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# When Courts Run Amuck: A Book Review of *Unequal: How America's Courts Undermine Discrimination Law* by Sandra F. Sperino and Suja A. Thomas (Oxford 2017)

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## BOOK REVIEW

# WHEN COURTS RUN AMUCK: A BOOK REVIEW OF *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* BY SANDRA F. SPERINO AND SUJA A. THOMAS (OXFORD 2017)

by: Theresa M. Beiner\*

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### I. INTRODUCTION

In *Unequal: How America's Courts Undermine Discrimination Law* (“*Unequal*”),<sup>1</sup> law professors Sandra F. Sperino and Suja A. Thomas provide a point-by-point analysis of how the federal courts’ interpretations of federal anti-discrimination laws have undermined their efficacy to provide relief to workers whose employers have allegedly engaged in discrimination. The cases’ results are consistently pro-employer, even while the Supreme Court of the United States—a court not known for being particularly pro-plaintiff—has occasionally ruled in favor of plaintiff employees.<sup>2</sup> The authors suggest some reasons for this apparent anti-plaintiff bias among the federal courts,<sup>3</sup> although they do not settle on a particular reason for the courts’ frequent dismissal of these claims.<sup>4</sup> Instead, the book seeks to expose how these

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1. SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

2. *Id.* at 128–30.

3. *Id.* at 124–50.

4. The Author uses the terms “dismiss” and “dismissal” loosely and broadly in this Review to refer to more than dismissal under Federal Rule of Civil Procedure 12. The Author also uses the terms occasionally to encompass the variety of ways courts can remove these cases from court without a jury trial, including summary judgment, judgment as a matter of law, and motions to dismiss under Rule 12(b). FED. R. CIV. P. 12(b).

seemingly erroneous dismissals occur and suggest avenues for reforming these legal standards.

For those who are unfamiliar with how the courts resolve employment discrimination and retaliation claims, this book will be eye-opening. For lawyers and academics entrenched in this area of the law, it provides a summary of the many varying and creative ways that the federal courts have dismissed seemingly viable claims. In the final chapter, the authors suggest that Congress, the courts, the Equal Employment Opportunity Commission (“EEOC”), and coalitions of the public could help fix the situation and lead to increased effectiveness in this area of the law.

Limiting their analysis to individual disparate treatment claims,<sup>5</sup> the authors spend chapters two through six describing the various ways courts have found to dismiss or grant summary judgment against plaintiffs in these cases or reverse a jury’s determination that discrimination did indeed occur.<sup>6</sup> Thematically, the authors advocate for jury determinations, instead of life-tenured federal judges superimposing their own views of what constitutes discrimination.<sup>7</sup> Indeed, this critique is well-taken given, as the authors point out, the procedural limits on judges’ fact-finding authority.<sup>8</sup>

In chapters seven and eight, the authors explore the potential reasons for this apparent anti-plaintiff effect, including the impact of politics and arguments that there are too many spurious employment discrimination suits.<sup>9</sup> In chapter nine, they bring together various doctrines that implicate how judges dismiss cases, before finally, in chapter ten, making suggestions for reform.<sup>10</sup>

This Review begins by describing the book’s main arguments. Throughout this description, the Review supports and at times challenges some of the authors’ positions. In particular, this Review examines arguments regarding the role politics play in the courts’ decision-making in employment discrimination cases. It also explores the ironic result that the courts’ approaches to these cases actually may lead to more discrimination in the workplace and therefore more cases. Finally, this Review describes the authors’ suggestions for reform and

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5. The authors are explicit that they are not considering pattern or practice discrimination claims or disparate impact claims. SPERINO & THOMAS, *supra* note 1, at 112. These theories of liability likewise have their difficulties. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011) (making it more difficult to bring pattern or practice class actions under Title VII).

6. SPERINO & THOMAS, *supra* note 1, at 15–123.

7. *Id.* at 149.

8. *See, e.g.*, FED. R. CIV. P. 56(a), 50(a). Although judges can act as factfinders, there is a right to jury trials in employment discrimination cases after the Civil Rights Act of 1991. 42 U.S.C. §§ 2000e–2, e–3; *see also* SPERINO & THOMAS, *supra* note 1, at 19–29, 66–69, 110.

9. SPERINO & THOMAS, *supra* note 1, at 124–50.

10. *Id.* at 151–62.

proposes that changes in this area of the law are best accomplished by the entities that created the problems—the courts.

## II. THE CASE OF *UNEQUAL*

Professors Sperino and Thomas make a compelling and accurately described case that the courts have interpreted anti-discrimination statutes to undermine the ability of plaintiffs to succeed in pursuing these claims. The authors accomplish this the old-fashioned way—by examining legal theories used in actual federal cases. This is a very law-on-the-ground approach, whereby they use compelling examples from case law to illustrate the ways that courts have found to dismiss these cases prior to a jury trial or, in some cases, after a jury has rendered a verdict for the plaintiff. Although in some areas the courts are split on these approaches, the examples help illustrate the authors' points. In the end, the described case law looks like a wholesale assault on the efficacy of employment discrimination law, although the authors do not explicitly say so.

The authors begin by placing this case law in the context of a larger narrative that pervades anti-discrimination jurisprudence: the main problem of workplace discrimination has been dealt with and all that remains is the elusive problem of unconscious bias, which is difficult for courts to address.<sup>11</sup> Thus, there is not much left for courts to do. The authors take on this narrative, arguing that judges are dismissing cases that are viable outside the context of unconscious biases. Indeed, courts are dismissing what could be referred to as first-order discrimination claims—claims in which discrimination is quite conscious and overt.<sup>12</sup>

The next five chapters prove this point well. In these chapters, Professors Sperino and Thomas build a case that the courts are employing a variety of means, including using procedural devices to dismiss cases (chapter 2), declaring certain conduct or words nondiscriminatory (chapter 3), creating doctrines that allow courts to ignore statements and behaviors that appear to be evidence of discrimination (chapter 4), creating high burdens for causation (chapter 5), and setting up complex frameworks that make it easier to dismiss cases for failing to meet some technical element (chapter 6). In these chapters, the authors suggest that courts are unnecessarily taking cases away from juries where it is unclear whether or not discrimination actually occurred. As they correctly point out, juries are supposed to decide cases where there is a disputed issue of fact.<sup>13</sup>

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11. *Id.* at 10.

12. *See id.*; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001). *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 170–71 (1976).

13. *See* FED. R. CIV. P. 56(a), 50(a); SPERINO & THOMAS, *supra* note 1, at 19–29, 66–69, 110. The general standard for summary judgment is that summary judgment is

These chapters have many virtues. Many scholars have alluded to or identified various ways in which courts have used procedural rules to downplay discriminatory acts and statements, resulting in dismissed claims.<sup>14</sup> But no source other than *Unequal* puts all the courts' various theories together in one place. As a primer on how discrimination plaintiffs end up out of court (often unjustly), this book is an excellent reference tool.

In chapters seven and eight, Professors Sperino and Thomas suggest a couple explanations for why this is occurring, without settling on a particular one. Beginning with politics, they explore whether some of the apparent judicial hostility toward employment discrimination claims might result from simple politics—whether it be the political ideology of the Supreme Court of the United States or lower federal courts. Arguing that the partisan politics model “overemphasizes the

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improper “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the context of judgment as a matter of law, Rule 50 states that judgment may be granted if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1).

14. See, e.g., M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999); Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) [hereinafter *Summary Judgment*]; THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005); Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII; An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865 (2012); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L. REV. 203 (1993); Elizabeth M. Schneider & Nancy Gertner, “*Only Procedural*”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2012); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007); Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937; Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U.L. REV. 959 (1999); Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843 (2015); Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Henry L. Chambers, Jr., *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U.L. REV. 781 (2015); Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103 (2005).

role of political bias when the law favors employers,”<sup>15</sup> they explain, “there is no evidence that actually supports that all or a majority of federal judges decide discrimination cases based on politics.”<sup>16</sup> While there is no direct evidence of “politics” per se, there is a significant amount of evidence that judges appointed by Republican presidents are less likely to vote in favor of employment discrimination plaintiffs.<sup>17</sup> Indeed, as the authors point out in passing, law professors Kevin Clermont and Stewart Schwab have identified an anti-plaintiff effect in the federal courts in these cases.<sup>18</sup>

The authors also note that the role of politics in employment discrimination law is undermined by President George H.W. Bush’s (a Republican president) signing of the Civil Rights Act of 1991.<sup>19</sup> However, President Bush’s signing of the 1991 Act was not precisely a hardy endorsement of employment discrimination laws. President Bush vetoed the bill’s initial version and then attempted to limit the reach of the law by issuing a signing statement when he signed the bill into law.<sup>20</sup> The politics of the time likely had an impact on President

15. SPERINO & THOMAS, *supra* note 1, at 125.

16. *Id.*

17. See Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1769 tbl.2 (2005) (study of sexual harassment and sex-discrimination cases showing judicial ideology—whether a judge was appointed by a Democratic or Republican president—had an impact on outcomes); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167–68 (1992) (correlation found between political party of appointing president and outcomes of employment discrimination cases, with judges appointed by Democrats more likely to vote for plaintiffs); Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 337–38 (2012) (during the time period 1977–1987, “Democratic judges were 3.19 times more likely to make a liberal decision in race discrimination cases than were their Republican counterparts.”); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 319–20 (2004).

18. SPERINO & THOMAS, *supra* note 1, at 27–28; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 128 (2009) (“Over the period of 1979–2006 in federal court, employment discrimination plaintiffs have won 3.59% of pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications.”) [hereinafter *From Bad to Worse*]; Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451 (2004); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 957–58; Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 555 (2003).

19. SPERINO & THOMAS, *supra* note 1, at 126, 135.

20. Presidential Statement on Signing the Civil Rights Act of 1991, Pub. L. No. 102-166 (Nov. 21, 1991) (statement available at Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=20258> [https://perma.cc/D9MU-MUDA]).

Bush's decision to sign a revised version of the bill, especially considering the difficulties President Bush faced with female voters during his re-election bid because of the controversial congressional hearings regarding the appointment of Supreme Court Justice Clarence Thomas.<sup>21</sup>

In chapter eight, the authors explore other possible explanations for the courts' readiness to eliminate these cases, including that plaintiffs frequently bring spurious employment discrimination cases and, if courts interpreted these laws too broadly, they would overload the federal court system. Calling this the "fakers and floodgates argument,"<sup>22</sup> the authors poke holes in these theories in this chapter. It is good that the authors take this argument seriously, because it is commonly used in the media and occasionally by the courts to justify dismissing cases. As the authors point out, the Supreme Court itself has used the specter of false claims in its own rhetoric about retaliation to create a standard that makes it more difficult for an employment discrimination plaintiff to successfully bring such a claim.<sup>23</sup> Professors Sperino and Thomas point out that, to the extent a plaintiff does bring a false claim, the federal courts have sanction capabilities that should sufficiently curb such abuses.<sup>24</sup> In addition, there is no reason to believe that attorneys who take these cases would be consistently evaluating them as viable when they are not.<sup>25</sup>

Ironically, the courts' failure to let employment discrimination cases go to juries or to uphold jury determinations in a plaintiff's favor may add to the proliferation of these lawsuits. Some of the factual issues

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21. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 *How. L.J.* 937, 948–49 (2005); Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*; 22 *HOFSTRA LAB. & EMP. L.J.* 431, 467 (2005); Olatunde C.A. Johnson, *Disparity Rules*, 107 *COLUM. L. REV.* 374, 379 n.15 (2007). Controversy arose after law professor Anita Hill testified regarding alleged sexual harassment by Justice Thomas while Professor Hill worked for him at the EEOC. In spite of Professor Hill's testimony, Justice Thomas's nomination was confirmed by the Senate. See Ron Elving, *A Refresher on Anita Hill and Clarence Thomas*, NATIONAL PUBLIC RADIO (Dec. 10, 2017), <https://www.npr.org/2017/12/10/569716802/a-refresher-on-anita-hill-and-clarence-thomas> [<http://perma.cc/CS97-REYQ>].

22. SPERINO & THOMAS, *supra* note 1, at 138.

23. See *id.* at 142, 144–45 (citing and describing *Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 133 S. Ct. 2517 (2013)).

24. *Id.* at 146.

25. See Clermont, Eisenberg & Schwab, *supra* note 18, at 565 (noting that there is no empirical basis for the theory that employment discrimination plaintiffs bring weaker claims than other plaintiffs). Clermont and Schwab have opined that a downturn in cases may well have resulted from lawyers realizing that plaintiffs have a very tough time being successful in these cases. See Clermont & Schwab, *From Bad to Worse*, *supra* note 18, at 120–21.

arising in this context rely on a reasonable person standard.<sup>26</sup> Even where the legal standards do not rely on this, jurors' common sense can add a lot to our understanding of what actions are discriminatory. Jury determinations regarding what is considered, for example, racial or sexual harassment—an issue that is evaluated on a reasonable person standard—help set workplace norms. Right now, the frequency of granted summary judgment motions and other motions that take away cases from juries permit employers and employees to continually test the limits of what constitutes discrimination. If juries provided those community standards—for example, if a jury determined that touching a woman's breast constitutes sexual harassment and courts permitted that verdict to stand—employers would know what standards to implement in their workplaces and employees would know what types of behaviors were unacceptable. The plaintiff in this example might not receive quite as much in damages as a plaintiff in a case with more pervasive or extreme sexually harassing behaviors, but letting such a verdict stand would signal to both employees and employers that such behavior is unacceptable in the workplace.

The authors vaguely allude to that point at the end of chapter ten, noting that, because judges frequently dismiss discrimination cases, there is little case law on what constitutes discrimination.<sup>27</sup> Having jury verdicts that declare what is discrimination might reduce discriminatory behavior—something those legislating Title VII and other anti-discrimination laws clearly had in mind.<sup>28</sup> Right now, it is not clear what behavior is actionable, even though most persons believe a particular behavior, for example, touching a woman's breast,<sup>29</sup> is sexual harassment.<sup>30</sup> Thus, employers, as Professors Sperino and Thomas point out, have successfully won cases with these types of fact patterns, allowing discriminatory behaviors to persist in the workplace.<sup>31</sup>

Another factor the authors point out that may influence judges' dismissals of employment discrimination cases is that federal judges have a different understanding than the average worker of the types of behaviors that impact employees' ability to work.<sup>32</sup> Indeed, federal judges have great job security. Very few people have jobs that are guaranteed for life with no possibility of a salary reduction.<sup>33</sup> Federal

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26. *See, e.g.,* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (In the sexual harassment context, “objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position.”).

27. SPERINO & THOMAS, *supra* note 1, at 162.

28. Indeed, Title VII has measures in place designed to remedy discrimination so that a lawsuit will be unnecessary. 42 U.S.C. §§ 2000e to e-16c.

29. THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 35–36 (2005).

30. *Id.* at 15–16.

31. SPERINO & THOMAS, *supra* note 1, at 160.

32. *Id.* at 149.

33. Sperino and Thomas point this out. *See id.* Article III of the United States Constitution grants federal judges these protections. U.S. CONST. art. III, § 1.

judges do not risk retaliation by their employer for complaining about a discriminatory incident on the job. In addition, studies of the federal judiciary show that federal judges are a rather wealthy group.<sup>34</sup> Even without these workplace guarantees, they hold a lot of economic power compared to the average American.<sup>35</sup>

In chapter nine, the authors appear to put the prior chapters together to explain, overall, “why workers lose.”<sup>36</sup> Although the authors allude to the various frameworks and theories to show how employment discrimination plaintiffs end up out of court, this chapter does not add that much to the authors’ discussions in the previous chapters. However, chapter nine does emphasize that, due to the courts’ approaches, the issue that factfinders must resolve in these cases—whether discrimination actually occurred—gets lost.<sup>37</sup> This is worth noting. While some of the concepts discussed in the previous chapters—such as the *McDonnell Douglas* burden shifting analysis—were designed to help plaintiffs prove discrimination, strict adherence to and the morphing of these standards has made it more difficult for plaintiffs to win these cases in the long run.<sup>38</sup> The *McDonnell Douglas* test provides an interesting example of this phenomenon.

In *McDonnell Douglas Corp. v. Green*, the Supreme Court of the United States set out the burden shifting analysis designed to raise an inference of discrimination.<sup>39</sup> The Court established a relatively easy standard for plaintiffs to meet:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position

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34. Elliot Slotnick et al., *Writing the Book of Judges: Part 1: Obama’s Judicial Appointments Record After Six Years*, 3 J.L. & CTS. 331, 351 tbl.4, 353 tbl.5 (2015) (statistics on wealth of President Obama’s judicial appointees—the majority of whom have a net worth over \$1 million).

35. See Jim Wang, *Here’s the Average Net Worth of Americans at Every Age*, BUSINESS INSIDER (June 5, 2017, 1:56 PM), <http://www.businessinsider.com/heres-the-average-net-worth-of-americans-at-every-age-2017-6> [<https://perma.cc/33J9-N4TS>] (estimating that the average net worth of householders under age thirty-five is \$6,676 and over age seventy-five is \$155,714).

36. SPERINO & THOMAS, *supra* note 1, at 151.

37. See *id.* at 152.

38. See, e.g., *infra* note 43 and accompanying text.

39. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The Court in *McDonnell Douglas* referred to this standard as raising a “prima facie” case of discrimination. *Id.* Later Supreme Court case law refers to a plaintiff’s satisfying the prima facie case standard established as raising an “inference of discrimination,” see *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978), or “presumption of discrimination.” See *Texas Dept. of Commun. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>40</sup>

Plaintiffs satisfying this standard created a *prima facie* case of discrimination simply by being qualified for a job for which they were not hired. The presumption was that, absent some explanation by the employer, discrimination played a role in the decision. This was helpful to plaintiffs, because savvy employers who had discriminatory motives were unlikely to make those motives obvious by stating a discriminatory reason for not hiring the plaintiff. It is worth noting that, even under this standard, it was still relatively easy for an employer to wiggle out from under the *prima facie* case. The employer only had to articulate a legitimate, nondiscriminatory reason for its decision not to hire the plaintiff and the presumption of discrimination dropped out.<sup>41</sup> Still, it was relatively easy to raise the initial *prima facie* case of discrimination.

By the time Professors Sperino and Thomas wrote *Unequal*, their characterization of the standard had morphed to a slightly different test:

The *prima facie* case has four prongs. Mary must prove (1) that she belongs to a protected class, (2) that she met the objective qualifications for her job, (3) that she suffered adverse action, and (4) that there were circumstances suggesting discrimination, such as being treated differently than individuals who are not members of her protected class—like men or younger people.<sup>42</sup>

While the authors cite *McDonnell Douglas* for this test, the *McDonnell Douglas* test actually has a different fourth prong that is easier to meet. Still, Professors Sperino and Thomas's characterization of the test today is consistent with the test lower courts are using<sup>43</sup> and is a more difficult standard to meet. Thus, a standard the Supreme Court designed to help root out difficult-to-show discriminatory acts has become increasingly problematic for plaintiffs.

40. *Id.*

41. *Id.*

42. SPERINO & THOMAS, *supra* note 1, at 115.

43. *See, e.g.*, *Swaso v. Onslow Cty. Bd. of Educ.*, 2017 WL 3432388 at \*1 (4th Cir. 2017) (“To establish a claim under *McDonnell Douglas*, a plaintiff must put forth a *prima facie* case of discrimination by establishing that: (1) she is a member of a protected class; (2) she ‘suffered an adverse employment action’; (3) her job performance was satisfactory; and (4) the adverse employment action occurred ‘under circumstances giving rise to an inference of unlawful discrimination.’”) (quoting *Adams v. Tr. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 558 (4th Cir. 2011)); *Parson v. Vanguard Grp.*, 2017 WL 3263526 at \*3 (3d Cir. Aug. 1, 2017) (“The plaintiff must first make out a *prima facie* case of discrimination by showing (1) that he is a member of a protected class, (2) that he was qualified for the position in question, (3) that he suffered an adverse employment action, and (4) that ‘the action occurred under circumstances that could give rise to an inference of intentional discrimination.’”) (quoting *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008)).

Rather than simply identifying the problems, the authors do suggest several different actors who could provide solutions to the difficulties discrimination plaintiffs face in court. Beginning with Congress, Professors Sperino and Thomas suggest changes to various anti-discrimination laws in an effort to correct some of the problems identified in *Unequal*.<sup>44</sup> Included in the suggested legislative changes are: modifying the but-for causation test courts have developed for use in Age Discrimination in Employment Act cases, Americans with Disabilities Act cases, and retaliation cases; changing or eliminating rules and inferences that make it difficult for plaintiffs to maintain claims; advising courts to interpret anti-discrimination laws liberally; and clarifying what types of behaviors the statutes prohibit.<sup>45</sup> The authors do realize that it may be difficult to get Congress to act to broaden anti-discrimination laws.<sup>46</sup> This seems even less likely in the current Congress, which is majority Republican and more business-friendly rather than plaintiff-friendly.<sup>47</sup> The suggestion that courts interpret employment discrimination laws liberally should already be the law. Title VII and other employment discrimination statutes are remedial measures, which courts have repeatedly stated should be broadly interpreted to achieve the statutes' goals.<sup>48</sup> Of course, the urgings of these courts appear to fall on deaf ears in some jurisdictions.

Professors Sperino and Thomas have other suggested avenues to remedy these problems. In particular they suggest that the EEOC

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44. See SPERINO & THOMAS, *supra* note 1, at 164–69.

45. *See id.* at 165–69.

46. *See id.* at 168.

47. Employment discrimination laws are often viewed as costing businesses money. *See, e.g.,* Harry Bradford, *Workplace Discrimination Costs Businesses \$64 Billion Every Year*, HUFFPOST (Mar. 23, 2012, 8:43 AM), [https://www.huffingtonpost.com/2012/03/23/workplace-discrimination-costs-businesses-cap\\_n\\_1373835.html](https://www.huffingtonpost.com/2012/03/23/workplace-discrimination-costs-businesses-cap_n_1373835.html) [<http://perma.cc/S9A8-X8GC>].

48. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979) (“We believe that broad remedial legislation such as Title VII is entitled to the benefit of liberal construction.”); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1211–12 (E.D. Cal. 1998) (explaining that Title VII, as remedial legislation, should be interpreted broadly and that allowing employers to engage in third-party reprisals would undermine Congress’ intent to maintain unfettered access to Title VII’s remedial scheme and root out discrimination in employment discrimination); *Hammer v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 706–07 (7th Cir. 2000); *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997); *Moyo v. Gomez*, 32 F.3d 1382, 1386 (9th Cir.), *amended by* 40 F.3d 982 (9th Cir. 1994); *cf. Steger v. Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000) (noting that the ADA is a remedial statute and should be interpreted broadly); *see also* Rudolph H. Heimanson, *Remedial Legislation*, 46 MARQ. L. REV. 216, 218 (1962). The legislative history of several of the employment discrimination statutes covered in this book also support the idea that Congress meant for courts to interpret this legislation broadly. *See, e.g.,* 154 Cong. Rec. H6074 (daily ed. June 25, 2008) (statement of Rep. Nadler) (The ADA Amendments Act “lowers the burden of proving that one is disabled enough to qualify for coverage. It does this by directing courts to read the definition broadly, as is appropriate for remedial civil rights legislation.” (emphasis added)).

could challenge the fakers-and-floodgates arguments and provide guidance on what types of actions are actionable as discrimination and retaliation.<sup>49</sup> The EEOC could also re-focus the courts on what really matters in these cases—whether discrimination did indeed occur.<sup>50</sup> Of course, the courts could also be a source of correction, as they created many of these problems in the first place. One suggestion Professors Sperino and Thomas make is that the courts dismantle the doctrines and frameworks that shunt apparently meritorious cases (or, at least cases that should go to the jury) out of court and focus on the underlying issue of whether discrimination in fact occurred.<sup>51</sup> The courts should, in a sense, simplify the analysis and ask jurors the primary question of whether the statutory language was met. As the authors point out, there is no evidence that the elaborate frameworks developed by the courts are necessary to answer this basic question.<sup>52</sup>

Finally, Professors Sperino and Thomas see employers as a source of coalition building to address these problems with the manner in which the courts are applying the law.<sup>53</sup> The authors are correct that many employers favor anti-discrimination laws and wish to employ diverse workforces.<sup>54</sup> Yet, when backed into a corner by a lawsuit, employer tactics in litigation often run counter to the goals of employment discrimination laws. Professors Sperino and Thomas suggest that people interested in reform harness social media to run campaigns to call out progressive employers on these litigation tactics.<sup>55</sup> There are certainly examples of corporate shaming resulting in changes in corporate policy, and this approach might prove fruitful on an employer-by-employer basis.<sup>56</sup>

### III. HOW TO MAKE CHANGE IN EMPLOYMENT DISCRIMINATION LAWS

While Professors Sperino and Thomas have suggested some potential ways to address the current problems with court interpretations of employment discrimination law, it is difficult to know what will actu-

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49. SPERINO & THOMAS, *supra* note 1, at 169.

50. *Id.* at 170.

51. *Id.* at 172.

52. *Id.* at 173.

53. *Id.* at 176.

54. One example of this is diversity initiatives implemented by in-house counsel to diversify the lawyers they hire. See Theresa M. Beiner, *Theorizing Billable Hours*, 75 MONT. L. REV. 67, 68 (2014) (describing these initiatives).

55. SPERINO & THOMAS, *supra* note 1, at 176.

56. See, e.g., Yuki Noguchi, *Uber Fires 20 Employees After Sexual Harassment Claim Investigation*, NPR: THE TWO-WAY (June 6, 2017, 6:57 PM), <http://www.npr.org/sections/thetwo-way/2017/06/06/531806891/uber-fires-20-employees-after-sexual-harassment-claim-investigation> [<http://perma.cc/88JG-W874>]. It is not clear that public media campaigns are always successful. See, e.g., Stephen J. Dubner, *Do Boycotts Work?*, FREAKONOMICS (Jan. 21, 2016, 9:49 AM), <http://freakonomics.com/podcast/do-boycotts-work-a-new-freakonomics-radio-podcast/> [<https://perma.cc/7BRS-DSP2>].

ally work best. As it stands, they make a compelling case that there are serious problems and that courts are throwing out plaintiffs' claims unnecessarily. The authors make suggestions for changes by Congress, the EEOC, and employers.<sup>57</sup> Given the current legal climate in Washington, it is doubtful that Congress or the EEOC will do anything to make employment discrimination laws more plaintiff-friendly. While employers who care about these issues may, on an individual basis, adopt policies that make their workplaces more open to women and workers of color, it is doubtful that those employers will put the type of political pressure on Congress that is necessary to make significant legislative change. After all, the current system, in effect, limits employer liability. The authors also suggested creating a social movement for reform.<sup>58</sup> The changes needed, however, are technical. It may be difficult to use what the courts are doing in these cases as a rallying point for a public campaign. Instead, the courts, which caused these difficulties in the first place, are likely the best place to make this correction.

The courts hold promise for two reasons. First, thanks to President Obama appointing an incredibly diverse group of federal judges,<sup>59</sup> it is quite possible that these new judges will see these cases differently. Second, reform in this area will require lawyers to make very technical arguments. The legal expertise of federal judges, who are much more familiar with how these laws operate, is needed to help understand the nature of the changes necessary and why they are necessary. Although the courts' continuing adaption of law is often considered politically controversial,<sup>60</sup> the courts, and the Supreme Court in particular, have traditionally been a place of legal reform. Indeed, sexual and racial harassment as theories of liability under Title VII of the Civil Rights Act of 1964 were court creations.<sup>61</sup>

The diverse judges appointed by President Obama suggests that arguments about needed changes to employment discrimination law may not fall on deaf ears. Studies suggest that women and minority-group judges, as well as judges appointed by Democratic presidents,

57. SPERINO & THOMAS, *supra* note 1, at 165–69, 170–72, 176.

58. *Id.* at 176.

59. Donna Owens, *Obama's Legacy on Judicial Appointments, by the Numbers*, NBC NEWS (Jan. 19, 2017, 9:21 PM), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306> [<https://perma.cc/8LM6-SBRP>] (“The more than 300 Obama-nominated judges are considered to be the most diverse group in U.S. history in terms of terms of gender, ethnicity, and nationality.”).

60. *See, e.g.*, Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 571–72 (2010) (describing criticism leveled at the Court by various politicians).

61. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (recognizing sexual harassment as a viable theory of discrimination under Title VII); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) (noting that racial harassment claims under Title VII follow the same standard as sexual harassment claims).

may be more sympathetic to employment discrimination plaintiffs.<sup>62</sup> President Obama appointed the most diverse group of judges in the history of the federal courts.<sup>63</sup> During his first six years in office, forty percent of his district court appointees and sixty percent of his court of appeals appointees were women.<sup>64</sup> Over twenty percent of his district court appointees were African American and five percent of his court of appeals appointees were African American.<sup>65</sup> Eleven percent of his district court appointees were Hispanic American, and six percent of his district court appointees and five percent of his court of appeals appointees were Asian American.<sup>66</sup> The current diversity on the federal bench may be short-lived. President Trump has made quick strides in appointing federal judges who are more ideologically consistent with his conservative positions.<sup>67</sup> Thus, advocates may need to act quickly to bring about reform in the courts.

While Professors Sperino and Thomas were able to explain some of the challenges facing plaintiffs in the courts in a manner that the average person can understand, the nuances of how these rules interact with procedural rules is something that is best understood by lawyers and judges. Part of the issue with employment discrimination cases is how courts and defendants use procedural rules to dismiss potentially meritorious claims.<sup>68</sup> The interaction is subtle and not for someone who is not well-versed in law. Indeed, Professors Sperino and Thomas spend some time explaining how procedure works in this book so that a non-lawyer audience can understand what is going on in these cases. The solution Professors Sperino and Thomas offer on the legal aspect of this is simple to state: have juries decide whether the employee's protected status played a motivating role in the adverse employment action. While the solution is simple, convincing judges to eliminate all the procedural hurdles they have placed in front of plaintiffs will take nuanced legal and, in some cases, social science arguments. This is best examined, criticized, and changed through lawyers' suggestions and court decisions.

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62. See Theresa M. Beiner, *Is There Really a Diversity Conundrum?*, 2017 WIS. L. REV. 325, 331–34 (studies discussed and cited).

63. See Max Ehrenfreund, *The Number of White Dudes Becoming Federal Judges Has Plummeted Under Obama*, WASH. POST, (Feb. 18, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/02/18/the-number-of-white-dudes-becoming-federal-judges-has-plummeted-under-obama/?utm\\_term=.808793248a3e](https://www.washingtonpost.com/news/wonk/wp/2016/02/18/the-number-of-white-dudes-becoming-federal-judges-has-plummeted-under-obama/?utm_term=.808793248a3e) [<http://perma.cc/BK3H-KQPC>]; Slotnick et al., *supra* note 34, at 354.

64. Slotnick et al., *supra* note 34, at 356, tbl.6, 364, tbl.9.

65. *Id.*

66. *Id.*

67. See Charlie Savage, *Trump is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017), [https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html?\\_r=0](https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html?_r=0) [<http://perma.cc/Z5AL-M8X6>].

68. See, e.g., Medina, *supra* note 13; Beiner, *Summary Judgment*, *supra* note 13; McGinley, *supra* note 13; Schneider & Gertner, *supra* note 13; Chambers, *supra* note 14.

## IV. CONCLUSION

Given the latest allegations of sexual harassment leveled at Harvey Weinstein<sup>69</sup> and others,<sup>70</sup> it is clear that effective employment discrimination laws are still needed in the United States. Law Professors Sandra Sperino and Suja Thomas present a thorough examination of why employment discrimination laws are not currently working as they should, but instead courts are undermining potentially meritorious employment discrimination claims. They suggest reasons for what appears to be judicial hostility to these claims as well as solutions. A “must read” for anyone who is interested in the implementation of employment discrimination law and equality in the workplace, the solution to employment discrimination problems rests with those who created them—the judges who decide employment discrimination cases.

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69. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), [https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?\\_r=0](https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0) [http://perma.cc/AM9L-4PTN]. That sexual harassment in employment is still prevalent is discouraging, given the high profile it gained due to the sexual harassment allegations of Anita Hill during the Clarence Thomas confirmation hearings in 1991. See Marcia D. Greenberger, *What Anita Hill Did for America*, CNN (Oct. 22, 2010, 9:54 AM), <http://www.cnn.com/2010/OPINION/10/21/greenberger.anita.hill/> [https://perma.cc/J3UB-ZWF2] (“The issue of sexual harassment was out of the shadows. Before Hill’s testimony, sexual harassment was viewed as a problem for victims, predominantly women, to solve on their own. Most women suffered in silence rather than jeopardize their careers by complaining.”).

70. Dan Corey, *Since Weinstein, Here’s A Growing List of Men Accused of Sexual Misconduct*, NBC NEWS (Jan. 10, 2018, 4:34 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546> [http://perma.cc/9UNZ-V3QK].