

THE PROPER PLACE FOR INTELLECTUAL PROPERTY IN
EMPLOYMENT DISCRIMINATION LAW

*Andrea Giampetro-Meyer**

INTRODUCTION

Intellectual property law . . . [has] far too long . . . been cloaked by a presumption of race and gender neutrality.¹

Every day, in companies across the United States, marketing professionals are making decisions about how to meet the needs of consumers in specific markets. How can a financial services company offer advice to African Americans who are seeking to transform wealth from small business ownership into a family legacy?² How can a health care provider provide care “just like family”³ when patients and caregivers are likely to be of different races?⁴ How can a retailer sell hunting equipment to customers who want to purchase products

* Professor and Chair, Law & Social Responsibility Department, Sellinger School of Business and Management, Loyola University, Maryland.

¹ Danielle M. Conway, *Intellectual Property: Implicit Racial and Gender Bias in Right of Publicity Cases and Intellectual Property Law Generally*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 179, 182 (Justin D. Levinson & Robert J. Smith eds., 2012).

² See *infra* note 206 and accompanying text.

³ Many long-term care companies promise care “just like family.” See, e.g., JUST LIKE FAMILY HOME CARE, <http://justlikefamilyhomecare.com> (last visited Dec. 5, 2013).

⁴ See Sara Gronningsater, *A Patient's Right to Choose is Not Always Black and White: Long Term Care Facility Discrimination and the Color of Care*, 26 J. CIV. RTS. & ECON. DEV. 329, 344-45 (2012). “[T]he two largest groups of people found in long-term care facilities are nurse’s aides and residents, who are often ‘racially and ethnically disparate.’” *Id.* at 344 (quoting Celia Berdes & John M. Eckert, *Race Relations and Caregiving Relationships: A Qualitative Examination of Perspectives From Residents and Nurse’s Aides in Three Nursing Homes*, 23 RES. ON AGING 109, 109 (2001)). Gronningsater states, “among African Americans there is a cultural preference for home care.” *Id.* at 345. Moreover, the baby boomer generation is largely white. *Id.* In 2009, 76 percent of baby boomers were white and 10 percent were African American. *Id.* Gronningsater urges long-term care facilities to rely on behavior contracts that promise to “avert[] a patient’s focus away from discriminatory feelings, and instead toward obtaining the best health care possible.” *Id.* at 360. *But see* Kimani Paul-Emile, *Patients’ Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 505 (2012) (suggesting that accommodating patients’ racial preferences in a hospital setting and thereby supporting “physician-patient race concordance confers tremendous health benefits to patients, particularly those from racial minority populations, and advances antisubordination norms.”).

from salespeople who have actually used the equipment?⁵ Some companies respond to these questions with sophisticated analysis and approaches, but others do not.⁶ When marketing professionals create intellectual property (IP) in response to these and similar questions, what is the nature of that IP? To what extent do companies rely on stereotypes when creating and answering these questions? How do these marketing decisions affect employee hiring? Are human resources professionals making hiring decisions that consider which employees will fulfill their corporate brand? If so, does this form of decision-making matter?

Now imagine a world in which it is easy to believe that IP should be part of the mix in conversations about employers' rights to engage in discriminatory hiring practices. In a recent article, Professor Rowe argues that intellectual property should be part of the balancing process in employment discrimination cases governed by Title VII of the Civil Rights Act of 1964 ("Title VII").⁷ The first step in moving toward the conclusion that employment discrimination cases call for a balance of intellectual property and labor rights⁸ is to make property rights especially important. To make property rights significant, Rowe highlights "[t]he realities of today's competitive business climate"⁹ and the "fiduciary duty" corporations have to make money for sharehold-

⁵ See, e.g., *infra* text accompanying note 286.

⁶ See Ross D. Petty, Anne-Marie G. Harris, Toni Broaddus & William M. Boyd III, *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 336, 354-63 (2003) (highlighting the racist effects of standard targeted marketing techniques and noting the subsequent economic, health-related, psychological, and societal harms); see also John Solomos & Les Black, *Races, Racism and Popular Culture*, in RACE AND RACIALIZATION: ESSENTIAL READINGS 247, 252 (Tania Das Gupta et. al. eds., 2007) (exploring the cultural mechanisms that enable racist expressions and highlighting media images of multiculturalism, especially Benetton ads that rely upon absolute images of racial and cultural difference); CLINT C. WILSON II, FÉLIX GUTIÉRREZ & LENA M. CHAO, RACISM, SEXISM, AND THE MEDIA: THE RISE OF CLASS COMMUNICATION IN MULTICULTURAL AMERICA 140-44, 159-61, 164-66 (Margaret H. Seawell ed., 3rd ed. 2003) (exploring race and ethnicity in advertising, including what it means to mine—and possibly exploit—multicultural markets).

⁷ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2006); Elizabeth A. Rowe, *Intellectual Property and Employee Selection*, 48 WAKE FOREST L. REV. 25, 53 (2013).

⁸ Rowe, *supra* note 7, at 56-58; see Marion Crain, *Work Matters*, 19 KAN. J.L. & PUB. POL'Y 365, 381-82 (2010) (questioning U.S. labor market policy that gives "deference to managerial property rights" and whether U.S. work law should assume that "property rights trump labor"); see also Malla Pollack, *The Romantic Corporation: Trademark, Trust, and Tyranny*, 42 U. BALT. L. REV. 81, 81 (2012) (discussing the "ongoing war [in U.S. law] between those who prioritize property and those who prioritize humans").

⁹ Rowe, *supra* note 7, at 63.

ers.¹⁰ Rowe also considers the relationship between a company's intellectual property and survival, especially the bottom line, revenue, and profitability.¹¹ The second step is to create conversations about jobs and discrimination that seem relatively light-hearted.¹² To create casual conversation, Rowe focuses on work that presents women as sexy props, including jobs as Playboy Bunnies and professional cheerleaders. Rowe also assumes that labor is a commodity,¹³ for example, that job seekers can transition from one job opportunity to another if they fail to fit a particular employer's ideal employee profile.

This two-step process is how Professor Rowe sets the stage for her argument in favor of an IP defense in Title VII employment discrimination cases. Rowe's argument is important because she makes it at a time when society's valuation of intellectual property is increasing,¹⁴ anti-discrimination law is in jeopardy,¹⁵ and job seekers are

¹⁰ *Id.* at 60.

¹¹ *Id.* at 59.

¹² *Id.* at 58. It is unclear why Rowe decided to highlight sexualized jobs. It is possible that Rowe highlights sexualized jobs to make it easier for readers to accept a flexible IP defense. If the jobs she has in mind can be devalued, it is easier to undervalue plaintiffs' claims to particular types of work. By deflating the importance of workers' claims, it is easier to artificially inflate the rights of IP holders. The word "artificially" is important. Rowe might be relying on stereotypes about sexualized jobs. In reality, the attributes and/or industriousness required for the jobs Rowe highlights do not correspond to stereotypes about these jobs. See Conway, *supra* note 1, at 184-85 (arguing that racial and gender bias are implicit in right of publicity cases).

¹³ See Crain, *supra* note 8, at 374.

¹⁴ See, e.g., Joseph Richard Falcon, *Managing Intellectual Property Rights: The Cost of Innovation*, 6 DUQ. BUS. L.J. 241, 241, 243 (2004) (explaining that because "[i]ntellectual property rights have become one of the most valued assets for a competing business," companies should manage these rights so they can maximize opportunities). But see DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 2 (2005) (arguing that corporations misuse copyright law to stifle creativity and free speech); DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH 5-6 (2002) (arguing that private interests are eroding public ownership, and IP supports this trend).

¹⁵ Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 80, 80-81 (Justin D. Levinson & Robert J. Smith eds., 2012) (highlighting judicial bias in employment discrimination lawsuits); Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012) [hereinafter *Losers' Rules*] (exploring "[a]symmetric decisionmaking—where judges are encouraged to write detailed decisions when granting summary judgment [in employment discrimination cases] and not to write when denying [summary judgment]"); see also Ellen Eardley & Cyrus Mehri, *Defending Twentieth Century Equal Employment Reforms in the Twenty-First Century*, AMERICAN CONSTITUTION SOCIETY (Jan. 2013), available at https://www.acslaw.org/sites/default/files/Eardley_and_Mehri_-_Defending_Equal_Employment_Reforms.pdf (suggesting ways to improve enforcement of civil rights laws, for example, encouraging President Obama to nominate more attorneys from public interest groups to serve as federal judges, and requiring companies to disclose diversity data that shows the extent to which they are complying with equal opportunity laws). See generally Tristin

especially vulnerable.¹⁶ This Article suggests that incentivizing employers to create or protect intellectual property laced with race¹⁷ or gender bias would be a mistake. Rather, legal scholars need to take stock of the complex relationship between intellectual property and anti-discrimination law, and then realize that corporate investments in some forms of intellectual property should serve as evidence of employment discrimination, instead of a defense.

The purpose of this Article is to analyze and evaluate Rowe's argument in favor of an IP defense in employment discrimination cases, explain how IP can provide evidence of employment discrimination, and provide recommendations for how to safeguard anti-discrimination law in the context of "The Rise of the Brand."¹⁸ The Article proceeds in three parts. Part I serves two purposes. First, it explains relationships among trademarks, brands, and intellectual property. Second, it explains Rowe's specific argument in favor of an IP defense in employee selection cases and delineates the legal mechanics of the proposed defense. Part II offers two streams of analysis. First, it explains the appropriate relationship between IP and employment discrimination law, reframes contemporary interpretations of Title VII, and offers a critical IP perspective.¹⁹ Second, it

K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011) (using the majority opinion in *Wal-Mart v. Dukes* to consider the future of systemic disparate treatment law).

¹⁶ See *infra* text accompanying notes 136-45.

¹⁷ Rachel Ward, *Reporting on Race and Ethnicity*, (Apr. 10, 2013), DRAKE UNIV. SCH. OF JOURNALISM AND MASS COMMUN, <http://drakej70.wordpress.com/2013/04/10/reporting-on-race-and-ethnicity>. When this article uses the term "race," assume this word encompasses ethnicity. Both terms refer to minority groups. However, the terms are not the same. Race refers to "a group of people with genetically transmitted distinct physical characteristics. Ethnicity is a group of people who share a national culture or tradition resulting from racial/cultural ties." *Id.*

¹⁸ See Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 800-04 (2010) (using the phrase "The Rise of the Brand" and explaining how branding has become more important than manufacturing to U.S. companies). See, e.g., Chelsea Cook, *Is Pope Francis on a Mission to 'Re-brand' the Catholic Church*, CNN, (Dec. 15, 2013, 11:46 AM), <http://newday.blogs.cnn.com/2013/12/15/is-pope-francis-on-a-mission-to-re-brand-the-catholic-church/> (discussing how even the Catholic Church has a new "brand").

¹⁹ This context is important because it sets the stage for deeper probing about IP in the context of employment discrimination. This section makes it clear that IP is not objective or neutral, as Rowe assumes. See K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 432-33 (2008) [hereinafter *Trademark Law and Racial Subordination*] (exploring the intersection of race and trademark, especially how "trademarked imagery has been central to the promotion of derogatory racial stereotypes"); see also John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1248 (2012) (using the term "critical IP theory,"

explains a four-question sequence that shows how IP can provide evidence of employment discrimination. This section considers discrimination at financial services company Merrill Lynch, or the “bias at the bull.”²⁰ Part III goes beyond the financial services industry and reframes recent cases in the service sector. Part III also offers concrete suggestions for moving forward, for improving policies, practices, and property. The reforms this Article suggests contribute to increased equality in the context of today’s IP-intensive business environment.

I. INTELLECTUAL PROPERTY AND EMPLOYMENT DISCRIMINATION LAW—TAKE ONE

A. *Context*

Today, a company’s intellectual property is one of its most important assets. Manny Schecter, IBM’s chief patent counsel, stated that “[i]t’s now an accepted fact that, just like financial capital or commodities or labor, IP is more than an economic asset—it also forms the

defined as “the deconstruction of trademark, copyright, and patent laws and norms in light of existing power relationships to better understand the role of intellectual property in both maintaining and perpetuating social hierarchy and subordination”). See generally K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) (tracing copyright law’s role in mass appropriation of work created by African-American artists and urging reparations in the music context); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL’Y & L. 365 (2008) (investigating how black women artists have been impacted by the IP system).

²⁰ Merrill Lynch uses the bull as part of its logo. See MERRILL LYNCH, http://www.ml.com/index.asp?id=7695_15125 (last visited Dec. 28, 2013). Ann Wozencraft, *Bias at the Bull; Merrill Lynch’s Class-Action Settlement Draws a Crowd*, N.Y. TIMES (Feb. 27, 1999), available at <http://www.nytimes.com/1999/02/27/business/bias-at-the-bull-merrill-lynch-s-class-action-settlement-draws-a-crowd.html?pagewanted=all&src=pm> (coining the phrase “bias at the bull”). See generally William T. Bielby, *Minority Vulnerability in Privileged Occupations: Why Do African American Financial Advisors Earn Less Than Whites in a Large Financial Services Firm?*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 13 (2012) [hereinafter *Minority Vulnerability in Privileged Occupations*]. This volume presents innovative, creative articles from inequality scholars that relate to gender, race, and management. *Id.* Bielby’s chapter examines racial inequality by presenting an in-depth analysis of a case of African American stockbrokers employed in a large financial service firm—Merrill Lynch. *Id.* Matt L. Huffman, *Introduction: Gender, Race, and Management*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 7 (2012) (“Bielby convincingly demonstrates that . . . [i]nstead of operating meritocratically, barriers to racial equality are common, including those that affect wage trajectories early in the career of workers, producing cumulative disadvantage over the career.”).

basis of a global market.”²¹ IP is intangible and refers to creations of the mind, including distinctive signs and creative designs.²² Legal mechanisms, including patents, copyright and trademarks protect IP. IP law seeks to protect those who innovate and create.²³ It also aims to protect the public.²⁴ For example, trademark law offers consumer protection.²⁵ A trademark is a “badge of origin” that enables a customer to recognize a product of a particular company.²⁶ A trademark can be a word, symbol, number, color, shape, smell, or sound.²⁷ Uniforms can enjoy trademark protection.²⁸ For example, the Play-boy Bunny costume is registered as a trademark.²⁹ Trademarks distinguish a company’s products and services. In doing so, they act as a quick, reliable guide to quality.³⁰ The Nike “swoosh” symbol, for instance, gives consumers an indication of the quality of a particular product.³¹ A successful trademark can be a significant commercial asset, especially when that trademark generates goodwill.³²

Novel forms of distinctive signs, such as color and sound, attract potential customers. When protected by trademark law, these distinctive signs become key tools in a company’s branding strategy. The

²¹ Manny Schechter, *The Emerging Global Market for Intellectual Property*, FORBES (Apr. 18, 2012, 12:47 AM), <http://www.forbes.com/sites/ciocentral/2012/04/18/the-emerging-global-market-for-intellectual-property/>.

²² *What is Intellectual Property?*, WORLD INTELLECTUAL PROP. ORG. 2, available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf. (stating that intellectual property (IP) “refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce.”) *Id.* at 2.

²³ *Id.* at 3-4.

²⁴ *Id.* at 3-4, 13, 19.

²⁵ *Id.* at 8 (highlighting that trademark law strives to prevent consumer confusion). See William McGeveran & Mark P. McKenna, *Confusion Isn’t Everything*, 89 NOTRE DAME L. REV. 253, 253-54 (2013) (suggesting that courts should identify categories of cases and respond to different categories of cases differently, depending on the competition or communication values at stake in a particular case).

²⁶ *How to Protect Your Brands and Reputation: Trade Marks*, IP-ACTIVE, <http://ip-active.com/trademarks/trademarks.php> (last visited Dec. 26, 2013).

²⁷ *Trademarks in General*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/madrid/en/faq/trademarks.html#P13_397 (last visited Dec. 26, 2013).

²⁸ See Rowe, *supra* note 7, at 26, 36, 58.

²⁹ *Id.* at 26.

³⁰ *Sport and Branding*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/ip-sport/en/branding.html> (last visited Dec. 26, 2013) (focusing specifically on sports branding).

³¹ See *id.*

³² *Id.*

field of brand strategy comes with its own terminology.³³ Brands can be thought of as “important vessel[s] of corporate identity and property.”³⁴ Brands include trademarks and designs, but they also include the “concept, image and reputation . . . those elements transmit with respect to [specific] products and/or services.”³⁵ Companies use brands to align strategy, culture, identity, and reputation.³⁶ There are a variety of types of brands, including product brands,³⁷ corporate brands,³⁸ employer brands,³⁹ and branded service.⁴⁰

Businesses use legally protected tools such as trademarks to create brand value.⁴¹ Brand value includes both brand identity and brand image.⁴² According to brand identity expert Alina Wheeler, “[b]rand identity is tangible and appeals to the senses. You can see it, touch it, hold it, hear it, [and] watch it move.”⁴³ She indicates that “[b]rand identity fuels recognition . . . and makes big ideas and meaning accessible. Brand identity takes disparate elements and unifies them into

³³ See, e.g., *Brand Careers – Glossary*, BRAND CHANNEL, http://www.brandchannel.com/education_glossary.asp (last visited Dec. 26, 2013).

³⁴ Katyal, *supra* note 18, at 797.

³⁵ *Branding: How to Use Intellectual Property to Create Value for your Business?*, INDIAN INST. OF MATERIALS MGMT., http://iimm.org/ed/index.php?option=com_content&view=article&id=114&Itemid=107 (last visited Dec. 26, 2013) [hereinafter *Branding to Create Value*].

³⁶ See generally MARY JO HATCH & MAJKEN SCHULTZ, *TAKING BRAND INITIATIVE: HOW COMPANIES CAN ALIGN STRATEGY, CULTURE, AND IDENTITY THROUGH CORPORATE BRANDING* (2008) (examining the management practices and processes that underlie corporate branding efforts); see also *THE EXPRESSIVE ORGANIZATION: LINKING IDENTITY, REPUTATION, AND THE CORPORATE BRAND* (Majken Schultz, Mary Jo Hatch & Mogens Holten Larsen eds., 2000) (contributing ideas about how organizations create strong reputations, relationships between corporate branding and organizational processes, and how organizations discover their identities).

³⁷ HATCH & SCHULTZ, *supra* note 36, at 7-8. A product brand equates a brand to a specific creation or piece of merchandise, such as a packet of Marlboro cigarettes. See *id.*

³⁸ *Id.* A corporate brand equates a brand to company, such as Nike, and the wide-ranging activities of the company. *Id.*

³⁹ SIMON BARROW & RICHARD MOSLEY, *THE EMPLOYER BRAND: BRINGING THE BEST OF BRAND MANAGEMENT TO PEOPLE AT WORK* (2005) (explaining that employers can brand distinctive styles of employment). The book jacket of Barrow and Mosley’s book states, “[l]eading companies realise [employer brand] importance in attracting and engaging the people they need to deliver profitable growth. They are also beginning to recognise that creating a positive brand experience for employees requires the same degree of focus, care and coherence that has long characterised effective management of the customer brand experience.” *Id.*

⁴⁰ See *infra* text accompanying notes 79, 81.

⁴¹ *Branding to Create Value*, *supra* note 35.

⁴² See *id.*

⁴³ ALINA WHEELER, *DESIGNING BRAND IDENTITY: AN ESSENTIAL GUIDE FOR THE WHOLE BRANDING TEAM* 4 (4th ed. 2013).

whole systems.”⁴⁴ Brand image considers customer perspectives about a brand.⁴⁵ Brand image is important from a holistic perspective because “[i]t is the brand image as a whole, and not merely a trademark or design as a stand-alone element, that differentiates one’s goods and/or services from those of competitors, denotes a certain quality, and over the long term attracts and nourishes consumer loyalty.”⁴⁶ Brand image “is the heart and spirit of [a] business.”⁴⁷ It is the “central nexus of communication between an enterprise and its consumers.”⁴⁸ Certain aspects of branding are so important that they are imperatives, for example, it is essential that companies “[u]nderstand the customers . . . [and] [b]uild on their perceptions, preferences, dreams, values, and lifestyles.”⁴⁹

As brands, brand identity, and brand image become recognized as including important forms of IP—which are essential corporate assets—it is likely that the legal system will grant more protection to IP. Professor Desai suggests that legislators and courts should develop trademark law so it protects brands.⁵⁰ He says that “[a]

⁴⁴ *Id.*

⁴⁵ *Branding to Create Value*, *supra* note 35.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ WHEELER, *supra* note 43, at 11. Additional branding imperatives are:

(1) Acknowledge that we live in a branded world; (2) Seize every opportunity to position your company in your customers’ minds; (3) Communicate a strong brand idea over and over again; (4) Go beyond declaring a competitive advantage. Demonstrate it!; (5) Identify touchpoints—places in which customers interface with the product or service; (6) Use brand identity to create sensory magnets to attract and retain customers. *Id.* (numbers added).

Given that understanding customer preferences (and more) is a branding imperative, it is possible that companies will use the branding process as a pretext for discrimination. *See generally* Cameron Lynne Macdonald & David Merrill, *Intersectionality in the Emotional Proletariat: A New Lens on Employment Discrimination in Service Work*, in *SERVICE WORK: CRITICAL PERSPECTIVES* 113, 113-133 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009) (relying on research regarding the sociology of work to promote increased understanding of service workers’ experience). Macdonald and Merrill’s chapter considers “[w]ho fills what service jobs and why?” *Id.* Macdonald and Merrill explore the implications of customer preferences in the service sector. *Id.* They assert that “the investment of the service worker’s gendered or ethnic identity as both a selling tool and an inextricable aspect of the service itself – create new and more intractable forms of discrimination in hiring.” *Id.* Marek Korczynski & Cameron Lynne Macdonald, *Critical Perspectives on Service Work: An Introduction*, in *SERVICE WORK: CRITICAL PERSPECTIVES* 7 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009) (focusing on jobs in the “[e]motional [p]roletariat” and exploring what is described as a gendered ghetto that is segmented by both ethnicity and class).

⁵⁰ *See* Deven R. Desai, *From Trademarks to Brands*, 64 *FLA. L. REV.* 981, 1043-44 (2012).

information plays an ever-larger role in our economy, a brand theory of trademarks offers the opportunity to bring trademark law into the information age.”⁵¹ In other words, Desai suggests that trademark law should catch up with the world of marketing.⁵² Trademarks provide information about origin⁵³ and quality. They do not, however, create business value. It is *brands* that create business value. Consequently, Desai suggests that law should protect brands.⁵⁴ If Desai is accurate, it is important to delineate the extent to which legislators and judges will protect intellectual property in the form of brands, and how this protection might affect other areas of law, including employment discrimination law.

B. *Rowe’s Suggested Mashup*

In *Intellectual Property and Employee Selection*, Rowe asks: Should employers have a flexible IP defense available to them in employment discrimination cases?⁵⁵ She answers this question “yes.”⁵⁶ Rowe offers two reasons in support of her conclusion.⁵⁷ First, she asserts that employers should have a flexible IP defense available to them in employment discrimination cases because IP has become too important to ignore.⁵⁸ Second, she argues that IP compares favorably to current Title VII defenses and exceptions that insulate employee selection decisions,⁵⁹ so an IP defense should also exist. Rowe admits that she is uncertain about how to implement the IP defense and the implications of this defense.⁶⁰ Still, she wants to start a discussion about the proper role of IP in employment discrimination cases.⁶¹ Before considering Rowe’s two reasons that support her conclusion in favor of an IP defense, this section offers a brief summary of

⁵¹ *Id.* at 1044.

⁵² *See id.*

⁵³ *See id.* at 1010-11 (using the term origin to refer to the origin of goods, meaning the company that produced the goods).

⁵⁴ *See id.* at 1043-44.

⁵⁵ *See Rowe, supra* note 7, at 26.

⁵⁶ *See id.*

⁵⁷ *Id.* at 59-63. A careful read of Rowe’s argument indicates that she offers two main reasons for needing flexible defense options in IP cases. However, Rowe does not flag these two reasons as the main reasons.

⁵⁸ *Id.* at 60-62.

⁵⁹ *Id.* at 60-63.

⁶⁰ *See id.* at 64.

⁶¹ *See Rowe, supra* note 7, at 64.

the IP defense, articulates key descriptors Rowe attaches to the IP defense, and makes clear the context in which Rowe argues in favor of an IP defense.

In terms of mechanics, Rowe indicates that an employer who wants to use an IP defense would need to “establish that (1) it owns IP rights,⁶² (2) there is a relationship between the IP and the business practice that resulted in the employee selection decision, (3) the job description is tied to the IP, and (4) there is a direct financial correlation between the IP and the company’s business success.”⁶³ Apparently, a plaintiff would argue the opposite, asserting that a company failed to prove that a job description is tied to IP.⁶⁴

Rowe offers many descriptive assertions about the IP defense she proposes. First, Rowe makes clear that she does not intend for an IP defense to “replace or change the fundamental tenets of employment discrimination law.”⁶⁵ Instead, Rowe points out that an IP defense would supplement the existing framework of Title VII by adding one more component for employers to add to the balancing that already takes place in Title VII analysis.⁶⁶ Second, Rowe describes the IP defense as flexible.⁶⁷ The employer can raise the defense as a rebuttal in the *prima facie* case, or assert it in discussions about recognized Title VII defenses, including defenses known as the BFOQ defense⁶⁸ and the business necessity defense.⁶⁹ She assures the reader that, no

⁶² The easiest way for a company to prove it has IP rights is to provide “a government-issued certificate if the IP is registered.” *Id.* at 56. Rowe is open to additional avenues of proof. *Id.* For example, the company can prove it has a valid common law claim. *Id.* Basically, a company must satisfy that it has IP rights. *Id.* at 56-57. Rowe indicates that courts would protect trade dress, but they would be unlikely to protect general marketing themes. *Id.* at 57.

⁶³ Rowe, *supra* note 7, at 27.

⁶⁴ *See id.* (stating that plaintiffs could use the IP defense to show pretext).

⁶⁵ *Id.*

⁶⁶ *Id.* at 27, 60-61; *see also id.* at 54 (asserting that “the IP Defense . . . requires balancing, on a case-by-case basis, the IP rights at stake versus the societal interest in protecting antidiscrimination policies, through the existing framework of Title VII.”).

⁶⁷ *Id.* at 54. The flexible IP Defense fits in with the existing employment discrimination framework and can be inserted at various parts of the framework. Rowe, *supra* note 7, at 54. With regard to rebutting a *prima facie* case, the employer can ask: Were you qualified for the position in the first place? *See id.* With regard to the business necessity defense, the employer can assert that the decision was not really discriminatory. *Id.* With regard to the bona fide occupational (BFOQ) defense, the employer can assert that its actions supported the essence of its business. *Id.* at 54-56.

⁶⁸ *See infra* text accompanying notes 151-53.

⁶⁹ *See infra* text accompanying notes 154-55.

matter how a case progresses, the IP defense will be useful.⁷⁰ Third, Rowe makes it clear that the IP defense has many positive attributes—it offers objectivity,⁷¹ transparency,⁷² and precision.⁷³ At times, the defense could even benefit *plaintiffs*.⁷⁴ Finally, Rowe makes it clear that “customer service and the employees who deliver that service are [paramount].”⁷⁵ She believes that employers should have wide latitude when making hiring decisions in cases when appearance matters.⁷⁶ Moreover, Rowe assumes courts should be deferential to employers in IP-discrimination cases, as employers are in the best position to articulate the appropriate relationship among job descriptions, qualifications, and IP.⁷⁷

Rowe sees IP as branded service.⁷⁸ Branded service is service in which “[t]he human wearing the trade dress merges with the brand image.”⁷⁹ A company can get trade dress protection when it “can show . . . commercial use of certain distinct features in connection with a product or service.”⁸⁰ Trade dress highlights the elements that make up the image companies present to customers, including uniforms, scripts, and routines.⁸¹ Trade dress protects intangible elements—the look and feel, or ambiance, that makes a service unique.⁸² Companies have been successful in attaining trade dress protection for the décor of a restaurant, and the design of a magazine cover.⁸³ It is important

⁷⁰ See Rowe, *supra* note 7, at 54.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 56.

⁷⁴ *Id.* at 27, 54, 56.

⁷⁵ *Id.* at 28 (quoting Janelle Barlow & Paul Stewart, *BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE* 23 (2004)).

⁷⁶ Rowe, *supra* note 7, at 39 (citing Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 *DUKE J. GENDER L. & POL’Y* 319, 322 (2007)).

⁷⁷ *Id.* at 58-59.

⁷⁸ *Id.* at 28.

⁷⁹ *Id.* at 26; see also *id.* at 28 (citing Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 *DUKE J. GENDER L. & POL’Y* 13, 18-19 (2007)) (“Branded service, then refers to the process of integrating the business image into the service itself through human resource policies.”).

⁸⁰ Ben L. Wagner, Carl A. Kukkonen III & Susan Neuberger Weller, *The Law that Protects the Appearance of Your Website*, MINTZ LEVIN (Apr. 15, 2011), available at <http://www.mintz.com/newsletter/2011/Advisories/1032-0411-BOS-TRA/1032-0411-BOS-TRA.pdf>.

⁸¹ Avery & Crain, *supra* note 79, at 28 (exploring the marketing of branded service and the law’s response).

⁸² See Wagner, Kukkonen III & Neuberger Weller, *supra* note 80.

⁸³ *Id.*

to note that companies have not been successful at obtaining trade dress protection for the humans wearing trade dress.⁸⁴ Intellectual property law bars rights and registration to marks deemed “functional,”⁸⁵ or essential to the use or purpose of the article it affects.⁸⁶ The Hooter Girl, for instance, “is not entitled to trade dress protection because . . . she is the very essence of Hooters’ business.”⁸⁷ Employers can, however, control how their employees look.⁸⁸ They can do so by enforcing appearance policies.⁸⁹

Rowe’s discussion focuses exclusively on gender discrimination. The jobs she has in mind are jobs as sexy food and alcohol servers,⁹⁰ cheerleaders,⁹¹ Disney performers,⁹² and blond service workers in a fantasy resort in the Maldives that does not yet exist.⁹³ Rowe understands that employers have strong incentives to hire for brand fit.⁹⁴ She does not say whether employers’ desire to hire employees with a particular “look” stems from customer preferences,⁹⁵ perceived customer preferences,⁹⁶ or style choices a company makes about how to

⁸⁴ See Avery & Crain, *supra* note 79, at 29-31.

⁸⁵ See *id.* at 30.

⁸⁶ See *id.* at 28-29.

⁸⁷ *Id.* at 30 n.90.

⁸⁸ See *id.* at 19, 30-32.

⁸⁹ *Id.* at 30-31.

⁹⁰ See Rowe, *supra* note 7, at 45-48. Rowe highlights Southwest Airlines and their flight attendants, Hooters waitresses, and Playboy bunnies. *Id.* at 25-26, 31-35.

⁹¹ *Id.* at 34-36 (highlighting Dallas Cowboy Cheerleaders and pointing out that the cheerleaders are more than eye candy—they “master more than fifty songs and dance routines for every football season.”).

⁹² *Id.* at 29-31.

⁹³ *Id.* at 37-38.

⁹⁴ *Id.* at 26.

⁹⁵ See generally Rowe, *supra* note 7. Rowe does, however, realize that the BFOQ defense cannot rely on customer preferences or stereotypes. See *id.* at 47-48; see also *id.* at 47 (citing *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971)) (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.”); Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103, 129-30 (2012) (considering customer preference and religious attire in the workplace, for example, a man who sears a Sikh turban, or a Muslim woman who wears the hijab as part of religious practice). Sidhu points out that, if customers prefer to refrain from interacting with service workers who wear a turban or hijab, “the public’s preferences may, at worst, be infected with animus and, at best, perpetuate and reinforce homogeneous conceptions as to who should serve and interact with the public.” *Id.* at 129. “[M]ost courts have ignored the reality of what customer preferences actually reflect.” *Id.*

⁹⁶ *Id.* at 130 (quoting *Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs*, U.S. EQUAL EMPLOYMENT OPPOR-

present employees to the public. It is unclear whether she would place any limits on employer discretion to select employees in the context of branding.

Rowe believes that employers should have a flexible IP defense available to them in employment discrimination cases because IP has become increasingly important.⁹⁷ In general, Rowe believes that the “property” label is weighty.⁹⁸ She indicates that intellectual property is a form of property, and should enjoy the “attendant privileges” of the property label.⁹⁹ Rowe points out that IP rights are important in other contexts as well.¹⁰⁰ For example, courts contemplate IP considerations seriously when asked to balance IP rights with the First Amendment.¹⁰¹ Additionally, employers’ IP rights can outweigh rules and policies that govern employee conduct, for example, when non-compete agreements restrict employee options and mobility.¹⁰² Rowe assumes that we have reached a societal tipping point, a point that triggers the need for an IP defense.¹⁰³

Rowe makes several positive comments about the importance of brands in particular. She asserts that brands “help[] form the corporate identity,”¹⁰⁴ “offer[] powerful benefits to trademark owners as well as to consumers,”¹⁰⁵ and “are not just the logos or slogans that are attached to products and services [but instead] ‘are the values, beliefs,

TUNITY COMMISSION (2005), <http://www.eeoc.gov/facts/backlash-employer.html>) (“The EEOC explicitly states that notions about customer preference real or perceived do not establish [an employer’s defense of] undue hardship.”) (internal quotation marks omitted). Sidhu explains that if employers are uncomfortable with unfamiliar religious appearances, or believe the public is “put off” by these appearances, and segregates those who wear religious attire, it marginalizes those workers. *Id.* at 130-32. Sidhu urges employers to refrain from endorsing or validating the public’s discriminatory attitudes. *Id.*

⁹⁷ See Rowe, *supra* note 7, at 39.

⁹⁸ *Id.* Rowe is not alone in assuming that property is important. See Falcon, *supra* note 14, at 241.

⁹⁹ See Rowe, *supra* note 7, at 39 (citing *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 497-98 (3d Cir. 1998); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108, 108 (1990)).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² *Id.*

¹⁰³ See *id.* at 26-27.

¹⁰⁴ *Id.* at 28 (citing Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 801 (2010)).

¹⁰⁵ Rowe, *supra* note 7, at 28 (citing Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 954-57 (2006)).

and service experiences that underpin them.’”¹⁰⁶ She also writes that IP rights are increasingly important because they “serve as ‘market differentiators’ for companies, enhancing their economic value and appeal to customers.”¹⁰⁷ In multiple similar assertions, she links IP to the bottom line. In particular, she says that “the kinds of IP rights that may implicate employee selection are more likely to be driven by decisions about company values, vision, and financial goals and strategies.”¹⁰⁸ Rowe also states that, given today’s competitive business climate, “it does not seem reasonable . . . for courts to discount or disregard . . . financial concerns in the employment discrimination context.”¹⁰⁹ Clearly, Rowe believes that one of law’s most important aims is to safeguard corporate economic interests.¹¹⁰

In addition to arguing that IP is important,¹¹¹ Rowe argues that an IP defense is necessary because IP compares favorably to current Title VII defenses and exceptions.¹¹² With regard to defenses, Rowe compares the IP defense to Title VII’s two defenses, the BFOQ defense, and the business necessity defense.¹¹³ In essence, both defenses provide justifications for employment practices that employers can prove are necessary, even though they are discriminatory.¹¹⁴ Rowe states that cases that consider these defenses are “riddled with inconsistencies.”¹¹⁵ She continues to say that, arguably, IP concerns could fit readily into analysis of Title VII defenses.¹¹⁶

¹⁰⁶ *Id.* at 28 (citing JANELLE BARLOW & PAUL STEWART, *BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE* 23 (2004)).

¹⁰⁷ *Id.* at 63 (quoting Joseph Richard Falcon, Comment, *Managing Intellectual Property Rights: The Cost of Innovation*, 6 *DUQ. BUS. L.J.* 241, 250 (2004)). Rowe further asserts that “[t]o the extent [companies’] objectives clash with societal norms and expectations, then the marketplace will serve as a further safeguard to the legal protections under Title VII.” *Id.* Rowe offers the decline of Playboy Clubs as an example of market forces eliminating a one-gender-workforce. *Id.*

¹⁰⁸ *Id.* at 62.

¹⁰⁹ Rowe, *supra* note 7, at 60.

¹¹⁰ *See id.* at 59-60. “Departing from current employment discrimination jurisprudence, consideration of the economic effect on the company is an important consideration in the IP Defense.” *Id.* at 59. “While the fear of lost profits should not justify or excuse illegal action, these financial realities deserve consideration within the overall picture of understanding a company’s essence.” *Id.* at 60.

¹¹¹ *See id.* at 26-28, 59. Rowe argues that because IP is important, it should be considered in Title VII cases. *See id.*

¹¹² Rowe, *supra* note 7, at 60-63.

¹¹³ *See generally id.* at 41.

¹¹⁴ *Id.* at 42, 50.

¹¹⁵ *Id.* at 46.

¹¹⁶ *Id.* at 54.

With regard to exceptions, Rowe highlights sectors of the economy that enjoy exemptions from Title VII law.¹¹⁷ For example, she highlights the ministerial exception,¹¹⁸ which is grounded in the First Amendment religion clauses.¹¹⁹ This exception “protects religious organizations from religious discrimination [law]suits.”¹²⁰ Rowe states:

[U]nder the ministerial exception, the First Amendment religion clauses push aside the antidiscrimination laws. Sometimes IP outweighs First Amendment concerns. Accordingly, IP should at least enter into the balance with discrimination laws. If religious workplaces have the authority to decide who best will fulfill their mission, why shouldn’t other secular businesses that are IP owners have a similar right?¹²¹

In other words, if churches can hire for mission or brand, why shouldn’t regular businesses with IP that sits at the core of their success enjoy the same ability to hire for brand?¹²²

One of the implications of Rowe’s flexible IP proposal is that employers could use this defense to justify discrimination, beyond gender.¹²³ Employment discrimination experts know that an IP defense should not be used to justify race discrimination,¹²⁴ but Rowe, with a background in intellectual property law, leaves this possibility

¹¹⁷ *Id.* at 51-53.

¹¹⁸ Rowe, *supra* note 7, at 52.

¹¹⁹ *Id.* (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703 (2012)).

¹²⁰ *Id.* (citing 42 U.S.C. § 2000e-1(a) (2006)).

¹²¹ Rowe, *supra* note 7, at 60-61.

¹²² *Id.* at 59.

¹²³ *See id.* at 53 (leaving this possibility open).

¹²⁴ *See* Sidhu, *supra* note 95, at 132-33. “Southern employers often argued that hiring blacks would be financially ruinous; white customers would go elsewhere. In rejecting such customer preference defenses, Congress and the courts recognized that the most effective way of combatting prejudice was to deprive people of the option to indulge it.” *Id.* (quoting Deborah L. Rhode, *The Injustice of Appearance*, 61 *STAN. L. REV.* 1033, 1065 (2009)). Customer preferences, whether real or perceived, cannot justify employment discrimination. *See id.* at 132-33. The principle that customer preferences do not justify discrimination is true no matter whether the customer preferences are explicit, or standing behind a company’s branding strategy. *See id.* at 122-23, 127-32. For example, if a company’s branding strategy relies on an assumption that customers prefer to be served by a particular kind of employee, and employers act on this assumption by engaging in hiring strategies that create unequal opportunities for protected groups, this series of actions would violate Title VII. *See id.* at 127-32.

open.¹²⁵ Some judges, especially judges who do not understand or appreciate modern discrimination, might consider a flexible IP defense as a viable option.¹²⁶ Another implication of Rowe's flexible IP defense is that employers could use this defense in cases that consider additional forms of IP, beyond trade dress. Rowe leaves this possibility open, too.¹²⁷ It is conceivable that some judges would consider a flexible IP defense in cases highlighting branding in general.¹²⁸ Section II considers these possibilities as part of an ongoing dialogue about the proper role of IP in employment discrimination cases.

II. INTELLECTUAL PROPERTY AND EMPLOYMENT DISCRIMINATION LAW—TAKE TWO

A. *Context*

As intellectual property becomes more important, so does human capital. Although firms own IP, employees create it, manage it, and sometimes wear it as they engage in uniformed work serving customers. Rowe is correct that Title VII already includes balancing.¹²⁹ However, she places her proposed defense in the wrong place. Rather than embedding IP balancing *within* Title VII, as Rowe suggests, IP and Title VII need to instead sit at opposite ends of a fairness seesaw.¹³⁰ In other words, IP considerations need to stay *outside* of Title VII analysis. We need a balance between these two significant areas of laws and rights. Rowe describes corporations' bedrock duty to

¹²⁵ Rowe, *supra* note 7, at 50. Rowe could have made it clear that her argument in favor of a flexible IP defense would not apply in race-based discrimination cases but she does not do so. *Id.* Instead, she points to places where the IP defense would fit, even in race cases. *Id.* For example, she says, “[u]nlike BFOQ, [the business necessity defense] applies to all types of discrimination, including race. Arguably, IP concerns would also fit readily here.” *Id.* However, when Rowe discusses the BFOQ defense, she says, “the [the BFOQ defense] does not include race. However, where racial characteristics are necessary for job performance a necessity defense has been recognized.” *Id.* at 42 n.150 (citing *Miller v. Tex. Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980)).

¹²⁶ See *infra* text accompanying notes 164-68.

¹²⁷ See generally Rowe, *supra* note 7, at 27-29. Although Rowe highlights trade dress and its impact on employee selection, she makes positive comments about brands in general throughout her article. See *id.* Brands include trademarks, trade dress, designs, and more. See *id.*

¹²⁸ See *infra* text accompanying note 168.

¹²⁹ See Rowe, *supra* note 7, at 53 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242-43 (1989)).

¹³⁰ See generally *id.* at 53-54.

shareholders.¹³¹ She fails to acknowledge that fair access to work is the bedrock of our democracy.¹³² When considering the employment side of the fairness seesaw, we need to consider: (1) what work means, especially to workers, (2) the extent to which work is generally available today, and (3) the current state of Title VII. Section I already considered the significance of IP today. This Section adds one more piece of information to the IP side of the seesaw. This Section makes it clear that IP is not race or gender neutral, as Rowe assumes. This assumed neutrality matters because if IP is biased, Rowe is proposing a tainted defense to employment discrimination.

Professor Crain, a labor and employment law scholar, has articulated what work means today.¹³³ Her work indicates that, to employees, work means economic self-sufficiency, health insurance, retirement plans, security, dignity, standing, belonging, membership in the social structure, and participation in democracy.¹³⁴ Depending upon the nature of work, it can also provide independence, an avenue to personal achievement, advancement up the economic ladder, and the esteem of others.¹³⁵ Crain makes it clear that labor is more than a commodity by stating that “[work] is how we create and perform our identities in the world—how we assert our membership in the larger communities to which we belong: economic, cultural, and political.”¹³⁶

Although work is critically important, America is experiencing a serious work shortage. Crain highlights the millions of jobless workers, including those who have given up on finding employment in recent years.¹³⁷ She also emphasizes that job loss has been the most severe among lower income households.¹³⁸ Crain notes that jobs in some fields—including manufacturing, construction, transportation,

¹³¹ *See id.* at 60.

¹³² Crain, *supra* note 8, at 372.

¹³³ *See id.* at 371-74; *see also* Ann Nicholson, *Crain Stresses ‘Work Matters’ at Chair Installation*, WASHINGTON UNIVERSITY LAW MAGAZINE 36 (2009), available at <http://law.wustl.edu/magazine/fall2009/Crain.pdf>.

¹³⁴ *See* Crain, *supra* note 8, at 370-72.

¹³⁵ *Id.* at 371.

¹³⁶ Nicholson, *supra* note 133, at 36. *See generally* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY (Marion G. Crain & Michael Sherraden eds., 2014) (highlighting the role and value of work in America today, with an emphasis on how to rebuild a society of opportunity with meaningful and sustaining jobs).

¹³⁷ Crain, *supra* note 8, at 365.

¹³⁸ *Id.* at 366.

and finance—might not return.¹³⁹ Three years after Crain described America’s jobless recovery, the situation remains bleak. Today, “jobs remain scarce and unemployment painfully high.”¹⁴⁰ Employers offer good jobs, but have difficulty finding qualified workers.¹⁴¹ Crain explains that, “[t]he best jobs—jobs that pay well with benefits—are in health care, high-tech manufacturing, social services, finance, and construction. All [of these jobs] require sophisticated training or years of school.”¹⁴² Crain further details that “much of the job growth since the end of the recession” has been in “low-wage retail, restaurant and service jobs.”¹⁴³ Many workers are working part-time, when they would rather be working full-time.¹⁴⁴ According to the Urban Institute, the most vulnerable groups—the young, poor, minorities, and the less educated—were hit hardest by the recession.¹⁴⁵

When the job market is tight, it is especially important that employers evaluate job candidates based upon their qualifications, rather than factors candidates cannot control, such as race and gender. Moreover, legally—and ethically—employers cannot deny employment opportunities based upon their customers’ preferences.¹⁴⁶ Historically, job candidates who believe employers have treated them unfairly have been able to rely on Title VII of the Civil Rights Act of 1964 for protection.¹⁴⁷ Title VII ensures that employers will provide equal opportunity for both jobs and upward mobility. In particular, Title VII “bars adverse employment actions taken on the basis of race,

¹³⁹ *Id.* (citing Sudeep Reddy, *It Will Be Years Before Lost Jobs Return—and Many Never Will*, WALL ST. J. (Oct. 5, 2009), <http://online.wsj.com/news/articles/SB125470053662262957>).

¹⁴⁰ Tim Landis, *Special Report: Americans’ Skill Sets, Good-Paying Jobs Mismatched*, (Oct. 27, 2013 1:05AM), <http://www.rrestar.com/article/20131027/NEWS/131029456?template=printart>.

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (“[T]here [is] a growing number of older workers among the long-term unemployed.”).

¹⁴⁶ *Minority Vulnerability in Privileged Occupations*, *supra* note 20, at 28.

¹⁴⁷ *See generally* JOHN F. BUCKLEY, EQUAL EMPLOYMENT OPPORTUNITY: 2014 COMPLIANCE GUIDE (2014). Title VII is a federal statute that prohibits employment discrimination on the basis of race, color, sex, national origin, and religion. *Id.* § 1.06. Employers are obligated to comply with Title VII if they have 15 or more employees. *Id.* Title VII protects employees from wide range of discriminatory employer conduct, including failure to hire, termination, failure to promote, discriminatory compensation, discriminatory terms and conditions of employment (such as access to training), and retaliation. *See id.*

color, religion, sex, and national origin.”¹⁴⁸ Title VII is important because it provides the external pressure employers sometimes need to provide equal opportunity.¹⁴⁹

The statute and case law offer few official exceptions. The two most relevant to this Article are the bona fide occupational qualification, or BFOQ defense, and the business necessity defense.¹⁵⁰ The BFOQ defense allows employers to discriminate based upon sex, religion, or national origin, but not race,¹⁵¹ as long as they can demonstrate that discrimination is “reasonably necessary to the normal operation of that particular business or enterprise.”¹⁵² Historically, courts have interpreted the BFOQ defense narrowly, and have stated clearly that customer preferences cannot justify discrimination.¹⁵³ The business necessity defense is more expansive and courts have allowed the defense in all kinds of discrimination cases, including race discrimina-

¹⁴⁸ Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 *YALE L.J.* 1257, 1257 (2003). See Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 *N.C. L. REV.* 379, 379-380 (2008) (analyzing discrimination based upon race or gender and “considers . . . employer demands that people of color and women ‘cover’ their race and gender by conforming their behavior and appearance to a white, male norm”); Sidhu, *supra* note 95, at 123 (analyzing discrimination based upon religion and arguing that “[p]roperly [i]nterpreted, Title VII [d]oes [n]ot [p]ermit [w]orkplace [s]egregation on the [b]asis of [r]eligion”); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329 (1991) (highlighting discrimination against individuals with an accent).

¹⁴⁹ See William T. Bielby, *Accentuate the Positive: Are Good Intentions an Effective Way to Minimize Systemic Workplace Bias?*, 95 *VA. L. REV. IN BRIEF* 117, 124 (2010) [hereinafter *Accentuate the Positive*].

¹⁵⁰ See generally BUCKLEY, *supra* note 147. The BFOQ defense is used in disparate treatment cases, while the business necessity defense is used in disparate impact cases. Rowe, *supra* note 7, at 41. Disparate treatment cases focus on intentional discrimination, while disparate impact cases focus on an employer’s facially neutral practice that disproportionately harms a protected group. See BUCKLEY, *supra* note 147, at § 1.03.

¹⁵¹ Ernest F. Lidge III, *Law Firm Employment Discrimination in Case Assignments at the Client’s Insistence: A Bona Fide Occupational Qualification?*, 38 *CONN. L. REV.* 159, 165 (2005).

¹⁵² Kapczynski, *supra* note 148, at 1257-58 (internal quotation marks omitted).

¹⁵³ See *id.* at 1258 (alteration in original) (internal quotation marks omitted) (citing *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981)). See also *Diaz*, 442 F.2d at 388-89)

[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, courts have refused to allow the preferences of airline customers to justify rejection of men for flight attendant positions, or the biases of customers or associates in other countries to justify refusal to promote women to positions directing international operations. *Id.*

tion cases.¹⁵⁴ Additionally, they have allowed the defense in a range of cases in which employers have suggested that a particular practice is necessary for business success.¹⁵⁵

Many scholars and practitioners have noted that Title VII is currently in jeopardy.¹⁵⁶ This law, the most important American anti-discrimination statute, is weak for three reasons. First, the nature of employment discrimination has changed, and the law has not kept pace with these changes.¹⁵⁷ Over time, the dominant forms of discrimination have changed from overtly discriminatory policies to more subtle forms of discrimination, including in-group favoritism, out-group bias, and stereotyping.¹⁵⁸ When companies fail to recognize and respond to subtle discrimination, the structures they create can reinforce discriminatory behavior, thereby harming employees.¹⁵⁹

Second, Title VII's complex frameworks have distracted federal judges from the statutory intent of the law.¹⁶⁰ Professor Sperino

¹⁵⁴ See generally Linda Lye, *Title VII's Tangled Tale, The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315 (1998) (analyzing several cases in which employers used the business necessity defense successfully in race discrimination cases and highlighting criminal history cases, in which courts granted an employer's business necessity defense when the employer wanted to exclude applicants with prior criminal convictions).

¹⁵⁵ See generally *id.* (showing that courts have allowed employers to consider both cost and safety in justifying policies that have a disparate impact on protected groups).

¹⁵⁶ Eardley & Mehri, *supra* note 15, at 3 (indicating that Title VII has been gutted and suggesting the following reforms: "(1) appoint[] federal judges with experience serving the public interest; (2) strengthen[] federal agencies' systemic enforcement of equal employment rights; and (3) expos[e] ongoing discrimination through enhanced transparency so that the nation understands the importance of defending civil rights laws in the twenty-first century.").

¹⁵⁷ See *id.* at 5-10.

¹⁵⁸ *Id.* at 16-17 (citing Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-66 (2001)) (explaining this type of discrimination is considered "second generation" discrimination). See generally David Wellman, *Unconscious Racism, Social Cognition Theory, and the Legal Intent Doctrine: The Neuron Fires Next Time*, in HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 39, 63 (Hernán Vera & Joe R. Feagin eds., 2007) (urging readers to rely on the sociological, rather than psychological, theories about discrimination). In particular, Wellman argues against a focus on social cognition theory. *Id.* at 52-53. "Racism in post-civil rights America . . . [is n]o longer expressed through bias, stereotyping, prejudice, and hostility." *Id.* at 53. Instead, "modern racial subordination takes the form of unequal loan policies and health care, residential segregation, variation in criminal sentencing, disparate administration of the death penalty, and, despite civil rights legislation, intractable, persistent racial inequality." *Id.*

¹⁵⁹ See Eardley & Mehri, *supra* note 15, at 17.

¹⁶⁰ See *id.* at 7; see also Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 124 (2011) [hereinafter *Rethinking Discrimination Law*] ("In some ways, the framework model is comforting because it gives the appearance that the courts are following an orderly and rational way of making decisions about employment discrimination."); Sandra Sper-

points out that even though Title VII's statutory language does not require it, judges have outlined and applied a series of tests or overlays to Title VII's statutory language.¹⁶¹ For example, disparate treatment, disparate impact, and pattern-and-practice cases all come with a standard framework for plaintiffs to prove discrimination.¹⁶² Sperino says that, when judges "require[] plaintiffs to funnel their discrimination claims into silos of discrimination," some cases fall through the cracks because "these frameworks fail to capture the full range of potential discrimination."¹⁶³ Sperino also questions whether judges "know how discrimination manifests itself in the workplace and can summarize those manifestations into multipart tests."¹⁶⁴

Finally, judges have created "outs" that have made it difficult for plaintiffs to assert their rights.¹⁶⁵ For example, judges can use something called the stray remarks doctrine "to discount[] *explicitly* discriminatory statements."¹⁶⁶ No matter what an employer said—no matter how racist or sexist the comment may be—many courts require

ino, *Framing Discrimination Law: Wal-Mart v. Dukes and Title VII*, JURIST (Nov. 12, 2011, 1:00 PM), <http://jurist.org/forum/2011/11/sandra-sperino-gender-discrimination.php> [hereinafter *Framing Discrimination Law*].

¹⁶¹ See *Framing Discrimination Law*, *supra* note 160.

¹⁶² *Id.* (stating that all three frameworks are court constructed ideas, "judicial gloss" placed on Title VII and are not mandated by the statute's language).

¹⁶³ *Id.* The author explains:

Given that the courts created many of these frameworks in the 1970s and 1980s, many of them fail to incorporate newer ideas of structural discrimination and do not reflect more modern understandings of how cognitive bias operates. Further, they fail to describe how corporate intent might interact with individual intent to create liability for the employer.

Id.

¹⁶⁴ *Rethinking Discrimination Law*, *supra* note 160, at 125. "Such an assumption vastly underestimates the complexity of discrimination, which stems from a variety of motivations and presents itself in countless ways." *Id.* (citing Samuel R. Bagenstos, *General Essay, Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 (2007)).

¹⁶⁵ See Gertner & Hart, *supra* note 15, at 90 (explaining that these outs are "shorthand descriptive tools that judges use to characterize their understanding of the evidence presented by the parties."). Unfortunately, these outs often reflect stereotypes and offer assumptions that allow judges "to filter cases out of litigation at early stages." *Id.* These judge-made rules are often used to dismiss employees' cases upon an employer's motion for summary judgment. *Id.* at 89-90.

¹⁶⁶ *Losers' Rules*, *supra* note 15, at 118-20 (noting "[t]here are striking examples of courts dismissing extraordinary statements of bias as stray remarks."). For example, in *Shorter v. ICG Holdings, Inc.*, a supervisor's racially-charged comments about the plaintiff were treated as stray remarks. *Id.* at 120 (citing *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1206-10 (1999)). Comments were made by the plaintiff's supervisor, who terminated the plaintiff. *Id.* The case indicates that one of the racially-charged comments was that Shorter was an "incompetent nigger." *Id.* Gertner notes that the court discounted this comment by indicating that the racially charged comments were just the speaker's personal opinion. *Id.*

that stray remarks “be supported by other evidence, such as . . . a history of discrimination by that employer.”¹⁶⁷ It is possible that the flexible IP defense Rowe envisions would be another judicial out, serving as an indirect way for judges to grant another concession to employers. Imagining how Rowe’s flexible IP defense might morph in the hands of judges who fail to understand discrimination is alarming.¹⁶⁸ The IP defense could become the exception that swallows the anti-discrimination rule.¹⁶⁹

Before considering the IP-Title VII mashup this Article suggests, we need to take another look at the IP side of the fairness seesaw. Although Rowe assumes that IP is race and gender neutral,¹⁷⁰ a small number of scholars¹⁷¹ have argued convincingly that IP often reflects explicit and implicit race and gender biases. With regard to explicit bias, Professor Greene emphasizes that, at times, IP reflects bias that is clear and fully expressed.¹⁷² Professor Conway affirms this observation.¹⁷³ Conway states that explicit bias is present in “trademark law where images and symbols . . . associated with African Americans and women are used to project negative, false, psychically injurious stereotypes that continue to marginalize members of these groups.”¹⁷⁴ For

¹⁶⁷ Ken LaMance, *Stray Remarks and Employment Discrimination Lawyers*, LEGAL MATCH, <http://www.legalmatch.com/law-library/article/stray-remarks-and-employment-discrimination-lawyers.html> (last modified May 16, 2013, 12:05 PM). An additional “out” is the “honest belief” out, where judges assume that an employer can escape liability if that employer had an honest belief (no matter how foolish, trivial, or baseless) that their action (e.g., firing an employee) was fair. Gertner & Hart, *supra* note 15, at 91. One more out is the “same decision maker” out. *Id.* at 92-93. For this one, judges assume that a plaintiff’s case is less valid when the same decision-maker who hired an employee also fired the employee. *Id.* Here, judges assume that employers are consistent—if they hire fairly, they fire fairly. *See id.* Because of these outs, and more general bias, Gertner and Hart state that any less than “a rogue, guilty decision-maker in the workplace . . . will not pass [a judges] muster.” *Id.* at 81.

¹⁶⁸ *See, e.g., id.* at 90 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988)) (discussing that the stray remarks doctrine developed from mere dicta in a United States Supreme Court case).

¹⁶⁹ *See Kapczynski, supra* note 148, at 1258.

¹⁷⁰ *See Conway, supra* note 1, at 182; Rowe, *supra* note 7, at 41. Perhaps Rowe realizes IP can be biased, but sees this bias as necessary in helping companies achieve financial success.

¹⁷¹ *See Conway, supra* note 1, at 183-84 (discussing that “IP law has largely escaped having its doctrines and practices scrutinized by critical race and feminist theorists most likely because its most fervent proponents, those who have benefitted from a head start in garnering the intangible spoils, have been über successful in creating the impression that this particular segment of the law is premised on that which is rational, objective, dispassionate, and neutral.”).

¹⁷² *See generally* Trademark Law and Racial Subordination, *supra* note 19.

¹⁷³ *See generally* Conway, *supra* note 1.

¹⁷⁴ *Id.* at 182.

example, the Aunt Jemima logo, a trademarked southern mammy character, denigrates women of color.¹⁷⁵ With regard to implicit bias, Conway has made it clear that IP reflects “multiple layers of implicit bias that flow wide and deep.”¹⁷⁶ She asserts that some forms of IP inspire reflexive race and gender-based snap judgments.¹⁷⁷ For example, Abercrombie & Fitch’s ads and approaches designed for attractive, all-American kids inspire reflexive snap judgments about what it means to be attractive, and all-American.¹⁷⁸ As more companies aim for more specific, and sometimes exclusive markets, both marketers and lawyers need to think more deeply about brands. It is also time to think more generally about the roles organizations play in creating and sustaining persistent workplace discrimination through both marketing practices and human resources policies.¹⁷⁹

B. *Giampetro-Meyer’s Suggested Mash-up*

In 1998, Merrill Lynch settled *Cremin v. Merrill Lynch*,¹⁸⁰ a gender-based discrimination class action lawsuit. Financial advisors (FAs)¹⁸¹ argued successfully that Merrill Lynch assigned accounts in

¹⁷⁵ Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1611 (2010) (pointing out that consumers see Aunt Jemima as a historical symbol of slavery); see also *Aunt Jemima*, AMERICAN STUDIES, http://web.wm.edu/americanstudies/370/2005F/sp6/auntjemima_history.htm (last visited June 29, 2014) (showing the evolution of Aunt Jemima).

¹⁷⁶ Conway, *supra* note 1, at 184.

¹⁷⁷ See *id.* at 182. Conway writes that individuals who demonstrate implicit bias are not aware, and thus cannot control, their actions. *Id.* Implicit bias reflects “hidden, reflexive associations that affect decision-making.” *Id.*

¹⁷⁸ See, e.g., Rhode, *supra* note 124, at 1064. Recently, Abercrombie & Fitch was in the news for favoring thin customers. Carter writes:

It would be easy to conclude that it was inbound filtering – controlling the kind of people who buy the brand – that causes controversy. And yet we control who uses the brand all the time: we nudge through product design (e.g. moisturiser in a grey packet is for men); and exclude through pricing strategies (e.g. Bentley is for rich people). Most of the time, these strategies don’t cause any raised eyebrows I don’t think this is about the principle of being exclusionary, but whether people feel excluded. Customers need to feel that their purchase behaviour represents a personal choice, that they’re excluding you Telling customers that they can’t join your club because they’re too fat isn’t generally the best way to do that.

See Nicola Carter, *Has Abercrombie & Fitch’s CEO Really Made a ‘Big, Fat, Marketing Mistake’?*, THE HUFFINGTON POST (May 16, 2013), http://www.huffingtonpost.co.uk/nicola-carter/abercrombie-fitch-marketing-mistake_b_3285249.html.

¹⁷⁹ See *Accentuate the Positive*, *supra* note 149, at 119.

¹⁸⁰ 957 F. Supp. 1460 (N.D. Ill. 1998); Minute Order, *Cremin v. Merrill Lynch*, 1:96-cv-03773 (N.D. Ill. Sept. 02, 1998).

¹⁸¹ The term Financial Advisor is used synonymously with the term Financial Consultant. William Bieby, *Expert Report of William T. Bielby, Ph.D., George McReynolds v. Merrill Lynch*,

ways that set the stage for male—but not female—brokers' success.¹⁸² Dr. William Bielby, a sociologist, provided expert testimony in that case.¹⁸³ In the years following the settlement, arbitration panels granted damages to women, arguably agreeing with one of the attorneys who litigated the case that “the standard operating procedure at Merrill Lynch was to discriminate against women.”¹⁸⁴

While women who filed claims as part of the *Cremin* settlement were having their day in arbitration,¹⁸⁵ Merrill Lynch was creating its Multicultural Diversified and Business Group.¹⁸⁶ This group aimed to help Merrill Lynch become the preeminent wealth management firm among diverse and multicultural markets.¹⁸⁷ The group expanded from originally focusing on just one market (South Asian) to ultimately focusing on seven (South Asian, LGBT, Special Needs, Women, African-American, Hispanic, and Native American).¹⁸⁸ Merrill Lynch's multicultural marketing materials, combined with information about the company's human resources policies and practices, supported Bielby's expert testimony in *McReynolds v. Merrill Lynch*.¹⁸⁹ *McReynolds*, a race-based class action discrimination law-

Pierce Fenner & Smith 4 (June 25, 2008), available at <http://www.merrillclassaction.com/pdfs/DrBielbyExpRep.pdf> [hereinafter *Expert Testimony*]. When the employees became FAs, it was because the job emphasis had switched to financial planning. See *id.* at 14.

¹⁸² See *Cremin*, 957 F. Supp. at 1464; Stipulation of Settlement at 16, 51, *Cremin v. Merrill Lynch*, 1:96-cv-03773 (N.D. Ill. June 17, 1998). The company also agreed to make changes in company policies and practices that would give female brokers a better chance of succeeding in the male-dominated brokerage business. *Id.* at 58-60.

¹⁸³ See *Expert Testimony*, *supra* note 181, at 2.

¹⁸⁴ Ameet Sachdev, *Panel Finds Sex Bias at Merrill Lynch*, CHICAGO TRIBUNE (Apr. 21, 2004), http://articles.chicagotribune.com/2004-04-21/business/0404210258_1_discrimination-merrill-lynch-wages-and-promotions.

¹⁸⁵ *Cremin*, 957 F. Supp. at 1663 (requiring applicants to submit to arbitration for any dispute or claim). The arbitration determined damages in individual cases. Stipulation of Settlement, *supra* note 185, at 20-58, 60.

¹⁸⁶ *Expert Testimony*, *supra* note 181, at 36. Subha Barry led this group. *Id.* at 37. As part of the *Cremin* settlement, the company agreed to “enhance and extend its diversity programs, and establish firm-wide guidelines for distribution of accounts of departing FAs.” See *id.* at 37-38, 54. Yet these programs often yield little change, and the companies are aware. See H. ROY KAPLAN, *THE MYTH OF POST-RACIAL AMERICA: SEARCHING FOR EQUALITY IN THE AGE OF MATERIALISM* 129, 133 (2011).

¹⁸⁷ See *Expert Testimony*, *supra* note 181, at 37-41.

¹⁸⁸ *Id.* at 39.

¹⁸⁹ See generally *Expert Testimony*, *supra* note 181. Specifically, Bielby's testimony was based upon deposition testimony from Merrill Lynch's managers and executives responsible for personnel policies and practices. *Id.* at 4. In addition to the deposition testimony, Bielby also examined marketing approaches, which he describes as “racialized.” See *id.* at 35; see also *Minority Vulnerability in Privileged Occupations*, *supra* note 20, at 16-18 (providing an overview

suit, settled in 2012 for \$160 million.¹⁹⁰ Soon thereafter, Merrill Lynch settled *Calibuso v. Bank of America*,¹⁹¹ a gender-based class action discrimination lawsuit, for \$39 million.¹⁹² Both of these cases challenged Merrill Lynch's policies and practices such as how the company formed teams, customer accounts distribution and opportunities, and decided which employees were eligible for promotions.¹⁹³ These two cases, viewed against the backdrop of *Cremin*, made it clear that Merrill Lynch generally struggled with diversity programs. This foundation of this struggle is unconscious bias, which made its way into the company's policies and practices.

This section offers a series of questions potential plaintiffs can use to consider how a company's IP might provide evidence of discrimination.¹⁹⁴ These questions are derived from Bielby's expert testimony in the *McReynolds* case.¹⁹⁵ This section explains the questions, pulling in facts from *McReynolds* and facts excerpted from the expert testimony.¹⁹⁶ Readers should assume that analysis regarding gender would be virtually identical, except that women in *Calibuso* alleged sexual harassment, in addition to standard gender discrimination.¹⁹⁷

This Article's IP-Title VII mash-up offers these four evidence-gathering questions:

of how Bielby gathers data for expert testimony). Bielby relies on deposition testimony, company materials, documents describing company diversity policies and practices, and information about the company's racialized marketing efforts. See *Expert Testimony*, *supra* note 181, at 4-25, 35-36.

¹⁹⁰ *Bank of America, Merrill in \$38 Million Gender Bias Settlement* *Calibuso v. Bank of Am. Corp.*, 28 N. 4 WESTLAW J. EMP'T 9, Sept. 25, 2013, available at 2013 WL 5338293. Nina Martin, *The Impact and Echoes of the Wal-Mart Discrimination Case*, PROPUBLICA (Sep. 27, 2013, 9:53 AM), <http://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case>.

¹⁹¹ No. 10-CV-1413 (PKC), 2014 WL 1779472, at *1, n.3 (E.D.N.Y. Apr. 30, 2014). The original case was against Bank of America but Merrill Lynch was brought in later, after the two companies merged. See *generally id.*

¹⁹² *Id.* at *2.

¹⁹³ See *id.* at *1, *Cremin v. Merrill Lynch*, 957 F. Supp. 1460, 1464 (N.D. Ill. 1998); see also Michael Orey, *White Men Can't Help It*, BLOOMBERG BUS. WK. (May 14, 2006), <http://www.businessweek.com/stories/2006-05-14/white-men-cant-help-it> (explaining that Wal-Mart made grave assumptions in how it identified candidates for particular positions, simply assuming that women were not interested in such jobs).

¹⁹⁴ See *generally Expert Testimony*, *supra* note 181.

¹⁹⁵ See *generally id.*

¹⁹⁶ See *generally id.*

¹⁹⁷ *Calibuso*, 2014 WL 1779472, at *1.

(1)	Describe the company's brand identity. What does the brand say or imply about race? What about gender?
(2)	Review the company's marketing strategy. What assumptions does the company make about customers/clients and their preferences? Does the company's IP create any barriers to equal opportunity, or does the IP leave a clear path to equal opportunity?
(3)	Review the company's human resources policies, including approaches to diversity and inclusion. What assumptions does the company make about their employees' abilities to engage in particular kinds of work? What is the background of the company's Chief Diversity Officer (CDO)? What is the reporting structure for the CDO?
(4)	How do the answers to questions (1) - (3) play out in the daily operation of the business?

1. Brand Identity

It is unlikely that a company will say that its brand identity reflects assumptions about race or gender, or that a particular brand “redlines,” or is designed to exclude.¹⁹⁸ It is also unlikely that a company will state that its brand is “white,” “male,” “female,” “Hispanic,” and the like. In fact, a company might not be aware of bias that underlies its brand identity. This first question, then, is designed as an open one, meant to inspire framing for the remaining three questions. Question one encourages potential plaintiffs to look at evidence from the company's marketing and human resources policies and practices through a lens that considers the possibility that bias is embedded in the company's policies and practices.

With regard to Merrill Lynch, evidence in *McReynolds* suggested that the financial advising business is primarily white and male.¹⁹⁹ However, evidence also suggested that the company wanted to target diverse and multicultural markets because those markets represented “a terrific opportunity for Merrill Lynch . . . because there was a lot of wealth.”²⁰⁰ Evidence clarified that Merrill Lynch acted upon a belief that race-matching is important.²⁰¹ The company encouraged the idea that white FAs should work with white clients and African American

¹⁹⁸ See Conway, *supra* note 1, at 182. The bias might also be implicit.

¹⁹⁹ *Expert Testimony*, *supra* note 181, at 67, 69-70. Both FAs and customers are presumably white. See *id.*

²⁰⁰ *Id.* at 37.

²⁰¹ See *id.* at 39-40.

FAs should work with African American clients.²⁰² Merrill Lynch assumed that individuals tend to associate and bond with people who are similar to themselves,²⁰³ a “birds of a feather” assumption. It is likely that gender-matching took place, too. In other words, it is likely that Merrill Lynch assumed that female FAs should work with female clients.

2. Marketing Strategy

With regard to marketing strategy and assumptions about clients, evidence in *McReynolds* suggests that the company’s multicultural marketing efforts were built on stereotypes about potential clients.²⁰⁴ The multicultural marketing group prepared a marketing plan for each of the diverse segments, including an “investment profile” characterizing the traits of each segment.²⁰⁵ For example, the materials describe

[S]outh Asians [as] being technical, self-directed, fee sensitive, and savvy investors, while typical households in other three segments possess[ed] none of those traits. Similarly, the document characterize[d] Hispanic, African American, and female households as conservative, need education, and prefer cash and real estate while South Asian household possess[ed] none of those traits.

The [] materials for marketing to affluent African Americans categorize[d] that group further into six segments, including entertainer/athlete with a mindset that includes money to burn/big spender, community leader/activist & small business owner with a mindset that includes don’t trust the system and cash is king and emerging with a mindset that includes it’s my time.²⁰⁶

Additionally, the multicultural marketing group produced a marketing newsletter that offered a toolkit for interacting with clients from diverse and multicultural markets.²⁰⁷ This newsletter offers information for FAs including a “cultural sensitivities fact sheet” for each segment and guidance on “‘etiquette,’ ‘values,’ ‘family relation-

²⁰² *Id.* at 34, 36.

²⁰³ *Id.* at 35-36.

²⁰⁴ *See generally id.* at 41.

²⁰⁵ *Expert Testimony*, *supra* note 181, at 42.

²⁰⁶ *Id.* at 42 (internal quotation marks omitted).

²⁰⁷ *Id.* at 43.

ship structures,’ and ‘business protocols & practices’ distinctive to each segment.”²⁰⁸ The document titled “‘African American Market Cultural Sensitivities’ includes under the Etiquette category, ‘as a general rule, business etiquette is identical to American customs.’”²⁰⁹ Under the Family and Relationship Structures category, the document states, “almost half of all households are single-parent homes.”²¹⁰ Bielby pointed out in his expert testimony that “[w]hile it is unclear how either of these pieces of guidance could have any utility for marketing Merrill Lynch products to affluent African American households, they are examples of the kind of broad generalizations found in the company’s multicultural marketing materials.”²¹¹

Merrill Lynch’s simplistic and biased approach to multicultural marketing is not the only approach companies can use. Companies that have embraced positive marketing realize that, in addition to satisfying organizational stakeholders, they must respond to the needs of both individuals and society.²¹² In particular, marketing can increase individual and societal welfare by challenging stereotypes, rather than relying on them in a quest for business success. For example, a recent Cheerios advertisement highlighted a mixed-race couple with a biracial child.²¹³ General Mills wanted its advertisement to reflect an American family, and, increasingly, American families are mixed-race.²¹⁴ A branding expert stated, “big brands like Cheerios need to be in touch with what’s authentic and true about American families.”²¹⁵

Another example comes from retailer giant, Gap. Over the holidays in 2013, Gap turned heads by featuring a Sikh man, Indian-American designer and actor Waris Ahluwalia, modeling Gap cloth-

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Expert Testimony, supra* note 181, at 43. Additionally, the company profiled its clients by race, ethnicity, national origin, and religion, and analyzed these clients based upon their surnames. *Id.* at 44.

²¹² See *Center for Positive Marketing*, FORDHAM SCHOOLS OF BUSINESS, http://www.business.fordham.edu/research_centers/center_for_positive_marketing/index.asp (last visited Jan. 12, 2014).

²¹³ *Leanne Italie, Cheerios Exec on Ad Featuring Mixed Race Couple: ‘We Were Reflecting an American Family’*, HUFFINGTON POST (June 5, 2013, 5:14 PM), http://www.huffingtonpost.com/2013/06/05/cheerios-ad-mixed-race-couple_n_3390520.html.

²¹⁴ *Id.*

²¹⁵ *Id.*

ing.²¹⁶ The advertisements embraced the Sikh culture, complete with Ahluwalia wearing a turban and displaying a full beard.²¹⁷ When companies create IP that reflects a diverse America, they serve the needs of a range of stakeholders, especially potential customers. Customers know they can walk into a store and see employees who look like them.²¹⁸ Additionally, companies can send a message about which job candidates will be welcome “out front” in service settings. For example, when Sikh males see Gap’s new advertisements, they are likely to believe they will be welcomed and included in Gap’s salesforce, and that they will not be segregated and engaged in work in the back-of-the-house.²¹⁹

3. Human Resources Policies

In *McReynolds*, Bielby found numerous flaws in the company’s human resources policies, including its diversity and inclusion strategies.²²⁰ He indicated that the materials he reviewed showed that African American and non-African American employees were similar in terms of skills, abilities, and experiences.²²¹ Both groups were capable of succeeding as FAs.²²² However, at Merrill Lynch, “African American FAs earn substantially less than do similarly situated non-African Americans, and very few have advanced into the management ranks.”²²³ Bielby also found that “[t]he company’s policies and practices reinforce beliefs that its African American FAs fall behind because of their own personal failings and perceived client bias.”²²⁴ He pointed out that the company’s willingness to blame African American FAs created resistance to corporate diversity initiatives.²²⁵

²¹⁶ G.B., *Waris Turns Heads in New Gap Holiday Ad Campaign*, AEROGRAM (Nov. 6, 2013), <http://theaerogram.com/waris-ahluwalia-gaps-holiday-campaign/>.

²¹⁷ *See id.*

²¹⁸ Conversely, the issue of racial profiling of customers in retail stores is also relevant. *See, e.g.*, Kim Bhasin & Julee Wilson, *Barneys Racist Culture Deeply Ingrained in Stores*, *Insiders Say*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/11/07/barneys-racist_n_4225710.html (last modified Jan. 23, 2014) (explaining that racial profiling by retail employees against customers of other races is still largely prevalent in retail stores).

²¹⁹ *See* G.B., *supra* note 216.

²²⁰ *See Expert Testimony*, *supra* note 181, at 51-67.

²²¹ *Id.* at 70.

²²² *See id.*

²²³ *Id.*

²²⁴ *Id.* at 71.

²²⁵ *Id.* (asserting that the company’s approach also “reinforce[d] the biases built into the company’s cumulative advantage system”).

The company's approach also helped privileged employees justify the company's cumulative advantage system. Bielby concluded that Merrill Lynch is "[f]ar from being a colorblind meritocracy."²²⁶ He observed that "race permeates policy and practice in a way that creates substantial obstacles to equal employment opportunity."²²⁷

Bielby offered numerous examples to support his conclusions. He offered data that made it clear that the company's decision to hire very few African American FAs contributed to African American employees' experience of isolation and exclusion from networks.²²⁸ Merrill Lynch offered less support and productivity-enhancing resources to African Americans,²²⁹ especially because of its emphasis on team work, combined with a laissez faire approach to team formation.²³⁰

Additionally, Bielby described the system the company uses to promote FAs into its field management ranks.²³¹ In particular, materials used to assess candidates for management positions were based on racial stereotypes and likely to reproduce the racial composition and culture of the company's current management.²³² He explained that FAs who wanted to become managers had to pass a number of assessment exercises.²³³ Assessors were virtually all non-African American.²³⁴ Moreover, the assessment exercises contained stereotypes.²³⁵ The assessment exercises assumed that African American female FAs are difficult.²³⁶ For instance, the company asked candidates for management positions to respond to a "real life"—but hypothetical—case involving a "'frustrated' African American female FA with a 'short temper' who is 'struggling in the fifth quintile.'"²³⁷ Another vignette used to judge a candidate's "situational judgment" considered the issue of "coaching a difficult minority FA" who is a "bright and articu-

²²⁶ *Expert Testimony*, *supra* note 181, at 71.

²²⁷ *Id.* at 71-72.

²²⁸ *See id.* at 25-26.

²²⁹ *See id.* at 67.

²³⁰ *Id.* at 20-24. The company stayed out of team formation, comparing them to "arranged marriages," which the company did not support. *Id.* at 24.

²³¹ *Expert Testimony*, *supra* note 181, at 46-51.

²³² *Id.* at 71.

²³³ *Id.* at 46.

²³⁴ *See id.* at 47.

²³⁵ *See id.* at 47-49.

²³⁶ *See id.*

²³⁷ *Expert Testimony*, *supra* note 181, at 48.

late” African American female “failing in the business,” has a “tough and abrasive” personality, and “is not well liked.”²³⁸

In general, Bielby described the company’s diversity programs, office and initiatives as choosing “symbol over substance.”²³⁹ He stated that “[o]rganizations today [including Merrill Lynch] readily embrace and invoke the rhetoric of diversity and inclusion, and some do so with little impact on human resources practice.”²⁴⁰ Moreover, he proclaimed that a company decides whether to emphasize symbol over substance by how it structures programs and policies, especially how the structure does-or does not-emphasize responsibility and authority.²⁴¹ In this context, it becomes important to consider the role of the company’s Chief Diversity Officer (CDO),²⁴² including the

²³⁸ *Id.* The vignette also made it clear that “nobody in the office wants to team with [this African American female].” *Id.*

²³⁹ *Id.* at 71. Merrill Lynch thought its employment policies and practices created a meritocracy, even though the company has admitted that it has a white male culture that excluded African Americans and other persons of color. *Id.* at 67, 69. Company executives view the “culture dominated by white men” as “a fact of history.” *Id.* Moreover, the company thought highly of its diversity initiatives, for example, the company nomination itself to the Securities Industries Association (SIA) to receive a diversity and leadership award. *Expert Testimony, supra* note 181, at 44.

²⁴⁰ *Accentuate the Positive, supra* note 149, at 121 (citing Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1589-90 (2001)).

²⁴¹ *See Expert Testimony, supra* note 181, at 54-60, 66-67.

²⁴² *See* Damon A. Williams & Katrina C. Wade-Golden, *What is a Chief Diversity Officer?*, available at http://www.uc.edu/content/dam/uc/diversity/docs/What_is_a_Chief_Diversity_Officer.pdf. Companies make a mistake when they fail to realize the importance of the selection process for the CDO. *See id.* It is not enough for the CDO to be a member of a minority group. *See id.* The person must be results oriented, committed to encouraging change, and to achieving significant results. *Id.* Merrill Lynch did not employ a CDO. *See generally Expert Testimony, supra* note 181. Subha Barry led the company’s diversity initiatives, and it was unclear why she was selected for this leadership role, and how committed the company was to diversity in any form. *See id.* at 37-38. Barry was tasked with marketing strategy, not human resources strategy. *Id.* at 38. It is interesting to note that Barry had chosen to refrain from participating in the *Cremin* lawsuit. *Wozencraft, supra* note 20 (drawing the conclusion that the company wanted a “team player” in charge of diversity, rather than someone who would play a strong role in challenging structures that reinforced inequality). A 1999 New York Times points out that Barry ran Merrill Lynch’s Plainsboro New Jersey office during that time. *Wozencraft, supra* note 20. Barry indicated that she would not file a claim as part of the *Cremin* settlement because “she had had great success working from within.” *Id.* Soon after, Barry was tapped to lead the company’s multicultural marketing initiatives. *Merrill Lynch Appoints Subha Barry Head of Multicultural Careers*, BUINESSWIRE (Sept. 7, 2005, 11:27 AM), <http://www.businesswire.com/news/home/20050907005739/en/Merrill-Lynch-Appoints-Subha-Barry-Head-Multicultural#>. U6bwVI1dUrg. It is reasonable to infer that Merrill Lynch chose a diversity leader who had faith in the company’s approaches, rather than someone who was able and willing to challenge the status quo.

reporting structure for this leadership role, and what information the CDO tracks and reports. For example, a CDO could track compensation and career trajectories for its employees, including female and African American professionals. The CDO must have the knowledge and ability to change the status quo. Moreover, company leadership must empower the CDO to create change.

4. Daily Operations

Marketing and human resources strategies shaped Merrill Lynch's daily operations.²⁴³ One significant practice that affected African American FAs negatively was the process by which the firm distributed accounts/business opportunities.²⁴⁴ Although the *Cremin* litigation in 1998 had pushed the firm to adopt official account distribution processes, Merrill Lynch allowed white male FAs to make account transfers outside the formal system.²⁴⁵ For example, when an FA retired or left the business, that person could transfer accounts to teammates.²⁴⁶ In other words, they could bypass the official account distribution process.²⁴⁷ Moreover, Merrill Lynch lacked mechanisms that allowed it to monitor the account distribution process to ensure fairness.²⁴⁸

If Merrill Lynch had supported a diversity office with an adequate accountability and responsibility structure, FAs who experienced unfair practices could have sought support and action to ensure equal opportunity.²⁴⁹ Instead, the firm sustained a cumulative advantage system, a "success-breeds-success"²⁵⁰ system, even as it expressed a commitment to its increasingly multicultural workplace. When an FA's best chance of getting good clients comes from relationships with the most successful coworkers,²⁵¹ and white FAs are hoarding oppor-

²⁴³ See *Expert Testimony*, *supra* note 181, at 67-70.

²⁴⁴ *Id.* at 67, 71.

²⁴⁵ See *id.* at 26-33.

²⁴⁶ See *id.*

²⁴⁷ *Id.* at 33.

²⁴⁸ See *id.* at 33-34, 50.

²⁴⁹ See *Minority Vulnerability in Privileged Occupations*, *supra* note 20, at 30; see also *Expert Testimony*, *supra* note 181, at 71 ("The company's diversity programs, office and initiatives have inadequate accountability and responsibility structures, and the company has chosen to decouple its diversity efforts from both its core operations and its legal obligations not to discriminate.").

²⁵⁰ *Expert Testimony*, *supra* note 181 at 47.

²⁵¹ See *id.* at 21.

tunities and passing them along to their white male colleagues, the reward system ends up embracing modern prejudice—favoritism, self-dealing, and bias. Merrill Lynch executives were in denial about unfairness.²⁵² They blamed African American FAs, explaining the racial earnings gap to barriers African American FAs face in crossing cultural boundaries.²⁵³ Companies that embrace racialized—or gendered—approaches to multicultural marketing, combined with human resources systems that are race and gender-neutral in name only,²⁵⁴ are likely to create evidence that will help job candidates and under-utilized employees obtain legal remedies.

Now that this Article has considered FA and management jobs at Merrill Lynch, it is necessary to consider lower wage, service jobs to get a sense of the additional implications of Rowe's proposed flexible IP defense. The next section considers two cases—*Chaney v. Plainfield*, which was resolved in 2010 and highlights the nursing assistant job,²⁵⁵ and *EEOC v. Bass Pro Outdoor World*, which is ongoing as of 2013 and highlights the retail sales job.²⁵⁶ These less privileged service jobs are the jobs of the future,²⁵⁷ and the process by which employers create, or fail to create, equal opportunity for these jobs is both complicated and important, especially to less economically privileged candidates.

III. BEYOND THE BULL

A. Reframing Cases in the Service Sector

Social scientists have contributed research that illustrates how race and gender bias continue “to play a significant role in the allocation of job opportunities.”²⁵⁸ For example, underlying race bias leads to more job opportunities going to candidates named Greg or Emily

²⁵² See *id.* at 71-72. “The company’s policies and practices reinforce beliefs that its African American FAs fall behind because of their own personal failings and perceived client bias, which creates resistance to diversity interventions and reinforces the biases built into the company’s cumulative advantage system.” *Id.* at 71.

²⁵³ *Id.* at 67.

²⁵⁴ See *id.* at 67-72.

²⁵⁵ *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).

²⁵⁶ *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2013 WL 1124063 (S.D. Tex. Mar. 18, 2013).

²⁵⁷ See *supra* text accompanying notes 132-45.

²⁵⁸ Gertner & Hart, *supra* note 15, at 83.

than those named Lakisha or Jamal.²⁵⁹ However, bias in the service sector, especially the lower-wage service jobs, is much more complex than the relationship between names and opportunities. Doctors Macdonald and Merrill are sociologists who have studied the “service triangle,” which is the relationship among management, customers, and servers.²⁶⁰ Macdonald and Merrill emphasize that all three groups participate in the service triangle. In interactive service work, “the ‘personal qualities’ of the worker—both as constructed by management and the customer and perceived internally by the incumbent—are inextricably interwoven with the nature of the service provided.”²⁶¹ This means that workers internalize managers’ and customers’ expectations about what, who, and how they present themselves in the workplace.

Similarly, Macdonald and Merrill have pointed out what they call “logics,” which explain the process by which managers hire according to assumed customer preferences.²⁶² When customers engage with servers, they expect workers who “look the part,” given a particular service.²⁶³ For example, customers in do-it-yourself, or DIY, stores like Home Depot expect workers in the drywall section of the store to be older, male workers.²⁶⁴ The assumption is that older, male workers are more experienced than other groups in construction, so they will know more about drywall.²⁶⁵ Employers take customers’ stereotypes into account, and hire accordingly, as part of fulfilling their brand.²⁶⁶

The problem is that some groups are excluded from major categories of work, even when they can perform the tasks the job requires. For example, employers and customers generally believe that African American men lack “soft skills.”²⁶⁷ Macdonald and Merrill point out that, given this stereotype, “urban males face employment discrimination before they walk in the door” of service establishments.²⁶⁸ By contrast, women have some advantages in obtaining entry-level ser-

²⁵⁹ *Id.* Additionally, Gertner & Hart recognize that the race of hiring managers affects the race of new hires. *Id.*

²⁶⁰ Macdonald & Merrill, *supra* note 49, at 115.

²⁶¹ *Id.* at 130.

²⁶² *Id.* at 115.

²⁶³ *Id.* at 123.

²⁶⁴ *See id.* at 123-24.

²⁶⁵ *See id.*

²⁶⁶ Macdonald & Merrill, *supra* note 49, at 122.

²⁶⁷ *Id.* at 125.

²⁶⁸ *Id.* at 127.

vice jobs. Not only are most service sector jobs “typed” female, but also, some attributes are prompted by physical appearance.²⁶⁹ In these entry-level jobs women are more likely to be perceived as nurturing, and sexy.²⁷⁰ Both marketing and human resources policies can affirm or counteract the “logics” Macdonald and Merrill describe. With logics in mind, the next paragraphs consider two real world cases—*Chaney v. Plainfield* and *EEOC v. Bass Pro Outdoor World*.

In 2008, African American Certified Nursing Assistant (CNA) Brenda Chaney sued her employer, Plainfield Healthcare Center (Plainfield).²⁷¹ The lawsuit, a Title VII case, alleged that the nursing home acted inappropriately when it reassigned a black caregiver to avoid confrontations with a biased patient.²⁷² In particular, Chaney’s daily assignments included a reminder that one patient in her unit “[p]refers No Black CNAs.”²⁷³ Plainfield’s policy of acceding to patients’ racial bias also affected the culture among white and black co-workers.²⁷⁴ On multiple occasions, Chaney’s white co-workers demonstrated racial animosity toward her, hence creating a hostile workplace.²⁷⁵ Plainfield defended its staffing decision by relying on

²⁶⁹ *Id.* at 113, 125.

²⁷⁰ *See id.* at 125.

²⁷¹ *See Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010).

²⁷² *See id.* at 910-11. According to Drexel University School of Public Health professor, David Smith, “[n]ursing homes can be hotbeds of racial friction.” *For Some Nursing Home Residents, Patients’ Rights Means Choosing Caregivers Based on Race*, FOX NEWS (Aug. 23, 2010), <http://www.foxnews.com/us/2010/08/23/nursing-home-residents-patients-rights-means-choosing-caregivers-based-race>. “In urban areas, staffs are often predominantly African-American while most patients are white. [To complicate matters, s]ome elderly people revert in dementia to the prejudices they grew up with.” *Id.* *See generally* Gronningsater, *supra* note 4 (discussing patients’ requests to receive care from a nurse or person of a specified race).

²⁷³ *Chaney*, 612 F.3d at 910. Customer preference cases in the service sector are on the rise. *See, e.g.*, *EEOC v. Creative Playthings, Ltd.*, 375 F. Supp. 2d 427 (E.D. Pa. 2005); *EEOC v. Frontier Materials Co.*, No. H-03-856 (S.D. Tex. Mar. 2, 2004); *EEOC v. HiCare, Inc.*, No. 1:10-CV-02692-WMN (D. Md. Dec. 10, 2010); *EEOC v. Schwan’s Home Servs., Inc.*, No. 4:07-CV-00221-AGF (E.D. Mo. Dec.17, 2007); *EEOC v. The Original Hot Dog Shop*, 2:06-CV-01243-JFC-RCM (W.D. Pa. Sept. 19, 2006); *EEOC v. Merrill Gardens, LLC*, No. 1:05-CV-4-TLS (N.D. Ind. Oct. 6, 2005).

²⁷⁴ *See Chaney*, 612 F.3d at 911.

²⁷⁵ *See id.* Chaney reported the comments to management, and the comments eventually stopped, but Plainfield’s racial preference policy remained in place. *Id.* Chaney was later terminated for using profanity in front of a resident, although Plainfield later claimed other reasons led to her discharge. *Id.* The court cautioned that a “shifting justification for an employment action can itself be circumstantial evidence of an unlawful motive.” *Id.* at 916.

patients' rights law.²⁷⁶ The company said, in essence, that it believed its patients had the right to reject certain caregivers, including CNAs.²⁷⁷ In 2010, the Seventh U.S. Circuit Court of Appeals ruled in Chaney's favor.²⁷⁸

Currently, the EEOC is pursuing a Title VII hiring discrimination lawsuit against Bass Pro Shops (Bass Pro), which plans to open a mega-store in Bridgeport, Connecticut.²⁷⁹ The EEOC has listed 200 potential claimants who are black and Hispanic applicants who were denied employment by Bass Pro.²⁸⁰ The EEOC alleges institutional racism.²⁸¹ Specifically, it points to alleged comments from Bass Pro founder Johnny Morris indicating that he does not want minorities working in his stores.²⁸² Some managers working under Morris' leadership used racial slurs. For example, the lawsuit includes evidence

²⁷⁶ *Id.* at 913-14. Courts have held that patients can refuse to be treated by a caregiver of the opposite sex, citing privacy issues. *See generally* Kapczynski, *supra* note 148 (discussing same-sex privacy cases).

²⁷⁷ *See* Chaney, 612 F.3d at 913-14.

²⁷⁸ *Id.* at 916. The Court suggested several actions a long-term care provider could take to confront a hostile resident without exposing itself to hostile workplace liability: "(1) it can warn residents before admitting them of the facility's non-discrimination policy, securing the resident's consent in writing; (2) it can attempt to reform the behavior after admission; and (3) it can assign staff based on race-neutral criteria that minimize the risk of conflict." *Id.* at 915 (numbers added) (citing Patrick Gavin & JoAnne Lax, *When Residents and Family Harass Staff: The Tightrope between Regulatory Compliance, Risk Management and Employment Liability*, LONG TERM CARE AND THE LAW 16-18 (Feb. 27, 2008) (Am. Health Lawyers Ass'n, Seminar Materials)). The court also gave employers advice about how to avoid Title VII liability. *See id.* at 911, 914-15. The specifically suggested a company advise "employees that they can ask for protection from racially harassing residents." *Id.* at 915. It encouraged employers to: (1) establish a clear and effective anti-harassment policy; (2) respond promptly to any complaints of harassment from employees; (3) provide clear and comprehensive reasons for discharge at termination; and (4) seek clarification from the Indiana State Department of Health or legal counsel if a state regulation appears to require actions inconsistent with federal law. *Id.* at 911, 914-15.

²⁷⁹ *See generally* *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2013 WL 1124063 (S.D. Tex. Mar. 18, 2013); Neena Satija, *Lawsuit Against Bass Pro Shops Charging Employment Bias Raises Questions in Bridgeport*, CT MIRROR (July 25, 2012), <http://ctmirror.org/lawsuit-against-bass-pro-shops-charging-employment-bias-raises-questions-bridgeport/>.

²⁸⁰ *Bass Pro Outdoor World, LLC*, 2013 WL 1124063, at *3.

Examining company reports from 2007, the EEOC found that of the nearly 6,000 sales employees in Bass Pro's 43 retail shops, only 4.2 percent were black. The lawsuit then compares the percentage of black sales employees and managers in each store to the overall percentage of black sales employees and managers in the locality. In some cases, the differences are small but are deemed significant by the EEOC. For instance, none of 83 sales employees in a store in Branson, Mo., were black, according to company records, but the representation of black sales employees in the entire county was only 0.1 percent. Satija, *supra* note 279.

²⁸¹ *Bass Pro Outdoor World, LLC*, 2013 WL 1124063, at *1.

²⁸² *Id.*

that a manager of a Bass Pro Shop in Indiana “was seen discarding employment applications after he decided that the name on the application ‘sounded like a n—— name . . . and opin[ing] that n——s steal and did not make good employees.”²⁸³

Under the light of employment discrimination law, both *Chaney* and *Bass Pro* reveal the harshness of unequal opportunity. In *Chaney*, an employer expected an employee to endure a hostile workplace fueled by a biased patient.²⁸⁴ Until a court stepped in, the employee lost the opportunity to thrive at her job because of her race. In *Bass Pro*, an employer is allegedly limiting the job options of African American and Hispanic job candidates who do not fit the company’s ideal employee profile.²⁸⁵ If the EEOC is unsuccessful in protecting employees from institutionalized racism, job candidates will continue to lose the opportunity for employment at Bass Pro.

What this analysis makes clear is that Title VII requires employers to be thoughtful about employment decisions. They cannot rely on what Macdonald and Merrill call logics, or reflexive notions about who can perform a particular job. It might be that white patients in a long-term care setting want caregivers who “look the part” (are the same race), but Title VII protects equal employment opportunity instead. Similarly, it might be that customers shopping for outdoor adventure merchandise want sales workers who “look the part” (are white guys), but Title VII protects equal opportunity instead.

Imagine, though, what the facts of these and similar cases might look like under the rosier glow of marketing, especially the branding

²⁸³ First Amended Complaint, *Bass Pro Outdoor World, LLC*, 2013 WL 1124063 (No. 11-3425). The lawsuit also claims Bass Pro (generally) refused to hire Hispanic workers, quoting one Indiana manager as saying that “Hispanics should be shot at the border by the Border Patrol.” *Id.* It said a Houston-area manager used derogatory terms such as “wetback” and “Pedro” when referring to Hispanic applicants. *Id.* Bridgeport is largely non-white—38 percent of Bridgeport residents are Hispanic and 35 percent are black. Satija, *supra* note 279.

The Steelpointe development is adjacent to two Bridgeport neighborhoods: the East Side, where 67 percent of residents were Hispanic as of 2000 and the East End, where 65 percent of residents were black. In 2000, manufacturing accounted for 40 percent of jobs in the East End, with an average annual salary of \$47,000, according to the city. In the East Side, the major employment sectors were health care and education, and the average salary was \$37,000. *Id.*

If Bass Pro believes in equal opportunity, their hiring practices in the months ahead should reflect that commitment. Equal opportunity would benefit people who live in the neighborhoods surrounding the proposed Bridgeport store. Employees in these neighborhoods have been hit hard by the 2008 recession.

²⁸⁴ See *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 915 (7th Cir. 2010).

²⁸⁵ See *Bass Pro Outdoor World, LLC*, 2013 WL 1124063, at *1.

component. Imagine a commercial for Plainfield, telling potential long-term care patients that its brand highlights a feeling of home, where the values of compassion and respect for patients are paramount. Imagine also that marketing materials ensure that Plainfield will customize care, doing its best to meet each patient's unique needs, and creating a relationship of trust between patients and caregivers. This general approach to marketing is consistent with logics, and inconsistent with equal opportunity. Now visualize a commercial for Bass Pro, telling potential customers that its brand highlights the outdoor lifestyle as people, including its sales staff, actually live it.²⁸⁶ Visualize also that marketing materials feature models either presenting a rugged lumberjack or outdoorsman look. Again this marketing is consistent with logics, and inconsistent with equal opportunity. Now, let's see how these scenarios might play out under different Title VII-IP theories.

Under Rowe's proposed Title VII-IP mash-up, a company would: (1) identify its IP rights, (2) explain the relationship between its IP and employee selection decisions, (3) show job descriptions that are tied to the IP, and (4) prove the relationship between the IP and the company's business/financial success.²⁸⁷ In *Chaney*, Rowe's flexible IP defense would be relevant if Plainfield could rely on branding as protected IP. If a home or family brand requires race matching, that white caregivers must care for white patients, Plainfield would be justified in selecting white employees who fulfill their brand. Under Rowe's analysis, the company's eye would be on the bottom line. When patients and their families are happy, the long-term care facility is more successful. In *Bass Pro*, if the outdoorsman brand requires sales staff who have lived the rugged lifestyle, as imagined by the company. Bass Pro would then be justified in selecting white, male employees who fulfill their brand. Doing so would ensure the company's financial success.

Under the Title VII-IP mash-up this Article proposes, potential plaintiffs would: (1) describe the company's brand identity, (2) review the company's marketing strategy, (3) review the company's

²⁸⁶ *Company Overview*, BASS PRO SHOPS, <http://us.vocuspr.com/Newsroom/Query.aspx?SiteName=basspro&Entity=PRAsset&PublishType=Company+Overview&Title=Company+Background&XSL=CompanyBackground> (last visited Jan. 14, 2014) (discussing their unique approach as "professional sales help who not only market the outdoor lifestyle but live it as well . . .").

²⁸⁷ See *supra* text accompanying note 62.

approaches to diversity and inclusion, and (4) consider how company marketing and human resources policies play out in the day-to-day.²⁸⁸ In future cases that raise facts similar to those in *Chaney*, it would be helpful to consider a company's branding strategy to find evidence of employment discrimination. Data about both hiring practices, and career trajectories for protected groups, would be also relevant. In *Bass Pro*, it would be interesting to consider trade dress—the extent to which the company is creating a certain look, feel or ambiance that forms a “white, male” brand sold by a predominantly white, male sales force. It would also be interesting to see the extent to which African American, Hispanic, and female employees have not only been hired, but also enjoyed upward mobility into management positions.

B. *Moving Forward*

The ideal IP-Title VII seesaw has valuable, convincing IP on one side of a fulcrum and strong anti-discrimination principles on the other. Compelling, and harmless, IP, combined with fair employment practices, provides a foundation for business success. To move toward this ideal, advocates need concrete action at the societal, organizational, and individual levels.

At the societal level, on the IP side of the fulcrum, interested advocates must support positive marketing, especially approaches that consider all stakeholders, including individuals as well as society.²⁸⁹ Those concerned about equal employment must support marketing initiatives that challenge stereotypes. On the law side of the fulcrum, advocates need to get the law right, and use the law effectively. The law is important because it provides external pressure for establishing effective accountability.²⁹⁰ For the law to be effective as a force that promotes sound organizational policies, practices, and structures, change is necessary.²⁹¹

First, legislators and judges need to underscore that under Title VII, a company's IP does not justify treating employees differently based upon race or gender. Second, social scientists need to continue their work in articulating what discrimination looks like today. This

²⁸⁸ See *supra* Part II.B.

²⁸⁹ See *supra* text accompanying notes 211-19.

²⁹⁰ *Accentuate the Positive*, *supra* note 149, at 124.

²⁹¹ See *id.* at 119.

work will provide support for the principle that IP cannot justify discrimination. Third, judges need to rely on this research when making decisions. Otherwise, they run the risk of preserving in-group advantage and reinforcing stereotypes. Fourth, when judges find in favor of plaintiffs in discrimination cases, they need to maximize Title VII's effectiveness by requiring ongoing monitoring of company efforts to create sound policies and practices.²⁹² In other words, they need to place limits on managerial discretion. Finally, legal scholars and activists with expertise in anti-discrimination law need to push for reforms that promote equal opportunity.²⁹³ These reforms should make it clear that juries play a key role in evaluating evidence.²⁹⁴

At the organizational level, companies need to take a look at both the IP side of the fulcrum, and the employment law side of the fulcrum. Companies must embrace thoughtful, positive approaches to IP creation, approaches that reflect the complexity of multicultural marketing and open opportunities, rather than redline or exclude. Companies should also embrace thoughtful approaches to human resources management, especially approaches that demonstrate accountability, transparency, and fairness. They should engage in benchmarking and self-monitoring to assess the outcomes of their diversity work and make corrections as necessary.²⁹⁵

²⁹² See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 367, 372 (2008) (“[D]efendant’s acceptance of the desirability of creating a diverse workplace, coupled with making specific people accountable for delivering diversity, is a key component to a successful consent decree.”). There are several hallmarks of successful consent decrees:

(1) the tenacity and creativity of courts exercising oversight and their willingness to appoint judicial surrogates (such as decree monitors or task forces); (2) the transparency of the process; (3) the understanding that change requires the dedication of resources and encompasses a long time span; (4) the creation of progress benchmarks or goals; and, (5) importantly, the corporation’s commitment to changing its workplace culture. These features emphasize accountability, a quality that is absolutely critical in reshaping workplaces in terms of equality and diversity. *Id.* at 372 (numbers added).

²⁹³ *Rethinking Discrimination Law*, *supra* note 160, at 115 (advocating for a return to first principals). “[T]he courts should reduce the categories to mere labels and abandon most, if not all, all [sic] of the current frameworks. In their place, the courts should return to first principles, fashioning the elements of employment discrimination claims with careful regard to the breadth of actual statutory language.” *Id.*

²⁹⁴ *But see* Rowe, *supra* note 7, at 55, 57-59 (stating that decisions are not up to the juries).

²⁹⁵ Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395, 414-15 (2004) (outlining an approach to incentivizing increased accountability and transparency with regard to diversity).

Once Title VII is clear and effective, and companies have created policies, practices, and structures that place substance over symbol, professionals are poised to engage in good work on both sides of the IP-Title VII fulcrum. Companies need smart, strategic, educated, culturally aware marketing and human resources professionals creating policies, practices, and property.²⁹⁶ Improved decision making, from an ethical perspective, could challenge individual corporate managers to act in accordance with moral rules.²⁹⁷ In particular, marketing and human resources professionals should consider whether their decisions around creating IP and human resources policies and practices violate core human values. Three of these core values are: (1) respect for human dignity, (2) respect for basic rights, and (3) good citizenship.²⁹⁸ Before deciding on a particular course of action, individual professionals can ask questions such as: Does our company's brand demonstrate respect for human dignity? Do our hiring practices show respect for job candidates' rights to fairness? Does our company model good citizenship by challenging stereotypes and urging customers to re-imagine the world? These questions can inform managers' work as they create policies, practices, and property.

CONCLUSION

In today's "chaos of competing . . . interests,"²⁹⁹ we cannot allow a company's service orientation to ignore equal opportunity principles in the name of pleasing the customer.³⁰⁰ This is especially true when companies' marketing approaches and IP are instrumental in suggesting what customers, clients, and patients want. IP that embraces stereotypes leads to under- or un-employment of America's workers, including the most vulnerable job candidates. The flexible IP defense Rowe proposes in employment discrimination cases would radically tip the scales in favor of flawed business practices and against fair workplaces. The good news is that discussions about the proper role

²⁹⁶ See *Accentuate the Positive*, *supra* note 149, at 126. Organizations must understand the multi-level nature of workplace bias.

²⁹⁷ See generally Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 515 (2010) (discussing the relationship "between mindful practice and ethical decision-making.").

²⁹⁸ See Thomas Donaldson, *Values in Tension: Ethics Away from Home*, in HARVARD BUSINESS REVIEW ON CORPORATE ETHICS 113, 119 (2003).

²⁹⁹ Conway, *supra* note 1, at 181.

³⁰⁰ See Macdonald & Merrill, *supra* note 49, at 125-26.

of IP in employment discrimination cases are in their initial stages. This Article suggests that, through improved business and legal decision-making, practitioners and scholars can work together to create harmless intellectual property for the global marketplace. By keeping IP on the opposite side of the fairness seesaw, making sure IP is bias free, and valuing the human capital that creates, manages, and displays IP, both employers and employees will be able to celebrate that “brands have become the global currency of success.”³⁰¹

³⁰¹ WHEELER, *supra* note 43, at 3.