v. City of Independence, 445 U.S. 622, 652 nn. 35 & 36 (1980)(liability will increase incentives to guard against indifference and interactive group behavior that may lead to unconstitutional conduct).

67. Illuminating discussions of merit-based personnel systems and Title VII, especially in contrast to the approach taken herein, include: Bartholet, *Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); and, Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Anti-Discrimination*, 60 B.U.L. Rev. 815 (1980). These two authors explore the concept of merit from different viewpoints—practical and philosophical, respectively—yet both look predominantly at criteria rather than processes for determining merit. Bartholet argues that her analysis is suitable for identifying discriminatory decision-making systems; however, her concept of what constitutes a system

discrimination concepts with moral imagination. As an ethical tenet, it is included in many moral systems.[68] In functional terms, truthfulness is a practice that may be used to derive "true" statements about particular matters, including those not open to absolute verification.

Essential traits of truthfulness correspond to distinguishing features of the moral imagination. Truthfulness is a guarantor of impartiality, which I define to be open-mindedness and lack of bias.[69] It has, therefore, a necessary methodological affinity to the moral imagination. As with truthfulness, moral imagination demands self-scrutiny and self-transcendence in order to eliminate personal bias and to ensure that decision-makers reflectively engage with a rich and varied—rather than a limited or incomplete—set of data. Truthfulness demands rigorous standards of reliability and integrity in data collection and assessment. It demands accuracy and impartiality in both subsidiary judgments and the discrete facts upon which rest ultimate judgments or statements of truth. As the moral imagination, truthfulness frequently enhances itself by expanding the context within which judgments are made. It promotes active rather than passive conduct, which leads to engagement.

Truthfulness is, therefore, a natural vehicle for implementing the moral imagination in decision-making. Moreover, because women and minorities frequently experience discrimination as a failure of truthfulness, and because the principle (if not always the practice) of truthfulness is essential to the operation of merit-based personnel systems that may foster and contribute to workplace discrimination, it is an obvious focal point for a discussion of

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is quite limited. Bartholet, *supra*, at 973-88.

68. *See, e.g.*, 7-8 ENCYCLOPEDIA OF PHILOSOPHY 150-51 (1972). As Niebuhr states, in individual relationships, truthfulness "[is part of] . . . the working capital of personal morality." R. NIEBUHR, *supra* note 8, at 174. For my understanding of truthfulness, I rely most heavily on S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1979) [hereinafter LYING]. Not only has Bok provided an exceptionally illuminating study of truthfulness as a moral concept, she has also demonstrated that it is not unduly difficult to give the concept practical meaning. Her discussion of practices of deceit, id. at 64, has obviously influenced my discussion of the practice of truthfulness. *See infra* notes 129-146 and accompanying text.

69. Personal bias frequently represents a special failure of truthfulness, i.e., a failure of truthfulness to oneself, or the avoidance of self-deception. On the corrupting effects of self-deception, and its impact on duties owed to others and responsibility for decisions, *see, e.g.*, M. MARTIN, SELF-DECEPTION AND MORALITY 39 and 55 (1986); and S. Bok, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 59-72 (1983).

how the moral imagination can be used to strengthen non-discrimination mandates.

B. *Truthfulness as Principle in Merit-Based Personnel Systems*

A commitment to the more obvious methodological principles of truthfulness is implicit in commonly used merit-based personnel systems. In merit evaluations, the employer seeks an ultimate judgment about individual merit that he can claim to be true.[70] What is true is not envisioned as an absolute. Rather, truth is relative to an employer's evaluation criteria: the "truth" about an employee's merit is reflected in the fit between that employee's qualifications or accomplishments and the generic, ideal employee envisioned by an employer's evaluation criteria. Depending on the degree of correspondence or fit, an employee may be described "in truth," for example, as satisfactory or exceptional.

Employers have no way of definitively testing whether their ultimate judgments of merit are valid at the time such judgments are made. For example, it is rare that ultimate judgments in post-hiring evaluations are entirely retrospective. Even salary adjustments—typically viewed as rewards for past performance— may be based on assessments of prospective contributions.[71] An employer might reliably test the truth of an ultimate judgment of potential contributions by determining at some future date whether the judgment did, in fact, accurately predict performance. Such a test is, by definition, impossible to apply at the time the ultimate judgment is made. Moreover, it is exceedingly difficult to apply the test to a negative evaluation of merit, as negative judgments tend to exclude individuals from the very work environment in which

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70. Bartholet challenges, as do other commentators, the assumption that employers are really interested in merit. Bartholet, *supra* note 67, at 957, 991-96; *see also* Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. J. 705; Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in The Workplace Under Title VII*, 97 YALE L.J. 1397 (1988). Employer disinterest in merit may exist, especially on an unconscious level, and, therefore, the actual results of personnel decisions may be hard to reconcile with merit. At the theoretical, explicit, and conscious level, however, most employers are committed to the use of merit systems. The disjunctures among conscious commitment, individual behavior, and actual results are the focus of this article.

71. Employers tend to have a longitudinal perspective in their evaluations. *See, e.g.*, R. LESTER, REASONING ABOUT DISCRIMINATION: ANALYSIS OF PROFESSIONAL AND EXECUTIVE WORK IN FEDERAL ANTIBIAS PROGRAMS (1980).

future performance might be judged.[72]

For this reason, an employer committed to a merit-based personnel system must also be committed to integrity and accuracy in data collection and assessment. The maintenance of integrity and accuracy in data collection and assessment is the only hope of an employer who wishes to attain a sufficient degree of certainty in a positive ultimate judgment to warrant reliance on the expectation that a favorable prediction will be fulfilled. This is also true where the employer desires a sufficient degree of certainty in negative judgments to ensure that a worthy employee will be neither mistakenly overlooked nor rejected.

Employers concerned about the truth of an employee's merit will necessarily tolerate a degree of uncertainty in broad, ultimate judgments. They will make a pragmatist's compromise with the principle of truth. They will be less willing to compromise truthfulness. For example, they will demand accuracy in the statement of discrete, subsidiary facts. They may also demand a substantial degree of certainty in subsidiary judgments about particular aspects of a career because such judgments can be more closely tied to fact than can ultimate judgments about overall merit. They will adhere to methodologies and review processes that ensure the truthfulness of persons who supply information used in judging an individual's merit.

C. *Truthfulness in Practice in Merit-Based Personnel Systems*

Although a commitment to the methodological principles of truthfulness is implicit in merit-based personnel systems, the principles are frequently neglected in practice. Moreover, there is no apparent recognition of the relationship between adherence to these principles, the type of information typically considered in merit reviews, the need for self-scrutiny and self-transcendence, and the objective of engagement.

Academic merit reviews provide a good illustration of the discrepancy between commitment in principle and practice.[73] Theo-

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72. Negative evaluations that prevent an employee from assuming new, expanded job responsibilities exclude the employee from the work environment in which he or she might be able to establish individual ability. Some evaluations, however, such as those undertaken in universities, may not affect job responsibilities.

73. A number of informative descriptions of academic review processes are available. In this section, I rely throughout on R. LESTER, *supra* note 71; G. LANOUE & B. LEE, ACADEMICS

retically, academic merit reviews are based upon an avowed commitment to the value of truthfulness, a value directly tied to the notion of academic freedom.[74] However, in practice, the value of truthfulness does not have a significant impact on the choice of methodologies used to evaluate faculty. Academic research methodologies used to collect and assess data must meet accepted standards of reliability and integrity. Research is deemed meritorious only if there is a strong correspondence between data and conclu-

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IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION (1987); Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143 (1990); Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L. J. 471 (1990); Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or The Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988); Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501 (1987); Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J. LAW & EDUC. 319 (1986); Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984); Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975 (1983); Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J. LAW & EDUC. 429 (1976); B. NENNO, *supra* note 2; and, AAUP POLICY DOCUMENTS AND REPORTS (1984). When I believe that aspects of review processes have special interest, I reference specific illustrations from the preceding works. Nenno is an especially good source of specific illustrations because she studies decision-making processes that have not resulted in litigation and can therefore be seen as normal rather than aberrant. *See also* Bell, *supra* note 70; and, Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

Academic reviews closely resemble reviews that affect career advancement in other—especially professional—work environments. For one comparison, see, R. LESTER, *supra* note 71. Lester discusses the characteristics of personnel evaluations of upper level employees in three different work environments: the university, the federal civil service, and business. He argues that the work environments are sufficiently different from each other, and from conventional blue collar, entry-level positions, that uniform non-discrimination guidelines cannot be applied to them. But Lester's conclusion is based on conventional interpretations of Title VII. The perspective of truthfulness employed herein sees more similarity than dissimilarity in the work environments described by Lester. The similarities inhere in the individualistic nature of jobs and job performance, the longitudinal view brought to bear on all performance reviews, and employer reliance on peer and group evaluation. Thus, many of the observations made herein will apply to reviews in other work environments.

74. Because personnel evaluations represent judgments about the academic merit of individuals and their teaching or research projects, they are considered an exercise of an evaluator's academic freedom. A professed commitment to truth and truthfulness is the quid pro quo for faculty autonomy from non-academic, institutional interests—such as tenure quotas—that might otherwise dominate the personnel decision-making process. *See, e.g.*, Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L. J. 251 (1989) (arguing that the university is premised on agreement that knowledge and understanding are pursued with detachment or disinterestedness; that a disinterested search for knowledge fosters, at its best, careful and critical discourse). Preserving these values is at the heart of academic freedom. *Id.* at 333-38.

sions. If data are incomplete or uncertain, or if the research methodology does not comport with accepted standards, the research is not considered "truly" meritorious or academically valuable. The same level of methodological rigor is not applied to the process of reviewing academic personnel.[75]

There are a number of methodological differences between evaluations of research and academic personnel.[76] I focus on two methodological traits that one would expect to find in merit reviews that adhere to the principle of truthfulness: (1) specification of criteria that determine inclusion and exclusion of relevant information; and (2) methodologies for gathering reliable, complete, and unbiased data respecting the criteria. These traits are given short shrift in academic personnel reviews.[77]

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75. See, e.g., the sources cited *supra* note 73, in particular, G. LANOUE & B. LEE, *supra* note 73, at 21, who characterize faculty reviews as lacking peer accountability. See also the specific case studies of hiring reviews contained in B. NENNO, *supra* note 2. This might not be a significant problem were the outcome of an individual's review dependent solely on the merit of prior scholarly research. But reviews take into account other types of accomplishments, such as teaching and service, as well as considerations of potential contributions. *See infra* notes 78-86 and accompanying text.

76. For example, although it is acknowledged that secrecy jeopardizes research integrity, it has traditionally been permitted to play a significant role in the evaluation of faculty. For a discussion of secrecy and norms of scientific research, see S. BOK, SECRETS, *supra* note 69, at 153-170. For a discussion of secrecy in the context of academic peer reviews, see Brooks, *Confidentiality of Tenure Review and Discovery of Peer Review Materials*, 1988 B.Y.U. L. REV. 705; Gregory, *Secrecy in University and College Tenure Decisions: Placing Appropriate Limits on Academic Freedom*, 16 U.C. DAVIS L. Rev. 1023 (1983); and Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual*, 82 NW. U.L. REV. 492 (1988).

The Supreme Court has demanded disclosure of materials that will indirectly affect the tradition of secrecy in academic merit reviews—at least in the context of litigation arising out of complaints of discrimination in academic personnel evaluations. *See* University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990).

77. The impact of these deficiencies is exacerbated by the fact that academic reviews are performed by a group rather than an individual. Merit reviews are performed by faculty peers who collectively express a final judgment of merit through either a favorable or an unfavorable vote. Group behavior may differ significantly from individual behavior. *See generally* R. NIEBUHR, *supra* note 8, and S. BOK, LYING, *supra* note 68, at Chapter XI. Group interests unrelated to academic merit may affect the review process itself or color an evaluator's assessment of individual qualifications. For example, collegiality may become as important a value as—or even operate at the expense of—truthfulness. A woman's insistence on non-discrimination may be viewed as uncollegial or disruptive. *See, e.g.*, G. LANOUE & B. LEE, *supra* note 73, at 58-59 and the sources cited *infra* note 79. Although an evaluator may believe information on a particular candidate is incomplete, collegial deference to those who gathered the information, a desire to avoid a hint of criticism that might be interpreted as a challenge to peer credibility, or fear of internal dissension may prevent a challenge to the information. *See infra* notes 87-89 and accompanying text.

In addition, a desire to maintain a certain group status may influence conduct. There

1. Criteria for Inclusion and Exclusion of Relevant Information

No serious scholar would undertake research to determine the truth of a particular hypothesis without first ascertaining the prevailing criteria for assessing truth within the relevant discipline. Such criteria set the boundaries for collecting data in a way that members of the discipline deem to be legitimate. They provide a benchmark for the assessment of research validity. In academic reviews, there is a consensus that the issue to be proved (or disproved)[78] is merit, and that teaching, service, and research are the relevant merit criteria.[79] Historically, however, universities have not provided more specific guidance to assist evaluators in determining merit.[80] Moreover, it is difficult to derive a specific, substantive import for a particular university's notion of merit from prior reviews. An academic department makes promotion and tenure decisions relatively infrequently; therefore, even informal

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may be, for example, an unstated concern that promoting a woman will diminish the status and salary level of others in a particular department. Confidential conversation, University of Colorado faculty member and author, Fall, 1987. *See also* J. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 155 (1989); G. LANOUE & B. LEE, *supra* note 73, at 180-82, 213 (illustrating departmental concern with status and reputation). Finally, although a woman is well qualified for a job, she might be rejected because an employer fears her hiring will cause disruption among otherwise productive male workers. *Cf.* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 24 (1984).

78. A research project really entails a search for evidence that will disprove a hypothesis since, except in mathematics or logic, affirmative proof of truth is impossible to achieve. H. PAGELS, THE DREAMS OF REASON 250-51 (1989). This feature of evaluations of merit has special significance because women and minorities typically enter a merit review without some of the presumptions of merit accorded other persons. *See infra* notes 95-101 and accompanying text.

79. Factors other than merit in teaching, research, and service may be used by upper-level administrators who must decide whether to ratify department salary, promotion, or tenure recommendations. For example, although departments are not typically concerned with long-term budgetary implications of tenure decisions, upper-level administrators may take high tenure ratios into account in their own decisions. This article uses department decisions as a model because they are theoretically untainted by such considerations.

Collegiality is also an important factor in decisions, even at the department level. In addition to the sources cited *supra* note 77, see Tobias, *supra* note 73, at 1148-50; Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1187-92 (1988); Angel, *supra* note 73 at 830; Zirkel, *supra* note 73, at 235-37; Brooks, *supra* note 76, at 709-10; and, B. NENNO, *supra* note 2, at 82, and 126-28. As these sources show, a concern for collegiality may result in consideration of matters that adversely affect women and minorities, or may arguably give rise to a distinct Title VII claim under 42 U.S.C. § 2000e-3, which prohibits retaliation against persons who oppose practices made illegal by Title VII. *See generally*, M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 270 (1988).

80. *See, e.g.*, Tobias, *supra* note 73 at 1150-52; Angel, *supra* note 73, at 830; and Zirkel, *supra* note 73, at 225-26.

standardization of criteria does not always occur. Even department faculty may have only an attenuated sense of comparative history or precedent in evaluations. Precedential ambiguity is exacerbated by two factors: the membership of review committees may change from year to year, and collective judgments are necessarily the product of differing mixes of motives, rationales, and discrete judgments.[81] Not only is it difficult to identify what criteria were actually dispositive of prior group decisions, it is almost impossible to determine whether individual evaluators used the same (or assigned the same weight to) merit criteria.[82]

An absence of clear and certain criteria for conducting an inquiry is a special problem when the ultimate issue to be determined is open-ended, as is merit, and to which a wide range of information is potentially relevant. It bears repeating that truthfulness is a practice used to derive a statement of truth about a particular matter. Truthfulness is truthfulness about a specific issue. If an evaluator does not know precisely what issue he must be truthful about, his truthfulness will be compromised. For example, he will not know when a particular statement or set of information must be made more complete if he is to be truthful about the issue at hand. Alternatively, he will not know which bits of information must, because they are central to the issue, be rigorously scrutinized for accuracy and bias. In other words, criteria (or their absence) affect the processes and methodologies of truthfulness in critical ways.

2. *The Integrity, Comprehensiveness, and Reliability of Data*

In academic merit reviews, there is no reason to assume that data bearing on the merit of individual faculty will have integrity, will be comprehensive, or will inevitably be demanded as justification for subjective assessments of merit. Informal information-gathering combines with the absence of clear merit criteria to compromise the integrity of information necessary to truthfulness.

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81. There is no requirement that any given individual provide a justification for his or her vote. There is, therefore, almost no reliable way to explain the basis for a prior group decision. Explications of the vote may consist of reconstructions of faculty discussions, or inferences drawn from comments offered during the give and take of discussion. These may or may not accurately reflect individual judgments.

82. *See, e.g.*, B. NENNO, *supra* note 2 (illustrating throughout how different criteria are important to different members of review committees).

As the previous discussion suggests, an absence of clear and certain merit criteria is part of the problem. In addition, faculty reviews generally occur over a period of months or years during which evaluators informally acquire information (for example, through daily interaction with the candidate or with the candidate's mentor).[83] In extended academic reviews, information-gathering and preliminary judgments are frequently the product of a "panoply of brief acts of attending and ignoring that form the warp and woof of [the] everyday consciousness."[84] They tend to be spontaneous events given no more conscious attention than other routine, daily acts of habit.[85] Unless a university has a careful, supplemental system for actively gathering information over time, and testing judgments as they develop, opinions and information introduced into the formal decision process will likely be unreliable, incomplete, or even inaccurate.[86]

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83. There are established times at which actual salary, promotion, or tenure decisions are made, but during the years preceding a review, colleagues form many subsidiary opinions about particular aspects of a candidate's work, and even about the general worthiness of a candidate. *See, e.g.*, Angel, *supra* note 73, at 831 (commenting on the fact that evaluation begins the moment a candidate walks in the door); Zirkel, *supra* note 73, at 224-25. A candidate, therefore, enters the actual decision process as the subject of various, more or less well-formed, individual hypotheses of merit. Group decision-making frequently consists of an undertaking to verify (or refute) these hypotheses. Verification or refutation of a particular hypothesis may take precedence over an attempt to ascertain whether a candidate measures up to the complete ideal described by stated merit criteria. If a particular hypothesis about a candidate fails to include assumptions relevant to all merit criteria, then evaluators may overlook accomplishments or qualifications that have been considered relevant in other reviews. Moreover, truthfulness is compromised by data that are incomplete relative to the employer's concept of merit.

I have not chosen to dwell on the ways in which extended reviews are influenced by whether, over time, opportunities to show merit are given to employees, but the importance of this aspect of extended reviews must be mentioned. If, for example, women are not asked to work on particular projects—are not asked to assume particular responsibilities—they are not given an opportunity to establish merit in the incremental ways that may influence ultimate judgments of merit at the time the formal decision-making process occurs. Subsidiary judgments formed over time are dependent on the opportunities which a person has been given to show merit. A university may have formal programs that give faculty opportunities to enhance their experience and reputation, but opportunities are much more likely to be the product of informal collegial interaction. Thus, daily opportunity—even opportunity which might in isolation seem minor—significantly influences the formulation of subsidiary and ultimate judgments critical to career advancement. *See generally* R. KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

84. M. MARTIN, *supra* note 69, at 83.

85. The informal methods of gathering personal information over time for academic reviews might even be characterized as "gossip." *Cf.* S. BOK, SECRETS, *supra* note 69, at 89-101; *see also* B. NENNO, *supra* note 2, at 112-31 and 155-56.

86. Formal systems for gathering information and testing judgments over time do not exist in most universities. Faculty tend to resist on-going administrative scrutiny of their

Truthfulness is clearly compromised under these conditions. It is further at risk because unscrutinized opinion plays a critical role in reviews that occur over time.

The difficulty is not opinion per se,[87] but unscrutinized opinion. Opinion tends not to be scrutinized for two different reasons. First, for reasons discussed previously, a peer evaluator's credibility, rather than closely examined facts, frequently serves as warrant for the integrity of a particular opinion, and for the truth of a judgment of merit.[88] Because disagreement with peer opinion respecting merit may be construed in personal terms as an assault on an evaluator's credibility or integrity, the discussion of another's merit puts at risk the collegiality of relationships among evaluators.[89] As a result, there is a built-in disincentive for faculty to scrutinize the validity of peer opinion. Second, because of the methodological deficiencies of academic reviews, there is frequently insufficient information against which opinion could be tested, even were a peer inclined to do so. Thus, opinion is not scrutinized. There is not a strong warrant for the integrity, impartiality, or accuracy—i.e., for the truthfulness—of the review.

Academic reviews are not unlike other merit reviews in the existence of a marked discrepancy between the commitment to methodological principles of truthfulness and actual practices of truthfulness. They are also not unlike other merit reviews in apparently ignoring the connection between methodologies of truthfulness, self-scrutiny, self-transcendence, and engagement. In my opinion, practical disregard for truthfulness is closely connected to the persistence of workplace discrimination. In the section that follows, I

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academic work. Moreover, there is no academic tradition of methodological constraints on how, over time, peers gather comprehensive and reliable data about individual faculty.

87. Reliance on opinion can present difficulties. Consider, for example, a university review policy that equates merit with reputation. By definition, reputation is mere opinion. Thus, its validity is not beyond question, although evaluators may be tempted to take it at face value or to use it as an easily obtainable surrogate for hard data.

88. For example, the endorsement of a respected senior faculty mentor may outweigh other types of information. The academic standing of scholars reviewing published work (or of students evaluating teaching) may count as much as the existence of facts that support the opinion. *See, e.g.*, B. NENNO, *supra* note 2, at 155-57 (discussion is influenced by opinions of certain individuals whose credibility is given deference, to the exclusion of consideration of objective facts); R. KANTER, *supra* note 83, at 181-84 (identifying the associational stature provided by mentors as one of four key functions that mentors serve in promoting a junior employee's career advancement); and, Taub, *Keeping Women in Their Place, Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 353 n.40 (1980). On mentoring, generally, *see infra* note 92.

89. *See supra* notes 77 and 79.

discuss why workplace discrimination inevitably flows from a disregard of truthfulness. To illustrate the point, I focus on gender discrimination in universities, although the argument applies equally well to racial discrimination and to discrimination in other environments.

III. The Link between Disregard for Practices of Truthfulness and Gender Discrimination

The demographics of the contemporary workplace[90] are such that the absence of truthfulness inevitably translates into the presence of a gender-based preference.[91] The preference affects both the opportunity to have merit assessed and the final assessment of merit itself. Its effect on opportunity is central to my discussion of workplace discrimination. Discrimination against women in their attempts to establish merit will predictably flow from a disregard of methodologies of truthfulness. A good illustration is provided by academic reviews and the way in which gender stereotypes affect

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90. Although women certainly have achieved gains in the workplace, and some forms of discrimination have been effectively eliminated, career progress continues to be slow and uneven. *See, e.g.*, Angel, *supra* note 73, at 804-05, 828-30, 834-35 (for statistics on the advancement of women in professional employment). According to recent reports of the American Association of University Professors, Annual Report on the Economic Status of the Profession, Academe (March-April 1989) [hereinafter Annual Report], and the AAUP's Committee W, Academic Women and Salary Differentials, Academe (July-Aug. 1988) [hereinafter Committee W Report], women constitute 26.4 percent of all full-time faculty in the four primary categories of institutions of higher education. Annual Report, *supra*, at 19, Table 14 (statistics exclude only those 2-year institutions that do not assign rank to faculty). While 71 percent of male faculty are tenured, only 49 percent of women enjoy this status. Committee W Report, *supra*, at 15, Table 9. The figures for doctoral level institutions are 73 percent and 46 percent, respectively. *Id.* In the four primary categories of institutions of higher education, women comprise only 12.3 percent of full professors, 25 percent of associate professors, and 38 percent of assistant professors. *Id.* at 19, Table 14. The comparable figures for doctoral level institutions are 8.6 percent, 21.6 percent, and 33.9 percent, respectively. *Id.* The percentages for all combined institutions have apparently changed only slightly since 1983, when the corresponding figures were 10 percent, 20 percent, and 35 percent, respectively. H. Bowen & J. Schuster, American Professors, A National Resource Imperiled 56 (1986). Between 1975 and 1988, in almost every faculty rank, salary differences between gender groups—which may be, but are not necessarily, dependent on rank and tenure status—increasingly disadvantaged women. Committee W Report, *supra*. The pace of career advancement for women in academia is not atypical. *See, e.g.*, J. Jacobs, *supra* note 77; Hartmann, *Internal Labor Markets and Gender: A Case Study of Promotion*, in Gender In the Workplace (C. Brown and J. Pechman, eds. 1987); Rhode, *supra* note 5, at 1208-11; Note, 97 Yale L. J. 1397 (1988); N.Y. Times, Aug. 21, 1989, sec. A, at 1, col. 1; Hymowitz & Schellhardt, *The Glass Ceiling*, Wall St. J., March 24, 1986, sec. 4, at 1, col. 1.

91. *See, e.g.*, C. MacKinnon, *supra* notes 3 and 5; and, Minow, *supra* note 9, at 74, who discuss how neglect of women's perspectives inevitably leads to discrimination.

those reviews.

Stereotypes are a crude, verbal form of probabilistic reasoning about particular individuals. There is much recent scholarship that convincingly demonstrates the prevalence of, and harm caused by, gender stereotypes in any merit review.[92] Gender stereotypes are overwhelmingly negative as they apply to women in professional

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92. *See, e.g.*, N. BENOKRAITIS & J. FEAGIN, *supra* note 2; R. KANTER, *supra* note 83, at 230-37; Rhode, *supra* note 5, at 1219-22; Rhode, *supra* note 79, at 1187-92; Radford, *supra* note 73; Cooper, *supra* note 73; Zirkel, *supra* note 73; Taub, *supra* note 88; Note, *Permissible Sexual Stereotyping versus Impermissible Sexual Stereotyping: A Theory of Causation*, 34 N.Y. LAW SCHOOL L. REV. 679 (1989); and B. SANDLER, ASSOC. OF AM. COLLEGES, THE CAMPUS CLIMATE REVISITED: CHILLY FOR WOMEN FACULTY, ADMINISTRATORS, AND GRADUATE STUDENTS (1986); *cf.* Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). I do not consider stereotypes the only subtle cause of contemporary discrimination in merit reviews that can be linked to truthfulness. I treat stereotyping as a serious methodological problem, one of many, that has a significant, deleterious effect on practices of truthfulness. Stereotypes are, of course, morally reprehensible as well as methodologically invalid. For example, historically, statistics were used to describe racial types or a more general "*homme type*," from which individual variations were considered error. The history of, and moral issues raised by, these academic theories are discussed in T. PORTER, THE RISE OF STATISTICAL THINKING, 1820-1900 at 106, 108, 140, and 164 (1986).

One other practice that is linked to truthfulness and creates difficulties for women and minorities is worth special mention. Mentors are especially important to the informal process of information gathering, and to the existence of favorable opinion respecting merit. *See, e.g.*, R. KANTER, *supra* note 83, at 181-84 (on the importance of sponsors in corporations). According to Kanter, sponsors have a number of roles: they coach junior employees on getting along and advancing within the system, they advocate for the junior employee, they help junior employees bypass obstacles in the corporate hierarchy, and they signal to other people that the junior employee is a person to be reckoned with. Their professional reputations lend stature to that of the junior faculty member. Their credibility and reputation are the warrant for favorable opinions of academic work. Mentors may provide invaluable feedback to junior faculty regarding how the merit of their activities is perceived by others. This feedback can have a significant impact on a merit evaluation that occurs over time. *See, e.g.*, G. LANOUE & B. LEE, *supra* note 73, at 53, 83 (lack of general feedback), 105 (failure to counsel plaintiff regarding the need for a master's degree); N. BENOKRAITIS & J. FEAGIN, *supra* note 2, at 67. Finally, the interaction fostered by mentors may help other evaluators transcend the irrelevant differences and assumptions embodied in stereotypes. Interaction contributes to a "working capital" of personal morality—trust and concern for truth as seen from several perspectives—that helps minimize the likelihood that "truth" will not be discerned. R. NIEBUHR, *supra* note 8, at 173-74; *cf. Legal Storytelling*, *supra* note 9. For a variety of reasons, junior women faculty apparently do not have the kind of relationships with professional mentors that junior male faculty enjoy. *See, e.g.*, Tobias, *supra* note 73, at 1149 n. 32. Not only are there few available mentors of their gender, but women may actually be affirmatively excluded from collegial interaction with senior male colleagues. *See, e.g.*, B. SANDLER, *supra* note 92; N. BENOKRAITIS & J. FEAGIN, supra note 2, at 91-95. Women may also be wary of mentorships because of the way in which they are occasionally abused. *Id.* at 103-104. Studies consistently show that women have difficulty becoming part of an informal work world that is predominantly male. *See, e.g.*, J. JACOBS, *supra* note 77, at 154.

(or academic) jobs.[93] Negative stereotypes of, and assumptions about, women will operate in disadvantageous tandem with stereotypes that tend to favor men.[94] They result in cumulative judgments that, in extended reviews, may become well entrenched long before formal assessment of merit is undertaken.

Explicit reliance on an identifiable, substantive stereotype is acknowledged as discriminatory.[95] But stereotypes exert their most important influence in much more subtle and powerful ways when review methodologies disregard the principle of truthfulness. Stereotypes put women at a procedural disadvantage in the review process.

In order to understand the procedural disadvantage, consider again the key methodological features of academic reviews: poorly understood or shifting merit criteria, a dearth of consistent and hard information respecting merit, and heavy reliance on peer opinion. Under these conditions, an evaluator has no choice but to grapple with uncertainty. Each time an evaluator decides whether to give the review subject the benefit of the doubt on a less than clear matter, or whether to insist on a careful inquiry into matters that may have been overlooked by others, the evaluator's personal standards of certainty influence his decision.

Evaluators' standards of certainty are affected by gender similarity or dissimilarity.[96] This is a likely explanation for the operation of an especially insidious procedural stereotype that views women to be a higher risk than men. A stereotype, which I refer to

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93. All of the works cited immediately above give specific illustrations of the overwhelmingly negative import of gender stereotypes. *See supra* note 92. There are some exceptions to the disadvantages that gender stereotypes usually have on women's employment opportunities. *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

94. This may especially be the case when continued lack of representation of women among evaluators gives men an overwhelming influence upon the evaluation. *See, e.g.*, R. KANTER, *supra* note 83. Kanter argues that the treatment of particular people within an organization is a direct consequence of their numbers. *Id.* at 207-41. Tokens tend to stand out, to get more attention than their peers, to be more easily stereotyped in terms of group characteristics, and to have exaggerated importance placed upon their differences from peers of the opposite gender. *See generally supra* note 92. For a description of a court that took the numerical dominance of male evaluators into account in assessing the strength of a plaintiff's statistical case of disparate impact, see G. LANOUE & B. LEE, *supra* note 73, at 165-66.

95. Courts have been alert to employment qualifications or rules that explicitly or implicitly embody stereotypes. *See generally* Taub, *supra* note 88.

96. R. KANTER, *supra* note 83, at 54 (a correlation between the degree of ambiguity in a position and the selection of incumbents on the basis of social similarity is to be expected).

as a merit-uncertainty stereotype, causes women's accomplishments to be attributed to luck rather than ability. Women are always, in a sense, on probation.[97] Evaluators may tolerate relatively weak evidence to support, and require almost incontrovertible evidence to dispel, preconceptions that make the merit of an individual woman's accomplishments presumptively more uncertain than similar accomplishments of men.[98]

The disadvantages of this procedural stereotype are exacerbated by methodological deficiencies in merit reviews. For example, information gaps necessarily undermine the certainty of individual merit. Professor Bok calls adjustments in the degree of certainty in the evaluation of merit "manipulations of certainty."[99] They can occur either through carelessness or through intentional misconduct, and can make an assessment of merit either falsely certain or falsely uncertain. For example, less than comprehensive or less than accurate information gathered through informal means and heavily infused by opinion can strengthen an evaluator's stereotyped and presumptive lack of confidence in women's merit. Worse, the methodological deficiencies of academic reviews put women at the mercy of individual evaluators who wish to construct career barriers for women by intentionally undermining certainty.

Consider what may happen when but a single evaluator in a group review intentionally seeks to lessen the chances that a woman will be favorably reviewed. Perhaps during pre-vote discussions of merit, the evaluator interjects a negative opinion on a critical issue. Even if the opinion is not based on facts that can be substantiated, the unfavorable assertion of opinion will: (1) require a response, diverting attention from discussion of other matters, and clouding the discussion of merit from that point forward; (2) raise questions that may linger in the memory of other evaluators

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97. Rhode, *supra* note 79, at 1187-92; *see also* B. SANDLER, *supra* note 92.

98. Although it occurred outside a formal review process, Professor Derek Bell's experience at Stanford is a good illustration of how benefits of the doubt and standards of certainty may combine with preconceptions about race or gender to the disadvantage of individuals. Some students, dissatisfied with Professor Bell's course in constitutional law, complained to other faculty. Instead of openly investigating the validity of the complaints or attributing student dissatisfaction to student deficiencies (certainly the more common peer reaction to student complaints about a colleague's class), Stanford faculty agreed to give students supplementary lectures in constitutional law. These arrangements were not discussed with or known to Professor Bell. *See An Insult to a Law Professor*, The Washington Post, Aug. 4, 1986, sec. C, at 3.

99. S. BOK, LYING, *supra* note 68, at 16 and 21.

despite refutation;[100] or, given the informality of data gathering in merit reviews, (3) not be susceptible to refutation prior to a group vote because of a dearth of information bearing on the validity of the opinion. Even a strong professional record can be rendered less certain of merit by intentional manipulations of certainty that take advantage of the methodological deficiencies in academic reviews.

Thus, in a merit review, a woman is especially dependent on complete and accurate information to fill in information gaps for two reasons. She needs information to counter the procedural influence of the merit-uncertainty stereotype. She is also dependent on complete and accurate information to counter intentional manipulations of certainty by those evaluators who let impermissible motives affect their judgment.[101]

Unfortunately, the usual and predominant method of gathering information in academic reviews does little to respond to these critical needs of women. Informality in a merit review—the absence of rigorous methodologies associated with truthfulness—gives no assurance that there is "truth" in an ultimate judgment of merit. This is potentially a problem for all faculty. However, the problem is demonstrably greater and creates more disadvantages for women. Even if an employer uses equally undisciplined evaluation methodologies for men, which I believe to be the typical situation, women will be relatively disadvantaged. For women, shifting and vague criteria will lead evaluators to rely upon opinion infused with negative stereotypes rather than factual information as the basis for review. Further, gaps in information will be filled with conscious or unconscious stereotypes. These negative substantive stereotypes will operate in conjunction with the disadvantaging merit-uncertainty stereotype—and also, occasionally, in conjunction with illegitimate motivations—to alter (and undermine) degrees of confidence in a woman's individual merit. Uncertain and shifting criteria and the predominance of informal rather than formal processes for gathering information and formulating judgments over time create a decision-making environment in which conscious and unconscious stereotypes—procedural and substantive—will flourish.

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100. Professor Bok uses the familiar example of Othello to illustrate this point. S. BOK, LYING, *supra* note 68, at 19.

101. Impermissible motives may be especially likely to surface in reviews of women in fields or departments dominated by men. B. SANDLER, *supra* note 92, at 16-17.

IV. Truthfulness and Legal Definitions of Workplace Discrimination

When women are reviewed by persons utilizing methodologies that disregard truthfulness, their opportunity to establish the merit of their accomplishments and abilities is significantly compromised. This disadvantage in opportunity is a critical form of discrimination in merit reviews. It may ultimately lead to discriminatory outcomes, but outcomes are a derivative matter. Discrimination has its genesis in the deprivation of opportunity to establish merit that inevitably flows from a disregard for truthfulness.

In general, legal concepts of discrimination underestimate both the importance of truthfulness to merit-based personnel systems and the vital link between truthfulness and workplace discrimination.[102] Because principles of truthfulness are neglected in constructing paradigms of discrimination, contemporary forms of discrimination are overlooked or immunized from challenge. In addition, non-discrimination mandates fail to exploit the moral imagination of persons whose decisions directly affect women and minorities in the workplace.

In the remainder of this article, I consider whether it is possible for the Title VII concept of discrimination to exploit the moral imagination. By focusing on the link between truthfulness and discrimination, we can reshape Title VII jurisprudence so that it becomes a more effective prohibition on workplace discrimination. I draw upon Title VII jurisprudence for my examples, but the same arguments might also apply to other non-discrimination mandates.

A. Conventional Title VII Non-discrimination Mandates

Judicial interpretations of Title VII decisively condemn the

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102. I believe that is why it has proven difficult for courts to address allegations of discrimination in merit reviews. For example, an overwhelming majority of academics believe that women have been discriminated against in academic life. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 Minn. L. Rev. 1233, 1258-59 (1988). However, the record of judicial decisions shows that allegations of discrimination in academia are infrequently proved. *See, e.g.*, Bartholet, *supra* note 67, at 959-78. According to one study, there were more than 300 federal court decisions in academic discrimination cases between 1972 and 1984, of which about one-half were decided on procedural grounds and one-half on the merits. Of those decisions reaching the merits, thirty-four favored plaintiffs, six were split decisions, and the rest were decided in favor of defendants. G. LaNoue & B. Lee, *supra* note 73, at 26-31 (statistics include all class-based discrimination).

use of discriminatory merit criteria that disadvantage women in ultimate judgments of merit. They do not clearly condemn discriminatory practices which are facially neutral when such practices affect opportunity rather than outcome. An examination of the facts underlying two recent Supreme Court decisions involving stereotypes helps one to understand the differences between these two types of discrimination claims.

In *Price Waterhouse v. Hopkins*,[103] the defendant used a complex group process to review the merit of candidates for partnership. The partner responsible for explaining the outcome of merit reviews told Ann Hopkins that a decision on her partnership was postponed, and that if she wanted to become a partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[104] Other partners indicated that Hopkins was sometimes too "aggressive" or "macho" or that, as a lady, she should not use "foul language."[105] Hopkins apparently did not dispute the accuracy of these descriptions; rather, she objected to the fact that women partners were expected to behave according to different standards than those applied to men. Her discrimination claim challenged the criteria her employer used to define merit, and the criteria against which the "truth" of her merit was judged.

In *Watson v. Ft. Worth Bank & Trust*,[106] the defendant repeatedly denied promotion to Clara Watson, a Black woman, based upon both the subjective judgments of supervisors acquainted with Watson, and the requirements of the positions to which she wished to be promoted. Watson was told, among other things, that one of the positions involved handling a lot of money, and that persons of her race could not perform that task.[107] In objecting to the suggestion that she could not competently deal with large sums of money, Watson did not challenge the criterion of qualification itself. Rather, she questioned the method used to determine whether she met the relevant and legitimate job qualification of competence to handle large sums of money. She challenged the employer's use of a stereotype as a substitute for inquiry into her individual merit.

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103. 490 U.S. 228 (1989).
104. *Id.* at 235.
105. *Id.*
106. 487 U.S. 977, 982 (1988).
107. *Id.* at 990.

The facts in *Watson* state an obvious claim of a denial of opportunity to establish merit, but the plaintiff did not structure her case to make such a claim. In contrast, the plaintiff in *Price Waterhouse* did argue that the Court should look at the practical impacts of the use of stereotypes on the process by which merit was assessed, but the Court did not orient its primary analysis to this argument.[108] The constraints of conventional disparate treatment and disparate impact analyses (or litigation strategies reflecting the assumptions of those analyses) apparently ensured in both cases that the validity of the final determination of merit, i.e., outcome rather than opportunity and process, would be the focal point of both decisions.[109]

In general, conventional disparate treatment analysis requires a plaintiff to show that a defendant's discriminatory motive caused an adverse outcome.[110] It is structured to enable a court to identify the reason for a final employment decision. In the typical case in which there is no direct evidence of a discriminatory motive, the plaintiff's qualifications and the outcome of decisions affecting comparable persons will be examined to determine whether the defendant's explanation for an adverse judgment of merit was justified. In other words, as a practical matter, conventional disparate treatment analysis tends to focus on qualifications and ultimate judgments of merit.

Some Justices believe that proven racism or sexism must be causally related to an adverse outcome because of the types of remedies available through Title VII.[111] Others appear to recognize that discriminatory comments can have negative effects, even in

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108. *Compare Price Waterhouse*, 490 U.S. at 238 *and Watson*, 487 U.S. at 982-83; *see also infra* note 114.

109. In fact, *Price Waterhouse* in many ways solidifies the outcome focus of conventional disparate treatment analysis. *See Price Waterhouse*, 490 U.S. at 258. Similarly, *Watson* reinforces the outcome focus of conventional disparate impact analysis. *See Watson*, 487 U.S. at 999-1000.

110. *See* M. PLAYER, *supra* note 79, at 327.

111. *See, e.g., Price Waterhouse*, 490 U.S. at 265-66 (O'Connor, J., distinguishing between damages and injunctive relief); *see also* M. PLAYER, *supra* note 79, at 327-28. Player apparently considers stereotypes as evidence only of illegal motivation that must be causally linked to an adverse outcome in order to give rise to a valid Title VII claim. "If the defendant is able to convince the fact-finder that the same decision would have been made even absent the illegal motivation, there has been no remediable violation of the Act." *Id.* at 328. The focus on motivation and outcome, rather than on process and opportunity, is accompanied by a distinction between what are called "technical" and "remediable" violations of Title VII. *See id.* at 328 n.17. Unless an adverse outcome is actually caused by the discriminatory motive, there is no Title VII remedy.

the context of a predominantly favorable review,[112] and that Title VII protects against more than adverse outcomes causally related to the use of discriminatory criteria.[113] When a plaintiff's claim is framed to focus on outcome, however, outcome will necessarily be the analytical focus,[114] and a causal connection between motive and outcome will be difficult to prove.[115] If, for example, discriminatory comments like those made by the Price Waterhouse partners are construed as views of only one or two of many evaluators, or as only inadvertent lapses insignificant in light of many other valid reasons considered in good faith during the review, an adverse outcome is not "because of" discrimination and no Title VII liability arises.[116]

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112. 490 U.S. at 257-58 (Brennan, J., plurality opinion).

113. *Id.* at 250.

114. The Supreme Court might have addressed a process claim had the plaintiff in *Price Waterhouse* raised that challenge to an alleged biased decision-making process at the early stages of litigation. Because she only addressed that argument to Supreme Court, it was not discussed in the opinion. *Id.* at 240 n.5.

115. It is difficult to establish a discriminatory motive for an adverse outcome in many merit reviews. Explicit sexism, like that revealed through the careless candor of the Price Waterhouse partner, is rare. Liability-conscious employers take pains to avoid such overt comments or explanations for their decisions. Conventional disparate treatment analysis permits a plaintiff to generate an inference of discriminatory motive by showing that an employer made a different and favorable decision regarding a comparable male. But in many merit reviews—especially those for upper-level or professional jobs—a plaintiff will find it exceedingly difficult to generate a circumstantial case based on different treatment of a comparable person. Comparability is not a feature associated with the types of jobs that exist, or the types of evaluations that occur, in a professional setting or at upper levels of management. Professional and upper level positions are sufficiently flexible in their responsibilities to accommodate unique qualifications of many different candidates. Moreover, openings in or decisions respecting these positions may occur infrequently. The passage of time and changes in the workplace will inevitably alter requirements for those positions. Comparability is elusive, if not chimerical, under these circumstances. *See, e.g.*, G. LaNoue & B. Lee, *supra* note 73. In the example offered by LaNoue and Lee, the court felt that the value of comparative evidence was so slight that the time needed to establish comparability warranted exclusion of the evidence. *Id.* at 69. The plaintiff compared himself to four other faculty, only one of which was in his department. The judge found that there was insufficient comparability given the terms of employment of the plaintiff and his department colleague. As for the other three faculty, the judge attributed differences in treatment to different department rules and stated that there was no discrimination in decentralized decision-making of this sort. *Id.* at 124-25. *See also*, Bartholet, *supra* note 67, at 1001 (disparate treatment analysis presumes a predictable system against which an aberrational decision will stand out as discriminatory).

116. *See, e.g.*, Watson v. Ft. Worth Bank & Trust, 487 U.S. at 990 (seven Justices seem to agree that proof of racist remarks regarding the competence of African-Americans in money matters might not be sufficient to establish a Title VII claim under a conventional disparate treatment analysis); *see also* Price Waterhouse v. Hopkins, 490 U.S. at 251 (Brennan, J., plurality opinion). Moreover, in many cases unconscious stereotypes and prejudices contaminate the merit-review process. Such contaminants are not reached by disparate

Conventional disparate impact analysis is even less suited to claims of discrimination in opportunity and process. It is unclear whether the Court does not appreciate the possibility that a disparate impact claim could be stated in terms of process and opportunity,[117] or whether plaintiffs simply have not yet structured such a claim. If the analytical standards utilized in *Wards Cove*[118] are applied to facially neutral evaluation processes that utilize subjective criteria, however, a plaintiff would be required to link adverse outcomes to a specific employment practice, using statistics that show that the particular practice has caused the adverse outcome "because of race [or sex]."[119] The lack of comparability of many personnel decisions will make it difficult if not impossible to establish a statistically significant showing that an adverse group outcome was caused by a particular impermissible discriminatory practice.[120]

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treatment analysis. *Watson*, 487 U.S. at 990. Disparate treatment analysis is evolving, *compare* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and is not necessarily inapplicable to discrimination resulting from unconscious prejudice. *See, e.g.*, Hebert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C.L. REV. 1, 87 n.286 (1990).

117. Justices frequently use the terms "criteria", "judgments", and "practices" interchangeably, to refer to the same discrimination claims. *See Watson*, 487 U.S. at 977.

118. 490 U.S. 642 (1989).

119. Four Justices adopted this standard in *Watson*, 487 U.S. at 993-95 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.).

120. *See, e.g., Watson*, 487 U.S. at 996-97 (O'Connor, J., alternative holding); *see also* Bartholet, *supra* note 67, at 998-99 (discussing the difficulty of using traditional statistical methods in disparate impact analysis). The Court invalidated one component of an evaluation process because its adverse impact precluded individuals from an opportunity to compete in later stages of an evaluation. Connecticut v. Teal, 457 U.S. 440 (1982). The language of the majority opinion supports application of disparate impact theory to process-opportunity claims. *Id.* at 448-51. However, Justice Powell's opinion described circumstances that he argued would enable an employer to avoid Title VII liability. *Id.* at 463-64. According to Powell, a weakness in the majority opinion is that it could be used to defeat disparate impact liability if an employer utilizes a multifaceted evaluation, rather than particular merit criteria, in a sequential screening process. *Id.* at 463-64 n.8; *compare Watson*, 487 U.S. at 994 (O'Connor, J., citing *Teal* opinion with approval) and *id.* at 487 n.10 (Blackmun, J., explicitly questioning the wisdom of that analysis).

If there are sufficient numbers of decisions available to justify a valid statistical analysis, statistical proof of disparate impact in outcome may have special relevance to denials of equal opportunity in some types of cases. For some time, Title VII analysis embodied an assumption that "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the population in the community from which employees are hired." International Bhd. of Teamsters v. United States, 431 U.S. 324, 341 n.20 (1977). In recent cases, the Supreme Court has come to question the *Teamsters'* assumption and the forms of statistical proof derived from it. Justice O'Connor has stated "[i]t is completely unrealistic to assume that unlawful discrimi-

The current outcome focus of disparate impact and disparate treatment analysis is unsuited to claims of discriminatory denials of opportunity to establish merit. If it is to be an effective nondiscrimination mandate, Title VII should be interpreted to reflect the fact that discrimination in merit evaluations arises not only because substantive criteria are sexist or racist, and therefore lead to discriminatory final judgments of merit, but also because review methodologies violate principles of truthfulness in ways that adversely affect the opportunity of women and minorities to demonstrate merit.[121]

As a theoretical matter, Title VII clearly applies to employment opportunity and to discriminatory practices and methodologies.[122] When employers adopt merit-based personnel systems premised on a commitment to truthfulness,[123] Title VII should protect opportunity within those systems. If an employer disregards the principle of truthfulness in a merit evaluation, he denies the individual who is being evaluated an opportunity to establish the merit

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nation is the sole cause of people failing to gravitate to jobs and employers in accordance with the laws of chance." *Watson*, 487 U.S. at 992.

Although O'Connor's disagreement with the *Teamsters'* proposition may carry weight when one is assessing the discriminatory impact of hiring decisions made from a pool of applicants having no necessary claim to qualification, it is less persuasive in post-hire personnel decisions. The pool of persons affected by post-hire decisions is not a random pool. It has been pre-screened for qualifications by the employer. It is entirely reasonable, therefore, for a court to assume that groups treated equally in opportunity and evaluations will have statistically comparable outcomes. Thus, statistics related to outcome may have special relevance to alleged discrimination in post-hire evaluations. *See also* G. LaNoue and B. Lee, *supra* note 73, at 73-74.

121. In conventional doctrinal terms, one might think of a failure of truthfulness either as having disparate impact or as evidence that an otherwise legitimate justification for an employment decision is a mere pretext for discrimination. In the latter case, in violating principles of truthfulness, review methodologies compromise an employer's claim to "truth" in a given ultimate judgment of merit. Moreover, they compromise attempts to establish that an ultimate judgment is "untrue," which places an aggrieved employee in a most difficult situation if she attempts to utilize internal grievance or appeal procedures to alter an initially adverse judgment. *See infra* notes 128, 130, 141 and accompanying text.

122. *See, e.g.*, Hishon v. King & Spaulding, 467 U.S. 69 (1984) (eligibility to be considered for partnership is protected by Title VII if the employer chooses to confer this privilege on other similarly situated employees); *see also* Connecticut v. Teal, 457 U.S. 440 (1982); *cf.* 42 U.S.C. § 2000e-2(d) (prohibition on discrimination in apprentice and training programs).

123. Although Title VII does not require employers to adopt merit-based personnel systems, eliminating gender and race as legal decision-making factors has encouraged merit-based decision-making. *See, e.g., Price Waterhouse* 490 U.S. at 244 (Brennan, J., concurring); Hishon v. King & Spaulding, 467 U.S. 69, 74-75 n.6 (1984); Texas Dep. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). "The . . . purpose of Title VII is to promote hiring on the basis of job qualifications rather than on the basis of race." 110 Cong. Rec. 7247 (1964).

of credentials, accomplishments, and abilities. The critical question in Title VII analysis is whether a particular disregard of truthfulness is necessarily a denial of equal opportunity based on race or sex. I believe that it is, and that a strong definition of Title VII discrimination should recognize that fact.

B. Proposed Title VII Analysis for Denials of Opportunity in Merit Reviews

The principle of equal opportunity embodies two different notions of equality. One is absolute and presumptive, the other factual and contextual.[124]

The absolute and presumptive view of equality inheres in the word "opportunity." Opportunity is an important individual right because it is predicated on, and affirms, the potential worth and abilities of each and every one of us, regardless of gender or race. A guarantee of opportunity protects one's right to prove oneself, a right to have a crack at something, a right to establish one's credentials. In the absence of an underlying presumption of potential equal worth of each individual, there would be no reason to protect individual opportunity. If individuals are branded by gender or racial grouping, and are not presumed to have potential equal individual worth, there is no reason to protect their opportunity: we know, by definition, that members of *those* groups cannot prove themselves even if given the chance. Thus, a denial of opportunity, represented by a failure of truthfulness, compromises the presumed potential equal worth and abilities of each individual.[125]

The phrase "equal opportunity" also embodies a factual and contextual concept of equality. It literally seems to demand only that all persons be treated strictly alike. But Title VII has applied the phrase in a more expansive way. Even literally equal treatment can be discriminatory under Title VII, as disparate impact analysis

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124. *Cf.* Ronald Dworkin's discussion of the twin notions of equality. R. DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977) (a right to treatment as an equal, and a right to equal treatment).

125. Although some would remind us that the notion of equality of individuals originated with the notion of equal moral potentialities, E. PAGELS, *supra* note 50, at 51-52, and even coexisted with strong beliefs in inherent inequalities in physical and mental capacities, G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 207-28 (1979), the notion has become secularized and expanded in its applicability. Contemporary thought does not typically differentiate between spheres of presumed equality. *See, e.g.*, Fallon, *supra* note 67, at 815 n.3, 836-37.

tells us.[126] If practices are functionally equivalent to intentional discrimination, they may violate Title VII's equality standard.[127]

Both notions of equality are important to meaningful Title VII analysis of denial of opportunity in merit reviews. The first notion draws attention to the individual claiming Title VII protection, and reminds us of the significance of what is at stake for women and minorities in a denial of opportunity. It is particularly significant to a legal analysis that draws on the strengths and predispositions of the moral imagination. The second notion reminds us that the "equality"—the even-handedness—of an employer's practices cannot be assessed in factually simplistic ways.

I propose a Title VII definition of discrimination in opportunity. This definition incorporates the two notions of equality, and exploits the link between disregard for truthfulness and workplace discrimination. The definition includes a presumption of discrimination against women and minorities because a failure of truthfulness in a merit review operates to their special disadvantage and necessarily precludes any meaningful inquiry into the legitimacy of merit-based justifications for a particular decision.[128] It asserts that discrimination in opportunity occurs whenever an employer fails to adhere to a practice of truthfulness in a woman's or a minority's merit evaluation.[129] For purposes of the definition, a practice of truthfulness consists of a methodology for reaching an ultimate judgment of merit that can claim to be true.

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126. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (even a facially neutral policy, applied equally to all, may be invalid under Title VII if it has a disparate impact on women or minorities); Bazemore v. Friday, 478 U.S. 385, 394-96 (1986) (even a facially neutral policy is invalid under Title VII if it operates to freeze a discriminatory status quo).

127. *Watson*, 487 U.S. 987.

128. *See supra* note 121 and accompanying text. Although some argue that discrimination occurs because employers apply exceptionally rigorous merit standards in reviews of women and minorities, their argument does not differentiate between forms of objectionable conduct in merit reviews. *See, e.g.*, Bell, *supra* note 70, at 2406 (quoting from a letter by Robert Paul Wolff). An employer's conclusion that a woman is not meritorious, when compared to other favorable decisions respecting the merit of apparently similar male employees, may be characterized as more rigorous, but the methodology that led to that conclusion is usually anything but rigorous. Informal methodologies simply inure to the benefit of men and the disadvantage of women. *See, e.g.*, Cannings & Montmarquette, *Managerial Momentum: A Simultaneous Model of the Career Progress of Male and Female Managers*, 44 INDUS. & LAB. REL. REV. 212 (1991).

129. I am indebted to Professor Sissela Bok's discussion of practices of "deception" and "deceit" which helped to clarify my notion of practices of truthfulness. *See* S. BOK, LYING, *supra* note 68, at 64. Of course, I assume full responsibility for the specific definition of practices of truthfulness used in this paper and for applications of the definition to discrimination.

Outcomes of subjective merit reviews may be difficult to second-guess, and rationales for decisions about merit difficult to pinpoint, but the character of a review—whether it qualifies as a practice of truthfulness—is more objectively ascertainable.[130] This is not to say there is a litmus test. A number of formal evaluative methodologies might qualify as a practice of truthfulness. Actions which are repeated, and impart pattern, consistency, and shape to informal evaluations might also qualify.

To qualify as a practice of truthfulness, a given evaluation must manifest integrity in the most important methodological features of truthfulness, the features that ensure impartiality and that parallel the moral imagination's requirements of self-scrutiny and self-transcendence.[131] More subjectively, a practice of truthfulness must create the conditions under which engagement will occur. Although the qualities of self-scrutiny, self-transcendence, and engagement cannot be measured quantitatively or according to an absolute formula, they must inform an assessment of the more objectively ascertainable methodological features of a practice of truthfulness.[132] For example, tolerance for methodological sloppiness may indicate that an employer is not truly concerned with merit, but with some other, perhaps illegal, criterion. Tolerance for sloppiness may also indicate that an employer's mind is already

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130. If the use of discriminatory criteria is not obvious, and must be inferred from different ultimate judgments of merit for particular men and women, it is not surprising that judges proceed with some caution in a Title VII dispute. Courts hesitate to second-guess the validity of an ultimate judgment of merit. *See supra* note 102 (articles discussing the history of judicial response to legal challenges to academic reviews). Deference to subjective systems is sometimes accepted as proper. *See, e.g.*, M. PLAYER, *supra* note 79, at 369, 379, 381; Fallon, *supra* note 67, at 856. Player notes that some vague conclusions could be reduced to more precise and objective elements, but he generally accepts deference. M. PLAYER, *supra* at 336, 379; *contra* Bartholet, *supra* note 67, at 959-78. All writers, including Bartholet, tie deference to subjectivity in criteria or outcomes. No writer considers, in depth, the issue of deference to methodologies for ascertaining the truth of merit. *Compare* Kluger, *supra* note 73 (questioning the rationale for judicial deference to universities that use vague processes and criteria).

131. *See supra* note 69 and accompanying text.

132. Although I do not attempt to provide a checklist of objective features of a practice of truthfulness, minimal methodological integrity might include an absence of sloppiness or carelessness in at least the following areas: (1) specificity of criteria for determining relevance, and inclusion or exclusion of information; (2) judgments of merit (either ultimate or preliminary) that are supported by facts truly stated; (3) accuracy in the statement of discrete facts; (4) processes that assure accuracy of information; (5) an ultimate judgment that takes into account the entire domain of merit designated by the employer's selection criteria; and, (6) prior, rather than ad hoc, consideration of the issue of certainty as it bears on truth, and prior agreement on criteria for resolving uncertainties respecting individual qualifications.

made up, and that the evaluation is simply being used to rationalize, or lend legitimacy to, a prior determination.[133] In either event, sloppiness indicates that an employer is not evaluating individual merit actively and impartially, i.e., through self-scrutiny, self-transcendence, and with engagement.

The model for a practice of truthfulness is not a due process model. It imposes no requirement of adversarial, procedural fairness. It imposes no prohibition on the use of anonymous or confidential materials. It embodies no requirement that an employee be permitted to participate directly in an evaluation. These procedural features may indicate whether a particular evaluation embodied a practice of truthfulness, but they are not determinative of that question. For example, confidential materials and anonymous peer reviews are characteristic of some merit evaluations. As Professor Bok notes,[134] one may argue that confidentiality enhances the possibility for untruthfulness by removing accountability and a reviewer's need to justify his opinion to others,[135] eliminating the possibility of reaction and feedback, permitting people to become "mired down in stereotyped, unexamined . . . ways of thinking,"[136] and sanctioning a differentiation between insider and outsider that is at the heart of secrecy, and entails special perils for women and minorities.[137] She also notes, however, that secrecy may enhance truthfulness because it encourages evaluators to be candid.[138] Thus, although a due process model of evaluation might see secrecy as *per se* impermissible, the practice of truthfulness model does not. Secrecy is simply a factor to be considered in determining whether a particular evaluation has adhered to a practice of truthfulness.[139]

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133. S. BOK, LYING, *supra* note 68, at 7, 90 (some persons may tell lies or manipulate facts because they believe that they already know the broader truth, and their action is simply a noble lie, a pious fraud, perpetrated in a higher interest); *id.* at 9-10 (some persons may indicate by their deceitful conduct that they are skeptical about whether truth can really be known). *Cf.* M. MARTIN, *supra* note 69, at 63 (self-deception can be seen as an " 'original project' to avoid using rational standards for evidence").

134. S. BOK, SECRETS, *supra* note 69, at 25-26, 109-11.

135. *Id.* at 106 (this is especially problematic when secrecy is practiced by those already in power).

136. *Id.* at 25-26.

137. *Id.* at 109-10. *See also*, S. BOK, LYING, *supra* note 68, at 158.

138. S. BOK, SECRETS, *supra* note 69, at 18-24.

139. In my opinion, it should be a factor that requires careful scrutiny because of its potential dangers for untruthfulness. For example, Bok notes that gossip, informal communication about individuals that has no assurances of accuracy or reliability and that is frequently a vehicle for stereotypes, flourishes in an environment of secrecy. As she says,

Whether a particular pattern or aggregation of discrete failures of truthfulness actually amounts to a larger failure in the practice of truthfulness must be decided on a case by case basis. A practice of truthfulness may be compromised through any combination of discrete failures of truthfulness. For example, a single discrete failure respecting a matter critical to an evaluation may suffice, as may a number of aggregate failures that in themselves would be trivial. General sloppiness that gives rise to an inference that an employer was not impartial or interested in truth might also suffice. Since practices of truthfulness can take many forms, an assessment of a particular evaluation will require an understanding of the evaluative environment. Expert testimony can help provide this understanding, but the integrity of a merit review, as measured against the model of a practice of truthfulness, can be judged by non-experts.[140]

To assess the significance of discrete failures of truthfulness, a court must look to three factors. The first factor is that truthfulness imposes disparate burdens and consequences upon employer and employee. For the employee, a practice of truthfulness is a primary guarantee of impartiality and of opportunity to establish individual merit. To be deprived of that opportunity is to be deprived of an important right, a right to be engaged with, and to be taken seriously. Moreover, the consequences to an employee of a process that disregards truthfulness, as well as any unjustly adverse evaluation derived from the process, can be severe, long lasting, and difficult to fully remedy.[141] Conversely, it costs the em-

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"[g]ossip increases whenever information is both scarce and desireable." S. BOK, SECRETS, *supra* note 69, at 91, 95, 100.

140. Expert testimony might also be used to review the replicability of the ultimate judgment, based on facts and subsidiary judgments known to the evaluator at the time the judgment was made. The expert is not presenting evidence for the purpose of enabling a court to second-guess the decision-maker. Rather, the expert's evidence provides one clue regarding the completeness and certainty of the judgments generated by the employer's evaluative process. This issue bears on whether the employer's process qualifies as a practice of truthfulness. Compare the discussion of similar evidence in Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 1011 (Stevens, J., concurring) (the relevant causation inquiry is whether the same outcome would have been reached on the basis of the facts before the evaluator at the time the decision was made).

141. Consider the difficulty of providing full relief to an individual through a new review. A new review that is performed by the same employer who disregarded truthfulness in the first place, and that is inevitably tainted by whatever substantive matters and opinions were introduced in the first review, can hardly provide a fully effective remedy. In some instances, this reality may cause a court to award the job or promotion that has been denied due to discriminatory conduct, but this course of judicial action is relatively rare. *See, e.g.*, Hopkins v. Price Waterhouse, No. 90-7099 (D.C. Cir. Dec. 4, 1990); Brown v. Trustees of

ployer little to provide a full opportunity to each employee to establish merit and to be taken seriously. Adherence to a practice of truthfulness does not bind an employer to a particular disposition or ultimate judgment, either in favor of or adverse to any employee. The disparity in burdens and consequences should inform the determination of what constitutes a failure in the practice of truthfulness.

The second factor is that of wrongfulness. An employer who fails to adhere to a practice of truthfulness is a wrongdoer in a number of conventional senses. An employer's failure to adhere to the dictates of truthfulness can have profound and direct effects on the character of an employee's personal and professional relationships, and interferes with personal autonomy, choice, and expectations.[142] These consequences are similar to consequences viewed sufficiently wrongful, in and of themselves, to impose tort liability through, for example, actions for defamation.[143]

Moreover, in the absence of explanation, a failure to adhere to a practice of truthfulness in the evaluation of a woman or minority is wrongful in the same way that careless conduct in light of foreseeable consequences is wrongful. In some instances, a failure to adhere to a practice of truthfulness may be so blatant a disregard of probable consequences that it should even be equated with conscious discrimination. A failure to adhere to a practice of truthfulness may have both a temporal and patterned dimension (i.e., a repeated disregard for truthfulness) that simply does not comport with what we know will be the behavior of an impartial evaluator, an evaluator who assumes the potential worth of all persons. Given

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Boston University, 891 F.2d 337, 359-61 (1989), *cert. denied*, 110 S. Ct. 3217 (1990) (awarding job upon finding of discrimination by employer).

142. Bok endorses the notion that deception "leads lives astray." *See* S. BOK, LYING, *supra* note 68, at 20, 22-23; WOMEN AND MORAL THEORY, *supra* note 46, at 134-35. An employee who is led to believe that her job performance will influence an employer's evaluation of merit believes that she has some control over the course of her career through the choices she makes as an employee. Her autonomy of choice is destroyed if truthfulness is not adhered to in a merit evaluation. When expectations upon which prior choices have been based are invalid, an employee will experience an assault on personal autonomy and the integrity of personal choice. Lack of truthfulness in merit evaluations may falsify, retrospectively, an entire professional life.

143. The severity of the wrongfulness of lying is attested to in a compelling story told by Irina Ratushinskaya. A prisoner of the Soviet Gulag, asked to identify the worst deprivation she suffered, identified the lies told by those in authority. These lies caused the prisoners to experience the world as essentially irrational, an extremely harsh consequence for thinking persons. I. RATUSHINSKAYA, GREY IS THE COLOR OF HOPE 156-62 (1988).

what is known about the gender-disadvantaging aspects of informal review processes, a sufficient degree of what might otherwise appear only to be carelessness may compel one to infer what Niebuhr called "interested intelligence"[144] or, in other words, bad motive. The pattern and consistency that characterize a failure to adhere to a practice of truthfulness make it highly unlikely that the nature of the practice has escaped the employer's conscious notice. These conventional notions of wrongdoing should affect how one assesses failures in the practice of truthfulness.[145]

The third factor is the guarantee of opportunity. A practice of truthfulness guarantees opportunity. This is an important principle because it is predicated on an affirmation of the potential worth of each individual. Failure to adhere to a practice of truthfulness compromises a fundamental principle of egalitarianism, one worthy of the strictest protection. In fact, of all principles associated with non-discrimination mandates, opportunity is the one principle to which most individuals have an unequivocal commitment.[146] The generally acknowledged significance of the right at stake should affect how one assesses discrete failures in the practice of truthfulness.

CONCLUSION

As the foregoing argument suggests, a new way of looking at workplace discrimination emerges from the moral imagination. It can enrich existing legal constructs,[147] and suggest new definitions

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144. R. NIEBUHR, *supra* note 8, at 215. *See also*, THE BOOK OF THE SELF: PERSON, PRETEXT, AND PROCESS 27 (P. Young-Eisendrath & J. Hall eds. 1987) (one discovers how to evaluate motive by looking at actions and reactions, at the give and take that occurs between individuals over time); S. BOK, LYING, *supra* note 68. As Bok says, it is easy to tell one lie, and hard to tell only one. To be effective, a lie must be part of a construct that has internal consistency. If a lie does not fit with other information, it will be difficult to maintain. For that reason, one lie tends to generate supporting lies. *See id.* at 26, 64.

145. One might forcefully argue that failure of a practice of truthfulness provides a *prima facie* case of intentional discrimination under disparate treatment analysis. However, in addition to the traditional concerns over outcomes and criteria, one must slightly reorient the analysis to take into account processes and practices.

146. This commitment is expressed by lay persons and theorists. *See* Auerbach, *supra* note 102, at 1265; *see generally* J. RAWLS, *supra* note 55.

147. For example, it may encourage courts to take full advantage of the remedial purposes of Title VII to respond to denials of opportunity, and to reassess conventional distinctions between "technical" and "remediable" violations of Title VII. Restricted applications of "make whole" equitable remedies are not responsive to Title VII's substantive proscriptions regarding opportunity. *Cf.* Bibbs. v. Block, 778 F.2d 1318, 1321-22 (8th Cir. 1985) (*en banc*). In addition, understanding the link between truthfulness and discrimination may

of discrimination that may practically affect the lives of women and minorities. In the workplace, for example, it may help employers address subtle forms of discrimination. It may encourage employers to acknowledge that egalitarianism is not opposed to, but is perfectly consistent with, and even implicit in, the merit-based personnel systems that are predominant in workplace evaluations. It will make it difficult for decision-makers to avoid self-scrutiny, self-transcendence, and engagement.

The moral imagination does not, of course, remedy all non-discrimination doctrinal difficulties. Predictably, it even creates new analytical complexities. For example, if truthfulness is to influence interpretations of Title VII, it is clear that causation standards must be adapted to new definitions of discrimination that focus on opportunity.[148] The relationship between liability and remedy must be carefully considered in the context of denials of opportunity.[149] Burdens of proof must be appropriately allocated.[150] A concept of discrimination that focuses on practices of truthfulness must be fine-tuned through an analytical framework sensitive to different work environments and different consequences for various racial and gender groups in those environments.[151]

Despite the complexity of these issues, the moral imagination should be brought to bear, in a sustained way, on definitions of workplace discrimination. The individuals who bear the burdens of specific acts of discrimination, and who are deprived of an opportunity to compete on an even playing field, deserve the effort. They deserve the right to conditions that will compel a decision-maker's engagement with them. They deserve non-discrimination doctrines that enable them to challenge decisions at the level of individual

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help courts draw a distinction between discrimination suits that ask for second-guessing the ultimate judgment of merit, and suits asking only that judgments be supported by facts truly stated. Additionally, it may assist courts in identifying criteria or aspects of process that need special attention because they are particularly susceptible to unequal application. Finally, it may affect the evaluation of evidence of discrimination, and what inferences about questionable decisions will be drawn from evidence of an employer's attitudes toward truthfulness or from discrete instances of untruthfulness.

148. Price Waterhouse v. Hopkins, 490 U.S. 228, 237-38 (1989) (Brennan, J.).

149. *Id.* at 242-45 n.10.

150. Price Waterhouse, 490 U.S. at 270-79 (O'Connor, J. concurring).

151. The Supreme Court has stated that its conventional analytical frameworks should not be automatically applied to all forms of alleged discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

decision-making.[152] They deserve a definition of discrimination that commands the moral attention of others because it incorporates fundamental notions of right and wrong.

In *Parting the Waters*,[153] Taylor Branch describes the influence of Reinhold Niebuhr and, in particular, Niebuhr's *Moral Man and Immoral Society*,[154] on the civil rights strategies adopted by the Reverend Martin Luther King, Jr.[155] Niebuhr was concerned with political strategies intended to secure "an ethical social goal for society."[156] He proposed that political strategies be measured by two criteria: (1) whether they "[d]o justice to the moral resources and possibilities in human nature and provide for the exploitation of every latent moral capacity in man," and (2) whether they "take account of the limitations of human nature, particularly those which manifest themselves in man's collective behavior."[157]

It is worthwhile to step back from our current debates about the problem of discrimination, and take a look at how civil rights laws fare when measured against the criteria that apparently influenced Dr. King's political strategy. The moral imagination enables us to embark on this task.

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152. Problems of discrimination frequently become more manageable, less resistant to solution, when they are framed and treated as problems of individual relationships rather than as consequences of the actions of faceless institutions. Perhaps the problem of discrimination has remained intractable over the years because it has not been confronted at the level of individual, personal accountability. The methodological requirements of the moral imagination reinforce and bring to the fore the normative demand for engagement that is embodied in non-discrimination mandates. In that way, the moral imagination reinforces the substantive claim of women and minorities to be treated seriously, to be engaged with and responded to as individuals. Historically a prerogative of the powerful, R. NIEBUHR, *supra* note 8, at 177, the claim is itself an assertion of power that in subtle but important ways affects decisions. For example, those who claim a right to engagement are not required to assume the role of supplicant. *Cf.* Minow, *supra* note 9 (the role of supplicant compromises an otherwise excellent argument). One may argue that the moral imagination creates opportunities for engagement among women or minorities that defeat the isolating effects of discrimination and that will empower these groups. *See, e.g.*, K. BUMILLER, *supra* note 9, at 93 (suggesting that a moral framework is necessary to overcome the powerlessness of women victimized by discrimination); R. FOGEL, *supra* note 59 (discussing the way in which slavery—and by extrapolation, discrimination—prevents the development of community among its objects).

153. T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988).

154. *See* R. NIEBUHR, *supra* note 8.

155. T. BRANCH, *supra* note 153, at 83-87.

156. R. NIEBUHR, *supra* note 8, at xxiv.

157. *Id.* at xxiv-xxv.