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Against Immutability

ABSTRACT. Courts often hold that antidiscrimination law protects “immutable” characteristics, like sex and race. In a series of recent cases, gay rights advocates have persuaded courts to expand the concept of immutability to include not just those traits an individual cannot change, but also those considered too important for anyone to be asked to change. Sexual orientation and religion are paradigmatic examples. This Article critically examines this new concept of immutability, asking whether it is fundamentally different from the old one and how it might apply to characteristics on the borders of employment discrimination law’s protection, such as obesity, pregnancy, and criminal records. It argues that the new immutability does not avoid the old version’s troublesome judgments about which traits are morally blameworthy and introduces new difficulties by requiring problematic judgments about which traits are important. Ultimately, immutability considerations of both the old and new varieties distract from the aim of employment discrimination law: targeting unreasonable and systemic forms of bias.

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INTRODUCTION

Why is it illegal to discriminate on the basis of certain traits, like race or sex, but not others, like experience or beauty? One answer that has been offered in the context of the constitutional guarantee of equal protection is that certain human traits are immutable, meaning they were not chosen. This concept has long endured the scholarly criticism that it is “both over- and underinclusive.”¹ For example, it is permissible to discriminate on the basis of intelligence, which some say is innate, but not religion, which some say can be changed. In response to the argument that sexual orientation might be changed and is therefore undeserving of protection, gay rights advocates have persuaded many courts, perhaps even the Supreme Court, to adopt a different understanding of immutable characteristics.² Many courts now ask “not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon.”³ Or,

1. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 504 (1998).
2. In *Obergefell v. Hodges*, the Supreme Court observed that “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and *immutable*.” 135 S. Ct. 2584, 2596 (2015) (emphasis added) (citing Brief for American Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 7-17, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1004713 [hereinafter APA Brief]). The APA Brief did not argue that sexual orientation is never chosen, nor did it argue that sexual orientation cannot be changed. Rather, it argued that “[m]ost gay men and lesbians do not experience their sexual orientation as a voluntary choice,” and treatments aimed at changing sexual orientation “are unlikely to succeed.” Brief for American Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 8-9, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1004713 [hereinafter APA Brief]. The brief explained that sexual orientation “defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.” *Id.* at 10. The Court did not clarify precisely what it meant by the term “immutable,” nor did it state what role the immutability of sexual orientation might have played in its holding that the Constitution requires states to license and recognize same-sex marriages.
3. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013), *rev’d sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584. Many federal courts have adopted this new definition of immutability. See *Latta v. Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014) (“We have recognized that ‘[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.’” (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006))); *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014) (describing the immutability inquiry as looking for “some immutable or at least tenacious characteristic . . . (biological, such as skin color, or a deep psychological commitment, as religious belief often is . . .)”); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014) (holding that sexual orientation is “so fundamental to one’s identity that a person should

as another judge put it, “‘immutability’ may describe those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”⁴

The success of the revised version of immutability in the courts has given new life to a concept once thought dead and led scholars to apply the insight to other identities or traits that are not currently protected by antidiscrimination law.⁵ Scholars have been optimistic about the so-called “new immutability”⁶

not be required to abandon [it]” (quoting *Hernandez-Montiel*, 225 F.3d at 1093)); *Love v. Beshear*, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) (“As to immutability, the relevant inquiry is not whether a person *could*, in fact, change a characteristic, but rather whether the characteristic is so integral to a person’s identity that it would be inappropriate to require her to change it to avoid discrimination.”); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014) (“[R]egardless whether sexual orientation is ‘immutable,’ it is ‘fundamental to a person’s identity,’ which is sufficient to meet this factor.” (citation omitted)); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014), *aff’d sub nom.* *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (“[S]exual orientation is so fundamental to a person’s identity that one ought not be forced to choose between one’s sexual orientation and one’s rights as an individual—even if one could make a choice.”); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013) (“Even if sexual orientation were not immutable, sexual orientation is an integral part of personal identity.”); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) (“[A] person’s sexual orientation is so fundamental to one’s identity that a person should not be required to abandon it.”).

The Supreme Courts of California, Connecticut, Iowa, and New Mexico have also adopted this new definition for purposes of holding that sexual orientation is a suspect classification under their respective state constitutions. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (“[G]ay persons, because they are characterized by a ‘central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual’s sense of self,’ are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.” (citation omitted) (quoting *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev’d on other grounds*, 976 F.2d 623 (10th Cir. 1992))); *Varnum v. Brien*, 763 N.W.2d 862, 886-89 (Iowa 2009) (“[W]e agree with those courts that have held the immutability ‘prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].’” (quoting *Kerrigan*, 957 A.2d at 438)); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013) (“This [immutability] requirement cannot mean that the individual must be completely unable to change the characteristic. Instead, the question is whether the characteristic is so integral to the individual’s identity that, even if he or she could change it, would it be inappropriate to require him or her to do so in order to avoid discrimination?” (citations omitted)).

4. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring).
5. See, e.g., Sharon Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1531-37 (2011) (arguing that the new immutability re-

for its potential to expand those aspects of identity covered by antidiscrimination law.⁷

This Article offers the first sustained challenge to the new immutability.⁸ Despite the extensive attention the theory has received in judicial opinions and

quires protection against discrimination based on appearance, parental status, marital status, and political affiliation); Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 31 (2003) (lauding the new immutability for its potential to expand protection to transgender identity); cf. Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1482-83 (2011) (discussing polyamory in terms of whether it is “integral to an individual’s personal identity”).

6. “New” is somewhat of a misnomer, as the theory now being advanced in many same-sex marriage cases was identified by legal scholars as early as 1981. See *infra* note 111 and accompanying text. Although the theory is not of recent vintage, its rise to popularity in equal protection case law is a recent phenomenon.
7. See, e.g., Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL’Y & L. 169, 173 (2011) (approving of the new immutability for “mov[ing] toward an autonomy-based model . . . that is premised on a respect for human dignity, which protects critical constitutive aspects of personhood, and which allows courts to offer heightened scrutiny protection to groups whose public identities are often not obvious”); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014) (arguing that “[m]aybe we need a softer definition of immutability” to address discrimination on the basis of sex, transgender status, sexual orientation, and religion); Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 263 (2005) (arguing that “the soft immutability standard[] suggests great promise, and serves as a lodestar for LGBT litigants in other statutory and constitutional contexts”); Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1505 (2009) (applauding the new immutability, as formulated by the Connecticut Supreme Court, for “provid[ing] a means of graceful exit from the immutability morass in which equal protection analysis has become mired”); cf. Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 11 (2009) (arguing in favor of the new immutability for purposes of asylum law, while endorsing variants of the old for purposes of equal protection and Title VII); Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right To Choose “Immutable” Identity Characteristics*, 88 N.Y.U. L. REV. 373, 373 (2013) (arguing that the new immutability “resolves inconsistencies in traditional equal protection jurisprudence caused by a biological immutability standard and . . . harmonizes recent lower court opinions discussing race- and gender-related equal protection in an era of increased multiracial, intersex, and transgender visibility”).
8. Although scholars have not critically considered the latest wave of cases on the new immutability, see *supra* note 3 and accompanying text, Janet Halley was an early critic of the doctrine, referring to it as “personhood” immutability and arguing that it essentialized sexual orientation identity. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 519-21 (1994). This Article builds on Halley’s points, see *infra* Part II.B, and identifies additional normative and strategic objections to the theory.

While “academic critiques of the immutability doctrine fill volumes,” those critiques are primarily directed at the old version of immutability, which protected only traits a person could not change. See Richard Thompson Ford, *Bias in the Air: Rethinking Employment Dis-*

legal scholarship,⁹ no work has critically considered its broader implications for the development of antidiscrimination law. The evolution of immutability has important implications for antidiscrimination doctrine, as well as debates among the public, legislatures, and employers over whether to prohibit discrimination on the basis of various traits and identities. To assess the theory's potential and limits, this Article examines how arguments based in the revised version of immutability might play out with respect to characteristics on the borders of employment discrimination law's protection. It concludes that, while the new immutability has had success in constitutional litigation for LGBT rights, it is a questionable strategy for reconceptualizing the broader project of equality law. As a normative matter, the new immutability obscures critical questions about why some characteristics ought to be treated equally, offering only the empty assertion that they are fundamental to personhood. Rather than replacing the old theory of immutability, which entails problematic moral judgments about individual responsibility, the new version reinvigorates the ideology behind the old. As a strategic matter, the new immutability may backfire for groups advocating that new forms of bias be prohibited, because it creates line-drawing problems and justifies only limited forms of protection.

This Article is concerned with the migration of the new immutability from equal protection cases to new contexts, particularly the various statutes prohib-

crimination Law, 66 STAN. L. REV. 1381, 1418-19 (2014) (defending the old immutability). These critiques generally did not assess the revised version of immutability advanced in recent same-sex marriage cases. *See supra* note 3 and accompanying text. *But see* Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 633-35 (2014) (critiquing the old immutability and arguing that the new version is also problematic because it "is just not immutability in the standard sense of the term"). Moreover, prior work has been directed at advancing protection for "mutable traits commonly associated with race or sex," such as "racially identified hairstyles." *See Ford, supra*, at 1418. This Article looks at other frontiers of antidiscrimination protection that have generated recent legal controversies: weight, pregnancy, and criminal records.

A few scholars who applaud the new immutability have noted its limitations. *See, e.g.*, Landau, *supra* note 7, at 263 (recognizing that "[s]ome scholars might object that a soft immutability standard fails to adequately protect performative characteristics and that the only way to truly protect all transgender individuals is to jettison immutability altogether"); Enriquez, *supra* note 7, at 399 n.110 (noting there is a need for caution "when relying on such potentially subjective criteria as a court's conception of what is or is not fundamental to an individual's sense of self").

9. *See, e.g.*, Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377 tbl.1 (2014) (providing a "[d]escriptive [m]odel" listing eight criteria commonly associated with antidiscrimination protection, including, as the first factor, "[i]dentity beyond the individual's control or thought too deeply rooted to ask people to alter").

iting employment discrimination.¹⁰ While this Article suggests reasons to be skeptical of the new immutability in general, its intervention is not focused on equal protection doctrine or the same-sex marriage cases. Instead, it focuses on employment discrimination, not only because of the economic importance and profound social significance of the workplace,¹¹ but also because employment discrimination law has shown remarkable willingness to extend legal protections to new traits.¹²

As the role of immutability in the Supreme Court's equal protection jurisprudence has diminished, the concept has continued to have a strong influence and enduring explanatory force in employment discrimination law.¹³ While immutability is but one among many factors in equal protection doctrine,¹⁴ it often plays a determinative role in employment discrimination disputes. Courts use the old concept of immutability to limit the reach of employment discrimination statutes, narrowly construing what counts as discrimination based on

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10. As a general matter, concepts from equal protection contexts tend to migrate to the employment discrimination arena. *See infra* notes 151-153 and accompanying text.
 11. *See, e.g.*, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 4-5 (2000) (discussing the importance of "the workplace" as "a uniquely important site within a diverse democratic society that aspires to achieve integration and equality among the citizens but that recognizes limitations on the proper scope of regulation"); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1884 (2000) ("[T]he prospect of who we become as a society, and as individuals, is shaped profoundly by the laws that create and control the institutions that govern our experiences as workers.").
 12. Federal employment discrimination law protects a wide array of traits from discrimination. *See* 8 U.S.C. § 1324b(a) (2012) (certain immigration statuses); 29 U.S.C. § 158(a)(3) (2012) (union affiliation); 29 U.S.C. § 623 (2012) (age); 38 U.S.C. § 4311(a) (2012) (military service); 42 U.S.C. § 2000e(k) (2012) (pregnancy); 42 U.S.C. § 2000e-2(a) (2012) (race, color, religion, sex, and national origin); 42 U.S.C. § 2000ff-1 (2012) (genetic information); 42 U.S.C. § 12112(a) (2012) (disability). State and local laws often cover even more traits. *See, e.g.*, D.C. CODE § 2-1401.01 (2012) (personal appearance, familial status, family responsibilities, matriculation, political affiliation, source of income, and place of residence or business); KY. REV. STAT. ANN. § 344.040 (West 2015) (smokers); N.Y. EXEC. LAW § 291 (McKinney 2015) (sexual orientation and marital status). By contrast, the Supreme Court has long been reticent to extend any level of heightened scrutiny to classes other than illegitimacy, race, alienage, national origin, and gender, turning its focus instead to whether legislation is "rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).
 13. *See* Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 515 (2004) (explaining that, although the Supreme Court may be "retiring the immutability criterion" in equal protection cases, "[i]t is clear . . . from reading Title VII decisions . . . that the notion of immutability remains a persuasive ideological framework for many courts in the employment discrimination context").
 14. *See infra* notes 42-46 and accompanying text.

characteristics such as race, sex, and disability.¹⁵ The old immutability's pervasive influence on employment discrimination law suggests that the new version might have obvious applications there as well.¹⁶ This Article considers how the new immutability might play out in controversies over whether the law forbids employment discrimination based on obesity,¹⁷ pregnancy,¹⁸ and criminal records.¹⁹ Despite plausible statutory arguments for covering these types of discrimination, courts often refuse to extend protection.²⁰

In these contexts, the old immutability's argument that these traits were chosen lies at the heart of courts' refusals to extend familiar forms of antidiscrimination protection.²¹ The old immutability assumed that certain traits, like race and sex, were not blameworthy on account of being "accidents of birth."²² The corollary is that traits for which an individual is accountable, in some sense, are appropriate bases for discrimination.²³ This reasoning may be prem-

15. See *infra* note 149 and accompanying text.

16. See Hoffman, *supra* note 5, at 1537 ("Immutability is the common thread that runs through the fabric of the employment discrimination statutes."). Courts have on occasion employed a test that resembles the new version of immutability in interpreting employment discrimination statutes. See *infra* note 148 and accompanying text.

17. See, e.g., Sibilla v. Follett Corp., No. CV 10-1457(AKT), 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012) (holding that, despite recent revisions to the Americans with Disabilities Act to make it easier for a plaintiff to prove she is "disabled," obesity is not a disability unless the plaintiff can prove her obesity was the result of a physiological disorder).

18. See, e.g., Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354-55 (2015) (addressing whether an employer must accommodate pregnancy-related disabilities if it accommodates a subset of other, non-pregnancy related impairments).

19. See, e.g., U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2012) [hereinafter EEOC ARREST AND CONVICTION RECORDS GUIDANCE], http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [<http://perma.cc/557L-N5L7>] (advising that the use of arrest and conviction records to screen out job applicants may be illegal discrimination).

20. With respect to obesity, the Americans with Disabilities Act of 1990 forbids an employer from discriminating against someone regarded as having a physical impairment that is not transitory and minor. See *infra* notes 293-300 and accompanying text. The Pregnancy Discrimination Act of 1978 requires employers to accommodate pregnant workers to the same extent that they do nonpregnant workers who are similarly unable to work. See *infra* note 344 and accompanying text. Blanket exclusions of job applicants with criminal records may violate Title VII of the Civil Rights Act of 1964, which forbids employment practices that have a disparate impact on a minority group. See *infra* notes 425-431 and accompanying text.

21. See *infra* notes 300-311, 339-382, 446-449 and accompanying text.

22. See *infra* notes 50-71 and accompanying text.

23. To be sure, immutability may not be a necessary factor in equal protection law. See *infra* text accompanying note 55. But for immutability to have any force as a factor, it must in the very

ised on the moral intuition that discrimination against those who are blameworthy is fair. Or it may rest on the unstated assumption that the law should create incentives for good (or efficient) behavior by allowing discrimination on the basis of certain bad (or costly) choices. For instance, discrimination based on weight often goes unredressed by the law because obesity is commonly thought to be a mutable trait that may be prevented or ameliorated through adjustments to lifestyle and diet.²⁴ Judges may refuse to require that employers accommodate pregnancy because they believe that women who make private reproductive choices ought to bear the costs.²⁵ Employment discrimination on the basis of criminal records is thought to be fair as a collateral consequence of conviction.²⁶ The judgments underlying these views are often harsh, intrusive, and stigmatizing. Yet these moral and economic judgments lie below the surface of policy and legal doctrine and are rarely interrogated or theorized. Is obesity more morally blameworthy than heart disease, which is protected from discrimination despite having behavioral components? Should pregnant women alone bear the costs of pregnancy? Should those with criminal records be shunned from all employment opportunities?²⁷

The new immutability is no better than the old on these questions. It fails to provide a theoretically satisfying basis for understanding which characteristics deserve protection and invites normatively problematic judgments that are at odds with the purposes of antidiscrimination law. While the old immutability assumed that certain traits might be blameworthy because they were chosen, the new immutability's appeal to "personal identity" masks underlying moral assessments about which traits, while entailing some degree of choice, ought not be blameworthy.²⁸ These estimations may be unfair and irrelevant to employment. But by softening the edges of immutability theory to render it more appealing, the new immutability shields problematic judgments from

least be true that we think discrimination is more likely to be legitimate to the extent that an individual bears more responsibility for a trait. See *infra* notes 79-82 and accompanying text.

24. See, e.g., Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 211 (2010) (positing that "one of the reasons obesity is not considered a disability is because we blame the obese person for being fat. We see fat people as responsible for their physical condition and, therefore, assume that their obesity is voluntary.").
25. See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 417-18 (2011).
26. See, e.g., Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 932 (2014).
27. The EEOC has not taken the position that employers may never consider applicants' criminal histories; rather, it has advised that blanket exclusions of applicants with criminal records may violate Title VII if not justified by a business necessity. See *infra* text accompanying notes 427-431.
28. See *infra* Part II.A.

scrutiny. Moreover, the new immutability's focus on valued traits leaves out many stigmatized identities—identities that might have the strongest claims to protection precisely because judgments based on them are superficial and perpetuate systemic subordination.²⁹ For example, many people would dispute that weight is a central part of identity, and most people would prefer to change their weight if they could.³⁰ (And many would dispute that even sexuality, sex, and race are, or ought to be, central to personhood.³¹) Even worse, to argue a trait is fundamental to personality is to bolster the argument that it cannot change.³² The suggestion that criminal records are central to personality would lend support to employer beliefs that automatic exclusion of all those with criminal records will help avoid workplace crime.³³ In this way, the new immutability reinforces stereotypes of the sort that antidiscrimination law is intended to disrupt.

Nor does the new immutability clear a path toward legal protection for new characteristics. The new immutability protects traits that are fundamental to a person's identity.³⁴ But defining what makes a trait fundamental is not easy, giving rise to judicial anxiety that protecting new identities might lead down a slippery slope to protecting all variations in personality.³⁵ For example, judicial opinions on whether obesity is a protected disability demonstrate that courts are likely to resist extending protection for weight if the question is framed as a right to personality, because, these courts reason, every aspect of an individual's appearance might be said to be central to personality.³⁶ Additionally, the protection offered by the new immutability may be sparse. The new immutability draws on the ideas of liberty and privacy, but protections for liberty and privacy are often limited to rights against state interference, rather than the full set of antidiscrimination remedies.³⁷ Finally, the new immutability invites intractable conflicts among groups asserting that certain choices are fundamental to their identities, such as between women seeking insurance coverage for contraception and employers whose religious beliefs do not countenance non-procreative sex.³⁸

29. See *infra* Part II.B.

30. See *infra* notes 322-325 and accompanying text.

31. See *infra* notes 202-208, 214 and accompanying text.

32. See *infra* Part II.C.

33. See *infra* notes 433, 458-460 and accompanying text.

34. See *supra* note 3 and accompanying text.

35. See *infra* Part II.D.

36. See *infra* notes 332-335 and accompanying text.

37. See *infra* Part II.E.

38. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014); *infra* Part II.F.

While the new immutability may have been a useful doctrinal workaround for courts seeking to expand equal protection to sexual orientation, it is not a fruitful way to reimagine the law of equality in every context. Asking whether a characteristic is immutable, in either the new or old sense, focuses attention on the victims of discrimination and their blameworthy or costly choices, rather than the systemic effects of biases that are not required for the workplace to function. Immutability is a poor fit for employment discrimination law because it measures a person in the abstract, not that person's qualifications for a particular job.³⁹ It also fails to call attention to how certain biases, when compounded, can result in caste-like social structures, leading to wholesale disadvantages or constrained opportunities based on identity.⁴⁰

This Article proceeds in four parts. Part I describes the revised theory of immutability, discussing its origins in equal protection jurisprudence, its evolution in recent gay rights cases, and its emergence in employment discrimination law. Part II raises several normative and tactical objections to the revised immutability. It argues that even when revised, immutability is a harsh and intrusive moral theory. The new immutability's protections for "personhood" exclude the most stigmatized, and its underlying premises reinforce stereotypes. Practically, the new immutability fails to give courts a principled basis for distinguishing between those traits that deserve protection and those that do not. It cannot justify transformative interventions into discriminatory social practices, and it invites conflicting equality claims. Part III applies these objections to current controversies in employment discrimination law. It discusses how the old immutability limits the law's reach in the weight, pregnancy, and ex-offender discrimination contexts, and how the new immutability also fails to capture the wrong of these forms of discrimination. Part IV analyzes two alternatives to immutability arguments in the employment discrimination sphere: specifically, universal approaches that seek to enhance fairness for all workers, and targeted approaches that address systemic and superficial barriers to opportunity. It argues for targeted, incremental expansion of employment discrimination law, along with explicit scrutiny of the moral judgments behind immutability arguments of any stripe.

39. *Cf.* *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) ("Far from disparaging job qualifications as such, [by enacting Title VII] Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.").

40. *See infra* Part IV.B.

I. THE REVISED THEORY OF IMMUTABILITY

This Part discusses the original reasoning behind the immutability factor in equal protection doctrine, describes objections to that theory, and explains how the immutability factor has been transformed by lower courts in gay rights cases. This Article’s primary intervention, however, is not aimed at equal protection doctrine. Rather, this Article aims to demonstrate problems with the theory of immutability as a general test of what traits ought to be protected against discrimination, by looking at its applications in a specific context: employment discrimination law. It examines the equal protection cases to excavate the justifications for the assumption that immutable traits deserve protection, to connect those arguments to moral theories about egalitarianism, and to critique those arguments as applied to specific controversies in employment discrimination law. While this analysis may also suggest directions for constitutional law, this Article leaves those questions for another day. This Part will describe the revised immutability and how it attempts to address the principal objections to the old.

A. Two Concepts of Immutability

1. Protection from Chance

This Part will discuss the “old” concept of immutability as chance, luck, or an “accident of birth,” as that idea arose in the Supreme Court’s equal protection jurisprudence. Other scholarly treatments of this subject have examined immutable traits defined as those characteristics that cannot be changed.⁴¹ This account examines another definition of immutable traits: characteristics for which an individual is not responsible. It will then connect that concept of immutability with the moral theories of egalitarianism that might support it, an exercise that reveals a number of objections to the old immutability. This Part will discuss those objections and conclude by describing the demise of the old immutability in Supreme Court jurisprudence.

To begin, the Supreme Court has mentioned immutability as one of several factors that might be relevant to the question of whether a legislative classifica-

41. See Ford, *supra* note 8, at 1418-19; cf. Yoshino, *supra* note 1, at 487 (criticizing the immutability factor for “subtly encouraging groups . . . to assimilate by changing or hiding their defining characteristic”).

tion based on a particular trait deserves heightened scrutiny by the courts.⁴² For instance, the Court has referred to immutability alongside “visibility” — whether a group “exhibit[s] obvious . . . or distinguishing characteristics that define [it] as a discrete group.”⁴³ The Court has considered other independent factors as well, including whether the class has “experienced a ‘history of purposeful unequal treatment,’”⁴⁴ whether it has “been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of [its] abilities,”⁴⁵ and whether it is “in need of extraordinary protection from the majoritarian political process.”⁴⁶

The Supreme Court has referred to immutable traits simply as those that their “possessors are powerless to escape or set aside.”⁴⁷ But the concept of immutability is deeply rooted in notions of individual responsibility, referring not just to traits that cannot be changed, but also traits that were never chosen.⁴⁸ The term “immutable characteristic” first appears in the Supreme Court’s equal protection jurisprudence in *Frontiero v. Richardson*, a case striking down policies that discriminated on the basis of sex by providing more benefits to the wives of male military servicemembers than to the husbands of female servicemembers.⁴⁹ A plurality of the Court reasoned:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex

42. The Court has analyzed legislative classifications based on three levels of scrutiny: rational basis, intermediate, and strict, ratcheting up its scrutiny of the state’s motives as the suspectness of the classification increases. See Yoshino, *supra* note 1, at 487-89.

43. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

44. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

45. *Id.*

46. *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

47. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part) (“[R]ace, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside.” (citation omitted)); *cf.* *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (holding that conscientious objectors lacked an “immutable characteristic determined solely by the accident of birth” (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion))).

48. A trait may be impossible to change and yet chosen by an individual, such as criminal records. See Helfand, *supra* note 7, at 5-8 (discussing the confusion over three different definitions of immutable characteristics: traits that have not been chosen, traits that cannot be changed, and traits that no one should have to change).

49. *Frontiero*, 411 U.S. at 678-79.

would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility”⁵⁰

To support this conclusion, the *Frontiero* plurality cited *Weber v. Aetna Casualty & Surety Co.*, a case with facts that starkly illustrate the unfairness of accidents of birth.⁵¹ In *Weber*, death benefits under a workers’ compensation scheme had been denied to a deceased man’s children because those children were “illegitimate.”⁵² The Court held:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.⁵³

Immutability is therefore not confined to biological traits; as this legitimacy example demonstrates, social categories too may be assigned at birth.⁵⁴

To be sure, the Court has not held that immutability is necessary⁵⁵ or sufficient⁵⁶ to turn a classification suspect. But even when the Court has refused to

50. *Id.* at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Immutability alone was not sufficient. The plurality opinion goes on to say: “[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” *Id.*

51. *Id.*

52. *Weber*, 406 U.S. at 165.

53. *Id.* at 175.

54. *Cf.* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1381 (1999) (arguing that the Supreme Court understands race as “the product of social and political institutions” and that this “nonbiological understanding of race compels the conclusion that the immutability standard is not grounded in understandings of biological variation”).

55. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (treating alienage as a suspect classification, even though alienage may sometimes be changed through naturalization).

56. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985) (refusing to treat the “class of the mentally retarded” as “quasi-suspect,” on the ground that there is no “principled way” to distinguish this group from others with “immutable disabilities”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (denying suspect-class status to age, a trait generally thought to be outside an individual’s control, in holding that a statute setting a mandatory retirement age of fifty for police officers survived rational basis review).

hold that a group with an immutable characteristic is a “suspect class,” it has been solicitous in its application of rational basis review toward the rights of those deemed innocent.⁵⁷ In *Plyler v. Doe*, the Court struck down a Texas statute excluding undocumented immigrant children from public education.⁵⁸ While the Court acknowledged that “undocumented status” is not “an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action,” it nevertheless concluded that the law in question “imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”⁵⁹ This type of unfairness “suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”⁶⁰ In *City of Cleburne v. Cleburne Living Center*, the Court confronted a Texas city’s ordinance denying a permit for the operation of “a group home for the mentally retarded.”⁶¹ The Court held that the group did not have suspect class status, but went on to quote John Hart Ely: “Surely one has to feel sorry for a person disabled by something he or she can’t do anything about”⁶² The Court struck down the ordinance.⁶³

Immutable characteristics, defined as “accidents of birth,” are suspect to the Court because they bear no relationship to individual responsibility.⁶⁴ As a practical matter, the law is unlikely to deter private conduct by discriminating on the basis of accidents of birth because their bearers did not choose, or may be powerless to change, these immutable traits.⁶⁵ The term “accident,” then, is

57. The Supreme Court has occasionally deviated from the ordinary standard of rational basis review to apply what scholars have called “rational basis ‘with bite.’” See Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 331-35 (2013) (contrasting cases that apply the ordinary standard of rational basis review with those said to apply rational basis “with bite”).

58. *Plyler v. Doe*, 457 U.S. 202 (1982).

59. *Id.* at 220.

60. *Id.* at 216 n.14.

61. 473 U.S. at 435. The term “the mentally retarded” was used by the Supreme Court and reflected common usage at the time.

62. *Id.* at 442 n.10 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980) (alteration in original)). I note that Ely was a critic of the immutability factor. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980).

63. *Cleburne*, 473 U.S. at 450.

64. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972).

65. *Id.* at 175.

used in the moral sense, as the opposite of a matter for which one is accountable.⁶⁶

This moral concept has powerful intuitive appeal. It is linked to notions of childhood innocence, eliciting empathy for those who were blameless in their misfortunes and evoking disdain for those who obtained their privilege without merit. The phrase “accident of birth” has a long philosophical pedigree, and was an important theme in the writing of John Stuart Mill on sex and race equality in the nineteenth century.⁶⁷ Mill wrote:

If it be said that . . . virtue is itself the greatest good and vice the greatest evil, then these at least ought to be dispensed to all according to what they have done to deserve them; instead of which, every kind of moral depravity is entailed upon multitudes by the fatality of birth; through the fault of their parents, of society, or of uncontrollable circumstances, certainly through no fault of their own.⁶⁸

More recent philosophical work has developed this intuition – that individuals should not be responsible for chance occurrences – into a theory of distributive justice called “luck egalitarianism.”⁶⁹ An extreme version of this theory would justify widespread redistribution.⁷⁰ A more limited version undergirds the notion of immutability operative in equal protection doctrine – that the Constitution calls for scrutiny of government classifications that burden those whose fault is only in their stars.⁷¹

66. It is not used in the ontological sense of being the opposite of an essential characteristic. Cf. Herbert Spiegelberg, ‘*Accident of Birth*’: A Non-Utilitarian Motif in Mill’s Philosophy, 22 J. HIST. IDEAS 475, 476 (1961) (discussing John Stuart Mill’s use of the concept).

67. See *id.* at 476-80. The phrase also appears in nineteenth-century literature. William Makepeace Thackeray’s novel *Vanity Fair* tells the story of young William Dobbin, who was the victim of schoolyard taunting related to his father’s lower-class occupation as a grocer. WILLIAM MAKEPEACE THACKERAY, *VANITY FAIR* 54 (John Carey ed., Penguin Classics 2003) (1848). But after Dobbin bested the school bully in a fight, “[i]t was voted low to sneer at Dobbin about this accident of birth.” *Id.*

68. JOHN STUART MILL, *THREE ESSAYS ON RELIGION* 36 (Prometheus Books 1998) (1874).

69. See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999) (coining the term “luck egalitarianism”).

70. JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 37, 49-50 (2014) (arguing that luck egalitarianism would require policies that make everyone’s developmental opportunities equal at every stage of life, including policies to redistribute the advantages certain children receive from having parents with more resources).

71. The allusion is to William Shakespeare. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 1, sc. 2, at 41 (William Rosen & Barbara Rosen eds., Signet 1963) (1599) (“The fault, dear Brutus, is not in our stars / But in ourselves, that we are underlings.”). Apart from egalitarian ideals, the immutability factor has been justified on political process

Luck egalitarianism is subject to a number of criticisms that might also be applied to the use of immutability as a criterion for antidiscrimination protection. These include problems distinguishing between chance and choice, as well as the theory's harshness, its intrusiveness, and its stigmatizing effects.

Problems Distinguishing Between Chance and Choice. First, critics argue that luck egalitarianism rests on a thin notion of choice, as distinguished from chance. Luck egalitarians struggle to draw a principled line between merit and luck: talents, aptitudes, and even the motivation to work hard may be just as much accidents of birth as race or sex.⁷² One need not believe free will is an illusion to agree that what may seem a free choice from a privileged perspective may seem predetermined by socioeconomic circumstances from a disadvantaged one. What appears merit may be luck, as privileged families transmit myriad advantages to their children.⁷³ And the "irresponsible" choices on which luck egalitarians would rest moral responsibility may not, upon closer examination, turn out to be "informed, voluntary, uncoerced, and deliberated upon."⁷⁴ Moreover, there are good reasons to question impulses to assign individual agency for certain traits but not others. Social science research demonstrates spontaneous "blame validation" effects in which observers tend to over-attribute volition and causation to individuals they have already implicitly judged as morally culpable.⁷⁵

grounds. See Yoshino, *supra* note 1, at 506-07. The political process argument is that immutable groups require special protection from the judiciary against disfavor by other branches of government, because immutable groups cannot change their stripes to achieve political influence. See *id.* at 507-08. I do not analyze political process theories here because this Article aims to intervene in debates about which forms of employment discrimination deserve scrutiny by legislatures, employers, and courts interpreting statutes, not the question of when judicial intervention in the political process is warranted.

72. See FISHKIN, *supra* note 70, at 59.

73. See *id.* at 48-55.

74. I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 274 (2013); see also Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 18 (2003) ("[I]n any ordinary sense of 'voluntary,' people's voluntary choices are routinely influenced by unchosen features of their personalities, temperaments, and the social contexts in which they find themselves.").

75. See, e.g., Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 558 (2000) (discussing "blame validation" effects); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1204 (1995) (summarizing research on biases in causal attribution); Dean Pettit & Joshua Knobe, *The Pervasive Impact of Moral Judgment*, 24 MIND & LANGUAGE 586, 589 (2009) (concluding that "people's moral judgments are somehow influencing their intuitions as to whether or not an agent acts intentionally" (citations omitted)). More troublingly, psychologists have described a "tendency to blame victims for their misfortunes," as when participants in a study blamed a student they observed receiving electric shocks. Alicke, *supra*, at 566 (discussing Melvin J. Lerner & Carolyn H. Simmons, *The Ob-*

Harshness. A second criticism is that luck egalitarianism is harsh. On a pure version of the theory, an uninsured driver who is at fault for an accident should not be granted emergency medical assistance.⁷⁶ If the driver survives and is disabled, society has no obligation to accommodate her disability.⁷⁷ The theory distinguishes between “the deserving and the undeserving disadvantaged,” and abandons the latter, even if her circumstances are catastrophic.⁷⁸ It is not concerned with providing second chances, opportunities to correct mistakes, or paths to redemption.

It is no answer to these criticisms to say that some traits, like intelligence, are often relevant to legitimate purposes while others, like race, are usually not. As Ely put it: “At that point there’s not much left of the immutability theory, is there?”⁷⁹ Equal protection jurisprudence generally asks the question of a trait’s relationship to a governmental objective only after deciding the extent to which the classification is suspect and deserving of special scrutiny.⁸⁰ Likewise, employment discrimination law generally asks whether a trait was related to the job, but this inquiry is only necessary if the plaintiff has shown that the employer discriminated on some prohibited basis.⁸¹ The relevance of the trait to a particular purpose does all the work in the analysis, and immutability has no

server’s Reaction to the “Innocent Victim”: Compassion or Rejection?, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966)). Alicke explains, “Victim blame serves, at least symbolically, to restore a sense of justice, whereas ascribing harm to impersonal environmental forces sustains the belief that bad things can happen randomly to blameless people.” *Id.* at 566 (citing Camille B. Wortman, *Causal Attributions and Personal Control*, in 1 NEW DIRECTIONS IN ATTRIBUTION THEORY 23 (John H. Harvey et al. eds., 1976)).

76. Anderson, *supra* note 69, at 295.

77. *See id.* at 296. Luck egalitarians might qualify their arguments, admitting, for example, that “some outcomes are so awful that no one deserves to suffer them, not even the imprudent.” *Id.* at 301. But this argument is not supported by the theory behind luck egalitarianism; it must be supported by some other moral theory. *See id.*

78. *Id.* at 311.

79. ELY, *supra* note 62, at 150.

80. *See* Yoshino, *supra* note 1, at 487 (“Under current equal protection doctrine, the question of whether a classification deserves heightened scrutiny precedes the question of whether the legislation is sufficiently related to its objective.”). *But see supra* note 45 and accompanying text (discussing how a history of inaccurate stereotypes regarding a group’s abilities is a factor in favor of suspect class status).

81. 42 U.S.C. § 2000e-2(e)(1) (2012) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [a protected trait other than race] in those certain instances where [that trait] is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business”); *id.* § 2000e-2(k)(1)(A)(i) (providing that an employer is liable for a policy that creates a disparate impact on the basis of a protected trait if the plaintiff demonstrates the disparate impact and the employer fails to demonstrate “that the challenged practice is job related for the position in question and consistent with business necessity”).

bearing, unless we imagine that irrelevant traits are more suspect when they are immutable, and less suspect when they are mutable. But to endorse the idea that the state might discriminate on the basis of irrelevant traits just because they are mutable is to justify all forms of “state-sponsored cultural conformity and assimilationism.”⁸² Thus, immutability arguments allow those in power to require stifling conformity to conventional norms.

Intrusiveness. This observation points to a third objection to luck egalitarianism: intrusiveness. Luck egalitarianism requires “moralizing judgments of individual choices” that “interfere[] with citizens’ privacy and liberty.”⁸³ “[I]n order to lay a claim to some important benefit, people are forced to obey other people’s judgments of what uses they should have made of their opportunities”⁸⁴ This intrusiveness objection resonates with the concerns of scholars critical of immutability as a forward-looking concept (as inability to change), rather than a backward-looking one (as lack of responsibility). Kenji Yoshino has argued that the immutability factor reflects an “assimilationist bias,” allowing government policies to create incentives for those who can “change or conceal their defining trait” to conform to mainstream expectations.⁸⁵ According to Yoshino, one problem with the immutability factor is that it transforms the “descriptive claim that a group *can* assimilate . . . into the prescriptive claim that it *should* assimilate without much intervening investigation by the courts into the legitimacy of the legislation.”⁸⁶ For instance, “Jews generally can change or conceal their religion, while blacks generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation.”⁸⁷ This example demonstrates how immutability arguments deflect attention from questions about the extent to which religious coercion is a legitimate pursuit for governments or employers. Likewise, immutability arguments focused on past responsibility deflect attention from questions about whether those in power have legitimate reasons for imposing moralizing judgments on citizens or employees.

Stigma. A fourth criticism responds to the argument that law might appropriately disincentivize or deter mutable, but not immutable, traits. Whether discrimination is an effective means of incentivizing behavior is an empirical

82. Halley, *supra* note 8, at 508-09.

83. Anderson, *supra* note 69, at 310 (emphasis omitted).

84. *Id.*

85. Yoshino, *supra* note 1, at 490.

86. *Id.* at 506.

87. *Id.* at 505.

question, but it is rarely examined as such.⁸⁸ Discrimination may be intended to change behavior by shaming individuals possessing a certain trait.⁸⁹ Whether shaming is generally effective in shaping behavior, as an empirical matter, is disputed and depends on context.⁹⁰ In discrimination contexts, there are reasons to doubt whether adverse treatment of those with mutable traits would be effective in shaping behavior. Rather than giving people incentives to take personal responsibility, an immutability requirement may instead put people to the disempowering task of proving they were victims of circumstances beyond their control.⁹¹ For example, an individual staking a claim to disability benefits must tell a story of misfortune that convinces adjudicators it is impossible for her to work through no fault of her own. And in the process, she must disclaim whatever abilities, competences, and hopes of returning to work she might have.⁹² Additionally, an immutability requirement stigmatizes some traits for which an individual certainly bears some responsibility, leading those individuals to dissemble about their status, conceal the trait, or avoid seeking needed assistance.⁹³

Apart from these utilitarian considerations, many egalitarians oppose shaming practices as being “characteristic of hierarchical relationships.”⁹⁴ Shaming penalties have historically been employed to reaffirm class relation-

88. The question is more often examined as an expressive or moral one. Consider *Weber*, which held it was “ineffectual” to penalize illegitimate children for their parents’ sins. *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972). *Weber* cites no evidence in support of this proposition, and common experience suggests many potential parents would just as likely be deterred by the threat of harm to their children as by the threat of harm to themselves. Likely, the court did not investigate this empirical question, because whatever the outcome, it was “unjust” for the law to express its “condemnation of irresponsible liaisons beyond the bonds of marriage . . . on the head of an infant.” *Id.*

89. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 287-96 (2004) (discussing how discrimination often imposes shame).

90. See, e.g., Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 754 (1998) (“The most one can say for now is that shaming penalties can deter some offenders some of the time, even if they don’t deter optimally.” (footnotes omitted)); Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2089 (2006) (discussing controversy over his empirical claim that in criminal law contexts, “shame would, or at least might, work”).

91. Anderson, *supra* note 69, at 311.

92. See, e.g., Spencer Rand, *Creating My Client’s Image: Is Case Theory Value Neutral in Public Benefits Cases?*, 28 WASH. U. J.L. & POL’Y 69, 77 (2008) (“In Supplemental Security Income (‘SSI’) and Social Security Disability cases, clients must testify to their own failings and their lack of hope of ever overcoming those failings to show that they are not just trying to beat the system.”).

93. See Cohen, *supra* note 74, at 274.

94. Kahan, *supra* note 90, at 2086-88.

ships and reinforce the shamed person's subordinate status.⁹⁵ Martha Nussbaum has distinguished shame, which is about actors, from guilt, which is about acts, arguing that "whereas shame focuses on defect or imperfection, and thus on some aspect of the very being of the person who feels it, guilt focuses on an action (or a wish to act), but need not extend to the entirety of the agent"⁹⁶ While the criminal law may appropriately determine guilt and assign punishment, shaming is a form of "mob justice" in which the public punishes offenders in ways that are "not the impartial, deliberative, neutral justice that a liberal-democratic society typically prizes."⁹⁷ Stigmatizing practices go beyond expressing disapproval of a particular act or behavior to impose a "spoiled identity" on their targets.⁹⁸ One feature of stigma is that people "tend to impute a wide range of imperfections on the basis of the original one."⁹⁹ Thus, "[t]he harm of stigma is that a single perceived characteristic is seen as 'disqualifying' the whole person, excluding him or her from membership in the community that calls itself the 'normals.'"¹⁰⁰ As a result of this exclusion, empathy for the stigmatized group breaks down.¹⁰¹ Those targeted by shaming practices often internalize stigma, coming to believe themselves to be deficient.¹⁰² Antidiscrimination law has long been concerned with practices that assign stigmatized identities to individuals based on certain traits or behaviors, and then shame and disparage those individuals as less deserving of equal respect or consideration.¹⁰³

95. See *id.* (discussing how corporal punishment, as a "shaming" penalty, was historically a way "that sovereigns disciplined subjects, masters disciplined slaves, parents disciplined children, and husbands disciplined wives," with members of upper classes often exempt).

96. NUSSBAUM, *supra* note 89, at 207.

97. *Id.* at 233-34 (discussing James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998)).

98. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2-3 (1963) (arguing that a stigmatized person is "reduced in our minds from a whole and usual person to a tainted, discounted one").

99. *Id.* at 5.

100. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 286 (1995).

101. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983).

102. GOFFMAN, *supra* note 98, at 7 ("Shame becomes a central possibility, arising from the individual's perception of one of his own attributes as being a defiling thing to possess, and one he can readily see himself as not possessing.").

103. See, e.g., 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 128-29 (2014) (reading the distinctive wrong of school segregation in *Brown v. Board of Education* to be institutionalized humiliation); see also NUSSBAUM, *supra* note 89, at 174-76 (arguing that "law should protect the equal dignity of all citizens, both by devising ways in which those already stigmatized as different can enjoy lives of greater dignity and by refusing to make law a

In the 1980s and 1990s, a number of courts confronted the question of whether sexual orientation classifications violate the Equal Protection Clause. Most upheld these classifications based, at least in part, on the logic that homosexuality was “behavioral” rather than immutable.¹⁰⁴ During this time, the concept of immutability was under attack by scholars and judges.¹⁰⁵ The courts, including the U.S. Supreme Court, began citing academic criticisms of immutability¹⁰⁶ and omitting it as an express consideration in equal protection analysis.¹⁰⁷ Over the last two decades, the Supreme Court’s equal protection cases have seldom mentioned immutability.¹⁰⁸ A notable exception is the brief reference to sexual orientation’s immutability in *Obergefell v. Hodges*, the Supreme Court’s landmark 2015 same-sex marriage opinion.¹⁰⁹

2. *Protection for Choice*

Despite the Supreme Court’s move away from immutability in the decades prior to *Obergefell*, that concept enjoyed a substantial resurgence in the equal protection jurisprudence of lower federal and state courts.¹¹⁰ These courts reformulated the immutability factor in same-sex marriage cases. This Part will describe those cases and discuss how this new concept of immutability attempts to respond to the objections to the old.

It is important to note that the new immutability is “new” only in the sense that its rise to prominence is recent. As early as 1981, Douglas Laycock argued

partner to the social infliction of shame”); Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3046-47 (2014) (arguing that discrimination is wrong when it is an exercise of power that “demeans” a person or people by “express[ing]” that they “are less worthy of equal concern or respect”).

104. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

105. See Halley, *supra* note 8, at 509-10; Yoshino, *supra* note 1, at 490-91, 490 n.14.

106. See Yoshino, *supra* note 1, at 490 & n.15; *supra* note 62 and accompanying text.

107. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24-28 (1973).

108. *But see Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality opinion) (describing “[p]olitical affiliation” as mutable); *Nguyen v. INS*, 533 U.S. 53, 83 (2001) (O’Connor, J., dissenting) (citing precedent holding that sex classifications require heightened scrutiny because sex is an immutable attribute).

109. See *supra* note 2 and accompanying text. *Obergefell* rested on the interaction of due process and equal protection principles; it did not hold that sexual orientation classifications are generally suspect and it did not specify the role that sexual orientation’s immutability played, if any, in its analysis. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

110. See *supra* note 3 and accompanying text.

that “some characteristics should be treated as immutable because of fundamental interests in not changing them,” such as sex and religion.¹¹¹ The new immutability began gaining jurisprudential traction in 1989, when Judge William Norris advanced the theory in his concurring opinion in *Watkins v. U.S. Army*, a Ninth Circuit case challenging the military’s refusal to re-enlist a soldier because he was gay.¹¹² A similar definition of immutability developed concurrently in asylum law.¹¹³ This Article follows recent scholarship in referring to this definition as the “new immutability,”¹¹⁴ although it has also been termed “personhood”¹¹⁵ or “soft immutability.”¹¹⁶

Judge Norris’s opinion resisted the simplistic distinction between chance and choice. It demonstrated how traits thought to be products of chance may be subject to control, and how traits thought to be products of choice may be experienced as inevitable. The opinion rejected an understanding of “immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class.”¹¹⁷ While acknowledging that “[i]t may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment,” Judge Norris concluded this did not make sexual orientation “mutable.”¹¹⁸ As examples of how traits considered immutable might be changed, the opinion pointed to sex change through surgery, naturalization of aliens, legitimization of children, and racial passing.¹¹⁹ Changing such traits is not impossible, but it

111. Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 383 (1981) (reviewing ELY, *supra* note 62) (arguing that although they might be changed, sex is a matter of personal autonomy and religion a matter of free exercise).

112. 875 F.2d 699, 711 (9th Cir. 1989) (en banc) (Norris, J., concurring). In *Watkins*, the majority held that the Army was equitably estopped from denying reenlistment to Perry Watkins, because Watkins had always been candid about his sexuality and the Army had allowed him to reenlist in the past. *Id.* at 709-11 (majority opinion). Although the majority did not reach the issue, Judge Norris would have held that sexual orientation was a suspect classification. *Id.* at 728 (Norris, J., concurring).

113. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). Immutability plays an important role in asylum law, as an express criterion for determining what characteristics qualify as “membership in a particular social group.” 8 U.S.C. § 1101(a)(42)(A) (2012).

114. Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 473 (2012); Emens, *supra* note 9, at 377 & n.440; Schmeiser, *supra* note 7, at 1495. This Article uses the term “revised immutability” to refer to the synthesis of the old and new concepts into a test that prohibits discrimination on either basis. See *infra* Part I.B.

115. See Halley, *supra* note 8, at 519; Yoshino, *supra* note 1, at 493-94.

116. See Landau, *supra* note 7; Stein, *supra* note 8, at 633.

117. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

118. *Id.*

119. *Id.*

“would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.”¹²⁰ In support, the opinion cited research from disciplines such as psychiatry.¹²¹ To drive home the point that some aspects of identity, while not “strictly immutable,” might be “effectively immutable,” the opinion asked “whether heterosexuals feel capable of changing *their* sexual orientation.”¹²² As another court explained, such traits “may be altered only at the expense of significant damage to the individual’s sense of self.”¹²³

But ultimately, neither scientific proof of the difficulty of change nor the trauma of conversion efforts is what makes a trait immutable.¹²⁴ Judge Norris explained that immutable traits are

those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one’s skin pigment.¹²⁵

This analogy to racial discrimination only works if the reader believes, like Judge Norris, that the various sexual orientations are all on equal moral footing, just like racial categories are. Judge Norris’s opinion acknowledges that in determining which traits to protect, constitutional law must distinguish between fair and unfair bases for discrimination: “After all, discrimination exists against some groups because the animus is warranted – no one could seriously

120. *Id.*

121. *Id.*; see also *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (relying on psychological, psychiatric, social, and behavioral sciences in an asylum case as to the fixed nature of sexual orientation and trauma caused by conversion efforts), *overruled on other grounds* by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006).

122. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

123. *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev’d*, 976 F.2d 623 (10th Cir. 1992).

124. *Watkins*, 875 F.2d at 726 (Norris, J., concurring). Not every court would agree with this statement. Some opinions suggest that the difficulty of change is dispositive. See *infra* notes 168-170 and accompanying text.

125. *Watkins*, 875 F.2d at 726 (Norris, J., concurring). This example came from Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 n.52 (1980). The opinion also quoted a *Harvard Law Review* Note arguing “that the ability to change a trait is not as important as whether the trait is a ‘determinative feature of personality.’” *Watkins*, 875 F.2d at 726 (Norris, J., concurring) (quoting Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985)).

argue that burglars form a suspect class.”¹²⁶ The opinion is not clear on why discrimination based on sexual orientation was unfair, unlike discrimination against burglars, but it likely rested on Judge Norris’s conclusion that sexual orientation status did not necessarily entail any sort of illegal conduct.¹²⁷ To be sure, *Bowers v. Hardwick*, a 1986 Supreme Court decision upholding a state statute criminalizing homosexual sex, was still good law at the time Judge Norris was writing.¹²⁸ Thus, the new immutability had a narrow reach: invalidating a military rule that defined sexual orientation as a “status,” but not any rules prohibiting same-sex sodomy, marriage, or other “conduct.”¹²⁹

The new immutability is inflected with ideas about privacy and liberty, by contrast to the intrusiveness of the old theory. It finds inspiration in Justice Blackmun’s dissent in *Bowers*, which drew on cases protecting the right to privacy to argue that “[w]e protect those rights . . . because they form so central a part of an individual’s life” and are “significant” ways “that individuals define themselves.”¹³⁰ *Lawrence v. Texas* overruled *Bowers* in 2003.¹³¹ In light of *Lawrence*, the Connecticut Supreme Court expanded the theory of the new immutability in *Kerrigan v. Commissioner of Public Health*.¹³² *Kerrigan* holds that sexual orientation is immutable because the Constitution protects the right of “homosexual adults to engage in intimate, consensual conduct” as an “integral part of human freedom.”¹³³ Quoting the U.S. Supreme Court’s decision in *Paris Adult Theatre I v. Slaton*, the Connecticut Supreme Court held that “[s]exual intimacy is ‘a sensitive, key relationship of human existence, central to . . . the development of human personality’”¹³⁴ In this formulation, immutability has mutated into an argument about choice—“a person’s fundamental right to self-determination.”¹³⁵ Cases on the new immutability hold that, if a trait is not

126. *Watkins*, 875 F.2d at 724 (Norris, J., concurring).

127. *See id.* at 716-17.

128. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

129. *See* Halley, *supra* note 8, at 520 (explaining why “personhood arguments do not establish a rationale for delegitimizing popular decisions to sanction [i.e., punish] voluntary conduct”).

130. *Bowers*, 478 U.S. at 204-05 (Blackmun, J., dissenting). Justice Blackmun anchored this objection to anti-sodomy statutes in the right to privacy alone, not any considerations related to immutability. *Id.*

131. *Lawrence*, 539 U.S. 558.

132. 957 A.2d 407, 436-39 (Conn. 2008).

133. *Id.* at 438 (quoting *Lawrence*, 539 U.S. at 576-77).

134. *Id.* at 437 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

135. *Id.* at 438.

innocent in the sense of being an accident of birth, it must be innocent in the sense of being an “integral part of human freedom.”¹³⁶

Obergefell reflects this new understanding of immutability, although that case did not explicitly define immutability, nor did it specify the role immutability might have played in its analysis.¹³⁷ In *Obergefell*, the U.S. Supreme Court cited a brief by amici, led by the American Psychological Association (APA), in support of the claim that “psychiatrists and others” have recognized that sexual orientation is “immutable.”¹³⁸ The APA Brief did not argue that sexual orientation is never chosen or impossible to change.¹³⁹ Instead, it explained that sexual orientation “defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.”¹⁴⁰

For the old immutability, a normative conclusion flows from a descriptive premise: because an individual never chose or cannot change a trait, that trait should not be the basis for discrimination. The new immutability substitutes a normative judgment for that descriptive premise: a certain trait should not be the basis for discrimination because it is a normatively acceptable, protected exercise of individual liberty or expression of personality.

B. *The Synthesis*

Courts describe the immutability test as a synthesis of the old and new formulations: a trait “that either is beyond the power of an individual to change *or* is so fundamental to individual identity or conscience that it ought not be required to be changed.”¹⁴¹ On this theory, those traits that should be protected by antidiscrimination law include those that are immutable in both the old and new senses. This Article refers to this synthesis as the revised immutability. Its analysis is directed at the revised immutability as a normative theory of what traits should be covered by antidiscrimination law.

^{136.} *Id.*

^{137.} *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

^{138.} *Id.* (citing APA Brief, *supra* note 2, at 7-17).

^{139.} The APA Brief did not even use the word “immutable.” It argued instead that sexual orientation “[i]s [g]enerally [n]ot chosen, and [i]s [h]ighly [r]esistant to [c]hange,” APA Brief, *supra* note 2, at 7, citing the results of one survey showing “only 5% of gay men and 16% of lesbians reported feeling they had ‘a fair amount’ or ‘a great deal’ of choice about their sexual orientation,” *id.* at 8, and discussing the scientific consensus that “sexual orientation change efforts are unlikely to succeed and can be harmful,” *id.* at 9.

^{140.} *Id.* at 10.

^{141.} *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (emphasis added) (defining immutability for asylum law generally).

The revised theory makes immutability more palatable to those who objected to the old version. The old immutability was subject to the criticisms that it rested on a thin delineation between chance and choice, and that it was harsh, intrusive, and stigmatizing.¹⁴² By integrating the new immutability, the revised theory might be understood as abandoning the fraught distinction between chance and choice. It refocuses the doctrine to consider the costs of change for an individual's sense of self. The revised theory is not as harsh as the old version, in that it expands protection beyond those deemed blameless for possessing disfavored traits to include those who have made protected choices to adopt particular traits. It addresses the intrusiveness objection by shielding a private sphere of liberty for the formation of personality, in which government intervention is prohibited. And it counters stigma by allowing those claiming discrimination to do so without disavowing their own agency and pride in determining the content of their characters. The synthesis of the old and new versions of immutability protects both those whose misfortunes result from accidents of birth and those who seek freedom from discrimination to define their own personalities.

C. *Potential for Migration*

The revised immutability has the potential to carry over from opinions on equal protection doctrine to broader normative debates regarding what traits should be protected against discrimination. Such a migration could impact judicial decisions, public arguments, and legislative actions in areas like employment discrimination law.

My argument is not that there is a direct doctrinal pathway through which immutability considerations must move from equal protection to employment discrimination law. Employment discrimination law differs from equal protection doctrine in many important ways. While the Equal Protection Clause constrains public entities and actors,¹⁴³ employment discrimination law constrains many public and private employers.¹⁴⁴ Although courts define which classifications are suspect for purposes of equal protection, legislatures specify suspect classifications for purposes of employment discrimination law.¹⁴⁵ The array of

142. See *supra* notes 72-103 and accompanying text.

143. U.S. CONST. amend. XIV § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying a similar equal protection guarantee to the federal government).

144. See, e.g., 42 U.S.C. § 2000e(b) (2012) (defining “employers” for purposes of employment discrimination law).

145. Employment discrimination statutes might have a broader reach than the constitutional guarantee of equal protection because they are enacted by Congress, and the Court may be

traits protected by statute is far broader than that of those protected by the Constitution.¹⁴⁶ Additionally, employers themselves are also important sources of discrimination rules and norms.¹⁴⁷

Despite these differences, the concept of immutability from the equal protection context plays a role in employment discrimination law in ways both direct and indirect.¹⁴⁸ Even though the term “immutability” does not appear in any employment discrimination statute, courts have borrowed immutability concepts to answer definitional questions about the scope of statutory prohibitions on discrimination.¹⁴⁹ For example, courts have held that employer poli-

less concerned that it is overstepping its role when it carries out specific congressional commands. *See* *Washington v. Davis*, 426 U.S. 229, 248 (1976) (holding that Title VII’s prohibition on disparate impact discrimination does not apply to the equal protection clause because “extension of the rule beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription”).

146. *See supra* note 12 and accompanying text (contrasting the wide variety of traits protected by employment discrimination law with the Supreme Court’s limited heightened scrutiny jurisprudence).
147. *See, e.g.*, Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1589 (2001) (discussing “the rise of diversity rhetoric in U.S. management” and its impact on law).
148. One area of Title VII law where the new immutability has been directly adopted is what some courts call the “sex-plus” theory of discrimination, which “allows plaintiffs to bring a Title VII claim for sex discrimination if they can demonstrate that the defendant discriminated against a subclass of women (or men) based on either (1) an immutable characteristic or (2) the exercise of a fundamental right.” *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994) (holding plaintiff could make out a case of sex discrimination under Title VII by demonstrating that her employer discriminated against older women). This particular doctrinal formulation grew out of the context of employer grooming policies that allowed women, but not men, to wear their hair long, policies courts saw not as impinging on equal opportunity, but as an employer’s prerogative. *See, e.g.*, *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc). Thus, some courts cabined the sex-plus theory to characteristics deemed immutable or fundamental, such as parenthood. *See, e.g., id.* at 1089 (discussing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971), in which the Supreme Court held that discrimination against mothers of pre-school-age children, but not fathers of pre-school-age children, violated Title VII). I note that *Phillips* did not find analysis of old or new immutability to be necessary to its holding.
149. *See, e.g.*, Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987) (discussing the role of immutability arguments in Title VII cases allowing employers to forbid the use of the Spanish language at work, require that men have short hair, and mandate that women alter their appearances); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII*, 76 TEX. L. REV. 317, 323 (1997) (arguing that immutability considerations resulted in interpretations of Title VII that fail to adequately prohibit discrimination based on language, dress, grooming, or religious practices); Farrell, *supra* note 13, at 491-99 (discussing how arguments about workers’ voluntary preferences affect Title VII cases on how to explain statistical disparities with respect to female and minority workers, cases re-

cies that allow women, but not men, to wear their hair long do not discriminate on the basis of sex because hair length is not an immutable trait.¹⁵⁰ Immutability's endurance may be a result of the concept's intuitive appeal. Or it may be due to the "gravitational pull" that constitutional principles often exert on statutory interpretation.¹⁵¹ Some cases suggest that the Court is inclined to interpret equal protection doctrine and employment discrimination statutes in a unified manner,¹⁵² a practice likely to impact lower court decisions. This "doctrinal migration" may be subtle as well as formal, reflected in how rules operate if not in their specific dictates.¹⁵³

Outside the courts, immutability-related ideas influence debates among legislators, scholars, employers, and members of the public regarding which

quiring that sexual harassment be "unwelcome," and cases refusing to extend protection to appearance-based discrimination, transgender identity, and sexual orientation); Helfand, *supra* note 7, at 30-34 (discussing the role of immutability arguments in canonical Title VII cases); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2217-27 (2003) (discussing how immutability arguments prevent courts from recognizing cultural rights in Title VII cases).

150. See, e.g., *Willingham*, 507 F.2d at 1092. I discuss examples of how immutability serves to limit employment discrimination law in the contexts of weight, pregnancy, and criminal records in Part III.
151. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1013 (1989); see also Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1206 (2011) (discussing the practice of "constitutional mainstreaming" in which "the Court interprets an ambiguous statute in unforeseen contexts to accord with the evolving values that it has emphasized in its decisions interpreting the Constitution but in a manner that conflicts with the values reflected in subsequent legislative enactments"); cf. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (arguing that "'constitutional' norms provide the background context that informs our interpretation of statutes and other sub-constitutional texts").
152. See, e.g., Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 97, 104-05 (2014) (discussing how the Supreme Court imported concepts from equal protection law to interpret Title VII in *Ricci v. DeStefano*, 557 U.S. 557, 582-84 (2009) and *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976)); Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 204-05 (2014) (discussing how the Supreme Court has favored "convergence" in interpretation of the equal protection clause and employment discrimination statutes in the context of race discrimination).
153. Harris, *supra* note 152, at 124-43 (discussing the subtle impact of equal protection principles on Title VII, and vice versa, in the contexts of disparate impact law and affirmative action, despite textual differences). Harris argues that transference seems particularly likely when constitutional standards weaken antidiscrimination protections for historically disadvantaged groups. *Id.* at 98. This argument suggests that new ideas of immutability might be more likely to spread insofar as they limit, rather than extend, protection.

traits should be prohibited bases for discrimination.¹⁵⁴ Identity-based social movements seeking legal redress frequently articulate their aspirations in “constitutional terms” and are influenced by the “rhetoric, strategies, and norms” of constitutional law.¹⁵⁵ This Article is concerned with the persuasive power of the revised immutability as a principle to explain what traits should be protected by equality law broadly, and by employment discrimination law specifically.¹⁵⁶ In analyzing the prospects for the addition of new groups to antidiscrimination legislation, Elizabeth Emens has offered a descriptive model that includes the revised immutability as its first criterion.¹⁵⁷ Sharona Hoffman goes further, arguing that the revised immutability both does and should provide a unifying principle for determining which traits employment discrimination law protects.¹⁵⁸ For example, while race, color, sex, age, national origin, genetics, and many disabilities are commonly considered accidents of birth,¹⁵⁹ religion, sexual orientation, transgender identity, marital status, parental status, cigarette smoking, and political affiliation might be considered crucial to an individual’s right to self-definition.¹⁶⁰ Many argue that certain characteristics associated

154. Consider the remarks of Senator Carl Levin (D-MI) in support of the Genetic Information Nondiscrimination Act (GINA): “We do not determine our own DNA. We are born with it. We cannot allow discrimination on the basis of such a fundamental aspect of life and one in which we had no choice.” 154 CONG. REC. S3372 (daily ed. Apr. 24, 2008) (statement of Sen. Levin); see also Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 478 (2010) (discussing examples of arguments from immutability in the legislative debate over GINA).

155. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422-23 (2001) (describing a dialectical dynamic between constitutional law and social movements seeking tolerance or acceptance of a despised identity).

156. See *supra* notes 5, 7 and accompanying text.

157. See *supra* note 9 and accompanying text.

158. Hoffman, *supra* note 5, at 1537-44.

159. Some might contest whether these characteristics are invariably or even predominantly accidents of birth. See, e.g., Elizabeth F. Emens, *Against Nature*, in NOMOS LII: EVOLUTION AND MORALITY 293, 309-12, 320-21 (James E. Fleming & Sanford Levinson eds., 2012) (describing conflicting views on the immutability of age, for example, that it is quintessentially immutable; that it is capable of reversal through exercise, diet, or plastic surgery; that it is “meaningless” or notional; and that it is a process too individualized to be susceptible to any generalization).

160. While it is beyond the scope of this Article to assess whether these categories are immutable in the old sense, the new one, or neither, I note these questions are subject to much disagreement. Like sexual orientation, whether transgender identity fits under the old immutability rubric is vigorously disputed. See, e.g., Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANSGENDER RIGHTS 3, 18 (Paisley Currah et al. eds., 2006) (discussing how transgender rights advocates often argue that “gender identity and often even expressions of gender identity” are “unchangeable, set from an early age”). Religion too may be considered ascribed at birth. See Christian Legal Soc’y Chapter of the Univ. of Cal., Has-

with the old immutability (for example, race) may include traits that are immutable in the new sense (for example, an African American woman who wears her hair in cornrows), and therefore deserve protection too.¹⁶¹

II. OBJECTIONS TO THE REVISED IMMUTABILITY

Despite its advantages over the old immutability, there are reasons to object to the revised immutability's suitability as a unified theory of protected traits. This Part will sketch out those objections. It draws empirical support from recent gay rights controversies.¹⁶² I explore these objections with an eye toward how the revised immutability might function as a normative theory of employment discrimination law.¹⁶³

Some of these concerns are normative: first, that the revised immutability masks questionable moral judgments about the blameworthiness of traits and

tings Coll. of the Law v. Martinez, 561 U.S. 661, 726 n.5 (2010) (Alito, J., dissenting) (discussing discrimination against an individual because she was born into a particular religion or due to her ancestors' religion). Marital status is generally conceptualized as a choice, with exceptions when marriage is forced, prohibited, or not feasible. See Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253, 1319 (2014) (observing that discrimination against the single and childless "seems to violate" the test of the new immutability). While parental status might, on occasion, be accidental, it is rarely thought to be a matter for which the parent is not responsible. Compare *id.* at 1317 ("[T]he decision not to parent is in most cases, excepting infertility, a matter over which an individual has some control given advances in contraception methods over the last forty years."), with Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 483-84 (2013) (discussing unwanted pregnancies).

161. See Gonzalez, *supra* note 149, at 2196-99 (discussing scholarly responses to Rogers v. Am. Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981)).

162. Many of these controversies pertain to whether gay rights issues should be framed as questions of equal protection (sex or sexual orientation discrimination) or substantive due process (privacy, liberty, autonomy, or other fundamental rights). This Article does not take a position on which frame might be more appropriate in the abstract. Rather, it is concerned with unique drawbacks to the way the revised immutability imports concepts from substantive due process law into the definition of protected identities for antidiscrimination purposes. See *supra* text accompanying notes 130-136 (discussing how the new immutability employs privacy, freedom, and autonomy norms in its definition of protected identities). Some of the objections discussed here may also apply to substantive due process arguments in general and not just those that rely on protected identities. Whether substantive due process arguments alone might still be worth pursuing depends on context and is beyond the scope of this Article.

163. Space limitations prevent exploration of how the revised immutability might apply across the many domains of equality law, including equal protection, asylum, education, housing, and public accommodations. However, the employment discrimination examples discussed in this Article suggest reasons to be critical of applications of the revised immutability to these contexts.

reinvigorates the old theory of immutability; second, that it inserts a highly disputable notion of “personhood” into the doctrine that omits many traits that are stigmatized or irrelevant to any government or employer purpose; and third, that it reinforces stereotypes about the identities it protects.

Other interrelated concerns are strategic: first, that the revised immutability is unlikely to succeed with courts or legislatures because of the difficulty of drawing a principled line between those characteristics that are essential to personhood and those that are not; second, that even if it does succeed, rights based on the new immutability alone will be more limited than other antidiscrimination rights because they will be perceived as negative liberties against state or employer interference, rather than positive demands for equal access; and third, that groups concerned with maintaining traditional social norms may argue their convictions are just as “immutable,” requiring compromises that would not be palatable in other contexts, like race discrimination.

After this Part describes the theoretical and empirical bases for these objections, Part III will discuss how these critiques might specifically apply in controversies over protection for traits currently at the borders of employment discrimination law: obesity, pregnancy, and criminal records.

A. Masking Moralizing Judgments

As discussed, the old immutability often rests on untenable, harsh, intrusive, and stigmatizing judgments about the traits for which individuals should receive blame.¹⁶⁴ These judgments are often not just moral, but moralizing: that is, based on superficial assumptions or made without consideration of their broader implications.¹⁶⁵ Cases revising the theory of immutability have not abandoned the core idea of immutability as blamelessness, or the moralizing judgments inextricable from the concept. Rather, these cases have buried immutability under a notion of personhood that protects certain choices already deemed morally acceptable from discrimination. Thus, the revised theory merely mitigates and obscures the untenability, harshness, intrusiveness, and stigma objections to the old.¹⁶⁶ Moreover, the new immutability fails to explain why certain characteristics ought to be protected while others should not. Par-

^{164.} See *supra* notes 72–103 and accompanying text.

^{165.} See *supra* note 75 and accompanying text (discussing psychological research on how implicit judgments drive attributions of blame); *supra* note 88 and accompanying text (discussing the confusion of empirical, expressive, and moral arguments by those who imagine discrimination could be a means of incentivizing behavior); *supra* note 97 and accompanying text (analogizing shaming practices to mob justice in which the public punishes transgressors without due process).

^{166.} See *supra* text accompanying notes 76–103.

tial corrections to the theory of immutability run the risk of masking the moral judgments that are its necessary prerequisites, and making a flawed concept more palatable.

The revised immutability may become a Trojan horse: an appealing conceptual package that allows the harsh, intrusive, and stigmatizing judgments that corrupted the old immutability to sneak back into doctrine. As an initial matter, not all courts that revise the immutability factor understand the gravamen of an immutable trait to be its importance for an individual's self-determination.¹⁶⁷ Rather, some have merely softened the definition—from “unchanging” to “difficult to change.”¹⁶⁸ In *Baskin v. Bogan*, for example, the Seventh Circuit reformulated the immutability factor to mean, if not unchangeable traits, then “at least tenacious” characteristics, including attributes that are “biological, such as skin color, or a deep psychological commitment, as religious belief often is.”¹⁶⁹ Similarly, the Iowa Supreme Court has made the definition of immutability a question of “degree”: “[t]he degree to which an individual controls, or cannot avoid, the acquisition of the defining trait, and the relative ease or difficulty with which a trait can be changed.”¹⁷⁰ This “difficult to change” standard acknowledges the trouble with the old immutability's vexed notion of choice. It recognizes that certain psychological commitments may be just as difficult to overcome as, for example, skin color. This standard is somewhat less harsh, intrusive, and stigmatizing than the old, in that it does not require individuals to make Herculean (or Sisyphean) efforts to change their personalities.

But the “difficult to change” definition of immutability remains firmly rooted in notions of “individual responsibility,” requiring the same moralizing judgments as the old immutability.¹⁷¹ The Seventh Circuit distinguished “tena-

167. *But see supra* notes 124–136 and accompanying text (discussing cases identifying the key feature of a newly immutable trait as related to individual privacy, autonomy, or liberty interests in defining the self).

168. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014). *Obergefell* is not clear on whether the Supreme Court considers sexual orientation to be immutable because it is usually not experienced as a choice, because it is difficult to change, because it is fundamental to personality, or for some combination of these reasons. *See supra* note 2 and accompanying text.

169. *Baskin*, 766 F.3d at 655.

170. *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (quoting *Dean v. District of Columbia*, 653 A.2d 307, 346 (D.C. 1995) (Ferren, J., dissenting)). The Iowa Supreme Court adopted a definition of immutability as both a trait that is “highly resistant to change,” and one that “forms a significant part of a person's identity.” *Id.* (citing *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008)).

171. *See id.* at 892 (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion), for the proposition that the purpose of the immutability requirement is to tie legal burdens to “individual responsibility”).

cious” traits from “characteristics that are easy for a person to change, such as the length of his or her fingernails.”¹⁷² The Iowa Supreme Court spelled out the reasoning: the relative difficulty of change “may separate truly victimized individuals from those who have invited discrimination by changing themselves so as to be identified with the group.”¹⁷³ These courts did not stray far from the original theory of immutability; they simply “transpos[ed] the site of immutability from the body to the personality.”¹⁷⁴ This rule requires harsh, intrusive, and stigmatizing judgments about who is “truly” victimized, based on whether a victim might have been able to change, hide, or downplay a disfavored characteristic.¹⁷⁵ The “difficult to change” definition may not prohibit, for example, discrimination against a woman for dressing in ways associated with masculinity.¹⁷⁶ This interpretation of the immutability factor may, in effect, be no different than the old version. Indeed, after softening the definition of immutability, the Seventh Circuit nevertheless found that sexual orientation met the test of the *old* immutability as a characteristic that is “probably . . . in-born.”¹⁷⁷ Courts following the Seventh Circuit and running with this logic may simply apply the old immutability.¹⁷⁸

By contrast to this “difficult to change” standard, other courts have defined the new immutability to emphasize that self-determination with respect to personality is a fundamental liberty, and the state ought not discriminate among choices individuals make within that sphere.¹⁷⁹ Yet this definition is disingenuous, obscuring moral judgments about what types of variation in personality society should tolerate. Many aspects of “personality” – like risk taking, aggression, addiction, and impulse control – generate behaviors society regulates,

172. *Baskin*, 766 F.3d at 655.

173. *Varnum*, 763 N.W.2d at 893.

174. Halley, *supra* note 8, at 519.

175. Cf. Schmeiser, *supra* note 7, at 1517 (arguing that this aspect of the *Varnum* decision is “unfortunate and unnecessary”).

176. Or it may require that she demonstrate she has a condition, such as “gender identity disorder,” and that to dress in ways associated with femininity would violate her deep psychological commitments to masculine identity. See, e.g., Currah, *supra* note 160, at 8-11.

177. *Baskin*, 766 F.3d at 657 (holding—based on survey data, evidence from psychotherapy, and various genetic, neuroendocrine, and evolutionary theories—that “there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice”).

178. See Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 939 (S.D. Miss. 2014) (following *Baskin* in holding that sexual orientation is immutable in that there is virtually no choice as to the characteristic).

179. See *supra* notes 124-136 and accompanying text.

particularly at the workplace. The concept of personality alone does not identify the appropriate limits of discrimination.

Sexual orientation provides an example. It is doubtful whether arguments from immutability, old or new, ultimately persuade courts to apply heightened scrutiny to sexual orientation classifications.¹⁸⁰ As Michael Boucai has noted, courts that accept arguments about mutability also tend to accept other dubious rationales for denying protection.¹⁸¹ The argument that sexual orientation is important to personality does not rebut claims that social policy should discourage same-sex sexual behavior or encourage those few on the fence to choose heterosexuality.¹⁸²

Thus, in *Obergefell*, the Court summarized evolving views on sexual orientation with the statement that “sexual orientation is *both* a normal expression of human sexuality and immutable.”¹⁸³ The normative point is essential. An intermediate step in the new immutability’s argument is that there is no principled basis for treating certain gay relationships differently than straight ones, since they are both “normal.”¹⁸⁴ “Normal” here does not simply mean commonplace; it means the opposite of pathological.¹⁸⁵ Implicit is the idea that private, consensual, adult sexuality—whether gay or straight—is not harmful, shameful, or morally depraved. Rather, it is productive, fundamental, and essential to family life.¹⁸⁶ *Obergefell* used the word “immutable” to describe not only sexual orientation, but also the “profound” features of the institution of

180. Boucai, *supra* note 114, at 472.

181. *Id.*

182. Halley, *supra* note 8, at 520-21 (“Explaining why rules burdening conduct impinge on elements of life central to personhood would require not a psychiatric or psychological theory of sexuality but a political one.”). By explaining this objection, I do not mean to imply that I agree that social policy should encourage heterosexuality. Rather, I mean to demonstrate that other arguments are doing the persuasive work.

183. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (emphasis added).

184. Realizing this, the APA Brief cited in *Obergefell* combined the argument that sexual orientation is immutable with the argument that homosexuality is *normal*, all under the heading: “Sexual Orientation Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change.” APA Brief, *supra* note 2, at 7-9. That section of the APA Brief emphasized that homosexuality “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities,” *id.* at 8 (citing AM. PSYCHIATRIC ASS’N, POSITION STATEMENT: HOMOSEXUALITY AND CIVIL RIGHTS (1973), *reprinted in* 131 AMERICAN JOURNAL OF PSYCHIATRY 497 (1974)), and “pose[s] no inherent obstacle to leading a happy, healthy, and productive life,” *id.*

185. *Id.*

186. The portion of the APA Brief cited by the Court also included a section with the heading: “Gay Men and Lesbians Form Stable, Committed Relationships That Are Equivalent to Heterosexual Relationships in Essential Respects.” *Id.* at 11.

marriage, which the Court held would not be disrupted by the inclusion of same-sex couples.¹⁸⁷

The new immutability does not protect all intimate liberties; it is limited to certain forms of happy domesticity that are akin to traditional, heterosexual marriages.¹⁸⁸ For example, the U.S. Supreme Court decisions that the Connecticut Supreme Court cited in support of the new immutability, *Paris Adult Theatre I v. Slaton* and *Lawrence v. Texas*, protect a traditional form of private, consensual, adult sexuality.¹⁸⁹ *Slaton* was a case about hardcore pornography.¹⁹⁰ That case endorsed a traditional view of sexual morality as “central to family life,”¹⁹¹ and as a virtue that had to be protected from “the tide of commercialized obscenity” even in the absence of empirical proof that commercial obscenity caused any harm.¹⁹² If *Slaton* protects a certain form of romanticized sexuality from the threat of the market, *Lawrence* protects it from the threat of the state. Critical to the success of this argument has been gay rights advocacy focused on convincing courts and the public that same-sex relationships might resemble an idealized form of traditional marriage as an “enduring” bond with “transcendent dimensions.”¹⁹³ This reasoning may protect everyone’s right to enter into “transcendent” relationships, but it does not require that straight- and cross-sex relationships receive equal treatment. Thus, the right to intimate

187. *Obergefell*, 135 S. Ct. at 2594 (“Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”).

188. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) (arguing that *Lawrence v. Texas* “relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty”).

189. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 437–38 (Conn. 2008) (discussing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) and *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003)).

190. *Slaton*, 413 U.S. at 52.

191. The full quotation from *Slaton* reads:

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Id. at 63.

192. *Id.* at 57.

193. Franke, *supra* note 188, at 1408–09 (quoting *Lawrence*, 539 U.S. at 562, 567).

liberty alone may not bar a state from penalizing crimes like statutory rape more harshly when they involve same-sex sexual conduct.¹⁹⁴

The concept of liberty or choice in the new immutability does not explain why a trait is within the sphere of morally blameless choices. Other arguments must fill that void. In both the old and new forms, the argument from immutability rests on generalized notions of individual responsibility, merit, incentives, and just desert. Thus, even in its revised form, the new immutability responds only partially to the objections to the old. The new immutability remains based on an inchoate sense of egalitarianism that rests on a problematic definition of responsibility, with harsh, intrusive, and potentially stigmatizing consequences. These considerations are masked behind the superficially appealing invocation of the need to protect traits “fundamental to a person’s identity,” now repeated as a mantra by courts.¹⁹⁵

B. Excluding Inessential and Stigmatized Traits

The old immutability protected those with traits considered predetermined; it left out those deemed accountable for the traits that form the grounds for discrimination against them. The new immutability protects a subset of the accountable: those for whom a particular, chosen characteristic is essential to who they are as individuals and a matter of pride rather than shame or regret. This formula omits inessential yet chosen conditions, such as stigmatized conditions, that might otherwise be the focus of antidiscrimination protection.

194. Franke, *id.* at 1412, offers the example of *State v. Limon*, in which a Kansas appellate court upheld the conviction of a male eighteen-year-old for “criminal sodomy” with a male fourteen-year-old under a statute that “criminalized heterosexual sodomy less severely than homosexual sodomy.” 83 P.3d 229, 232 (Kan. Ct. App. 2004), *rev’d*, 122 P.3d 22 (Kan. 2005). The court reasoned that due process protection for “private consensual sexual practices” under *Lawrence* did not extend to minors. *Id.* at 234. Its decision was reversed on equal protection grounds. *Limon*, 122 P.3d at 24; *see also* Anna K. Christensen, Comment, *Equality with Exceptions? Recovering Lawrence’s Central Holding*, 102 CALIF. L. REV. 1337, 1341-42 (2014) (discussing enforcement of rules remaining on the books post-*Lawrence* that penalize same-sex or nonprocreative sexual conduct more harshly than other forms of sexual conduct).

195. *See, e.g.*, *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014), *aff’d sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (“[R]egardless whether sexual orientation is immutable, it is fundamental to a person’s identity, which is sufficient to meet this factor.” (citation omitted)); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014), *aff’d sub nom.* *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (“[S]exual orientation is so fundamental to a person’s identity that one ought not be forced to choose between one’s sexual orientation and one’s rights as an individual—even if one could make a choice.”); *supra* notes 3-4 and accompanying text.

The various formulations of the new immutability assume that the trait to be protected is essential to its bearer's identity, such that if it were to change, she would no longer be the same person. Courts describe such traits as "integral,"¹⁹⁶ "core,"¹⁹⁷ or "fundamental to one's identity."¹⁹⁸ As one court put it, "[T]o discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals."¹⁹⁹ Dissenting in *Bowers v. Hardwick* in 1986, Justice Blackmun wrote that "[h]omosexual orientation may well form part of the very fiber of an individual's personality."²⁰⁰ Janet Halley described this definition of gay identity as "'a personhood definition,' in which the class of homosexuals is defined by a form of personality shared by its members."²⁰¹

This concept of personhood, as a set of core, stable traits, is both historically and culturally contingent.²⁰² In the context of sexual orientation, for example, scholars have argued the personhood definition is by no means universal. Rather, it relies on a contested Freudian narrative of self-discovery through revelation of repressed sexuality.²⁰³ As Michel Foucault famously argued, this narrative is particularly Western and arose in a specific historical moment.²⁰⁴ It was nineteenth-century medicine that first gave rise to the idea of homosexual-

196. *Love v. Beshear*, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014).

197. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

198. *Latta v. Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014) (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006)).

199. *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992).

200. 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting).

201. Janet E. Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 82, 91 (Michael Warner ed., 1993).

202. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 797 (1989) ("The concept of personal identity—that sense of a unitary, atomic self that we all tend to consider ourselves to 'have'—is complex and difficult. It has an almost theological or metaphysical aspect, as if one's 'identity' were a kind of hypostatic quantity underlying the multiplicity of his vastly different relations in the world and the mutability of his nature over time.").

203. *Id.* at 770-74.

204. *Id.* at 771-74 (discussing 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (1980)).

ity as a type of identity distinct from heterosexuality.²⁰⁵ In its contemporary manifestations, the personhood idea of homosexuality

entirely fails to represent those pro-gay constituencies that deny the centrality of a particularized homosexual orientation to their psychic makeup, whether because they identify as bisexual, because they seek to de-emphasize the gender parameters of sexuality, because they are experimental about sexuality, or because they experience sexuality not as serious self-expressiveness but as play, drag, and ironic self-reflexivity.²⁰⁶

Sonia Katyal has detailed how the concept of “gay personhood” is both historically and culturally contingent, “[f]or at the heart of the fabled closet lies a predominantly Western assumption that a gay, lesbian, or bisexual identity is a major determinant in the lives of all individuals.”²⁰⁷ Katyal has described alternative cultural understandings that do not link sexual preferences with identity or that place sexual orientation in the background, with class, occupation, gender, or race as foreground determinants of sexuality.²⁰⁸

This concept of personhood also relies on a romanticized story of self-discovery and public disclosure through which the authentic self is actualized. In early cases formulating the new immutability, some courts cited a 1985 *Harvard Law Review* Note²⁰⁹ that argued for consideration of whether a trait plays an “important role” in “personhood” defined as “self-perception, group affiliation, and identification by others.”²¹⁰ As evidence that sexual orientation is a crucial component of personhood, the Note looked to “personal testimonies in gay literature and . . . the well-known phenomenon of ‘coming out,’ or publicly acknowledging one’s gay identity,” as well as the existence of “gay communities” in the form of “bars, bookstores, newspapers, political lobbies, legal rights

205. *Id.* at 777 (citing 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (1980)); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1088 (1988)).

206. Halley, *supra* note 8, at 520.

207. Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 *WM. & MARY BILL RTS. J.* 1429, 1442 (2006).

208. *Id.* at 1445-48; see also Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 97, 99-100 (2002) (“[S]ome cultures view homosexuality as an activity, not an identity; others view it as a necessary phase in a quest for full-fledged adulthood; and still others equate it with transgenderism.” (citations omitted)).

209. See *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991).

210. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *HARV. L. REV.* 1285, 1303 (1985).

committees, and gay neighborhoods.”²¹¹ The legal success of sexual orientation’s personhood argument was possible only as a result of a gay rights movement that emphasized pride and “coming out” as counters to shame, secrecy, and self-loathing.²¹²

This template for legal change is unlikely to succeed, however, for two types of traits that are traditionally covered by antidiscrimination law: those that individuals would prefer to disclaim as constitutive of their authentic selves, and those traits that individuals would prefer to change due to shame or stigma. For many multiracial individuals, for example, racial identity might be experienced as manipulable and changing over time,²¹³ or unimportant to one’s fundamental sense of self.²¹⁴ Many forms of disability, too, might fall through the cracks of the revised immutability, as conditions subject to control and yet seldom celebrated as features of identity. Sexually-transmitted diseases are an example. During debate over the Americans with Disabilities Act (ADA) in 1989, Senator Jesse Helms objected that the Act would not allow an employer to “set up any moral standards for his business by asking someone if he is HIV positive, even though 85 percent of those people are engaged in activities that most Americans find abhorrent.”²¹⁵ Senator Ted Kennedy took a different tack, submitting a statement from the National Commission on AIDS that called for “understanding” and “compassion.”²¹⁶ Compassion won the day.²¹⁷ The internalized stigma was a reason for protection.

211. *Id.* at 1304-05.

212. For the strong version of the argument that public views shaped legal decisions on gay rights, see Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 132-33 (2013), which states: “With regard to *Windsor*, the critical development has been the coming-out phenomenon, which over a period of decades has led to extraordinary changes in attitudes and practices regarding sexual orientation.” For the weaker one, see Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 76-77 (2013), which states: “Evolving public opinion enabled this Term’s marriage decisions, but conflict over law importantly contributed to the public’s changing views.”

213. See, e.g., Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1263-67 (2014) (discussing research on the multiplicity and fluidity of multiracial identity).

214. *Id.* at 1269 (discussing research on the lack of salience of racial identity for many multiracial individuals).

215. 135 CONG. REC. 19,870 (1989) (statement of Sen. Helms).

216. *Id.* at 19,867 (statement of Sen. Kennedy (quoting statement by Louis Sullivan, Secretary of Health and Human Services)).

217. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (discussing evidence of congressional intent that the ADA cover asymptomatic HIV); Ruth Colker, *The ADA’s Journey Through Congress*, 39 WAKE FOREST L. REV. 1, 23 (2004) (arguing that the legislative history demonstrates “a unanimous understanding” among those who voted for the ADA “that Congress intended HIV to be covered”).

These gaps in the revised immutability's coverage subvert some of antidiscrimination's most commonly accepted premises. The argument that an identity characteristic deserves protection because it is essential or important is in tension with one of the basic impulses underlying antidiscrimination law: that individuals should be judged according to their qualifications rather than extraneous identity traits such as race, sex, and disability.²¹⁸ On this theory, such traits are forbidden grounds for discrimination not because they are important, but because they are not.

Moreover, leaving out many stigmatized traits undermines antidiscrimination law's goal of eradicating disparaging forms of subordination.²¹⁹ Antidiscrimination law targets stigmatizing practices that undermine an individual's sense of self-worth. Martin Luther King, Jr. famously wrote of the "degenerating sense of 'nobodiness'" imposed by racial subordination.²²⁰ Stigmatized individuals may believe it futile to invest in their own futures, creating a self-fulfilling prophecy in which discrimination discourages those who find themselves defined by the stigmatized trait from pursuing education or employment opportunities. That effect of discrimination is later cast as the cause of the group's lack of advancement.²²¹ Thus, the revised immutability leaves out those who most acutely feel the sting of stigmatizing bias: those who have internalized a stigma and feel shame and responsibility for their conditions.

218. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 11-16 (2000) (discussing the "simple but powerful" logic of "American antidiscrimination law" that "renders forbidden characteristics invisible" and requires that employers ask only about an individual's ability to perform a job).

219. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 445 (2000) (discussing an approach to determining what characteristics are covered by the ADA that asks what "actual, past, and perceived impairments . . . subject people to systematic disadvantages in society" and are "stigmatized"); Karst, *supra* note 101, at 248 (arguing that the equal protection clause protects a principle of "equal citizenship" and "the chief harm against which the principle guards is degradation or the imposition of stigma"); *supra* notes 94-103 and accompanying text (discussing scholarship on protections for dignity and antihumiliation as the aims of equality law).

220. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 92 (Beacon Press 2010) (1964). I use this quotation to evoke the harm of stigma, a paradigmatic type of harm that civil rights laws intend to address. Although racial identity may on occasion be manipulable, I do not intend to suggest that race does not usually meet the test of the old immutability.

221. See Bagenstos, *supra* note 219, at 464.

C. *Reinforcing Stereotypes*

Arguments that certain traits are fundamental to personality quite easily slide into the assumption that those traits are unchanging and correlate with a set of behaviors. Thus, these arguments reinforce stereotyping of identities, another of the foundational harms that discrimination law is designed to address.

The personhood argument, as a rhetorical strategy, complements and supports the assumption that certain conduct necessarily follows from status.²²² “By conceiving of the conduct that it purports to protect as ‘essential to the individual’s identity,’ personhood inadvertently reintroduces . . . the very premise of the invidious uses of state power it seeks to overcome.”²²³ In this way, the new immutability is not far from cases predating *Lawrence v. Texas* that understood homosexuality as a result of deviant sexual acts that formed the foundation of a person’s character.²²⁴ In those cases, individuals might have been classified as gay because, for example, they identified as such²²⁵ or acknowledged involvement in a gay organization.²²⁶ On the basis of that classification, courts assumed these individuals had engaged in then-illegal sodomy and had the propensity to do so in the future, even without proof of any past sodomy.²²⁷ With this understanding of sexual orientation as “essential, foundational, and inescapable,” courts denied equal protection.²²⁸ Arguments based on the new immutability are thus inextricably tied to a set of assumptions about the stability of personality types and propensity for certain behavior. The assumption that personalities can be “typed” and that individuals will conform to their types is the definition of stereotyping.

Yet antidiscrimination law condemns stereotyping.²²⁹ A stereotype, in anti-discrimination law, is “any imperfect proxy” or “overbroad generalization.”²³⁰

222. Halley, *supra* note 201, at 92.

223. Rubinfeld, *supra* note 202, at 782 (making this argument with respect to the right to privacy).

224. Halley, *supra* note 201, at 93-94.

225. *Id.* at 94 (discussing *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989)).

226. *Id.* at 93 (discussing *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1366 (N.D. Cal. 1987), *rev’d in part, vacated in part*, 985 F.2d 563 (9th Cir. 1990)).

227. *See id.* at 93-94.

228. *Id.* at 94.

229. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 86 (2010) (interpreting the “foundational sex-based

Importantly, the problem of stereotyping is distinct from the problem of stigma and subordination. Mary Anne Case provides a hypothetical to explain:

Imagine, for example, a society with two castes, not upper and lower, not Brahmin and untouchable, but priest and warrior. The two castes are equal in status, but radically different in role. Those born into the priest caste are limited to the role of priest even if they would rather fight than pray, and vice versa.²³¹

Such a caste system, while not subordinating, would implicate the Constitution's guarantee of equal liberty.²³² However, the injury of stereotyping, if conceptualized as a constraint on an individual's opportunities, is not limited to rigid roles assigned at birth, during childhood, or at some other stage of relative innocence.²³³ Suspect stereotypes may attach at myriad stages of life, such as stereotypes about what it means to be a "mother" or "father,"²³⁴ "disabled,"²³⁵ or "old."²³⁶

equal protection cases of the 1970s" as imposing "constitutional limits on the state's power to enforce sex-role stereotypes").

230. Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (discussing the definition of stereotyping for purposes of sex discrimination law).

231. *Id.* at 1476 (footnote omitted).

232. *Id.* (citing *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting)).

233. *Cf.* FISHKIN, *supra* note 70, at 7 (arguing that "if we care about giving people the freedom to shape their own lives—so that the contours of their lives are to a greater extent self-chosen rather than dictated by limited opportunities—we ought to care not only about their opportunities measured *ex ante* from birth, but also about the ranges of opportunities open to them at other points along the way, including for those who have, for one reason or another, failed to jump through important hoops at particular ages").

234. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (discussing evidence that Congress enacted the Family and Medical Leave Act of 1993 because many states provided maternity but not paternity leave, in violation of the equal protection clause, for reasons "not attributable to any differential physical needs of men and women," but rather based upon "the pervasive sex-role stereotype that caring for family members is women's work").

235. *See, e.g.*, *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (explaining that the Americans with Disabilities Act of 1990 "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace").

236. *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the [Age Discrimination in Employment Act of 1967] was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes"—for example, that "productivity and competence decline with old age").

Suspect stereotypes include even generalizations that are accurate to some degree.²³⁷ Statistically sound generalizations about identity groups – for example, that most women prefer cooperative to competitive environments – may be suspect for a number of reasons.²³⁸ Because some identity-based generalizations, including many of those based on sex, are “used for purposes going far beyond the predictive capacity of the generalization,” they “can be said to be, *in general*, suspect.”²³⁹ Sex-based generalizations are this suspect sort of stereotype, having historically been wielded as questionable proxies for various competencies from strength to intelligence.²⁴⁰ Additionally, generalizations may be self-fulfilling prophecies. For example, women’s preferences for cooperation and men’s for competition may result from systemic stereotypes or patterns of discrimination rewarding conformity with the stereotype, with the resulting conformity later held up as evidence of the “truth” of the generalization.²⁴¹ Equality law endeavors to address this type of harm, while arguments premised on the new immutability reinforce it.

D. Creating Line-Drawing Problems

Apart from these normative objections, the new immutability raises a number of tactical or strategic concerns for social movements seeking to extend antidiscrimination protection. The first is a line-drawing problem. The expanded concept of immutability does not have any limiting principle. While the old immutability seemed to be restricted to involuntary traits, there are no readily apparent parameters to limit which chosen traits are essential to per-

237. See, e.g., *United States v. Virginia*, 518 U.S. 515, 550 (1996) (holding that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description”).

238. See *id.* at 541-45 (rejecting this generalization); see also *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 716-17 (1978) (holding that Title VII of the Civil Rights Act of 1964 forbids employers from requiring female employees to make larger contributions to their pension funds than male employees, even though the pricing is based on statistics showing that women, as a class, live longer than men).

239. FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 150 (2003).

240. See *id.* at 149-51.

241. See *id.* at 139-41; see also Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 260 (1971) (mentioning how race-based generalizations may be the result of past discrimination); cf. Tuulia M. Ortner & Monika Sieverding, *Where Are the Gender Differences? Male Priming Boosts Spatial Skills in Women*, 59 SEX ROLES 274, 274 (2008) (finding a “pronounced gender difference” emerging in spatial reasoning capacity when subjects were primed with female gender stereotypes—but not when primed with male gender stereotypes).

sonhood. This difficulty is likely to create judicial and public resistance to arguments premised on the new immutability.

Line-drawing problems are often articulated as hypothetical consequences of proposed theories, through the metaphors of floodgates and slippery slopes.²⁴² Line-drawing concerns have purchase in public debates²⁴³ and in courtrooms.²⁴⁴ This is particularly true in equal protection cases, in which “[e]very new characteristic the courts recognize as warranting greater protection threatens to open the floodgates to a new wave of groups asking for protection based on that characteristic.”²⁴⁵ For example, the Supreme Court has refused to extend suspect class treatment to “the mentally retarded,” for lack of a “principled way” to distinguish this group from “the aging, the disabled, the mentally ill, and the infirm.”²⁴⁶ Even where statutes specify protected classifications, texts cannot provide answers to every potential question of application, and courts must use common law reasoning to decide which traits fall within the ambit of a statute’s protection. Common law reasoning requires the identification of principles that do not produce results that jurists consider counterintuitive, opposed to statutory purpose, or otherwise absurd.²⁴⁷

The new immutability does not help in this effort. Jed Rubenfeld has replied to personhood arguments by asking, “Where is our self-definition *not* at stake? Virtually every action a person takes could arguably be said to be an element of his self-definition.”²⁴⁸ The claim that the right to privacy should protect decisions crucial to personhood might be qualified with an exception for decisions that cause harm to others.²⁴⁹ But “[t]he minute someone starts de-

242. See, e.g., NUSSBAUM, *supra* note 89, at 310 & n.54 (arguing that “a protected class defined so broadly as to include the moderately overweight, the short, and the unattractive would be legally unworkable and would bring the entire idea of the protected class into disrepute,” and expressing concern regarding “a flood of litigation”).

243. See, e.g., Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

244. See, e.g., Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 79 (1996) (arguing that “ambitious interpretations of equal protection present a practical dilemma: How does the Court cabin the growing number of groups or identities claiming protection?”).

245. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1780 (1996).

246. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985).

247. See, e.g., Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE WESTERN RES. L. REV. 581, 590-93 (1989-90) (discussing the need for limiting principles that explain why legal rules will not result in “a parade of horrors,” or, in other words, “untoward results”).

248. Rubenfeld, *supra* note 202, at 754-55.

249. See *id.* at 756-60, 756 n.106 (discussing Mill’s well-known “harm principle,” “that, where ‘a person’s conduct affects the interests of no persons besides himself . . . there should be per-

fending her actions against a storm of protest with the claim that she is only affecting herself, we may be certain that the opposite is true.”²⁵⁰ Few actions affect only the actor, and those that generate litigation are always those where another person perceives her own interests to be at stake.²⁵¹ Rights to new forms of personhood threaten social interests in saving traditional norms from disruption by iconoclasts.²⁵² The question then becomes one of balancing relative rights, rather than recognizing absolute rights to personhood.²⁵³

E. Limiting Rights to Privacy and Recognition

The new immutability also creates a risk that rights based on the doctrine will be less robust than those based on other antidiscrimination theories. This is due to two dynamics. First, arguments based on the new immutability generally employ privacy-like reasoning: an individual has the right to make certain fundamental decisions without interference from government or employers. Privacy rights are traditionally understood as negative liberties, not positive rights that require transformative change. Second, rights premised on the new immutability may be understood as claims to cultural recognition of identities, which can work at cross purposes, politically, with claims to resource redistribution. As a result of these dynamics, rights grounded on the new immutability alone may prohibit only overt discrimination. These rights may not garner the full panoply of protections under employment discrimination statutes, which require employers to make structural changes to create more inclusive workplaces.

Rights based on the new immutability may be limited because the new immutability draws its notion of personhood from privacy doctrine.²⁵⁴ Privacy rights are generally understood as defending individual choices against outside influences.²⁵⁵ The concept of the individual evoked here is “an autonomous core—an essential self identifiable after the residue of influence has been sub-

fect freedom, legal and social, to do the action and stand the consequences” (quoting JOHN STUART MILL, *ON LIBERTY* 142 (G. Himmelfarb ed., Penguin Classics 1985) (1859))).

250. *Id.* at 758.

251. *See id.*

252. *See id.* at 759.

253. *See id.* at 760.

254. *See supra* note 130 and accompanying text.

255. *See, e.g.,* Julie E. Cohen, *What Privacy Is for*, 126 *HARV. L. REV.* 1904, 1906-07 (2013) (discussing the prevailing view of U.S. privacy policy).

tracted.”²⁵⁶ Rights to privacy thus protect an individual’s autonomous core from intrusions by the state, society, or the market. They do not envision the autonomous self as formed through the interaction of the individual with outside forces (or at least, not in any beneficial way). Thus, they do not see any positive role for the law, society, or the market in changing existing arrangements so as to create the conditions under which individuals might better achieve autonomy in self-determination.²⁵⁷ To give an example: privacy rights to abortion limit the ability of the state to ban that procedure, but do not require that the state make it accessible.²⁵⁸ By contrast, employment discrimination statutes often require affirmative changes to the structure of the workplace to combat bias: these statutes challenge employer practices that subtly perpetuate hierarchies²⁵⁹ by outlawing certain practices with a disparate impact on minority groups,²⁶⁰ requiring changes to job requirements or accommodations for certain employees,²⁶¹ and allowing affirmative action as a remedy.²⁶²

The new immutability is also hindered by its emphasis on cultural respect for outsider identities over redistribution of resources to the marginalized. It identifies the problem of discrimination as the lack of respect for an individu-

256. JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 113 (2012). As a descriptive matter, this view of the self is highly controversial: “The self has no autonomous, precultural core, nor could it, because we are born and remain situated within social and cultural contexts.” Cohen, *supra* note 255, at 1908.

257. See, e.g., *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”).

258. See, e.g., *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (holding that the right to privacy with respect to abortion does not limit the state’s ability to restrict public funds for abortions that are not necessary to save a mother’s life).

259. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 15-16 (2006) (assessing how certain aspects of employment discrimination law can prompt structural changes to the workplace, while acknowledging their limits).

260. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516-18 (2015) (explaining why Title VII and the Age Discrimination in Employment Act of 1967 have been interpreted to include disparate impact claims).

261. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring that employers “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship”).

262. *Id.* § 2000e-5(g)(1) (“If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.”).

al's "sense of self"²⁶³ or choices as to "self-determination."²⁶⁴ The harm of discrimination is thus characterized in psychological or cultural terms, rather than economic or material ones. Political theorist Nancy Fraser distinguishes between the politics of recognition and the politics of redistribution.²⁶⁵ Struggles for recognition seek to achieve social revaluation of disrespected identities, while efforts to achieve redistribution seek more equitable allotment of material resources.²⁶⁶ Fraser argues that claims for recognition often displace claims for redistribution.²⁶⁷ Advocates of recognition often ignore redistribution, overlooking the links between the two, seeing inequality as "free-floating" through "demeaning representations" rather than "socially grounded" in "institutionalized significations and norms."²⁶⁸ For example, they may not see how "heterosexist norms which delegitimize homosexuality" were connected to a social-welfare system that denied resources to gay men and lesbians by prohibiting them from marrying.²⁶⁹

The success of the gay rights movement might partly be explained by its emphasis on the recognition of a private right to gay identity, rather than the redistributive effects of expanding the right to marriage.²⁷⁰ Thus, in *United States v. Windsor*, the Court mentioned not only the financial benefits but also the financial obligations that same-sex marriage would entail, such as receiving less federal financial aid for a child's education due to a same-sex spouse's income.²⁷¹ The emphasis on the costs of marriage suggests that marriage does not

263. See *supra* note 123 and accompanying text.

264. See *supra* note 135 and accompanying text.

265. Nancy Fraser, *From Redistribution to Recognition?: Dilemmas of Justice in a 'Postsocialist' Age*, 212 *NEW LEFT REV.* 68, 70-73 (1995). Fraser's distinction between recognition and redistribution maps onto the distinction between the cultural and the material. *Id.* She posits a separate distinction between affirmative and transformative remedies, which maps onto the distinction between corrective and structural reforms. *Id.* at 82 (defining affirmative remedies as those that "correct[] inequitable outcomes of social arrangements without disturbing the underlying framework that generates them" and transformative remedies as those that "correct[] inequitable outcomes precisely by restructuring the underlying generative framework").

266. *Id.* at 73.

267. Nancy Fraser, *Rethinking Recognition*, 3 *NEW LEFT REV.* 107, 110 (2000).

268. *Id.*

269. *Id.*

270. See Fraser, *supra* note 265, at 77 (describing the gay rights movement as "quintessentially a matter of recognition").

271. 133 S. Ct. 2675, 2695 (2013) (holding that a federal statute defining marriage to exclude same-sex couples was unconstitutional). In *Windsor*, a same-sex spouse argued that she qualified for the marital exemption from the federal estate tax, in an amount totaling \$363,053. *Id.* at 2683. Yet arguments regarding same-sex marriage have not focused on costs

always entail financial benefits for families, and thus denies that recognition of same-sex marriage necessarily redistributes resources to same-sex couples. The harm of marriage inequality is thought of primarily as misrecognition rather than unfair distribution of resources.²⁷² Conceiving the problem thus means that redistribution is rarely seen as a remedy to heterosexism. It may also explain why disparate impact claims and affirmative action remedies are often excluded from legislative proposals to forbid sexual orientation discrimination in employment.²⁷³ Other movements following this recognition model are likely to run up against the same limits.

F. *Inviting Conflict*

Grounding a right on the new immutability may invite conflict from those whose moral opposition to the trait in question is also immutable. For instance, in the sexual orientation context, “[t]he intolerant heterosexual can claim, on personhood’s own logic, that critical to *his* identity is not only his own heterosexuality but also his decision to live in a homogeneously heterosexual community.”²⁷⁴ When a right is based on personhood, such conflicts are inevitable and create indeterminate legal results.²⁷⁵

Religious constituencies seeking protection for “immutable” convictions (e.g., the immorality of same-sex relationships) may find support from the new immutability. Some states that allow same-sex marriage also have “marriage conscience protection” provisions, giving those with religious objections to same-sex marriage the right to discriminate in employment, housing, and other domains.²⁷⁶ Douglas NeJaime argues that the basis for these exemptions

to the public fisc. Cf. Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1278-80 (2014) (discussing the financial costs of recognition of same-sex marriage for couples).

272. *Obergefell* gestured at the “material benefits” of marital status, such as preferential tax, inheritance, property law, and insurance treatment, but emphasized that the harm was “more than just material burdens” in that “exclusion from [marriage] has the effect of teaching that gays and lesbians are unequal in important respects.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601-02 (2015).

273. See, e.g., Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(f)-(g) (2013) (as passed by Senate, Nov. 7, 2013).

274. Rubinfeld, *supra* note 202, at 765.

275. *Id.* at 766.

276. See Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1185-87 (2012). Twenty states have such laws, and twelve states introduced similar legislation in the run-up to the *Obergefell* decision. Monica Davey & Laurie Goodstein, *Religion Laws Quickly Fall into Retreat in Indiana and Arkansas*, N.Y. TIMES (Apr. 2, 2015), <http://www.nytimes.com/2015/04/03/us/rights-laws-quickly-fall-into-retreat.html> [<http://perma.cc/54SH-BSGK>]. Nota-

is a “movement/countermovement” dynamic in which the Christian Right and LGBT advocates both claim minority group status.²⁷⁷ Each side casts the other as the oppressor, “seeking to use the force of the state to stamp out belief systems with which they disagree.”²⁷⁸ In the words of one religious liberty scholar: “Religious minorities and sexual minorities . . . make essentially parallel and mutually reinforcing claims against the larger society.”²⁷⁹

This understanding is also reflected in legislative proposals to add sexual orientation to the list of prohibited bases for employment discrimination. Although religious employers generally must abide by laws forbidding discrimination on the basis of race, sex, national origin, age, and disability,²⁸⁰ they may discriminate on the basis of religion.²⁸¹ The 2013 draft Employment Non-Discrimination Act (ENDA) would have put sexual orientation in the same class as religion, extending broad discretion to religious employers to discriminate on the basis of sexual orientation.²⁸² As a result, several LGBT-rights organizations withdrew their support for ENDA, arguing that its religious exemption “essentially says that anti-LGBT discrimination is different—more

bly, Indiana passed a religious freedom law in March 2015, but under pressure from business interests, lawmakers immediately amended the law to specify that it would not allow discrimination based on sexual orientation or gender identity. *Id.*

277. Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 305 n.2, 313 (2009).
278. NeJaime, *supra* note 276, at 1182. This quotation comes from NeJaime’s description of the arguments of certain Christian Right advocates, but the same could be said of LGBT rights advocacy that opposes belief systems such as sexism, heterosexism, and homophobia.
279. *Id.* at 1227 n.245 (quoting Douglas Laycock, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 189 (Douglas Laycock et al. eds., 2008)).
280. There is an exception for those employees defined as “ministers,” which allows, for example, the Catholic Church to refuse to hire women as priests. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705-06 (2012) (holding that the first amendment precludes the application of employment discrimination laws to “ministers”).
281. 42 U.S.C. § 2000e-1(a) (2012) (“This subchapter [Equal Employment Opportunities] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).
282. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013). *See generally* Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1375-76 (2014) (discussing the breadth of the draft ENDA’s religious exemption).

acceptable and legitimate—than discrimination against individuals based on their race or sex.”²⁸³

NeJaime argues that this problem occurs because same-sex relationships are inappropriately understood as conduct, rather than status. Thus, gay rights are cast as liberties, rather than questions of equality.²⁸⁴ But the revised immutability does not provide a workaround for gay rights advocates. Rather, it supports the case for religious exemptions. One advocate of religious exemptions acknowledges that “for both same-sex couples and religious objectors ‘conduct is fundamental to their identity.’”²⁸⁵ The issue is framed as two minorities battling over conflicting fundamental choices: the convictions of conscience of religious minorities versus the committed intimate associations of same-sex couples. When the values at stake sound in the same register, accommodation seems more reasonable.²⁸⁶ If the right to same-sex marriage were conceptualized on a different order—for example, like the right to interracial marriage—the case for religious exemptions would lose traction.²⁸⁷

Thus, the new immutability is of limited persuasive value. Moreover, to the extent that legislatures and courts accept traits as immutable aspects of personhood, they may afford lesser protection to those traits than other attributes covered by antidiscrimination law.

283. *Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People*, LAMBDA LEGAL: BLOG (July 8, 2014), http://www.lambdalegal.org/blog/20140708_joint-statement-withdrawal-support-enda [<http://perma.cc/Z3CW-XWSS>].

284. NeJaime, *supra* note 276, at 1226–29.

285. *Id.* at 1229 (quoting Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 212 (2010)).

286. See, e.g., Mark L. Rienzi, *Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 STAN. L. REV. ONLINE 18, 19 (2015) (“When the Court recognizes a right because it is deeply personal and important, governments are not free to force unwilling parties to participate in or support the exercise of that right.”); Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485, 492 (2014) (“The same fundamental values of personal liberty that support an individual’s right to live according to his or her sexual identity also support an individual’s right to live according to his or her religious convictions.”).

287. Even one advocate of religious exemptions seems to admit as much. See NeJaime, *supra* note 276, at 1229 (discussing Thomas Berg’s admission that “[g]iven equality’s absolute nature, it is hard to see how it can allow for any exemptions” (quoting Berg, *supra* note 285, at 212)); cf. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 103 (2015) (noting “the dearth of equal protection analysis in the modern debate over discrimination against same-sex couples” as compared to interracial marriage).

III. APPLYING THE REVISED IMMUTABILITY TO NEW CONTEXTS

This Part will apply the revised immutability to current controversies in discrimination contexts at the borders of existing legal protections, including employment discrimination on the basis of characteristics that the old immutability is thought to omit: weight, pregnancy, and criminal records. It argues that, due to the objections raised in the previous Part, the new immutability fails to capture the wrong of these forms of discrimination and may be counterproductive as a strategy for advancing protection. Weight is unlikely to meet the test of the new immutability because many do not regard it as important and it is often the source of stigma. Additionally, courts resist the argument that weight is fundamental to personality because the same could be said of most aspects of appearance. The argument that pregnancy is a choice that is integral to identity risks perpetuating stereotypes about women's roles, has limited persuasive force due to the difficulty of explaining why pregnancy is a more important choice than other life pursuits, may result in limited rights to privacy rather than support, and invites conflicts with religious and business interests. The new immutability does not offer any obvious arguments against the use of criminal background checks to screen out job applicants, and may even promote discrimination against ex-offenders by suggesting that criminal conduct is a fundamental personality trait.

A. Weight

According to survey data, weight is one of the most prevalent bases for discrimination; weight discrimination occurs in interpersonal, employment, healthcare, and educational settings.²⁸⁸ Yet weight is a category at the borders

²⁸⁸ See, e.g., R.M. Puhl et al., *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, 32 INT'L J. OBESITY 992, 998 (2008) (concluding, based on a national sample of adults, that “[w]eight/height discrimination is the third most common type of discrimination among women, and the fourth most prevalent form of discrimination reported by all adults,” and the risk of this type of discrimination “increases significantly with higher obesity”); see also Timothy A. Judge & Daniel M. Cable, *When It Comes To Pay, Do the Thin Win? The Effect of Weight on Pay for Men and Women*, 96 J. APPLIED PSYCHOL. 95, 95, 103, 107 (2011) (discussing research detailing the prevalence of employer stereotypes that depict obese workers as “lazy and lacking in self-discipline” and how those stereotypes disproportionately affect women, and concluding, based on a longitudinal study of 7,661 individuals, “that for men, increases in weight have positive linear effects on pay but at diminished returns at above-average levels of weight,” while “[f]or women, increases in weight have negative linear effects on pay, but the negative effects are stronger at below-average than at above-average weight levels”).

of antidiscrimination protection.²⁸⁹ Typical objections to protecting against weight discrimination echo concerns underlying the old immutability: that those who are accountable for their own status should not be protected,²⁹⁰ and that discrimination might send “pedagogical” signals of disapproval of excess weight.²⁹¹ Tellingly, one opponent of weight discrimination legislation objected to prohibiting discrimination “based merely on ‘weight’—as if weight were immutable and worthy of protected status on par with an individual’s race or sex.”²⁹²

289. In the United States, only one state and five localities explicitly prohibit “weight” discrimination. See S.F., CAL., POLICE CODE § 3301 (2015); SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83 (2015); URBANA, ILL., CODE OF ORDINANCES § 12-39 (2015); MICH. COMP. LAWS § 37.2102 (2014); BINGHAMTON, N.Y., CODE OF ORDINANCES § 45-2 (2010); MADISON, WIS., CODE OF ORDINANCES § 39.03 (2015). The District of Columbia prohibits discrimination based on “personal appearance” more generally. See D.C. CODE § 2-1401 (2015).

290. Roberta R. Friedman & Rebecca M. Puhl, *Weight Bias: A Social Justice Issue*, YALE RUDD CTR. FOR FOOD POL’Y & OBESITY 8 (2012), http://www.uconnruddcenter.org/files/Pdfs/Rudd_Policy_Brief_Weight_Bias.pdf [<http://perma.cc/TPP3-DWRT>] (describing typical objections to be that “overweight and obese people don’t need legal protection,” because “[i]f they want to avoid discrimination, they should simply lose weight” and that “[i]f you fight weight stigma, you’ll actually discourage people from trying to lose weight”). Other arguments against legal protection question the prevalence and harmfulness of weight discrimination, are concerned about the potential costs of litigation to business, and query whether alternative strategies, such as education, would better address the problem. *Id.*

Some scholars argue explicitly that discrimination on the basis of obesity is justified due to the characteristic’s mutability. See M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U.J. MED. & L. 1, 10 (2010) (“[R]esponsibility is complex, but ultimately, individual choice plays the most prominent role in obesity. Therefore, it is distinguishable from disabilities protected under law and should not be accorded the same protections.”).

291. Cf. Halley, *supra* note 8, at 521 (discussing this “pedagogical” argument in favor of anti-gay discrimination). In the context of obesity, discrimination does not seem to be working as an effective pedagogical technique. See, e.g., Angelina R. Sutin & Antonio Terracciano, *Perceived Weight Discrimination and Obesity*, PLOS ONE (July 24, 2013), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0070048> [<http://perma.cc/GPG6-TT9R>] (reporting the results of a nationally representative longitudinal study showing participants who reported weight discrimination were 2.5 times more likely to become obese upon follow-up); cf. TRACI MANN, SECRETS FROM THE EATING LAB: THE SCIENCE OF WEIGHT LOSS, THE MYTH OF WILLPOWER, AND WHY YOU SHOULD NEVER DIET AGAIN 165 (2015) (discussing studies suggesting that stigma causes weight gain by undermining self-confidence, leading to “a physiological stress response,” and making people feel “embarrassed to exercise in public”).

292. Gary Feldman & Judith Ashton, *Jumping the Gun on Weight Discrimination*, BOS. GLOBE (June 2, 2007), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/06/02/jumping_the_gun_on_weight_discrimination [<http://perma.cc/GB3F-X9AU>]; see also ABIGAIL C. SAGUY, WHAT’S WRONG WITH FAT? 85-89 (2013) (discussing “several empirical studies” and “systematic news media analyses” demonstrating that “a personal responsi-

Similar concerns have prompted courts to interpret existing antidiscrimination statutes narrowly to exclude weight discrimination. The ADA, which prohibits discrimination based on disability, is a potential source of legal redress for weight discrimination.²⁹³ The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities.”²⁹⁴ But even if a condition is not substantially limiting, a person may qualify as “disabled” under the statute if she is “regarded as having such as impairment.”²⁹⁵ In 2008, Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which clarifies that to be “regarded as” having a disability under the ADA, a plaintiff must prove only that she was perceived as having a “physical or mental impairment” that is not “transitory and minor.”²⁹⁶ Impairments are defined broadly to include “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine”²⁹⁷

bility frame dominates news coverage of obesity” in the United States); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1708-11 (2004) (identifying and criticizing the ideology of “dispositionalism” that posits that consumers’ choices are the causal origins of obesity); Kelly D. Brownell et al., *Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue*, 29 HEALTH AFF. 379, 379 (2010) (“Two of the most important words in the national discourse about obesity are ‘personal responsibility.’”); INST. MED. NAT’L ACADEMIES, ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION 99-101 (Dan Glickman et al. eds., 2012) (discussing the common belief “that obesity results primarily from a failure of personal responsibility to control food intake”).

293. 42 U.S.C. §§ 12101-12213 (2012). Weight restrictions have also been challenged as sex or age discrimination, but these theories require plaintiffs to show that an employer’s policy was not evenhanded as to sex or age. See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000).

294. 42 U.S.C. § 12102(1)(A) (2012).

295. *Id.* § 12102(1)(C). The statute also prohibits discrimination on the basis of “a record of such an impairment.” *Id.* § 12102(1)(B).

296. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555. Transitory is defined as six months or less. 42 U.S.C. § 12102(3)(B). This provision was a reaction to a 1999 Supreme Court precedent holding that to prove she was “regarded as” disabled, a plaintiff had to prove that her employer regarded her as having an impairment that substantially limited her in a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 499-501 (1999). A plaintiff no longer must prove that an employer regarded her as substantially limited. 42 U.S.C. § 12102(3)(A).

297. 28 C.F.R. § 36.104(1)(i) (2015). Congress authorized the EEOC to promulgate these regulations. 42 U.S.C. § 12205(a).

The issue of whether obesity counts as an “impairment” was disputed both before and after the ADAAA. The EEOC has offered the guidance that impairments do not “include physical characteristics such as . . . *weight* . . . that are within ‘normal’ range and are not the result of a physiological disorder.”²⁹⁸ In litigation, the EEOC has taken the position that obesity is an impairment when either (1) the plaintiff’s weight falls outside the “normal range” or (2) the plaintiff has proof that her weight has a physiological basis.²⁹⁹ Some courts, however, have held that regardless of how far a plaintiff’s weight deviates from the norm, it is not a disability unless it has an underlying “physiological cause.”³⁰⁰

The “physiological cause” requirement is best explained by the logic of the old immutability. The intuition is that weight discrimination is unfair only if a plaintiff’s weight is a function of her biology and a result of chance, not

298. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2015) (emphasis added). Prior to revisions in March 2011, the EEOC’s Interpretive Guidance on the definition of disability instructed that “except in rare circumstances, obesity is not considered a disabling impairment.” *Id.* app. § 1630.2(j). Its pre-ADAAA compliance manual stated that “[b]eing overweight, in and of itself, is not generally an impairment On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, COMPLIANCE GUIDELINES § 902.2(c)(5) (1995) (footnote omitted). Although courts and commentators continue to cite this provision, the EEOC has indicated that this manual has been superseded by the ADAAA. *Section 902 Definition of the Term Disability*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 25, 2012), <http://www.eeoc.gov/policy/docs/902cm.html> [<http://perma.cc/EC7E-5SAW>].

299. *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011) (adopting the EEOC’s definition).

300. *See, e.g.*, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (holding that “to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition”); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (holding that “obesity, except in special cases where the obesity relates to a physiological disorder, is not a ‘physical impairment’ within the meaning of the statutes”); *Sibilla v. Follett Corp.*, No. CV 10-1457(AKT), 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012) (holding that *Francis*’s “reasoning remains applicable even after the passage of the ADAAA”); *Merker v. Miami-Dade Cty.*, 485 F. Supp. 2d 1349, 1351 (S.D. Fla. 2007) (stating that courts have “uniformly held that obesity, absent some physiological cause, does not qualify as a disability under the ADA”); *Ivey v. District of Columbia*, 949 A.2d 607, 613 (D.C. 2008) (dismissing the plaintiff’s ADA claim because the plaintiff lacked “testimony” that her morbid obesity was “caused by a physiological condition”). *But see Res. for Human Dev., Inc.*, 827 F. Supp. 2d at 693; *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 231 (Mont. 2012) (interpreting a Montana statute consistently with the ADAAA and concluding that “[o]besity that is not the symptom of a physiological disorder or condition may constitute a ‘physical or mental impairment’ within the meaning of Montana Code . . . if the individual’s weight is outside ‘normal range’ and affects ‘one or more body systems’”).

choice.³⁰¹ While science increasingly suggests “hormonal factors, metabolism, and genetics are all factors that predetermine one’s weight and impede attempts to lose it,”³⁰² the causal force of such factors in any particular individual’s obesity can be difficult to prove.³⁰³ Perhaps sensing a problem with the harshness, intrusiveness, and stigmatizing nature of a rule requiring a plaintiff to provide expert medical testimony showing she is not to blame for her weight, judges do not always state the premise of the physiological cause requirement explicitly. Rather, they grope for other arguments to explain their results. In *EEOC v. Watkins Motor Lines*, the Sixth Circuit held that the line between true impairments and all other “‘abnormal’ . . . physical characteristics” had to be drawn by a physiological basis requirement.³⁰⁴ The court hypothesized that covering obesity without a physiological cause would lead down the slippery slope to providing coverage of, “for example, someone extremely tall or grossly short.”³⁰⁵ But the court did not explain how the physiology requirement draws a meaningful line. Height is indisputably a function of physiology, and the ADA often applies in such contexts.³⁰⁶

Some courts go so far as to hold that obesity is not “regarded as” an impairment absent evidence the employer believed the plaintiff’s weight was

301. Camille A. Monahan et al., *Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 ABA J. LAB. & EMP. L. 537, 554 (2014) (arguing that the physiological cause requirement “enacts the ideology of blame by seeking to hold severely obese individuals accountable for the disability that is assumed to be within their control”).

302. Yofi Tirosh, *The Right To Be Fat*, 12 YALE J. HEALTH POL’Y L. & ETHICS 264, 285 & n.73 (2012) (footnote omitted) (collecting studies); see also MANN, *supra* note 291, at 15-45 (describing research showing that diets fail due to genetic factors, psychological forces, and environmental circumstances, while aptitude for self-control plays only a small role).

303. See, e.g., *Wagner’s Pharmacy, Inc. v. Pennington*, No. 2013-SC-000541-DG, 2015 WL 2266374, at *1, *5 (Ky. May 14, 2015) (concluding that expert testimony about “the cause of morbid obesity in general—not specific to the plaintiff” was insufficient to establish a plaintiff’s disability under the Kentucky Civil Rights Act, where a doctor testified that “morbid obesity like [the plaintiff’s] is caused by a cluster of often unknown physiological abnormalities”); Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 964 (2012) (discussing the barriers to providing expert testimony as to weight’s physiological causes, including cost and the fact that “doctors simply do not know the cause of most people’s weight”).

304. 463 F.3d at 443.

305. *Id.*

306. For instance, in 2011, Starbucks paid \$75,000 to settle an EEOC enforcement action alleging it had unreasonably denied accommodation to a barista with dwarfism. Press Release, EEOC, Starbucks To Pay \$75,000 To Settle EEOC Disability Discrimination Suit (Aug. 18, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/8-18-11.cfm> [<http://perma.cc/3X7S-X5EX>].

caused by a physiological condition.³⁰⁷ In *Spiegel v. Schulmann*, Spiegel, a former karate instructor, sued his employer, Schulmann, alleging discrimination on the basis of weight.³⁰⁸ The district court held that, as per Spiegel's complaint, his weight was not regarded as an impairment by his employer:

Schulmann explained to Spiegel at considerable length his views about overweight people. Defendant Schulmann told him that the fact that he was fat demonstrated that he had no self-esteem and was a weak person. As such, Schulmann thought Spiegel could not be a proper role model for others. It was clear that it was not Schulmann's view that Spiegel was physically unable to teach karate, at least at the beginner level. Rather, it was simply his view that fat people are essentially undisciplined and weak, and therefore cannot be in a role in which others are supposed to look up to and respect them.³⁰⁹

The court dismissed the complaint for failure to allege that the employer "believed that Spiegel's weight condition was the symptom of a physiological disorder."³¹⁰ Thus, an employer's stereotyped views about the causes and correlates of obesity inoculated his discrimination from legal attack.³¹¹

What would weight discrimination look like if considered under the rubric of the new immutability rather than the old? The new immutability may ease the requirement that a trait be unchangeable, and ask instead whether the change would be very difficult or traumatic.³¹² Legislatures, the public, and

307. See, e.g., *Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F. Supp. 1082, 1089-90 (S.D. Iowa 1997) ("If the matter depends on [the employer's] perception, evidence which consists only of a belief that a physical characteristic presents an undesirable image or appearance does not support an inference that [the employer] regarded [the plaintiff's] weight problem as connected to a physiological disorder or condition."); *Ivey v. District of Columbia*, 949 A.2d 607, 613 (D.C. 2008) (dismissing a claim that an employer regarded a morbidly obese employee as disabled because the evidence only demonstrated that the employee's weight "impaired [her employer's] ability to get along with her," not that the employer regarded her as unable to do her job).

308. No. 03-CV-5088 (SLT)(RLM), 2006 WL 3483922, at *13 (E.D.N.Y. Nov. 30, 2006), *aff'd in part, vacated and remanded in part on other grounds*, 604 F.3d 72 (2d Cir. 2010).

309. *Id.*

310. *Id.* at *14.

311. Cf. Marc V. Roehling et al., *Investigating the Validity of Stereotypes About Overweight Employees: The Relationship Between Body Weight and Normal Personality Traits*, 33 GRP. & ORG. MGMT. 392, 392, 419 (2008) (concluding, based on two studies of 3,496 adults, that "body weight is not a practically significant predictor of the personality traits conscientiousness and extraversion in a broad sample of working-age adults, and, therefore, it should not be used as a predictor of personality in employment decisions").

312. See *supra* notes 120-123, 169-170 and accompanying text.

judges are more likely to conclude that obesity meets this requirement.³¹³ But it is less likely weight would be considered “highly resistant to change” for workers penalized for exceeding weight requirements by small amounts,³¹⁴ such as flight attendants³¹⁵ or NFL cheerleaders.³¹⁶

A trait’s resistance to change alone does not make it immutable in the new sense.³¹⁷ In addition, the trait must be central to personality, or its expression a protected liberty. In a provocatively titled article, Yofi Tirosh calls this *The Right To Be Fat*, and argues that “American law’s current constitutional commitments to liberty, autonomy, and human dignity entail that it legally recognize the right to be of any body size.”³¹⁸ This argument also has an antipaternalistic bent—that even if being overweight is a poor choice, it is one reserved for each person to make, without interference from the government and employers.³¹⁹

Yet obesity is a condition that is regarded as both inessential and stigmatized, falling through the cracks of the revised immutability.³²⁰ Body weight seems an unlikely candidate for inclusion in a list of traits thought central, fun-

313. However, there may be some resistance to the idea of weight loss as traumatic, which conflicts with the before-and-after narrative of weight loss as empowering that saturates American culture. This is not to say weight loss is always experienced as empowering. See, e.g., Alexis Conason et al., *Substance Use Following Bariatric Weight Loss Surgery*, 148 JAMA SURGERY 145 (2013) (providing evidence of increased frequency of substance abuse, particularly alcohol, following weight loss surgery).

314. According to one study, pay declines more sharply with increases in weight for women at below-average weights than for those at above-average weights. Judge & Cable, *supra* note 288, at 102. The explanation may be that employers “celebrate” “very thin” female employees who have met idealized standards, but “as women reach average weight, they have already ‘fallen from grace’ according to media images and social expectations.” *Id.* at 96.

315. See *infra* note 331 and accompanying text (discussing litigation by flight attendants).

316. See Julia Lurie & Nina Liss-Schultz, *Jiggle Tests, Dunk Tanks, and Unpaid Labor: How NFL Teams Degrade Their Cheerleaders*, MOTHER JONES (May 22, 2014), <http://www.motherjones.com/media/2014/05/nfl-cheerleader-lawsuits-sexism> [<http://perma.cc/4CSA-4SM2>].

317. *But see supra* notes 168-169 and accompanying text.

318. Tirosh, *supra* note 302, at 334.

319. *Id.* at 315 (“Even readers who are convinced that being fat without making efforts to lose weight is a bad lifestyle choice should endorse the right to be fat. They should view it as the right to make one’s own mistakes in one’s own way.”). I note that the food industry also employs antipaternalism, freedom, and choice arguments with respect to obesity in an effort to resist regulation. See SAGUY, *supra* note 292, at 75 (discussing advertisements by the advocacy group Center for Consumer Freedom).

320. See *supra* Part II.B.

damental, or integral to identity.³²¹ Those seeking to lose weight are particularly unlikely to advocate for this characterization.³²² As Tirosh describes in ethnographic detail, “[m]ost people perceiving themselves as fat experience the center of gravity of their identity in their imagined, post-transformation future.”³²³ They feel that excess weight is blocking them from realizing their true selves, not that weight is constitutive of their authentic identities. To say that weight is fundamental to personhood would strike many as deeply offensive, reinforcing stereotypes that weight entails certain personality traits. Many advocates of “fat acceptance” are committed to a paradigm that considers weight as a characteristic that is, and should be, irrelevant to individual identity.³²⁴ Some of these advocates expressly seek to deemphasize the preoccupation with weight, arguing size is a poor measure of personality, health, and beauty.³²⁵

The concepts of personhood and liberty are unlikely to persuade in this context because they lack limiting principles. Courts see expansion of discrimination law to cover obesity as eroding employer prerogatives to discriminate on the basis of all other bodily traits and practices that are meaningful to individuals, such as muscle tone, smoking, alcohol and drug use, piercings, tattoos, dress, and grooming.³²⁶ *Tudyman v. United Airlines* is one example.³²⁷ The

321. Sociologist Abigail Saguy conducted a series of experiments measuring subjects' views on obesity after reading news articles promoting various perspectives, including one attributing the obesity epidemic to lack of personal responsibility and one containing a “message of fat rights and the idea that one can be healthy at every size.” SAGUY, *supra* note 292, at 136-39. In one experiment, exposure to the positive message about fat did not reduce approval for weight discrimination relative to a control group. *Id.* at 139. Saguy concludes that her collective results “suggest news reports on the ‘obesity epidemic’ intensify antifat stigma but that it is more difficult—in a society so saturated with antifat messages—to lessen antifat prejudice or promote size diversity as a positive value.” *Id.* at 139.

322. According to a 2014 Gallup poll, fifty-one percent of Americans would like to lose weight. *Personal Weight Situation*, GALLUP, <http://www.gallup.com/poll/7264/personal-weight-situation.aspx> [<http://perma.cc/MSN6-YJJG>].

323. Tirosh, *supra* note 302, at 301.

324. Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW & SOC'Y REV. 397, 401-02 (2008) (analyzing interviews with members and leaders of the National Association to Advance Fat Acceptance, and concluding that many were “deeply invested in [a] vision of just treatment in which the body and its abilities are dissociated completely” and weight is considered “irrelevant”).

325. See, e.g., HEALTH AT EVERY SIZE, <http://www.haescommunity.org> [<http://perma.cc/4S7Q-RTWG>].

326. In particular, the analogy between obesity and smoking is often made by public health researchers to justify discriminatory treatment. SAGUY, *supra* note 292, at 73.

327. 608 F. Supp. 739, 741 (C.D. Cal. 1984). This case was decided under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), the ADA's predecessor. *Tudyman*, 608 F. Supp. at 740 (discussing the Rehabilitation Act).

plaintiff, an “avid body build[er],” was denied a job as a flight attendant because he was fifteen pounds over the airline’s maximum weight for flight attendants of his height and sex, due to his “low percentage of body fat and high percentage of muscle.”³²⁸ Under United’s policy, an employee who exceeded the weight maximum would be given an opportunity to lose weight or would be terminated.³²⁹ The policy allowed the airline’s medical staff to make exceptions, but they declined to make one for William Tudyman, “as his condition was voluntary and self-imposed.”³³⁰ The *Tudyman* court found that Congress had no intention of covering this sort of condition as an impairment: “What plaintiff is really suing for is his right to be both a body builder and a flight attendant, a right that [the statute] was not intended to protect.”³³¹

In another case, *Powell v. Gentiva Health Services, Inc.*, the plaintiff, who worked selling hospice services, argued that she had been terminated because her employer regarded her as obese.³³² As evidence, Powell pointed to a comment by her supervisor during a performance review that Powell’s “dress and appropriateness was not up to par, and that she wasn’t even going to discuss the weight issue at this time.”³³³ Assuming the supervisor “viewed Powell’s appearance as a whole (clothing, accessories, weight) as negatively affecting her sales performance,” the court held that the statement was nevertheless insufficient to prove the supervisor “perceived Powell’s weight to constitute a physical impairment.”³³⁴ The court offered the following analogy to illustrate its point:

[S]uppose plaintiff wore her hair in a neon green mohawk. Such an unconventional hairstyle choice might be viewed as unprofessional, and might well impede her efforts to sell hospice services . . . but it obviously is not a physical impairment. The same goes for weight. An overweight sales representative may have difficulty making sales if the pro-

³²⁸. *Id.* at 740-41.

³²⁹. *Id.* at 741.

³³⁰. *Id.*

³³¹. *Id.* at 746. Another court, interpreting New York State’s disability discrimination law, held that flight attendants could not challenge Delta Air Lines’s weight requirement unless they could show they were “medically incapable of meeting [it] due to some cognizable medical condition.” *Delta Air Lines v. N.Y. State Div. of Human Rights*, 689 N.E.2d 898, 902 (N.Y. 1997); *cf.* *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 696, 698 (N.Y. 1985) (holding plaintiff was disabled under New York state law on account of her “clinical diagnos[is]” of obesity notwithstanding that the cause “was probably due to bad dietary habits”).

³³². No. 13-0007-WS-C., 2014 WL 554155, at *5 (S.D. Ala. Feb. 12, 2014).

³³³. *Id.* at *3.

³³⁴. *Id.* at *7.

spective customer perceives her appearance to be unprofessional, but that does not render her weight a “physical or mental impairment” within any rational definition of the phrase.³³⁵

Employment discrimination law seeks to balance employer prerogatives against the rights of employees to avoid invidious discrimination. Without more, arguments based in claims to “personhood” and “liberty” seem to open the floodgates to eliminate too much employer discretion.

In sum, harsh, intrusive, and stigmatizing judgments about individual responsibility for weight operate in the background of judicial opinions and public discussions regarding obesity discrimination. But the new immutability does not provide the conceptual resources to overcome these judgments. Rather, it leaves out weight as an inessential and stigmatized condition. Moreover, the argument that weight is fundamental to personality is likely to find resistance because the same argument can be made of appearance in general.

B. Pregnancy

Immutability arguments also limit antidiscrimination protection for pregnancy. In a 1976 decision, *General Electric Co. v. Gilbert*, the Supreme Court distinguished pregnancy discrimination from prohibited sex discrimination, based in part on the argument that pregnancy is a choice.³³⁶ *Gilbert* was a Title VII challenge to an employer’s exclusion of benefits for pregnancy-related disabilities from its disability insurance plan.³³⁷ The Court did not equate this exclusion with sex discrimination, because “[w]hile the [group of pregnant women] is exclusively female, [the group of nonpregnant persons] includes members of both sexes.”³³⁸ The Court further explained:

[A] distinction which on its face is not sex related [such as a pregnancy-based distinction] might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrim-

335. *Id.*

336. 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

337. *Id.* at 127-28.

338. *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). This reasoning is “infamous” not only because “[t]he Court ignored the fact that the capacity to gestate distinguishes the sexes physically,” but also because “[j]udgments about women’s capacity to bear children play a key role in social definitions of gender roles and thus in the social logic of ‘discrimination based on gender as such.’” Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268-69 (1992).

ination. But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a “disease” at all, and is often a voluntarily undertaken and desired condition.³³⁹

Thus, because pregnancy is “voluntarily undertaken and desired,” it is not immutable in the old sense and may properly be excluded from an employer’s health plan.³⁴⁰ The law seldom construes pregnancy as an injury resulting from misfortune, the exception being in cases of sexual assault.³⁴¹ This reasoning rests on the normative judgment that “pregnancy’s character as a choice legitimate[s] the attribution of the costs of reproduction to the private family.”³⁴²

In response to *Gilbert*, Congress amended Title VII with the Pregnancy Discrimination Act (PDA) of 1978.³⁴³ The PDA provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employ-

339. *Gilbert*, 429 U.S. at 136. The dissent objected that “the characterization of pregnancy as ‘voluntary’ is not a persuasive factor, for . . . ‘other than for childbirth disability, [General Electric] had never construed its plan as eliminating *all* so-called ‘voluntary’ disabilities,’ including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery.” *Id.* at 151 (Brennan, J., dissenting) (quoting *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 665 (1975)).

340. An insurance program might argue that because pregnancy is foreseeable, it is not the sort of risk that an insurance scheme should cover. But, as Deborah Dinner has argued, foreseeability “could not do all the logical work” of justifying the distinction between pregnancy and other illnesses, because sickness and injury are a foreseeable part of everyone’s life cycle. Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 486 (2014).

341. Bridges, *supra* note 160, at 490-91 (“[S]exual assault [statutes that provide that a rapist who causes his victim to become pregnant commits an aggravated offense] are somewhat exceptional because it is rare for the law to embrace and reflect subversive understandings of pregnancy.”).

342. Dinner, *supra* note 340, at 486.

343. See generally *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (“When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.”).

ment-related purposes . . . as other persons not so affected but similar in their ability or inability to work³⁴⁴

Courts have limited the reach of the PDA by reasoning that pregnancy is not immutable because it is impermanent, and therefore discrimination based on a planned or past pregnancy may not be prohibited. One court has noted, in an oft-cited passage:

Pregnancy . . . differs from most other protected personal attributes in that it is not immutable. While some effects of pregnancy linger beyond the act of giving birth, at some point the female employee is no longer “affected by pregnancy, childbirth, or related medical conditions,” for purposes of the PDA.³⁴⁵

Using this rationale, courts distinguish between prohibited pregnancy discrimination and permissible discrimination based on parental status.³⁴⁶ Along these lines, some courts interpreting the PDA have refused to include in the protected class women who plan to become pregnant.³⁴⁷ Others hold that employer-provided health insurance plans need not include fertility treatments.³⁴⁸

344. 42 U.S.C. § 2000e(k) (2012).

345. *Solomen v. Redwood Advisory Co.*, 183 F. Supp. 2d 748, 753-55 (E.D. Pa. 2002) (dismissing a pregnancy claim at summary judgment based on plaintiff’s inability to “establish that she was affected by the pregnancy at or near the time of her termination”). *But see* *Laro v. New Hampshire*, 259 F.3d 1, 14 (1st Cir. 2001) (“[T]he potential for pregnancy is one immutable characteristic which distinguishes men from women and consequently has definite real life consequences.”); *Ponton v. Newport News Sch. Bd.*, 632 F. Supp. 1056, 1065 (E.D. Va. 1986) (referring to pregnancy as “an immutable sex characteristic” without explanation).

346. *Solomen*, 183 F. Supp. 2d at 753 (discussing *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) and *Piraino v. Int’l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996)).

347. *Panizzi v. City of Chi. Bd. of Educ.*, No. 07 C 846, 2007 WL 4233755, at *3 (N.D. Ill. Nov. 19, 2007) (refusing to cover women “*planning* to become pregnant”); *Barnowe v. Kaiser Found. Health Plan of the Nw.*, No. CV 03-1672-BR, 2005 WL 1113855, at *4 (D. Or. May 4, 2005) (excluding a plaintiff “*planning on*” pregnancy). *But see* *Ingarra v. Ross Educ., LLC*, 13-CV-10882, 2014 WL 688185, at *6 (E.D. Mich. Feb. 21, 2014) (holding that discrimination based on the “*desire to become pregnant and bear children*” is sex discrimination because “[c]hildbearing capacity only relates to women”).

348. *See, e.g., Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (holding that refusal to cover “*surgical impregnation procedures*” was not a violation of Title VII or the PDA because “[a]lthough the surgical procedures are performed only on women, the need for the procedures may be traced to male, female, or couple infertility with equal frequency”); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996) (holding that refusal to cover fertility treatment does not violate the PDA because “[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception”). *But see, e.g., Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008) (finding that terminating an employee for taking time off to undergo in vitro fertilization (IVF) vio-

Lurking behind these decisions may be the unstated assumption that certain reproductive choices are voluntary decisions deserving of moral judgment. The Eighth Circuit has held that employers may refuse to cover contraception, so long as it is not covered for men (condoms) and women (birth control pills), reasoning that contraceptive services are different in kind from other forms of preventative healthcare.³⁴⁹ The court took this difference for granted, declining to explain any rationale for the distinction.³⁵⁰ The thinking may be the unstated assumption that women who choose to engage in nonprocreative sex should not ask the workplace to fund that pursuit.

Immutability arguments also undergird the idea that the workplace has no duty to accommodate the incidents of pregnancy. Despite Congress's repudiation of *Gilbert*, lower courts continue to reason that "pregnancy is a voluntary condition and women bear the burdens of that choice if becoming a mother is not compatible with the rigors of the workplace."³⁵¹ Courts have interpreted the PDA to bar discrimination on the basis of stereotypes or generalizations about pregnant workers,³⁵² but not to require that employers provide pregnant workers with accommodations—such as excusing tardiness resulting from morning sickness—absent proof that nonpregnant employees received the same accommodations.³⁵³

lates the PDA because "[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women").

349. *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 944 (8th Cir. 2007). The Eighth Circuit was the only court of appeals to consider this question before the Patient Protection and Affordable Care Act mandated contraceptive coverage by employer-sponsored health insurance plans. See 42 U.S.C. § 300gg-13(a)(4) (2012); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012).
350. *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d at 944 (refusing to address whether the distinction is that pregnancy is not a "disease" or to explain any other distinction between contraception and other forms of preventative healthcare). A dissent argued that because the health risks of unplanned pregnancy befall only women, the right comparison was between forms of preventative health care provided to men and women. *Id.* at 948-49 (Bye, J., dissenting).
351. Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 85 (2013) (surveying recent PDA case law).
352. See, e.g., *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir. 1999) (holding that absent "sufficient specific evidence (apart from general assumptions about pregnancy) that [the pregnant plaintiff] would require special treatment," the employer could not terminate that plaintiff "simply because it 'anticipated' that she would be unable to fulfill its job expectations").
353. See, e.g., *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994). By contrast to the federal rule, fifteen states, the District of Columbia, and four cities require pregnancy accommodations. *Reasonable Accommodations for Pregnant Workers: State and*

The ADA, unlike the PDA, expressly requires reasonable accommodation of disabilities,³⁵⁴ defined as impairments that substantially limit a major life activity.³⁵⁵ Consistent with *Gilbert's* classification of pregnancy as a voluntary condition rather than an impairment, no court has ever held that pregnancy, as such, is a disability under the ADA.³⁵⁶ The EEOC has interpreted the term "disability" to include pregnancy-related impairments that substantially limit a major life activity, such as gestational diabetes.³⁵⁷ But courts have consistently denied coverage to women experiencing more "typical" pregnancy-related conditions, such as the inability to lift heavy objects,³⁵⁸ fatigue,³⁵⁹ or nausea.³⁶⁰

Local Laws, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (July 2015), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<http://perma.cc/S5AP-RFFH>]. Some private employers also require accommodation. See Lydia DePillis, *Under Pressure, Wal-Mart Upgrades Its Policy for Helping Pregnant Workers*, WASH. POST: WONKBLOG (Apr. 5, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers> [<http://perma.cc/47HB-NLWR>].

354. See *supra* note 261 and accompanying text.

355. See *supra* note 294 and accompanying text.

356. *E.g.*, *McCarty v. City of Eagan*, 16 F. Supp. 3d 1019, 1027 (D. Minn. 2014); see also *Conley v. United Parcel Serv.*, 88 F. Supp. 2d 16, 19 (E.D.N.Y. 2000) ("Conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments . . .").

357. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2011) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability . . ."); *id.* app. § 1604.10(b) ("Disabilities caused by or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions . . ."); see also U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, EEOC NOTICE NO. 915.003 (2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [<http://perma.cc/4MZ9-QQ3V>] (giving the example of gestational diabetes).

A "pregnancy-related impairment" may also count as a condition "regarded as" a disability, so long as it is not "transitory and minor." 29 C.F.R. pt. 1630 app. § 1630.2(h) (2011); see *Nayak v. St. Vincent Hosp. & Health Care Ctr.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at *2-3 (S.D. Ind. Jan. 9, 2013) (holding that pregnancy complications lasting ten months constituted an impairment under the "more lenient ADA"). "Transitory" means "with an actual expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B) (2012). However, reasonable accommodation is not required for impairments that are only "regarded as" disabilities. *Id.* § 12201(h).

358. See, *e.g.*, *Leahy v. Gap, Inc.*, No. 07-CV-2008, 2008 WL 2946007, at *5 (E.D.N.Y. July 29, 2008) (holding that an "inability to perform heavy lifting, climbing ladders and other strenuous movements" associated with pregnancy was not a disability).

359. See, *e.g.*, *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd*, 340 F.3d 543 (8th Cir. 2003) (holding that "periodic nausea, vomiting, dizziness, severe headaches, and fatigue" are not disabilities because they are "part and parcel of a normal pregnancy").

Since the ADA's 2008 amendments, which overrode judicial interpretations of that statute as requiring that impairments be permanent or long term,³⁶¹ courts have recognized more pregnancy-related conditions as disabilities.³⁶² Nonetheless, the EEOC continues to maintain that pregnancy itself is not a disability, and the amendments did not expressly repudiate judicial interpretations of disability as excluding the "normal" incidents of pregnancy.³⁶³

In interpreting the PDA's requirement that pregnant workers "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work,"³⁶⁴ courts draw on notions of mutability as individual responsibility. In *Young v. United Parcel Service*, the Supreme Court held that a fact finder might infer pregnancy discrimination if an employer denied accommodations (such as exemptions from heavy-lifting requirements) to pregnant workers while granting those accommodations to nonpregnant workers with similar limitations.³⁶⁵ The Court set forth a modified version of the *McDonnell Douglas* test³⁶⁶ for such cases rather than any per se rule.³⁶⁷

360. *Id.*

361. 29 C.F.R. § 1630.2(j)(1)(ix) (2014) (providing that even "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting"); see also *Heatherly v. Portillo's Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 920 (N.D. Ill. 2013) (rejecting the argument that limitations on heavy lifting necessitated by plaintiff's "high risk pregnancy" were not impairments under the ADAAA because the pregnancy was temporary).

362. See Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 123-35 (2013) (surveying post-ADAAA cases).

363. See *supra* note 357 and accompanying text. Thus, while courts may interpret the ADAAA's revised definition of impairment to include "significant pregnancy-related complications," *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012), they may continue to exclude those complications deemed "routine," *Lang v. Wal-Mart Stores E., L.P.*, No. 13-CV-349-LM, 2015 WL 898026, at *4 (D.N.H. Mar. 3, 2015) (holding that a plaintiff was not disabled because she had "not presented evidence that the lifting restrictions suggested by her doctor were the result of a disorder or an unusual or abnormal circumstance, rather than a routine suggestion to avoid strenuous physical labor during pregnancy").

364. See *supra* note 344 and accompanying text.

365. 135 S. Ct. 1338, 1353-54 (2015).

366. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (setting forth a burden-shifting framework for cases alleging disparate treatment based on race in hiring).

367. *Young*, 135 S. Ct. at 1353-54 (holding that, at the final stage of the inquiry, a plaintiff may survive summary judgment "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination"). The opinion does not define "a significant burden," but it states that one way a plaintiff may demonstrate a significant burden is with "evidence that the employer accom-

Prior to the *Young* decision, some courts imposed an implicit requirement in such cases: that pregnant plaintiffs demonstrate that they were just as deserving of workplace support as those nonpregnant workers who received accommodations. This requirement was evident in the distinction courts drew between, for example, pregnant workers and workers who received accommodations for on-the-job injuries. Several circuits held that an employer who provides accommodations for on-the-job, but not off-the-job, injuries need not accommodate pregnancy under the PDA.³⁶⁸ The language of the PDA asks only whether workers are “similar in their ability to work” without reference to the origins of their incapacities.³⁶⁹ But these courts saw on-the-job injuries as of a different kind than pregnancy. The workplace is thought to be, on some level, accountable for on-the-job injuries, while pregnancy is seen as a personal choice, wholly external to employment.³⁷⁰

modates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.” *Id.* The opinion also fails to clarify what sort of employer reasons would be “sufficiently strong to justify the burden,” except to say those reasons “normally cannot consist simply of a claim that it is more expensive or less convenient” to accommodate pregnant workers. *Id.* The majority left open the question of the meaning of “intentional discrimination” under the PDA, although it did not adopt the view implied by Justice Kennedy’s dissent, that a plaintiff must show something such as “animus or hostility” and not mere “indifference” to pregnant women. *Id.* at 1366-67 (Kennedy, J., dissenting).

368. See *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 440 (4th Cir. 2013), *rev’d*, 135 S. Ct. 1338 (2015); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1311-1313 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998); *cf.* *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198-99 (10th Cir. 2000) (holding that pregnant employees must be treated the same as those with off-the-job injuries). *But see* *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that a plaintiff had established a prima facie case under the PDA by showing that her employer offered accommodations to employees with on-the-job injuries, but not pregnant employees).

369. See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1022 (2013). (“The statute requires that employers’ treatment of pregnant employees be compared to their treatment of all employees ‘similar in their ability to work or not work,’ not all employees similar in the *cause* of their ability to work or not work.”).

370. Although this assumption has gone unstated in many judicial opinions, Deborah Widiss has noted that “[e]mployers might argue that other areas of employment law distinguish between work and non-work injuries or that employers naturally bear greater responsibility for accommodating workplace injuries.” *Id.* at 1032. In his concurrence in *Young*, Justice Alito concluded that UPS had a “neutral” reason for providing accommodations for on-the-job injuries, because otherwise, those employees might have been eligible for worker’s compensation benefits. *Young*, 135 S. Ct. at 1360 (Alito, J., concurring). If the premise of this argument is that worker’s compensation benefits are more expensive than accommodations, it is in tension with the majority’s holding that costs and inconvenience do not justify signifi-

For example, consider the facts in *Young*. In that case, the plaintiff Peggy Young worked as a driver for the United Parcel Service (UPS) in a position that required her to lift packages weighing up to seventy pounds.³⁷¹ When she became pregnant, her doctor informed her that she could not lift more than twenty pounds for the first twenty weeks of her pregnancy and no more than ten pounds for the remainder.³⁷² UPS denied Young’s request for an accommodation to do light-duty work, even though UPS offered temporary accommodations to certain other workers, including those with on-the-job injuries, those with ADA “disabilities,” and those whose driver’s certificate had been revoked by the Department of Transportation (DOT).³⁷³ But UPS argued that it did not accommodate all nonpregnant workers with disabilities.³⁷⁴ For example, UPS would not have accommodated a worker who suffered minor injuries “while picking up his infant child” or during “off-the-job work as a volunteer firefighter.”³⁷⁵ In this circumstance, formalistic reasoning failed to provide an answer to the question of whether pregnant workers had to be treated like the group of nonpregnant workers who were accommodated or if they could be treated like the group who were not.³⁷⁶

The Fourth Circuit assumed, without explanation, that pregnancy was different in kind from on-the-job injuries, disabilities under the ADA, or loss of DOT certification, and appropriately grouped with limitations stemming from childcare or volunteer work. The explanation may relate to judgments about pregnancy as mutable. In its recitation of the facts, the Fourth Circuit saw fit to point out that Young underwent three rounds of IVF before becoming pregnant in 2006, as if to emphasize that her pregnancy was not a chance occurrence,³⁷⁷ and that her employer had the beneficence to grant her leave for these

cant burdens on pregnant workers. *See id.* at 1354 (majority opinion). Justice Alito’s premise is more likely that a policy resulting from worker’s compensation rules is not one “because of” pregnancy. The majority opinion does not reach any determinate holding on this issue. *See supra* note 367 and accompanying text.

371. *Young*, 135 S. Ct. at 1344.

372. *Id.*

373. *Id.* at 1347.

374. *Id.*

375. *Id.* (quoting *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 448 (4th Cir. 2013)).

376. *See id.* at 1350 (describing the dilemma). Rather than resolving this dilemma, which might have required the Court to clarify the types of attitudes that might amount to “intentional discrimination” under the PDA, the Court established a complicated burden-shifting framework that may prompt judges to leave this question to the jury. *See supra* note 367 and accompanying text.

377. In the context of IVF, pregnancy is not just understood as a personal choice, but a choice that may also be subjected to harsh and intrusive judgments. Women seeking treatment for infertility can be stereotyped as “emotional or desperate” and therefore incapable of making

procedures.³⁷⁸ The Fourth Circuit also noted, as “backdrop,” that the light-duty accommodations provided for other workers were part of the applicable Collective Bargaining Agreement.³⁷⁹ The Fourth Circuit expressed the concern that nonpregnant workers would have to bear the costs of their coworkers’ pregnancies, as though accommodation would upset the workplace bargain.³⁸⁰ Implicit here is a moral prioritization of contractual entitlements over pregnancy accommodations.³⁸¹ Although the Supreme Court reversed the Fourth Circuit’s opinion, it did not clarify what types of reasons might be legitimate to distinguish between workers disabled by pregnancy and workers disabled by other conditions; it only precluded arguments based on the cost and inconvenience of accommodating pregnant workers.³⁸²

What if pregnancy were viewed through the lens of the new immutability as a protected choice or liberty, one essential to self-determination? The choice to become pregnant, on this theory, would be protected because becoming a parent is central to a person’s conception of her identity, like a person’s sexual orientation.³⁸³ Unlike obesity, which is almost invariably constructed negative-

reasonable judgments about whether a procedure is worth the cost. Jody Lyneé Madeira, *Woman Scorned?: Resurrecting Infertile Women’s Decision-Making Autonomy*, 71 MD. L. REV. 339, 343 (2012). They may also be faulted for “waiting too long” to have children. See Carrie Friese et al., *Rethinking the Biological Clock: Eleventh Hour Moms, Miracle Moms and Meanings of Age-Related Infertility*, 63 SOC. SCI. & MED. 1550, 1551 (2006).

378. See *Young*, 707 F.3d at 440. In its opinion reversing the Fourth Circuit, the Supreme Court left out the fact of Young’s IVF, framing Young’s story simply as one in which, “after suffering several miscarriages, she became pregnant.” *Young*, 135 S. Ct. at 1344.

379. *Young*, 707 F.3d at 439-40.

380. *Id.* at 448 (following other circuits’ opinions in refusing to interpret the PDA to require accommodation of pregnant employees, which could come “perhaps even at the expense of other, nonpregnant employees”).

381. The premise may also be a sort of process-based argument that women ought to have bargained for pregnancy accommodations.

382. See *supra* note 367 and accompanying text. The Court suggested that employers would be permitted to accommodate, for example, workers “who drive (and are injured) in extrahazardous conditions” without having to accommodate pregnant workers as well. *Young*, 135 S. Ct. at 1350; see also *id.* at 1358 n.3 (Alito, J., concurring) (describing hypothetical workplace heroic efforts). It was this concern—about preserving the employer’s prerogative to reward valued risk-taking without also having to accommodate pregnancy—that prevented the Court from adopting Young’s interpretation of the PDA. *Id.* at 1350 (majority opinion). The distinction between injuries sustained through pregnancy and extrahazardous work might be the on-the-job, off-the-job one. See *supra* note 370 and accompanying text. But the choice of hypothetical scenarios, even though phrased in sex-neutral terms, suggests an implicit moral prioritization of traditionally masculine heroics (like firefighting) over feminine travails (like pregnancy).

383. See Hoffman, *supra* note 5, at 1541 (arguing that the new immutability might compel protection of parental status).

ly in contemporary U.S. law and culture, pregnancy is almost invariably constructed as “a wonderful, life-affirming, overwhelmingly good event in the life of the woman.”³⁸⁴ In law, culture, and media, pregnancy may be recognized as “physically taxing, occasionally painful, and frequently burdensome,” but “the experience of pregnancy remains, at the end of the day, a good thing.”³⁸⁵ Even pro-choice advocates describe abortion as “always a tragic situation,” necessary only “because a woman’s pregnancy may occur during a time when she is incapable of taking pleasure in its inherently wondrous nature.”³⁸⁶ Pregnancy as protected choice would seem, then, to be a firm basis on which to ground a right against discrimination. Moreover, most people would agree that, although it is possible for a woman to terminate her pregnancy, it would be abhorrent to ask her to do so.³⁸⁷ Equal protection doctrine has long recognized the right to reproduction as a fundamental liberty.³⁸⁸

384. Bridges, *supra* note 160, at 461; cf. Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1225 (1996) (“Our society does not think it is just fine for people to remain single and childless deliberately or for married people to remain childless deliberately. Infertility is constructed as a nearly unbearable tragedy; deliberate childlessness is constructed as nearly unimaginable selfishness.”); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183-84 (2001) (coining the term “repronormativity” to describe “the complex ways in which reproduction is incentivized and subsidized in ways that may bear upon the life choices women face”).

Although this positive construction of pregnancy may be hegemonic in the sense Khiara Bridges describes, it is not universal. See, e.g., Bridges, *supra* note 160, at 503 (discussing the construction of pregnancy for an unmarried woman under eighteen as “far from a positive understanding,” in *Michael M. v. Superior Court*, 450 U.S. 464 (1981)); Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917, 927 (2010) (“The derogatory term ‘knocked up’ captures the many indignities to which unmarried pregnant women are subjected.”). Moreover, these positive views of pregnancy may be historically specific. See KELLY OLIVER, *KNOCK ME UP, KNOCK ME DOWN: IMAGES OF PREGNANCY IN HOLLYWOOD FILMS 1-2* (2012) (arguing, based on a study of popular American films, that “[p]regnancy and pregnant bodies have gone from shameful and hidden to sexy and spectacular” during the late twentieth century); cf. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 n.9 (1974) (discussing a mandatory pregnancy leave policy for schoolteachers enacted in 1952 in part “to insulate schoolchildren from the sight of conspicuously pregnant women”). Bridges notes that with respect to poor women, welfare law constructs pregnancy as an injury to the body politic while at the same time denying public funds for abortion. Bridges, *supra* note 160, at 501-07.

385. Bridges, *supra* note 160, at 462 (emphasis omitted).

386. *Id.* at 465 (quoting Senator Barack Obama, Final Presidential Debate (Oct. 15, 2008), <http://debates.org/index.php?page=october-15-2008-debate-transcript> [http://perma.cc/VN3G-4SQD]).

387. Even assuming a woman did not want to become a parent, she may oppose abortion for reasons of conscience or religion, or she may not have access to an abortion provider. For these sorts of reasons, in the 1970s, many pro-life advocates joined feminists in support of the PDA. Dinner, *supra* note 340, at 501 (quoting one pro-life PDA advocate as arguing that de-

Yet this view reinforces stereotypes.³⁸⁹ The trouble with personhood arguments for pregnancy is that they are “nothing other than a corollary to the insistence that motherhood, or at least the desire to be a mother, is the fundamental, inescapable, and natural backdrop of womanhood against which every woman is defined.”³⁹⁰ Such a framing may perpetuate sexist ideologies by imagining the plot of a woman’s life story as centering around her decision to have, or not to have, children. “[T]he idea that a woman is *defining her identity* by determining not to have a child is the very premise of those institutionalized sexual roles through which the subordination of women has for so long been maintained.”³⁹¹

The new immutability is also of limited value here because it is likely to be characterized as supporting only negative rights against direct interference.³⁹² The law may recognize pregnancy’s value for the pregnant woman, but refuse to require the public, employers, or other workers to “sacrifice” to accommodate her pregnancy. The new immutability’s claim for recognition casts pregnancy as special, while the claim for redistribution argues that pregnancy is not meaningfully different from other potentially disabling conditions. More specifically, the new immutability is about protecting the individual from the trauma of being asked to change a trait fundamental to her identity and the result of her private choice. By staking protection on a characterization of pregnancy as a private choice with benefits for the individual woman, the new immutability may lend support to arguments that women alone should bear the costs of pregnancy—the very arguments that employers used to lobby against the PDA.³⁹³

nial of “‘economic equality’ to pregnant workers . . . made a woman’s ‘decision to abort’ not ‘the product of free choice but of economic coercion’” (citing *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Comm. on Human Res.*, 95th Cong. 301, 436-37 (1977) (statement of Jacqueline M. Nolan-Haley, Special Counsel, American Citizens Concerned for Life, Inc.)).

388. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating a state statute authorizing sterilization as a criminal punishment on the ground that “[m]arriage and procreation are fundamental to the very existence and survival of the race”).

389. See *supra* Part II.C.

390. Rubinfeld, *supra* note 202, at 782.

391. *Id.*

392. See *supra* Part II.E.

393. As legal historian Dinner has documented, in the 1970s, in opposition to the PDA, “[b]usiness trade associations and state officials argued that because the legalization of birth control and abortion had rendered pregnancy a private choice, the costs of reproduction should remain a private responsibility.” Dinner, *supra* note 340, at 480. In response, feminist advocacy for the PDA in the 1970s “drew upon a socialist feminist tradition that emphasized

This logic goes hand-in-hand with a certain judgmental view of sexual morality.³⁹⁴ As Shari Motro has written, “[m]any people believe that sexual freedom comes with responsibility for the consequences. A woman who engages in sexual relations assumes the risk that she might conceive.”³⁹⁵ A woman’s “unilateral decisionmaking power” over whether to have an abortion is counterbalanced by her unilateral responsibility for the costs of pregnancy.³⁹⁶ Feminist and anti-racist legal scholars have long described how public assistance programs demonize women who are unable to earn enough income or find a male breadwinner to support their children, for example, by capping welfare payments to women who conceive while receiving public assistance.³⁹⁷

Even assuming that the argument that reproductive rights are negative liberties could be surmounted, another limitation of the new immutability in the pregnancy context is the line-drawing problem.³⁹⁸ Not just the state of being pregnant, but the very choice to have children could be thought central to the development of one’s personality and family life, a fundamental exercise of liberty, and a decision no one should be asked by the workplace to change. This logic requires that employer-sponsored health plans cover contraception³⁹⁹ and fertility treatments.⁴⁰⁰ Courts are resistant to extending discrimination law that far. In *Krauel v. Iowa Methodist Medical Center*, a case holding that the PDA did not require coverage of IVF, the court saw no evidence of sex discrimination, overlooking an admission by the company’s vice president that the reason the

the economic value of reproductive labor” and “[t]he belief that childbearing had general societal value and not merely personal value.” *Id.* at 504.

394. See *supra* Part II.A.

395. Motro, *supra* note 384, at 933.

396. *Id.* at 933-34; cf. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1409 (2009) (“[T]he individual right to terminate a pregnancy created by *Roe v. Wade* might have the effect . . . of legitimating the profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent.”).

397. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106-18 (1995); DOROTHY ROBERTS, *KILLING THE BLACK BODY* 209-17 (1997); ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* 147-58 (2007).

398. See *supra* Part II.D.

399. See *supra* notes 349-350 and accompanying text.

400. See David Orentlicher, *Discrimination out of Dismissiveness: The Example of Infertility*, 85 *IND. L.J.* 143, 154-56 (2010) (discussing the psychological trauma caused by infertility). Only fifteen states require insurance coverage for infertility. *Insurance Coverage in Your State*, RESOLVE, http://www.resolve.org/family-building-options/insurance_coverage/state-coverage.html [<http://perma.cc/29DZ-96LK>]. Circuit courts are split on whether the ADA or PDA requires coverage of fertility treatments. See *supra* note 348 and accompanying text.

company excluded coverage was “because too many women of child-bearing age were employed by IMMC and infertility treatments result in too many multiple births, thereby creating a financial burden on the Plan.”⁴⁰¹ Employers also express concern about disruptions caused in the workplace by women having too many children.⁴⁰²

Moreover, the new immutability does not draw a principled line between *childbearing* and *childrearing* for both men and women,⁴⁰³ nor between caring for children and other types of care, or even other valuable life pursuits workers might engage in, off the job, besides childrearing.⁴⁰⁴ Any number of off-the-job life pursuits may very well be central to a person’s identity such that the individual considers them immutable features of her personality and would experience trauma if forced to give them up. At oral argument in *Young v. United Parcel Service*, Justice Alito asked whether UPS would allow an accommodation “if a UPS driver fell off his all-terrain vehicle . . . on the weekend and was unable to lift.”⁴⁰⁵ The implicit comparison behind this question is between limitations brought on by pregnancy and those caused by recreational pursuits. The Fourth Circuit provided more sympathetic examples: the “employee who injured his back while picking up his infant child” and the “employee whose lift-

401. 95 F.3d 674, 680 (8th Cir. 1996). The Eighth Circuit did not view this statement as direct evidence of sex discrimination, because the bar on fertility treatments applied “equally to all individuals, male or female.” *Id.* But even a facially neutral policy is impermissible if enacted for a discriminatory reason. *See, e.g.,* *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 912 (1989).

402. Kyle C. Velte, *So You Want to Have a Second Child? Second Child Bias and the Justification-Suppression Model of Prejudice in Family Responsibilities Discrimination*, 61 *BUFF. L. REV.* 909 (2013).

403. *See, e.g.,* *Guglietta v. Meredith Corp.*, 301 F. Supp. 2d 209, 214 (D. Conn. 2004) (refusing to hold that Title VII protects a plaintiff on account of her status as a “woman with childcare difficulties”). Although Title VII does not prohibit discrimination based on parental status, some state statutes do. *See, e.g.,* *ALASKA STAT. ANN.* § 18.80.200 (West 2015) (“parenthood”); *CONN. GEN. STAT. ANN.* § 46a-60(a)(9) (West 2015) (“familial responsibilities”); *D.C. CODE ANN.* § 2-1402.11 (West 2012) (“family responsibilities”). The Family Medical Leave Act (FMLA) only requires that employers provide very limited accommodation of parenting in the form of unpaid leave of twelve weeks for the birth or adoption of a child or for a child’s “serious health condition.” 29 U.S.C. § 2612(a)(1)(A)-(C) (2012); *see also* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 *IND. L.J.* 1219, 1233-35 (2011) (discussing limitations of the FMLA).

404. *See* Clarke, *supra* note 403, at 1236-37, 1278-79.

405. Transcript of Oral Argument at 51, *Young v. United Parcel Serv., Inc.*, 134 S. Ct. 2898 (2015) (No. 12-1226). Justice Alito asked, “[I]s there really a dispute that if a UPS driver fell off his all-terrain vehicle during—on the weekend and was unable to lift that that person would not be given light duty?” *Id.* Counsel for UPS responded that the accommodation would not have been authorized. *Id.*

ing limitation arose from her off-the-job work as a volunteer firefighter.”⁴⁰⁶ We might distinguish some life pursuits as leisure and others as socially valuable caregiving, but we would have to look outside the logic of immutability to do so.⁴⁰⁷

Additionally, religious exemptions gain traction when the right to contraception is framed as a protected choice.⁴⁰⁸ In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court concluded that closely held corporations were not required to comply with the Patient Protection and Affordable Care Act’s mandate to provide health insurance coverage for certain forms of contraception thought to cause abortion, because those forms of contraception violate the sincerely-held religious beliefs of those corporations’ owners.⁴⁰⁹ Under the Religious Freedom Restoration Act of 1993 (RFRA), a sort of strict scrutiny applies to government actions that substantially burden the exercise of religious freedom.⁴¹⁰ The action must be justified by a compelling interest and use the least restrictive means of fulfilling that interest.⁴¹¹ In examining the compelling interest behind the contraceptive mandate, the majority opinion focused on “the constitutional right to obtain contraceptives,” and how this right might be impaired if women were required to share the costs of those contraceptives.⁴¹² The Court “grudgingly” assumed this to be a compelling interest, without so holding.⁴¹³ But the Court concluded that the government had not found the least-restrictive means for enforcing this interest, because the government itself

406. *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 448 (4th Cir. 2013), *rev’d*, 134 S. Ct. 2898 (2015). These hypothetical employees might be covered today under the amended ADA. See *supra* note 296 and accompanying text.

407. See, e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 21 n.15 (1999) (arguing that, in contrast to other life choices, children are “society-preserving”).

408. See *supra* Part II.F.

409. 134 S. Ct. 2751, 2759 (2015).

410. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

411. *Id.* § 2000bb-1(b) (providing that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest”).

412. *Hobby Lobby*, 134 S. Ct. at 2780 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)). The Court noted that the government had also argued the contraceptive mandate was required for reasons of public health and gender equality, but it found these concerns without sufficient “focus[.]” *Id.* at 2779. The compelling government interest, according to the Court, must be the “marginal interest in enforcing the contraceptive mandate in these cases,” specifically, how the objecting corporation’s employees might be harmed. *Id.*

413. See *id.* at 2800 n.23 (Ginsburg, J., dissenting).

could create a program to fund the forms of contraception objected to by the women's employers.⁴¹⁴

The dissent criticized the breadth of this holding, asking whether, for example, a restaurant owner who "refused to serve black patrons based on his religious beliefs opposing racial integration" might opt out of antidiscrimination laws.⁴¹⁵ The majority responded, "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."⁴¹⁶ The distinction is difficult to understand unless one grasps the nature of the compelling interest that the Court has articulated in the *Hobby Lobby* case: a right to obtain contraceptives, rather than a right to gender equality.⁴¹⁷ The government can supply contraceptives, but the government cannot remedy race discrimination in employment by paying off the victims. Race discrimination occupies a different plane of consideration.

In sum, beliefs that pregnancy is voluntary and a result of morally fraught sexual conduct limit equality law's reach in the pregnancy discrimination context. But arguments based on the new immutability—that reproductive choices are fundamental to personhood—do not avoid these judgments. Rather, they risk perpetuating stereotypes about women's roles, they have limited persuasive force due to the difficulty of differentiating the value of pregnancy from childrearing and other life pursuits, and even if successful, they are likely to result in limited rights and invite demands for exemptions by religious and business groups.

C. Criminal Records

Arguments about mutability, defined as personal responsibility, undergird opposition to rules that would circumscribe employers' ability to automatically decline job applicants with criminal records. A wide range of employers con-

414. *Id.* at 2780-81 (majority opinion). Alternatively, the Court speculated that insurers could make separate payments, as they may for certain non-profit religious employers, without reaching a holding on whether this would comply with the RFRA. *Id.* at 2782.

415. *Id.* at 2802-04 (Ginsburg, J., dissenting).

416. *Id.* at 2783 (majority opinion).

417. The majority opinion assumes that the compelling government interest is "in guaranteeing cost-free access to the four challenged contraceptive methods" rather than gender equality writ large. *Id.* at 2779-80. However, while Justice Kennedy joined the majority opinion, in his separate concurrence he recognized the government's "compelling interest in the health of female employees." *Id.* at 2786 (Kennedy, J., concurring).

duct background checks on job applicants to screen for criminal histories.⁴¹⁸ An industry of commercial vendors collects criminal records in databases and provides employers with computerized reports on job applicants.⁴¹⁹ The practice makes it difficult for many people to find employment. By one estimate, one in four American adults has some sort of criminal record.⁴²⁰ And African Americans and Hispanics are more likely to have been arrested or incarcerated by substantial margins.⁴²¹ Whether higher rates of crime among minorities could explain these disparities is disputed; consider, for example, that whites and minorities engage in similar rates of drug possession and sales, yet minorities are far more likely to be convicted of drug offenses.⁴²² Discrimination against ex-offenders in the workplace is compounded by racial discrimination. Sociologist Devah Pager has conducted well-known audit studies in which white and

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418. See Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, NAT’L EMP. L. PROJECT 13-18, 30 n.60 (Mar. 2011), http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf [<http://perma.cc/7UAK-KPZE>] (discussing the results of a survey of job posting ads in the commonly used online forum Craigslist); *Background Checking: Conducting Criminal Background Checks*, SOC’Y FOR HUMAN RESOURCE MGMT. 5 (Jan. 22, 2010), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> [<http://perma.cc/4MKV-YKY7>] (surveying 347 randomly selected human resources professionals who are members of the Society for Human Resource Management and finding ninety-three percent reported screening at least some job applicants for criminal records).
419. *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, SEARCH 7 (2005), <http://www.search.org/files/pdf/rntfscjri.pdf> [<http://perma.cc/WNJ8-NS2D>] (describing the background check business as consisting of “a few large industry players” and “hundreds, perhaps even thousands, of regional and local companies”).
420. Rodriguez & Emsellem, *supra* note 418, at 3, 27 n.2. Individuals with criminal records may include not just those who were incarcerated, but also those who were convicted but not incarcerated, and even those who were arrested but not convicted for reasons such as factual innocence. *Id.* at 7.
421. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, BUREAU JUST. STAT. 5 tbl.5 (2003), <http://www.bjs.gov/content/pub/pdf/piuspo1.pdf> [<http://perma.cc/A27F-P5SP>] (reporting that 1.4% of white adults, 8.9% of black adults, and 4.3% of Hispanic adults have been incarcerated in state or federal prisons); EEOC ARREST AND CONVICTION RECORDS GUIDANCE, *supra* note 19, at 9 (reporting, based on FBI and Census Bureau statistics, that twenty-eight percent of arrests in 2010 were of African Americans, while African Americans make up only fourteen percent of the U.S. population, and that, while arrest data for Hispanics is difficult to find, “[i]n 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population” according to the DEA).
422. EEOC ARREST AND CONVICTION RECORDS GUIDANCE, *supra* note 19, at 9, 37 n.68. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (claiming that practices of mass incarceration in the United States have constructed a new racial caste system); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (arguing that the U.S. criminal justice system relies on race and class inequalities).

black testers applied for jobs with identical resumes, varying only in that sometimes the testers were given criminal histories.⁴²³ In one study, the white applicants received half as many callbacks when saddled with a criminal history, while the black applicants received only one third as many callbacks when saddled with a criminal history.⁴²⁴

Automatic exclusion of job applicants with criminal records arguably violates Title VII's prohibition on race discrimination. Title VII forbids not only intentional discrimination but also employment practices that are "fair in form, but discriminatory in operation" on the theory of disparate impact discrimination.⁴²⁵ To prove a prima facie case of disparate impact discrimination, a plaintiff generally presents statistics showing that a particular employment practice has an adverse impact on the basis of a protected trait.⁴²⁶ In its 2012 guidance on the question, the EEOC took the position that national data suffices to demonstrate that employer exclusions based on criminal records have a disparate impact based on race.⁴²⁷ An employer, however, may defend against a charge of disparate impact discrimination by showing that the practice is "job related for the position in question and consistent with business necessity."⁴²⁸

423. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 198 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 947 (2003).

424. Pager, *supra* note 423, at 957-58 (describing an audit study of Milwaukee employers in which the percentage of callbacks received by applicants was: thirty-four percent for the white applicant with no criminal record, seventeen percent for the white applicant with a criminal record, fourteen percent for the black applicant with no criminal record, and five percent for the black applicant with a criminal record); *cf.* Pager et al., *supra* note 423, at 199, 200 fig.1 (discussing an audit study of New York City employers in which the percentage of callbacks received by applicants was: thirty-one percent for the white applicant with no criminal record, twenty-two percent for the white applicant with a criminal record, twenty-five percent for the black applicant with no criminal record, and ten percent for the black applicant with a criminal record).

425. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

426. See 42 U.S.C. § 2000e-2(k) (2012). If the components of an employer's "decisionmaking process are not capable of separation for analysis," the plaintiff can argue that the decisionmaking process as a whole caused a disparate impact, rather than a specific employment practice. *Id.* § 2000e-2(k)(B)(i).

427. EEOC ARREST AND CONVICTION RECORDS GUIDANCE, *supra* note 19, at 1. *But see* EEOC v. Freeman, 961 F. Supp. 2d 783, 798 (D. Md. 2013) (refusing to accept national statistics because they were not "representative of the relevant applicant pool" and because they reflected arrest and incarceration rates when the employer's hiring criteria did not consider arrests or incarceration).

428. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). A plaintiff can rebut this defense by showing that the employer refused to adopt an alternative employment practice that would have fulfilled its business purpose while avoiding the disparate impact. *Id.* § 2000e-2(k)(1)(A)(ii), (C); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

The EEOC has advised that exclusions based on arrests alone are not eligible for this defense because “[t]he fact of an arrest does not establish that criminal conduct has occurred.”⁴²⁹ While a conviction does establish criminal conduct, the EEOC maintains that “[i]n certain circumstances . . . there may be reasons for an employer not to rely on the conviction record alone.”⁴³⁰ An employer’s policy may be justified if it includes, for example, some sort of individualized assessment, considering “at least the nature of the crime, the time elapsed, and the nature of the job.”⁴³¹ Apart from Title VII, eighteen states have enacted legislation known as “ban the box” which prohibits certain employers from asking about criminal records on job applications, although employers are not precluded from considering criminal history at later stages in the hiring process.⁴³²

Employers screen applicants for a variety of utilitarian reasons. For example, they screen to prevent theft and fraud in the workplace, ensure the safety of other workers or customers, or avoid liability for negligent hiring.⁴³³ But this type of employer risk management runs counter to the public policy goal of reducing recidivism by encouraging ex-offenders to find employment.⁴³⁴ Setting

429. EEOC ARREST AND CONVICTION RECORDS GUIDANCE, *supra* note 19, at 1.

430. *Id.*

431. *Id.* at 2 (citing *Green v. Mo. Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977)). The EEOC has clarified that an individualized assessment is not required in all cases. *Id.* at 2, 14. An employer may screen out applicants with criminal records if it has data to “link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.” *Id.* at 14. That data must meet the agency’s standards for validity studies. *Id.* at 14, 42 n.111 (discussing standards for validity studies under 29 C.F.R. § 1607.5 (2011)). Additionally, employers who must comply with federal rules or licensing requirements that prohibit the hiring of employees with certain criminal records are not liable. EEOC ARREST AND CONVICTION RECORDS GUIDANCE, *supra* note 19, at 20-23 (giving examples such as bank employees and jobs requiring security clearances).

432. *Ban the Box*, NAT’L EMP. L. PROJECT 1, 3 (July 1, 2015), <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<http://perma.cc/PR7N-3C> PM]. Other states have gone further, barring consideration of criminal history except under specified circumstances related to job requirements, business needs, or safety concerns. HAW. REV. STAT. § 378-2.5(a) (2014); KAN. STAT. ANN. § 22-4710(f) (2014); N.Y. CORRECT. LAW § 752(1) (McKinney 2014); 18 PA. CONS. STAT. § 9125(b) (2015); WIS. STAT. § 111.335 (2014).

433. Lucas Loafman & Andrew Little, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 AM. BUS. L.J. 251, 291 (2014).

434. A number of studies have concluded that, under certain circumstances, employment opportunities may decrease recidivism. *See, e.g.*, Christopher Uggen & Sarah K.S. Shannon, *Productive Addicts and Harm Reduction: How Work Reduces Crime – but Not Drug Use*, 61 SOC. PROBS. 105, 106 (2014) (discussing the theoretical and empirical support for the view that work decreases crime among adults); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV.

aside the normative question of whether employers should bear the costs of public policy goals, there are empirical questions about the level of risk that ex-offenders pose to employers. Support for the specific claim that all those with criminal records are more likely to commit workplace misconduct is lacking.⁴³⁵ Criminal history reports are likely to be inaccurate, especially those from commercial vendors.⁴³⁶ Many include incorrect information, such as convictions that have been expunged by court order.⁴³⁷ And some employers are screening out applicants with any type of criminal history, regardless of the severity or nature of the offense,⁴³⁸ whether the arrest led to a conviction,⁴³⁹ or how long ago it occurred.⁴⁴⁰ Criminologists generally agree most people who commit crimes eventually desist, and some research suggests that the likelihood that certain individuals who have not re-offended for a number of years will commit crimes may be close to that of those without criminal records.⁴⁴¹ Other fac-

529, 542 (2000) (concluding that offenders over the age of twenty-six who are provided with “even marginal employment opportunities are less likely to reoffend than those not provided such opportunities”).

435. One set of researchers reviewed the literature and found only one study examining the likelihood that those with criminal records will commit workplace crimes. That study, which examined a sample of 960 New Zealanders, found that those with juvenile criminal records between the ages of thirteen and sixteen were no more likely to engage in “a wide range of counterproductive work behaviors” and were somewhat *less* likely to engage in fighting or stealing at work by age twenty-six. Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 207 (2013) (discussing the findings in Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1427-30, 1434 (2007)).
436. Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 189 (Shawn Bushway et al. eds., 2007) (finding a high rate of false negatives in criminal history reports from both a private vendor and an FBI database).
437. SEARCH, *supra* note 419, at 83.
438. Rodriguez & Emsellem, *supra* note 418, at 15.
439. *Id.* at 13-14.
440. *Id.* at 16-17.
441. See, e.g., Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 350 (2009) (measuring “the number of years that those who have a prior arrest need to stay clean to be considered ‘close enough’ to those who have never been arrested” and concluding that the answer depends on the age of the offender and the type of crime previously committed); Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 70 (2007) (concluding that the risk of recidivism diminishes over time using a data set of 670 males born in 1942 in Racine, Wisconsin); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 483 (2006) [hereinafter Kurlychek et al., *Scarlet Letters*] (reporting similar results from a data set based on a cohort born in Philadelphia, Pennsylvania, in 1958).

tors, such as youth, may correlate with crime, yet employers do not argue that the correlation is a basis for screening out younger workers.⁴⁴²

Immutability's logic is exerting influence here. A criminal record may be immutable in the sense of being virtually impossible to change, considering the difficulty of expungement.⁴⁴³ But a criminal record may be mutable in the sense that the decision to commit a crime was within an individual's control and responsibility. Opponents of the EEOC's enforcement policy have made clear that ex-offenders are morally responsible for their lack of employment opportunities. One theme of opposition to the EEOC's enforcement guidance is that it represents "the illegitimate expansion of Title VII protection to former criminals."⁴⁴⁴ A Heritage Foundation report argued, "[i]t is not racial discrimination that deprives felons, black or white, of their ability to obtain employment 'but their own decision to commit an act for which they assume the risks of detection and punishment.'"⁴⁴⁵ A letter from nine states' Attorneys General objected to the EEOC's guidance by arguing that "[y]our real target appears to be the perceived unfairness of judging an individual – of any race – solely by his or her past criminal behavior."⁴⁴⁶ An early district court opinion put it more

442. Noah Zatz, Presentation at the Colloquium on Scholarship in Employment & Labor Law, from *Redemption to Original Sin: Reframing the Relative Risks of Hiring People with Criminal Convictions* (Sept. 11, 2015). One study found, for example, that eighteen-year-old men who had never been arrested had rates of arrest very close to those of past offenders at age twenty-four. Kurlychek et al., *Scarlet Letters*, *supra* note 441, at 494.

443. Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1219 (2006) (discussing how, along with the difficulties of convincing private vendors to change criminal records in their databases, "only a fraction of states allow for some form of clearing of post-conviction records, and even those few states impose significant administrative and evidentiary hurdles to legally available remedies").

444. Letter from Patrick Morrissey, Att'y Gen. of W. Va., et al., to Jacqueline A. Berrien, Chair, U.S. EEOC, et al. 3 (July 24, 2013), <http://dojmt.gov/wp-content/uploads/EEOC-Letter-Final.pdf> [<http://perma.cc/ZF96-FJXX>]; see also Hans A. von Spakovsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs To Overrule the EEOC's New Employment "Guidelines,"* HERITAGE FOUND. (May 31, 2012), <http://www.heritage.org/home/research/reports/2012/05/the-dangerous-impact-of-barring-criminal-background-checks> [<http://perma.cc/PPU7-G948>] ("The April Guidance issued by the EEOC is based on a faulty premise: that convicted felons are a protected class under federal law.").

445. von Spakovsky, *supra* note 444 (quoting *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002)).

446. Letter from Patrick Morrissey et al., to Jacqueline A. Berrien et al., *supra* note 444, at 4. In support of this argument, the Attorneys General pointed to examples in the EEOC guidance directing employers to consider various factors in addition to criminal convictions, such as whether the applicant has reformed. *Id.* But whether an employer considers factors surrounding a conviction goes to the question of whether a background check policy is justified for business reasons, such as preventing on-the-job crime.

bluntly: “If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.”⁴⁴⁷

Opposition to the EEOC policy is also rooted in the endorsement of employers’ moral judgments about ex-offenders. These judgments are phrased in terms of ex-offenders’ inherent lack of trustworthiness as a class. In one district court case, even though the employer’s business reasons for conducting background checks were not at issue, the judge found it necessary to begin his opinion with a lengthy explanation of the “obvious,” “rational,” and “legitimate” reasons for conducting criminal history and credit background checks, to avoid hiring those who “appear to be untrustworthy and unreliable.”⁴⁴⁸ Similarly, in their letter to the EEOC opposing its enforcement guidance, the states’ Attorneys General wrote that “[a] criminal background may . . . be indicative of a lack of dependability, reliability, or trustworthiness.”⁴⁴⁹

The new immutability – with its emphasis on psychological understandings of personality, its attempts to avoid the trauma of being asked to change a fundamental trait, and its exaltation of self-determination – does not suggest any obvious arguments for prohibiting discrimination on the basis of criminal records. The new immutability does not counter the moral judgments condemning ex-offenders.⁴⁵⁰ It is difficult even to find an example of an ex-offender staking a political claim that criminal records are fundamental to personality.⁴⁵¹ Amy Myrick has offered a sociological account of the depersonalization that individuals often experience when inquiring about expungement or sealing of criminal records.⁴⁵² Rather than viewing their criminal records as fundamental to their personalities, those confronting their records “felt reduced to pieces of personal information that did not represent a holistic identity, even a deviant

447. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989).

448. *EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013) (dismissing an action alleging that an employer’s practice of considering criminal history and credit records had a disparate impact on African American and Hispanic job applicants on the ground that the EEOC failed to provide competent expert testimony regarding statistical disparities).

449. Letter from Patrick Morrissey et al., to Jacqueline A. Berrien et al., *supra* note 444, at 3 (citing *Carolina Freight Carriers Corp.*, 723 F. Supp. at 753).

450. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 282 (2015) (arguing that discrimination based on criminal records is different than discrimination based on religion, because, “in the case of religion, a person should not have to make a choice on account of other people’s prejudices” but in the case of criminal records, “[p]ublic policy strongly condemns criminal conduct”).

451. This is a variation of the argument that the revised immutability fails to cover traits that are inessential or stigmatized. See *supra* Part II.B.

452. Amy Myrick, *Facing Your Criminal Record: Expungement and the Collateral Problem of Wrongfully Represented Self*, 47 *LAW & SOC’Y REV.* 73, 74 (2013).

one.”⁴⁵³ Myrick’s clients offered accounts of their own identities that “were antithetical to the records’ way of representing, or misrepresenting” them.⁴⁵⁴ These accounts have two recurrent features: emphasis on “personal changes over time” and assertion of “social identities of parent, worker, and property owner” rather than criminal.⁴⁵⁵ Somewhat like those overweight individuals who see their true, essential selves as thin, ex-offenders may see their true, essential selves as law-abiding.⁴⁵⁶

In this context, the new immutability reinforces stereotypes.⁴⁵⁷ If anything, the new immutability may introduce a type of “criminal essentialism” that lends support to employer arguments for excluding those with criminal records.⁴⁵⁸ Many psychologists assume that personality is continuous and reliable—in other words, immutable—and offenders are not likely to desist from criminal behavior.⁴⁵⁹ Advocates of background checks might concede that the underlying identity, that of a “criminal,” is fundamental—if not in the old sense of being impossible to change because it is determined by social, economic, and genetic factors, then in the new sense of being highly impervious to change, requiring the traumatic experience of remorse and repentance for one’s crimes, and giving up the life of a criminal.⁴⁶⁰ Such views lend support to employer arguments that ex-offenders are untrustworthy and that blanket hiring bans are sound practices. These arguments are bolstered by the assumption that criminality is immutable as a fundamental aspect of personality.

The new immutability may gain more traction if the question were re-framed as protecting not the identity of the criminal but rather the identity of the ex-offender who has desisted from crime.⁴⁶¹ Advocates of “ban the box” policies and other protections for ex-offenders use narratives of redemption and the rhetoric of second chances to promote their cause. Consider the following example from a report by the National Employment Law Project:

453. *Id.* at 93.

454. *Id.* at 95.

455. *Id.* at 94.

456. *See supra* note 323 and accompanying text.

457. *See supra* Part II.C.

458. *Cf.* SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 5 (2001) (discussing “criminal essentialism”).

459. *See, e.g.,* Hans Toch, *Foreword* to MARUNA, *supra* note 458, at xvi.

460. MARUNA, *supra* note 458, at 86 (discussing individuals for whom the idea of “going straight” may be inconceivable, akin to being “stripped of one’s identity”).

461. *See, e.g., id.* at 97 (discussing redemption narratives in which “making good is part of a higher mission, fulfilling a role that had been inherent in the person’s true self”).

Like many, Darrell Langdon struggled with addiction in his youth. Now 52 and having raised two sons as a single father, Darrell, through his strength of character, has been sober for over twenty years. Although he has moved forward in life through hard-won rehabilitation, his 25-year-old felony conviction for possession of cocaine remains.⁴⁶²

This vignette appeals to a notion of fundamental character, a true self that is emerging through the hard work of rehabilitation and proven over twenty-five years of sobriety, a life redeemed through the socially valuable work of child-rearing.

But this is too much of a stretch for the new immutability, which is about characteristics so fundamental no one should be asked to change them. Instead, the argument from the new immutability is that even if he could have his conviction expunged, Langdon should not have to, because his conviction was a formative and important part of his life's journey toward redemption. The problem with this claim, however, is that it casts criminal conduct as necessary rather than regrettable, a claim unlikely to have political purchase, and one that does not fit with the narrative of crime as an unfortunate aberration from an individual's fundamentally good character. The new immutability would understand crime as constitutive of character.

As a strategic matter, arguments based on the new immutability also fall flat with respect to criminal records for other reasons. In contrast to the pregnancy and obesity examples, where the concern is that protection would lead down a slippery slope, ex-offenders are already at the bottom of the slope, the *reductio ad absurdum* of expansive concepts of the protected class. It seemed obvious to Judge Norris, when he expounded on immutability, that "discrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class."⁴⁶³

Thus, the revised immutability is only likely to strengthen resistance to legal rules that might require employers to perform more careful criminal background checks.

As this Part has demonstrated, courts impose implicit immutability requirements not supported by statutory text when interpreting employment discrimination law. Immutability concerns also feature in public opinion and political debates over executive enforcement of employment discrimination law

462. Rodriguez & Emsellem, *supra* note 418, at 12.

463. See *supra* note 126 and accompanying text.

and expansion of state and local laws to cover new forms of discrimination. While discrimination on the basis of weight, pregnancy, and criminal records is often considered job-related, arguments about job qualifications are infused with moralizing judgments about persons in the abstract. These moralizing judgments are problematic for all the reasons described by critics of luck egalitarianism. They rest on untenable assumptions about chance and choice, like the idea that pregnancy alone, among all potentially disabling conditions, is within an individual's control and therefore need not be accommodated by the workplace. They are harsh, like the argument that ex-offenders should be automatically and permanently denied entry to the job market. They are intrusive, like demands that workers conform to ideal norms regarding body size. Employers may believe they are creating incentives for better behavior (weight loss, personal responsibility for procreation, law-abiding conduct). But shaming and blaming can backfire, causing social dysfunction as their targets cope with the assignment of spoiled identities.

Rather than providing an easy rebuttal, the revised version of immutability first obscures these moralizing judgments and then raises new barriers to protection. The idea that weight, pregnancy, or a criminal record might be an essential aspect of personhood, to be romanticized and protected, fails to resonate because many experience these conditions as negative, neutral, or immaterial to personality. Rather than countering stereotypes, the new immutability reinforces them by suggesting that such traits are essential aspects of personality. The new immutability may even lend credence to arguments that traits like obesity, pregnancy, and ex-offender status are good predictors of future behavior. Courts have difficulty imagining what distinguishes these traits from all other choices that individuals may consider fundamental. To the extent it might be accepted, the new immutability rationale provides a lower tier of protection than that afforded to classifications such as race and sex. In this lower tier, it becomes more difficult to argue that civil rights obligations might override employer cost concerns or conflicting "immutable" convictions such as religious objections.

IV. BEYOND IMMUTABILITY

This Part considers alternatives to revising the theory of immutability for those interested in expanding employment discrimination law to new forms of bias. It examines two potential approaches: (1) universalizing a rule that employers only require qualifications that are both job-related and reasonable, and (2) incremental expansion of targeted antidiscrimination protection through legislative, judicial, or employer prohibitions on additional forms of systemic bias. It argues that universal approaches, while theoretically appealing, may not be politically possible in any form that would effectively address inequality.

Thus, it suggests efforts toward incremental expansion of antidiscrimination categories based on analogies between old forms of bias and new that do not rely on stretching the concept of immutability. In particular, it argues for consideration of whether biases create systemic limits on equal opportunity.⁴⁶⁴

A. *Universalizing a Reasonable Relationship Requirement?*

An often-suggested solution to the problem of identifying suspect classifications is to universalize antidiscrimination protections.⁴⁶⁵ Workers in the United States are not universally protected against unfair treatment. The default position in the United States is at-will employment, meaning employers may hire, promote, demote, compensate, or fire employees without cause.⁴⁶⁶ Likewise, employers are not generally required to accommodate the needs of workers on such matters as job duties, scheduling, or the physical workspace.⁴⁶⁷ Employment discrimination law, among other regulatory regimes, provides exceptions to these defaults, forbidding adverse treatment on the ba-

464. A focus on systemic forms of inequality raises the question of whether the problem can be addressed in a single sphere, such as employment, or whether it requires more far-reaching interventions into, for example, housing markets, politics, education, criminal justice, and even family and social networks. See generally DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (discussing how racial inequality operates as a set of reinforcing feedback loops across a number of domains). I do not argue that systemic inequality can be addressed solely through employment regulation, but rather that employment discrimination law could be part of the solution. Despite its many limitations and drawbacks, employment discrimination law has achieved dramatic change in the American workplace. See, e.g., Estlund, *supra* note 11, at 4 (discussing the “significant body of empirical research on intergroup interaction” that supports the claim that the workplace integration brought about by Title VII reduces racial biases); Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL. ANALYSIS & MGMT. 424, 425 (2015) (concluding that the Civil Rights Act “was largely successful in improving opportunities for underserved groups” and that “[b]y banning discrimination in employment and providing discrimination victims an outlet through which they could air grievances against their employers, the Act changed the face of employment”); Vicki Schultz, *Taking Sex Seriously*, 91 DENV. U. L. REV. (forthcoming 2015) (manuscript at 10-14) (on file with author) (describing the uneven but important achievements of Title VII for sex equality).

465. Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1438 (2014) (“Some might argue that we need no such principles: instead law ought to require ‘equal opportunity,’ perhaps in the form of meritocratic treatment, across the board.”).

466. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657-58 (1996) (discussing the traditional “at-will rule” of employment that “grew out of broad notions of employer property rights and freedom of contract”).

467. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1083 (2010).

sis of enumerated traits such as race and sex,⁴⁶⁸ and requiring accommodations for workers with disabilities or religious commitments.⁴⁶⁹ Employment discrimination law contains defenses, for example, when an employer can show that a trait such as sex is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business” (BFOQ),⁴⁷⁰ when a policy with a disparate impact is “job related for the position in question and consistent with business necessity,”⁴⁷¹ or when an accommodation would pose an “undue hardship.”⁴⁷²

Targeted approaches isolate certain identity traits as bases for legal interventions into employer decision making. Instead, we might imagine a universal model of workplace protection, in which employers would need to show cause for all personnel decisions. For example, the District of Columbia’s Human Rights Act was enacted “to secure an end . . . to discrimination for any reason other than that of individual merit.”⁴⁷³ Similarly, some proposed legal reforms would require employers to have a reasonable basis for rejecting any request for worker accommodation.⁴⁷⁴ These approaches would not single out particular groups, traits, or biases for scrutiny; rather, they would evaluate employment decisions based on their reasonableness in terms of business needs. Such approaches may be normatively superior to targeted expansion of discrimination law, but come with significant strategic disadvantages for those concerned about inequality.

As a normative matter, universal policies may be superior to focused interventions in that they guarantee important rights to liberty, dignity, and job security, raising the baseline of protection for all workers.⁴⁷⁵ Universal policies

468. See *supra* note 12 and accompanying text.

469. 42 U.S.C. § 2000e(j) (2012) (religion); *id.* § 12112(b)(5)(A) (disability).

470. *Id.* § 2000e–2(e)(1). Under Title VII, however, race is never a BFOQ. *Id.*

471. *Id.* § 2000e–2(k)(1)(A)(i).

472. *Id.* § 12112(b)(5)(A).

473. D.C. CODE § 2-1401.01 (2012).

474. Cf. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 53–54 (2009) (discussing a “universalist version” of disability accommodation that “would demand that employers design physical and institutional structures (including work schedules and work tasks) in a way that reasonably takes account of the largest possible range of physical and mental abilities” and “provide[s] reasonable flexibility to all potential employees whose physical or mental abilities still are not taken into account”); Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014) (arguing for “extending an ADA-like reasonable-accommodation mandate to all work-capable members of the general population for whom the provision of reasonable accommodation is necessary to give meaningful access to enable their ability to work”).

475. See, e.g., KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 192 (2006) (discussing Supreme Court opinions that frame rights not as questions of equality

would eliminate the difficult hurdle of proving discriminatory intent, the cause of death for many employment discrimination cases.⁴⁷⁶ And they would include all forms of discrimination not justified by job requirements or employer necessity, including much discrimination on the basis of weight, pregnancy, and criminal records. Universal approaches to workplace protection may have political traction in that they expand the potential constituency for change from minority groups to all workers, avoid the characterization of employment opportunities as zero-sum, evade the problem of fatigue with identity politics, and eliminate the fraught task of defining the beneficiary class.⁴⁷⁷

Yet there are reasons to be concerned that universal protections may not eliminate discrimination as well as targeted approaches. In other work, I have called these problems “dilution” and “assimilation.”⁴⁷⁸ Dilution occurs when a right must be narrowed to be extended to more claimants, or when the expansion of rights strains the resources of enforcers, reducing protection for those who need it most.⁴⁷⁹ For example, the proposed Model Employment Termination Act, which would prohibit discharge of employees without “good cause,” would apply only to terminations, not hiring or other aspects of employment; would limit employees to streamlined arbitral procedures rather than litigation; and would offer workers fewer remedies than employment discrimination law.⁴⁸⁰ Legislative proposals to expand accommodations beyond protected traits may limit a worker’s right to that of requesting the accommodation and receiving consideration from the employer, without imposing a duty on the employer to accept reasonable requests.⁴⁸¹ The assessment is that compromise

for minorities, “but as . . . rights that, like a rising tide, will lift the boat of every person in America”); see also Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2844-47 (2014) (discussing arguments in favor of universalism).

476. See, e.g., Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1279 (2012) (discussing psychological research suggesting that the reason discrimination plaintiffs fare poorly in court is that “in all but the most compelling factual circumstances, most people believe that some measure of merit—such as effort or ability—is a more likely explanation for why minorities fail”).

477. See Clarke, *supra* note 403, at 1242-45 (describing these advantages of universal policies in the context of sex discrimination).

478. *Id.* at 1245-49.

479. *Id.* at 1247-49.

480. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 424-27 (2002) (discussing the MODEL EMP’T TERMINATION ACT (UNIF. LAW COMM’N 1999)).

481. See Arnow-Richman, *supra* note 467, at 1108-12 (discussing the then-pending Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009)). But see Stein et al., *supra* note 474, at 737 (arguing that employers should be required to provide accommodations whenever necessary for a worker to perform essential job functions).

is required to ensure judicial and political will for such broad disruptions of employer prerogatives.⁴⁸²

The assimilation problem is that universal solutions often have goals other than the disruption of biases and inequality.⁴⁸³ Equality, as a goal, is thought to be folded into other goals, such as providing universal job stability or protecting the liberties of all workers against employer intrusion. But in the enforcement and application of universal rules, equality norms may be obscured and subverted. Imposing a rationality or reasonableness requirement for certain personnel decisions is unlikely to weed out discriminatory practices because, in many cases, discrimination may be cost effective.⁴⁸⁴ Discrimination may allow employers to use statistically sound generalizations as efficient sorting mechanisms;⁴⁸⁵ to maintain a homogenous workforce that can be managed more efficiently;⁴⁸⁶ to cater to the preferences of clients, customers, or co-workers for certain types of employees;⁴⁸⁷ and to avoid the risk that minority employees will bring litigation over workplace conditions such as harassment, denial of promotion, or termination.⁴⁸⁸ Moreover, most proposals would only protect employees from unfair termination, rather than requiring fairness in hiring or in the terms and conditions of employment.⁴⁸⁹ Some analysis of the European experience suggests that without a commitment to antidiscrimination in hir-

482. See Arnow-Richman, *supra* note 467, at 1092 (explaining that advocates have not pursued universal accommodation mandates due to employers' cost concerns); Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 370 (1994) (discussing the philosophy of compromise behind the Model Employment Termination Act); cf. Bagenstos, *supra* note 219, at 483-84 (arguing that the increased "number of potential lawsuits" and inefficiencies, risks of error, and expenses of federal litigation mitigate against "a universal rule of individualized accommodation").

483. Bagenstos, *supra* note 475, at 2862 ("Since universalists argue that their preferred policies will solve problems that are broader than and different from those solved by targeted policies, it should be no surprise that universalist solutions will not always do as well at solving the problems for which targeted policies are designed.").

484. See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 849-52 (2003) (offering examples of how employment law prohibits rational, cost-effective discrimination).

485. See *supra* notes 237-238 and accompanying text.

486. See, e.g., Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689, 700 (2007).

487. See, e.g., Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 686-87 (2001).

488. Cf. *id.* at 690-92 (arguing that antidiscrimination laws create costs for employers by exposing them to liability).

489. See, e.g., Befort, *supra* note 480, at 424, 427-30.

ing, job protection for incumbent employees locks members of subordinated groups out of opportunities.⁴⁹⁰

Simply requiring that employers evaluate potential employees based on “merit” would not call into question discrimination based on weight, pregnancy, or criminal records, insofar as employers and judges implicitly and explicitly consider these factors demonstrative of character, commitment, and integrity. Adding the requirement that discrimination be “job-related” would better address these biases, as an employer may find it difficult to convince a court that weight, for example, has any relationship to a sedentary back-office job. However, employer arguments gain plausibility if that office is in an image-conscious industry, or if the job is a highly visible one that requires that the employee inspire confidence.⁴⁹¹ In employment discrimination law, courts reject the argument that employers must engage in sex discrimination to cater to customer preferences for men or women in certain jobs, reasoning that employers are merely acting as conduits for societal discrimination.⁴⁹² Employment discrimination law requires scrutiny of sexist stereotypes by explicitly forbidding discrimination based on sex. A simple job-relatedness rule, by contrast, would not forbid an employer from catering to such prejudices. If the law does not delineate certain widespread biases as subject to scrutiny, it may not prompt critical examination of those biases.⁴⁹³

A law that imposes some sort of universal requirement, while also delineating prohibited bases for discrimination and not watering down remedies or resources, may be the most normatively desirable policy outcome for those concerned about employee rights generally as well as equal opportunity. Yet there are reasons to doubt whether such an approach is a viable strategy. Despite the strategic appeal of universal solutions in the abstract, there is little political support at present for a revolution in at-will employment.⁴⁹⁴ Joseph Fishkin has described such proposals as “non-starter[s]” because they “run[] rough-

490. See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 75-76 (2007).

491. See *supra* notes 307, 334-335 and accompanying text (giving examples of weight discrimination resulting from weight stigma and stereotypes related to the ineffectiveness of overweight workers).

492. See, e.g., *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 n.21 (N.D. Tex. 1981) (“[T]he purpose of Title VII to overcome stereotyped thinking about the job abilities of the sexes would be undermined if customer expectations, preferences, and prejudices were allowed to determine the validity of sex discrimination in employment.”).

493. Clarke, *supra* note 403, at 1247.

494. See BAGENSTOS, *supra* note 474, at 54 (concluding, in the context of disability rights law, that the case for universalism “would be well worth making, but its prospects are very doubtful politically”).

shod over our law’s commitment to leaving employers substantial discretion over whom to hire, promote, and fire.”⁴⁹⁵ Recent history suggests changes to workplace regulation are more likely to be incremental than revolutionary, occurring through the expansion of existing categories by courts and the addition of new ones by legislatures, at subnational as well as national levels, and by private employers as well as governments.⁴⁹⁶

B. Targeting Systemic Biases

This Part proposes incremental expansion of employment discrimination law with the goal of targeting systemic forms of bias, rather than the goal of protecting immutable traits. This project has both legal and political dimensions. Legally, it could entail judicial recognition that systemic biases—such as those based on weight, pregnancy, and criminal records—fall within the categories of disability, sex, and race discrimination. Politically, it could entail the enactment of new rules by legislative bodies or employers that would prohibit certain forms of discrimination on the basis of additional enumerated biases. Rather than revising the concept of immutability, advocates might expose the moralizing nature of judgments about “mutable” traits that are the bases of systemic forms of inequality. This Part will begin by describing a systemic bias approach and discussing its merits relative to universal protections or arguments from immutability. It will then apply this approach to discriminatory practices based on weight, pregnancy, and criminal records.

By systemic biases, I refer to discriminatory practices that are both structural and pervasive.⁴⁹⁷ Structural approaches to employment discrimination are concerned with whether institutional practices contribute to unequal opportunity, rather than the guilt or innocence of particular types of victims or perpetrators. Structural accounts of discrimination locate the causes and consequences of inequality in social and institutional practices, arrangements, and

⁴⁹⁵ Fishkin, *supra* note 465, at 1438.

⁴⁹⁶ See Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 483 (2012) (discussing the trajectory of recent expansions of workplace law). *But see* BAGENSTOS, *supra* note 474, at 143 (assessing the success of means-tested welfare versus social security and concluding that “[l]ooking at the history of the American welfare state in general, there seems to be a great deal of evidence to support the notion that broad social insurance programs fare better politically than do more targeted interventions”).

⁴⁹⁷ *Cf.* FISHKIN, *supra* note 70, at 164 (making a similar argument with respect to how “pervasive” and “strict” a limitation on equal opportunity is).

systems.⁴⁹⁸ They change the focus from individuals and their choices to how workplace structures “contribut[e] to the production or expression of bias.”⁴⁹⁹ The structural approach’s focus on the workplace itself as the cause of inequality creates an argument for legal intrusion into the prerogatives of employers.⁵⁰⁰ By contrast, immutability arguments look to whether the victims of discrimination, considered as a class or group, deserve protection.⁵⁰¹ Because they are understood as based on bad or costly “choices” (gluttony, sex, criminal behavior), certain traits receive limited or no protection. Victims of these forms of discrimination have lost their innocence, unlike those who did not choose their race or sex, and so the analogy to race or sex fails. The problem with analogical arguments that compare groups in this manner is that they “promote[] the idea that the traits of subordinated groups, rather than the dynamics of subor-

498. See, e.g., FISHKIN, *supra* note 70, at 1; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 142-43 (2003); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1824-25 (1990); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485-90 (2001). This approach has also been termed the “new structuralism.” See MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 221-22 (8th ed. 2013); Schultz, *supra*, at 1825.

In addition to diagnosing the problem as structural, many of these theorists argue for new structural cures. See Bagenstos, *supra* note 259, at 17-20 (summarizing reforms proposed by scholars to create employer accountability for workplace structures that contribute to bias); Ford, *supra* note 8, at 1384 (arguing that “the law should replace the conceptually elusive goal of eliminating discrimination with the more concrete goal of requiring employers, government officials, and other powerful actors to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy”). Debates over the merits of these new doctrinal frameworks are beyond the scope of this Article. See, e.g., Bagenstos, *supra* note 259, at 20-40 (discussing “reasons for skepticism” about the efficacy of certain proposals). This Article’s argument is against limiting existing employment discrimination frameworks to immutable traits, even if those existing frameworks may sometimes be thwarted by a judiciary lacking the competence or inclination to enforce them. See *id.* at 20-26 (describing the limits of existing doctrinal frameworks).

499. See, e.g., Sturm, *supra* note 498, at 488.

500. See Schultz, *supra* note 498, at 1841-43.

501. Not all proponents of structural solutions agree that the question of what traits to protect should be determined without respect to immutability. For example, Richard Thompson Ford argues, on pragmatic grounds, that the balance between an employer’s prerogatives and an employee’s interests “may tip to favor the employer when the employee can avoid the adversity by altering her behavior.” Ford, *supra* note 8, at 1419. This Part argues that the question should be reframed as whether the employer’s practice of discriminating on the basis of a “mutable” trait perpetuates systemic bias, not whether the law should protect an employee’s interest in engaging in a course of behavior.

dination, are the normatively important thing to notice.”⁵⁰² Thus, a structural frame would put this Article’s question not as which classes should be protected, but which forms of bias the law should disrupt.

Pervasive forms of bias connect to larger social systems of hierarchy and segregation and contribute to broader problems of inequality.⁵⁰³ The focus on pervasive biases differentiates a targeted approach from a universal one and provides a limiting principle.⁵⁰⁴ Unlike isolated instances of workplace unfairness, pervasive biases substantially limit the opportunities of affected individuals.⁵⁰⁵ For example, “victims of sex discrimination will encounter it in workplace after workplace,”⁵⁰⁶ while a man who is fired because, for example, “he reminded the employer of the employer’s hated stepfather” is unlikely to ever encounter this same unreasonable prejudice again.⁵⁰⁷ But the difference is not just that a victim of sex discrimination has diminished prospects for finding another job: the problem is also that sex discrimination reinforces larger patterns of superficial prejudice, stereotyping, and stigmatization.⁵⁰⁸

502. Janet E. Halley, “*Like Race*” Arguments, in *WHAT’S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 51 (Judith Butler et al. eds., 2000).

503. This discussion refers to pervasive biases in the present tense, but it is not intended to preclude consideration of the past or future. More precisely, the question is whether a form of bias has the potential to become systemic. This might be determined based on its history. Cf. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 470 (1985) (Marshall, J., concurring in part and dissenting in part) (“Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant.”). It might also be predicted based on changing norms or technologies. See, e.g., Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 601-11 (2011) (discussing how rules against genetic discrimination are justified to avoid a hypothetical future in which “a genetic underclass” faces social subjugation).

504. I do not endeavor to describe the line separating pervasive and idiosyncratic biases with anything approaching mathematical precision, because the difference will necessarily depend on context. No two forms of bias are identical, and no single group’s experience of discrimination should set the benchmark for future protection. It might therefore be objected that the criterion of “pervasiveness” creates the same line-drawing problems as the new immutability. See *supra* Part II.D. Yet a pervasiveness standard is less amenable to “floodgates” arguments because, while every aspect of personality might be said to be central, fewer biases might be said to be widespread.

505. See *supra* note 497 and accompanying text.

506. Ford, *supra* note 8, at 1385; see also, e.g., FISHKIN, *supra* note 70, at 167-68; Bagenstos, *supra* note 219, at 479.

507. Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality?*, 7 S. CAL. REV. L. & WOMEN’S STUD. 63, 91 (1997).

508. Cf. *id.* (“It is not simply the case that we care less, in designing a legal regime, about the person denied a job for the illegitimate reason that he reminded the employer of the employer’s

Whether a bias is pervasive in the sense of being widespread might be demonstrated through quantitative measures.⁵⁰⁹ But qualitative measures are also important; for example, patterns of bias might be pervasive because they are self-reinforcing: discouraging those affected from pursuing opportunities and limiting the options available to them, or distorting judgments about those identified as group members.⁵¹⁰ Or these forms of inequality might be complex in that they spill across more than one domain of social life, such as in employment, education, housing, the family, or politics.⁵¹¹ The focus on pervasive biases accords with the aim of disrupting wholesale patterns of discrimination that assign group-based statuses to individuals so as to limit their range of opportunities.⁵¹²

This systemic bias approach is both provisional and open-ended. It is provisional because it is not the aim of this Article to provide a unified theory of protected traits. Rather, this Part aims only to sketch out a potential alternative

hated stepfather because we believe that person will get another job. It is also the case that the decision not to hire in such a case does not confirm traditional status-based social hierarchies, express the social power of one group over another or contribute to ambivalent self-loathing.”).

509. Quantitative measures might include, for example, data on pay disparities or occupational segregation, see, e.g., *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, NAT’L EQUAL PAY TASK FORCE 6-7 (2013), http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf [<http://perma.cc/W8WA-HP8A>] (describing the persistence of pay gaps between men and women and occupational segregation based on sex), or measures of explicit and implicit attitudes and stereotypes, see, e.g., Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 433-34 tbl.1 (2007) (summarizing data on implicit and explicit attitudes toward and stereotypes regarding various identity traits). Arguments to explain these disparities are also required, as numbers alone will not do the work to persuade judges who “often believe that such patterns reflect real differences in qualifications or voluntary choices of individual workers.” Bagenstos, *supra* note 259, at 39.
510. See *supra* notes 221, 241 and accompanying text.
511. See, e.g., Susan Moller Okin, *Politics and the Complex Inequalities of Gender*, in PLURALISM, JUSTICE, AND EQUALITY 120, 125 (David Miller & Michael Walzer eds., 1995) (discussing Michael Walzer’s concept of “complex equality,” which requires that inequalities in any one sphere do not spread to others,” and applying this concept to women’s inequality in the family, which spreads into other social and political spheres).
512. See Vicki Schultz, *Antidiscrimination Law as Disruption: The Emergence of a New Approach to Understanding and Addressing Discrimination* 3 (Mar. 2014) (unpublished manuscript) (on file with author) (describing an approach to antidiscrimination that sees the law’s aim as disrupting institutional practices that “(1) pigeonhol[e] individuals into preconceived notions of the groups to which they belong; (2) assign[] preconceived notions of what it means to be members of those groups; and (3) structur[e] rewards or interactions in ways that tend to reproduce or confirm those presumed group-based differences in the particular setting”).

to the revised immutability that might be more normatively attractive and politically feasible.

This approach is open-ended in that, beyond asking about whether systemic biases attach to particular traits, it does not take sides in debates about the forms of bias that equality law should prohibit. As previously discussed, equality law already recognizes that biases may be prohibited because, for example, they are generally superficial (judging on a basis that is not, or need not, be required for the job),⁵¹³ stigmatizing (demeaning or subordinating based on identity),⁵¹⁴ or stereotyping (making assumptions about roles and competences based on group status).⁵¹⁵ This Article does not attempt to resolve debates among these theories; rather, it has argued that the revised immutability subverts the goals of eliminating each of these forms of bias,⁵¹⁶ and thus employment discrimination law requires a more inclusive theory of discrimination.

Some might argue that immutability could be stretched to encompass systemic biases. Susan Schmeiser, in her analysis of the new immutability, applauds those courts she sees as asking not whether a trait is immutable, but whether discrimination on the basis of that trait has been immutable.⁵¹⁷ She argues for a “reading of immutability . . . that turns not on the significance of individual self-definition or the question of volition, but rather on the persistence of ‘social and legal ostracism’ as the relevant aspect of group definition.”⁵¹⁸ For example, Schmeiser discusses an Oregon state appellate decision holding that immutability is not about “the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.”⁵¹⁹ Such a definition of immutability, how-

513. See *supra* note 218 and accompanying text.

514. See *supra* notes 219-221 and accompanying text.

515. See *supra* notes 229-241 and accompanying text.

516. See *supra* Parts II.A, II.B, II.C.

517. See Schmeiser, *supra* note 7, at 1518.

518. *Id.* (quoting *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 436 (Conn. 2008)); cf. Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 650 (2001) (arguing that an immutable trait should be defined as one with “terms, assumptions, and normative social requirements so deeply ingrained into the members of the society, that it is experienced at the individual level as immutable” and that discrimination based on such traits should be suspect because it signals “broader social disadvantaging of a disfavored group”).

519. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 446 (Or. Ct. App. 1998). In *Tanner*, the court held that a policy denying insurance benefits to same-sex couples violated the Oregon Constitution’s guarantee of equal privileges. *Id.* at 448. This definition of immutability is

ever, has not had wide uptake.⁵²⁰ Moreover, just as it is problematic to argue that human traits are immutable, so it is problematic to argue that biases are immutable. This line of argument may be self-defeating by suggesting that equality law is futile: if discriminatory assignments of identity and practices of segregation and subordination are immutable, the law cannot disrupt them.

To argue that employment discrimination law should forbid more forms of systemic bias is not to say an employer can never discriminate on these bases. Rather, to discriminate on the basis of a forbidden trait, an employer must demonstrate a business reason sufficient to meet a statutory standard or other exception.⁵²¹ Absent such a defense, moralizing judgments that an employee was to blame for her own deficiency should not excuse employer actions that perpetuate systemic problems of social inequality. Employment discrimination law seeks to balance employer prerogatives against the aim of eradicating invidious forms of bias. The law is justified in intervening in employer judgments with more force where those judgments cause social problems.⁵²² The focus on pervasive biases limits a systemic approach to those forms of bias that severely curtail opportunities, cut across social domains, or are self-perpetuating for those defined by certain traits. These forms of workplace unfairness create larger problems of inequality and make a stronger case for intervention in employer prerogatives.

It is true that more expansive antidiscrimination laws may trade off with the rigor of enforcement or the extent of remedies.⁵²³ Some might argue that

unusual, as courts have generally considered a history of discrimination to be a separate and distinct factor, apart from immutability. *See supra* text accompanying note 44.

520. *See supra* note 3 and accompanying text (discussing court opinions defining immutable traits as having to do with fundamental characteristics rather than social practices).

521. *See supra* notes 469-472 and accompanying text. Valid affirmative action plans are also exceptions to liability. *See, e.g.,* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (upholding an affirmative action plan against a Title VII challenge).

522. *See* Bagenstos, *supra* note 484, at 857-59.

523. Whether the expansion of antidiscrimination law to cover new forms of discrimination dilutes those resources and remedies available for more pressing problems is an empirical question. *See* Clarke, *supra* note 403, at 1248-49. Dilution may be minimal. Based on her study of state and local appearance discrimination ordinances, Deborah Rhode has argued that these legal rules have the potential to spark social change while generating little in the way of enforcement burdens or political backlash. DEBORAH RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 113 (2010) (arguing for the expansion of legal prohibitions on appearance discrimination and noting that jurisdictions that have expanded such prohibitions have not been overwhelmed with litigation).

I argue that universal expansion of employment protections is likely to dilute remedies based on prominent proposals for universal rules, which contain diluted means for enforcement or remedies. *See supra* notes 480-482 and accompanying text. Proposals to add categories such as “weight” to the enumerated lists of prohibited bases for discrimination, or to in-

immutability should serve as a proxy for measuring whether a group deserves priority in terms of antidiscrimination protection. Yet, as this Article has argued, the moral judgments underlying considerations of immutability are problematic. Rather than asking impossible questions about the relative moral desert of various groups, equality politics might focus on the harms to society when the labor market subdivides workers into rigid groupings based on superficial, stigmatizing, or stereotypical categories. Systemic problems of inequality have a stronger claim on limited enforcement resources and remedies. Moreover, stratification based on “immutable” characteristics like race may be impossible to address without attention to widespread discrimination on the basis of “mutable” characteristics, such as ex-offender status.

By contrast to the universal approach, an incremental approach to expanding antidiscrimination law may be more politically feasible. American civil rights law has often expanded by establishing analogies to and overlaps with discrimination based on race, sex, disability, and increasingly, sexual orientation.⁵²⁴ Analogies “can inspire empathy and understanding of harms previously unrecognized, and they may be desirable, if not necessary, in an adjudicative system based upon fidelity to precedent.”⁵²⁵ To suggest the power of careful analogical arguments is not to insist on the equivalence or ranking of oppres-

terpret existing categories to include more forms of discrimination, are not as often accompanied by such large compromises. *See supra* note 289 and accompanying text (discussing existing weight discrimination prohibitions); *supra* note 344 and accompanying text (discussing the PDA’s amendment of the category of “sex” discrimination to include “pregnancy”); *supra* note 427 and accompanying text (discussing the EEOC’s proposal to include criminal background checks under the familiar rubric of disparate impact law).

524. *See, e.g.*, Serena Mayeri, Note, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 *YALE L.J.* 1045, 1046 (2001) (discussing the “political and legal currency” of analogies between protected groups in civil rights advocacy). Analogies to race may be inescapable. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 2 (2011) (“The African American quest for civil rights has become so deeply ingrained in American consciousness that it is the yardstick against which all other reform movements are measured.”); Halley, *supra* note 502, at 46 (“‘Like race’ arguments are so intrinsically woven into American discourses of equal justice that they can never be entirely foregone. Indeed, analogies are probably an inescapable mode of human inquiry and are certainly so deeply ingrained in the logics of American adjudication that any proposal to do without them altogether would be boldly utopian . . .”). *But see* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 155 (2008) (arguing that “like-race” arguments are futile because no other form of discrimination is identical to race discrimination in all respects); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 *UCLA L. REV.* 1010, 1058 (2014) (discussing the flaws of “like race” arguments generally and arguing that “[i]nstead of playing the oppression Olympics, marriage equality advocates should focus on providing detailed, compelling accounts of antigay discrimination, which can stand on their own footing”).

525. Mayeri, *supra* note 524, at 1046.

sions.⁵²⁶ Rather than arguing that the common thread is immutable traits, in any sense of the term “immutable,” advocates might argue that biases on the basis of traits such as weight, pregnancy, and criminal records perpetuate systemic inequality, and that the arguments against protection are moralizing.

Looking at the social dynamics behind weight discrimination reveals a kinship with other forms of disability discrimination⁵²⁷ and substantial overlap with sex discrimination.⁵²⁸ Obesity is a stigmatized condition with systemic implications for employment opportunity,⁵²⁹ yet it often falls outside the definition of disability due to immutability concerns.⁵³⁰ One notable victory against weight discrimination is a 1993 First Circuit decision, *Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals*.⁵³¹ In that case, the court addressed immutability head-on and found it irrelevant. It rejected arguments that “morbid obesity” was not an impairment on account of being “caused, or at least exacerbated, by voluntary conduct.”⁵³² This was because the statute

contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like.⁵³³

Rather than appealing to an alternate concept of immutability as a protected realm of liberty, the court highlighted the hypocrisy of treating weight differ-

526. Civil rights struggles might appropriate lessons from one another without engaging in facile comparisons. See Robinson, *supra* note 524, at 1058 (discussing “how one can demonstrate a link between civil rights struggles without suggesting that they are generic and identical or, even worse, ranking one above another”).

527. Cf. *supra* note 288 and accompanying text.

528. See Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. (forthcoming 2016) (manuscript at 1) (on file with author) (arguing that “the obesity penalty for women is largely the result of employers keeping obese women (but not obese men) out of” jobs involving “public interaction”).

529. See Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 164-68 (2013) (discussing evidence of the prevalence of stigmatization and stereotypes surrounding obesity).

530. See *supra* text accompanying notes 292-311.

531. 10 F.3d 17 (1st Cir. 1993).

532. *Id.* at 24.

533. *Id.*

ently than other conditions brought on by voluntary conduct. It instead directly confronted the social stigma surrounding weight, ending with disapproval for “a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good.’”⁵³⁴ The European Court of Justice has addressed weight discrimination in a similar manner.⁵³⁵

Likewise, failure to accommodate pregnancy and related conditions has systemic effects on the employment opportunities of women.⁵³⁶ “[T]he maternal wall—the barriers to employment equality faced by mothers—begins with pregnancy.”⁵³⁷ Although the time during which a worker is pregnant is a relatively short period in the span of her career, the effects of pregnancy discrimination have a long-lasting impact.⁵³⁸ This form of discrimination is self-perpetuating: employers discriminate based on the stereotype that women will be less devoted to their jobs due to family responsibilities, resulting in fewer employment opportunities for women and creating incentives for women to devote themselves to family responsibilities rather than paid work.⁵³⁹

534. *Id.* at 28. In a study of U.S. news media reporting on weight, Abigail Saguy found that articles were more likely to “blame individuals for being overweight or obese than for having anorexia or bulimia.” SAGUY, *supra* note 292, at 71. Saguy observes connections to race, class, sex, and age, explaining that “fatness is more common among the American poor and minorities” while “anorexia and bulimia are diagnosed most often in middle-class white women and girls.” *Id.* Weight, class, and race may be linked because low-income and predominantly African-American neighborhoods are often “food deserts” without stores selling affordable, healthy foods, or because low-price stores target shoppers with junk food advertising. See, e.g., Bonnie Ghosh-Dastidar et al., *Distance to Store, Food Prices, and Obesity in Urban Food Deserts*, 47 AM. J. PREVENTIVE MED. 587, 587, 593 (2014) (studying 1,372 households in two low-income, majority African American neighborhoods, and finding that shopping at low-price food stores correlated with obesity and that low-price stores more actively marketed junk foods than high-priced stores).

535. In a 2014 employment discrimination matter, the Court of Justice of the European Union held that obesity may fall within the definition of disability under the United Nations Convention on the Rights of Persons with Disabilities, clarifying explicitly, “The concept of ‘disability’ . . . does not depend on the extent to which the person may or may not have contributed to the onset of his disability.” Case C-354/13, *Fag og Arbejde v. Kommunernes Landsforening*, 2014 E.C.R. 2106 ¶ 56 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160935> [<http://perma.cc/9HZU-E3PA>].

536. See, e.g., Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3, 3 (2006) (discussing “[n]ew work by economists [that] documents the central role of motherhood in creating economic vulnerability for women” in the form of an increasing wage gap).

537. Brake & Grossman, *supra* note 351, at 68.

538. *Id.* at 69.

539. Stephen J. Rose & Heidi I. Hartmann, *Still a Man’s Labor Market: The Long-Term Earnings Gap*, INST. FOR WOMEN’S POL’Y RES. 33 (2004), <http://www.iwpr.org/publications/pubs>

With respect to pregnancy, arguments based on the intersections between reproduction and sex equality, rather than any sort of immutability, have had some success in courts. In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*, the Supreme Court struck down as unlawful sex discrimination an employer's "fetal-protection policy" that forbade fertile women, but not fertile men, from working in certain jobs involving hazardous lead exposure.⁵⁴⁰ What doomed the company's policy was its distinction between men and women, not its distinction on the basis of "fertility alone."⁵⁴¹ Unlike rights to reproductive privacy or liberty, the interest in sex equality was strong enough to override employer arguments that discrimination was necessary to avoid the risk of costly tort liability.⁵⁴²

Rather than allowing immutability arguments to remain submerged in sex discrimination contexts, courts might directly address them. In one district court case, *Erickson v. Bartell Drug Co.*, an employer argued expressly that contraceptives are "voluntary" and "not truly a 'healthcare issue.'"⁵⁴³ The district court called this immutability point out as "[a]n underlying theme" of the employer's argument and rejected it, reasoning that "the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences."⁵⁴⁴

Likewise, with respect to criminal records, a focus on the harshness of immutability arguments, the racially disparate impact of screening practices, and the systemic effects of those practices has been persuasive with lawmakers. In analyzing the reasons that state legislatures enacted ban-the-box legislation, Fishkin describes how advocates directly confronted arguments regarding personal responsibility, exposing how these arguments are harsh and stigmatizing.⁵⁴⁵ For example, Philadelphia Mayor Michael Nutter emphasized that "people who 'have paid their debt to society' deserve 'an opportunity to work to

/still-a-mans-labor-market-the-long-term-earnings-gap/at_download/file [http://perma.cc/RT9F-KF5M].

540. 499 U.S. 187, 190 (1991).

541. *Id.* at 198.

542. *Id.* at 210. The Court qualified this holding with the explanation that it was "not presented with . . . a case in which costs would be so prohibitive as to threaten the survival of the employer's business." *Id.* at 210-11.

543. 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001).

544. *Id.* at 1272-73.

545. Fishkin, *supra* note 465, at 1462.

provide for their families and should not be discriminated against before they even have a first interview.”⁵⁴⁶ Immutability concerns clash with the goal of

open[ing] up a wider range of life paths and opportunities not only to those who demonstrate particular merit, desert, or promise, but to everyone—including those who have done poorly and those who did not manage to do as much as one would hope with the opportunities that were available to them.⁵⁴⁷

Fishkin also concluded that the disparate impact of criminal background checks on racial minorities played an integral role, by engaging anti-racist activists and organizations such as the NAACP to work for reforms.⁵⁴⁸ When the question is the moral desert or freedom of ex-offenders as a class, it is hard to make the case for imposing the additional costs of individualized assessments on employers. The case is much stronger if the problem is envisioned as systemic inequality: a potential future in which all employers automatically exclude every ex-offender, creating a large, permanent underclass of individuals with criminal records, disproportionately people of color, unable to find any employment.⁵⁴⁹

CONCLUSION

The new immutability has been useful for courts seeking to overcome doctrinal hurdles to protection against sexual orientation discrimination. But analysis of its potential applications to employment discrimination contexts reveals that the revised immutability is deeply flawed as a way of rethinking equality law. The new immutability is focused on determining whether individuals have made choices that ought to be protected aspects of their “personhood,” rather than asking how workplace policies limit equal opportunity by perpetuating systemic biases. Such biases may include the ideas that thin is always good, criminals are always bad, and pregnancy is always special. The promise

546. *Id.* (quoting City of Phila., “Ban the Box” Ordinance Goes into Effect, WORDPRESS (Jan. 13, 2012), <http://www.cityofphiladelphia.wordpress.com/2012/01/13/ban-the-box-ordinance-goes-into-effect> [<http://perma.cc/7E3Q-WTP4>]).

547. FISHKIN, *supra* note 70, at 23. Fishkin has coined the term “bottlenecks” to describe structural impediments to equal opportunity, and argued that “ameliorat[ing] severe bottlenecks” should be one of the central purposes of antidiscrimination law. Fishkin, *supra* note 465, at 1432.

548. Fishkin, *supra* note 465, at 1462–63. Fishkin emphasizes, however, that the “race-based and race-neutral” analyses of this problem are “deeply complementary.” *Id.* at 1463.

549. *See id.* at 1463.

of employment discrimination law is its ability to disrupt the stereotypes, stigmatizing practices, and superficial judgments that contribute to systems of inequality. This exercise will ultimately require more empathy and understanding, not revisions of the theory of immutability.