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After Work

Zachary A. Kramer†

INTRODUCTION

Employment discrimination scholarship tends to assume that the harms of employment discrimination are not borne beyond the walls of the workplace. This is a mistake. What happens to employees inside the workplace can bleed into their private lives.¹ Like many other aspects of work, employment discrimination transcends the boundary between public and private. As employees take the effects of discrimination home with them, their private lives are also affected by these experiences. Yet employment discrimination scholarship does not account for these harms.²

In this Essay, I seek to contribute to ongoing conversations about the many costs of discrimination by providing a theoretical framework—constructed from existing literatures in sociology, organizational theory, and legal scholarship on employment discrimination—for understanding how families are harmed by employment discrimination. I begin with the family because it is an important part—in many cases, the most important part—of how we as a society conceptualize the private sphere. My hope is

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1. For a similar claim in the context of corporate governance, see Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255 (2004) (arguing for a family-friendly approach to corporate governance).

2. In my research I have come across only one article in the legal literature that addresses, albeit briefly, the family harms resulting from workplace discrimination. It is telling of the extent to which legal scholars have overlooked family harms that the single law review article touching on the subject was authored not by legal scholars but by sociologists. See Joe R. Feagin et al., *The Many Costs of Discrimination: The Case of Middle-Class African Americans*, 34 IND. L. REV. 1313, 1331-32, 1354-55 (2001).

that this Essay will inspire further discussion within employment discrimination scholarship about how our work experiences affect our private lives and about how employees and their families can use the law to remedy the harms of workplace discrimination.

In Part I, I introduce “exporting,” the key component of my new framework. At its most basic level, exporting refers to the ways in which employees take work—both the substance of their work and their social interactions with coworkers—out of the workplace and into their private lives (and vice versa).³ As it is such an important part of employees’ lives, work lingers with employees. And as employees export work to all corners of their private lives, their work experience affects those with whom employees spend their private time, such as family members, friends, and the countless other people who play some role in an employee’s life away from work. Though employees export many different work experiences to many different people in their private lives, my focus in this Essay is limited to the ways in which employees export the effects of workplace discrimination to their families.⁴

In Part II, I establish two categories of harm experienced by the families of employees exporting their discriminatory work experiences: disruption harm and exclusion harm. Disruption harm results from employees bringing the effects of workplace discrimination home to their families. Due to the stress of discrimination, employees are less able to participate productively in family life, which in turn creates problems for their partners and children. Exclusion harm results from the steps taken by employees to shield their families from workplace discrimination. Employees experiencing discrimination may choose to keep their work and private lives separate to protect their families, but excluded families are thereby denied the benefits of being integrated into employees’ work lives, including the social, emotional, and political benefits associated with work.⁵ To develop my account of disruption and exclusion harms, I

3. To be sure, my conception of exporting is not unidirectional. Although my concern in this Essay is confined to how employees export work to their private lives, exporting also encompasses how people export their private lives to the workplace. For a discussion of how employees export their private lives to work, see Margaret Graham Tebo, *When Home Comes to Work*, A.B.A. J., Sept. 2005, at 42 (discussing how employees facing domestic violence in the home can bring the effects of abuse into the workplace).

4. As I noted earlier, I have conceptualized “work” as including both the content of work and the social aspect of work, in particular the personal interactions and relationships among coworkers both inside and outside the workplace. For purposes of this Essay, I assume that employment discrimination fits within both aspects of work.

5. My conception of work in this Essay does not include the unpaid care work that takes place in the home. *C.f.* Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1458-67 (2001). My limited scope is not meant as a categorical statement on the value of care work. Rather, the issue is merely beyond the scope of this Essay.

consider the case of a hypothetical employee to demonstrate the ways in which workplace discrimination harms families.

To further supplement my account of exclusion harms, I also examine the experiences of lesbian and gay employees who pass as straight in the workplace (“gay passing”). In recent years there has been a flood of legal scholarship recognizing and discussing the harms caused by pressures to assimilate in the workplace.⁶ None of this scholarship, however, has considered whether assimilation affects employees’ lives away from work. My examination of gay passing demonstrates that passing and other assimilation strategies can harm employees’ families. Thus my hope is that in addition to amplifying my account of exclusion harms, my discussion of lesbian and gay passing will also contribute to the growing body of legal scholarship on assimilation.⁷

In Part III, I consider ways in which employment discrimination law already captures family harms. A close reading of a handful of employment discrimination cases reveals that courts currently recognize a kind of harm closely resembling those described in this Essay. Under the compensatory damages provision of Title VII, employment discrimination plaintiffs may recover compensatory damages for emotional distress manifested in familial relationships. For instance, such a plaintiff may recover damages based on discrimination causing a strain on her relationship with her partner or child.⁸ Yet this compensation scheme is under-utilized; it has received only passing attention from the courts and no attention in employment discrimination scholarship. I seek to remedy this gap by developing a framework for understanding the existing case law on family harms in employment discrimination.

6. See, e.g., Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (discussing the harms associated with gender-based assimilation); Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005) (arguing that assimilation demands harm “intersectional” employees by restricting their choices as to how they can choose to perform their identities at work); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination By Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (criticizing Title VII doctrine for not recognizing claims based on identity performances); Susan Sturm, *Second-Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing the limits of employment discrimination doctrine in dealing with subtle, norm-based forms of workplace inequality).

7. I completed the bulk of this Essay prior to the release of two books which will surely prove to be two of the most significant contributions to the legal literature on assimilation and discrimination. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); DEVON W. CARBADO & MITU GULATI, *WORKING IDENTITY* (work-in-progress) (on file with author). Though they explore assimilation from different angles, both books provide rich accounts of the complex relationship between identity management and discrimination.

8. See, e.g., *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 503 (2000) (discussing how plaintiff’s relationship with her children and husband suffered because of the stress of discrimination, and how plaintiff felt she was forced to spend less time with her family because she feared she would lose her job).

In Part IV, I attempt to reconcile the scope of family harms currently recognized by existing employment discrimination doctrine with the scope of the harms I have identified in this Essay. Although existing legal norms recognize family harms closely resembling those I have identified, the existing harms are ultimately much narrower, as legal recognition is limited to harm done to employees' relationships with their families rather than harm done to family members themselves. Nevertheless, existing employment discrimination doctrine is capable of recognizing and compensating the family harms identified in this Essay. I start this dialogue by mapping the extended harms described in this Essay onto the harms already recognized by employment discrimination law, showing how far the existing legal doctrine can be stretched to recognize a wider range of family harms. This exercise is valuable because it allows us to reinterpret, rather than reinvent, the geography of employment discrimination law to more accurately account for the effects of discrimination experienced at work.

I

EXPORTING WORK

What happens to employees inside the workplace can affect their families. While work and family may often occupy physically distinct spaces, they do not exist entirely independently from one another.⁹ Employees' work experiences linger with them long after they leave the workplace and color their interactions with their families. Thus it is only natural that an employee's family members feel the effects of her work life. When employees come home from work they are expected to transition easily into their family role as partner or parent.¹⁰ For some, this transition is not only easy but pleasurable; they may race home from work to see their kids or spend time with their partner without even the slightest hesitation. For others, however, this transition can be more complicated, as their work stays with them long after they leave the workplace.¹¹

9. See CHRISTENA E. NIPPERT-ENG, *HOME AND WORK: NEGOTIATING BOUNDARIES THROUGH EVERYDAY LIFE* 7-18 (1996) [hereinafter NIPPERT-ENG, *HOME AND WORK*] (discussing how employees negotiate the interdependence of work and family life).

10. In a classic paper, organizational theorists Jeffrey Greenhaus and Nicholas Beutell illuminate the relationship between work and family roles, exploring the nature of why these roles so often conflict with one another. Jeffrey H. Greenhaus & Nicholas J. Beutell, *Sources of Conflict Between Work and Family Roles*, 10 *ACAD. MGMT. REV.* 76, 76-81 (1985).

11. This is not to say that family members are the only people affected by an employee's work experiences. As employees engage in a wide variety of activities outside of work, they can just as easily bring their work to any other facet of their private lives, for instance, to their extra-familial social relationships or to any religious or community organizations to which they belong. See ROBERT A. STEBBINS, *BETWEEN WORK AND LEISURE: THE COMMON GROUND OF TWO SEPARATE WORLDS* 49 (2004) (documenting the rise of "serious leisure"); see also RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFES, COFFEE SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS,*

It may be both the good and the bad that travel home with employees at the end of a work day. For instance, just as an employee celebrates with her family when she gets that well-deserved promotion, so too will she seek comfort from her family when she is having trouble with a colleague or when an important project is not panning out as she had hoped. Work is something we share with our families, sometimes because we want to, other times because we just have to.

A helpful way of approaching this phenomenon is to express it in terms of “exporting,” in that employees export work to the other spheres of their lives. The key to understanding exporting is the realization that employees play many other roles besides that of employee.¹² When they are not working, employees are parents and siblings, congregants and activity partners, significant others and friends, to name just a few. And even though we tend to think we can maintain our work roles separate from these other roles, it is actually quite difficult to do so in practice. By looking at work from the perspective of exporting, we can explore how an employee’s work relates to and affects the other roles she performs in her private life, as well as those with whom she interacts while playing these other roles. In this Essay I focus on how employees export the effects of employment discrimination to their families.

The concept of exporting is useful for understanding the work/family relationship in an employment discrimination context because it provides a different way to conceptualize how employees negotiate their work and family roles. The work/family relationship is most commonly conceptualized in terms of a struggle, as in the “work/family conflict.”¹³ The thrust of the conflict model is that the respective demands and obligations of work and family are at odds with one another. Because a person literally cannot be in two places at once, work and family vie with one another for the employee’s attention, time, and commitment.¹⁴ And as the employee is pulled in two directions—out to the workplace by her work obligations and into the home by her care responsibilities—she must find ways to negotiate both aspects of her life, as both are essential to who she is.¹⁵ The conventional wisdom in work/family scholarship is that family and care work usually end up on the losing side of the conflict. This is because, as a cultural matter, we privilege market work over the non-

HANGOUTS AND HOW THEY GET YOU THROUGH THE DAY 16 (1997) (distinguishing between “first,” “second,” and “third” places).

12. See *Greenhaus & Beutell*, *supra* note 10, at 76 (describing the inter-role conflict a person may experience between the work role and other life roles).

13. See Jeffrey R. Edwards & Nancy P. Rothbard, *Mechanisms Linking Work and Family: Clarifying the Relationship Between Work and Family Constructs*, 25 ACAD. MGMT REV. 178, 182 (2000).

14. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

15. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1952-55 (2000).

market care work that takes place in the home.¹⁶ The conflict narrative frames many of the ongoing conversations in work/family scholarship, such as debates over paid family leave¹⁷ and the “commodification” of family life.¹⁸

In contrast to the conflict scholarship, exporting is concerned not with the structure of the work/family relationship, but rather with the content of that relationship. Thus it does not necessarily follow that a conflicting work/family relationship will lead to exporting, and vice versa. Employees can export the pressures and hardships of work to their families even in the absence of a conflict between the two. For instance, an employee who has negotiated a relatively perfect balance between work and family may still face discrimination in the workplace, the effects of which she may still export to her family. When an employee leaves work, she becomes a courier of sorts, exporting her work, as well as what happened to her at work, from the workplace to her family.

Of course, notions of exporting are not entirely new to legal scholarship.¹⁹ Within the particular realm of workplace scholarship, legal scholar Cynthia Estlund relies on a similar concept when writing about the potentially transformative power work can have on civic society.²⁰ For Estlund, the process of “working together”—that is, depending on one another in the workplace, sharing a physical space, and working toward common goals²¹—forces coworkers to cast aside their differences and work

16. See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

17. See, e.g., Jeremy I. Bohrer, *You, Me, and the Consequences of Family: How Federal Law Prevents the Shattering of the “Glass Ceiling”*, 50 WASH. U.J. URB. & CONTEMP. L. 401, 418-21 (1996); Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. LEGIS. 335 (1993); Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L.J. 373 (1996); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

18. See, e.g., MARTHA ALBERTSON FINEMAN & TERENCE DOUGHERTY, *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY* (2005); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2002); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Katherine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

19. See, e.g., William P. Alford, *Exporting “The Pursuit of Happiness”*, 113 HARV. L. REV. 1677 (2000) (reviewing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97 (2002); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004).

20. See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003) [hereinafter ESTLUND, *HOW WORKPLACE BONDS STRENGTHEN*]; Cynthia Estlund, *Working Together: Crossing Color Lines at Work*, 46 LAB. HIST. 77 (2005); Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000); Cynthia Estlund, *Work and Family: How Women’s Progress at Work (and Employment Discrimination Law) May Be Transforming the Family*, 21 COMP. LAB. L. & POL’Y J. 467 (2000); Cynthia Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331 (2000).

21. See ESTLUND, *HOW WORKPLACE BONDS STRENGTHEN*, *supra* note 20, at 23-29.

amicably with each other.²² Such cooperative work, Estlund argues, has the power to transform employees' attitudes about issues such as racial integration or sex equality.²³ It is here where Estlund's theory relies on an exporting-like concept: as employees subsequently go off to spend time with friends, participate in community organizations, and take care of their families, they take with them their new attitudes, thereby exposing their friends and family to their diversified work experiences.²⁴ Thus employees are exporting the lessons of their work experiences to all corners of civil society. But for all its usefulness in revealing the different ways work enhances democratic life,²⁵ Estlund's project tells only the story of how employees export the positive experiences of cooperative work; it is a story about how workplace interactions *enhance* an employee's private life. What is missing from Estlund's account, and from employment discrimination scholarship as a whole, is the story of how workplace interactions *harm* an employee's private life.²⁶

My conception of exporting fills in this gap. Although scholars have relied on similar notions of exporting, my approach offers a new way to probe the relationship between work and family. Indeed, the concept of exporting is particularly useful in the realm of employment discrimination because it allows us to develop a more robust picture of the costs of discrimination borne beyond the walls of the workplace. In a broader sense, then, exporting is also valuable because it adds a fresh perspective to the already substantial literature on work/family relations.

II

FAMILY HARMS

Discrimination and harassment are still working realities for many employees.²⁷ Even as antidiscrimination statutes like Title VII of the Civil Rights Act²⁸ have done much to eliminate unlawful workplace discrimination, employees continue to suffer a wide variety of

22. The key to Estlund's theory is compulsion, in that employees are forced to work together. *See id.* at 12-15, 131-34 (discussing compulsory connectedness in the workplace).

23. In addition to race and sex equality, Estlund also briefly discusses sexual orientation, religion, ethnicity and language. *See id.* at 96-101.

24. *See, e.g., id.* at 29-34.

25. *See* Joan Flynn, *Bowling Alone But Working Together*, 26 BERKELEY J. EMP. & LAB. L. 607, 608-09 (2005) (reviewing ESTLUND, *supra* note 20).

26. Estlund herself acknowledges that her work may paint "far too rosy a picture." ESTLUND, *supra* note 20, at 74. But she goes on to note that her account "certainly could be countered with a far bleaker account—complete with its own litany of anecdotes—of hostility and harassment of racial minorities and of women, especially at the predominantly white or male workplaces." *Id.*

27. *See* THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005).

28. *See* 42 U.S.C. §§ 2000e-2000e-17 (2000).

discriminatory treatment at work.²⁹ Just as employees continue to suffer harms because of employee discrimination, so too do their loved ones.

In this Part, I establish two categories of harm experienced by families as a result of employment discrimination—disruption harm and exclusion harms. Briefly, disruption harm occurs when an employee's experience at work influences her ability to interact with her family. Exclusion harm occurs when an employee's work experience is so damaging that it leads the employee to exclude her family from her work. To frame my discussion, I consider the case of a hypothetical employee (whom I call Employee) and her family. The other members of Employee's family are Partner, a stay-at-home dad, and Child, the couple's daughter. Through their experiences I am able to show how all of the members of Employee's family are harmed by the discrimination Employee faces in the workplace.

Before beginning, it is important to note several points about this discussion. First, these two categories do not exhaust all forms of exported family harms—for instance, an obvious exported harm that I do not address is the economic harm of employment discrimination.³⁰ Without a doubt, one of the primary reasons why we work is to receive financial benefits with which to support ourselves and our loved ones,³¹ and families certainly lose out on important financial benefits when an organization unlawfully discriminates against potential employees in hiring or firing. As one federal circuit court of appeals wrote in 1970:

[R]acial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the outer benefits of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses.³²

The potential economic harms of employment discrimination are indeed a matter for serious concern, one that adds a layer of depth to my claim that families have a stake in what happens to employees in the workplace. In this Essay, however, I limit my discussion to two categories of harm that are less obvious.

Second, disruption harm and exclusion harm are not mutually exclusive categories. The same instances of workplace discrimination can

29. See, e.g., Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004) (advocating for a change in employment discrimination approaches under Title VII by treating trait discrimination as actionable sex discrimination).

30. For a recent discussion of the harms of layoffs, for instance, see LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* (2006).

31. See JOANNE B. CIULLA, *THE WORKING LIFE: THE PROMISE AND BETRAYAL OF MODERN WORK* 3-16 (2000) (theorizing reasons why we work, including the financial benefits of work).

32. See *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (internal quotations omitted).

produce both harms simultaneously. Consider the employee who suffers taunting and other workplace abuse to the extent that she is unable to sleep at night and cannot adequately fulfill her care responsibilities. She so resents the emotional toll her workplace experiences are taking on her family's wellbeing that she completely excludes her family from her work life, sharing no details of her day with her partner and skipping take-your-daughter-to-work day. Thus, as the family is suffering from the stress the employee brings home with her, they are also being denied access to the employee's work life.

Third, disruption and exclusion harms relate to larger theoretical questions about the work/family relationship because both offer alternative perspectives on how employees balance the opposing pressures and obligations of work and family. On the one hand, disruption harm results from a permeable boundary between work and family through which the effects of employment discrimination bleed. On the other hand, exclusion harm suggests that creating too rigid a boundary between work and family also causes problems, by shutting out families from a significant portion of employees' daily lives. Exploring the nature of these harms will not necessarily alleviate the burden associated with balancing work and family, but it is nevertheless important because it brings into sharper focus a fairly specific yet under-theorized aspect of the work/family relationship, namely how employment discrimination exacerbates the strains of negotiating work and family.

Fourth, that I have opted to use a nuclear family to frame my discussion of disruption and exclusion harms should not imply any normative claim about the value of diverse family forms. Indeed, I fully acknowledge that the experience of a nuclear family is not representative of all families, as there are many nontraditional family forms excluded by my discussion,³³ perhaps most notably single-parent households.³⁴ But it is important to keep in mind that my project seeks to isolate foundational insights about family harms rather than account for how every type of family suffers from employment discrimination. My analysis is meant to begin, rather than conclude, the conversation about the place of families in employment discrimination law. To that end, it seems prudent to reserve the more nuanced issues relevant to particular family forms for later discussions.

Finally, I make several assumptions about the discrimination experienced by Employee to limit the scope of my discussion. The discrimination is understood as that which would lead to an actionable

33. See, e.g., KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

34. See, e.g., NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* (1999).

discrimination claim under Title VII. This qualification is meant to assume the merits of any lawsuit Employee might bring arising out of the discrimination so that I may focus my efforts on accounting for the ways in which the discrimination harms Employee's family. I also assume that Employee faces a wide variety of discriminatory treatment, including both disparate treatment discrimination and sexual harassment. For now, I set aside the question of whether one type of discrimination causes different harms than the other. Here, the basic lesson about family harms is that they can result from *any* kind of employment discrimination. In short, my concern is not whether Employee can prevail in her discrimination case; it is whether and how this discrimination harms Partner and Child.

A. Disruption Harm

Consider what it is like to be the victim of employment discrimination. For instance, imagine that your coworkers engage in a seemingly systematic barrage of taunts and persistent ridiculing, all of which is intended to demean and degrade you, to send you a message. Perhaps one of them insists on grabbing you or placing offensive materials in your work area.³⁵ Or maybe you have been repeatedly passed over for a promotion for which you are well-qualified, only to see the position go to a less-qualified person who is the "right" race or sex. And imagine that these experiences have, unfortunately, become routine, just another part of your work life. These experiences are likely to take an emotional and psychological toll.³⁶ Now imagine what it feels like to go home, after having dealt with all of that in the workplace, and play with your kids or help your partner make dinner. Imagine what kind of resolve it takes to remain strong in front of your loved ones when you are struggling to put

35. Physical sexual assault or offensive touching is often sufficient to establish actionable sexual harassment. *See, e.g.,* *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002) (noting that "physical sexual assault has routinely been prohibited as sexual harassment under Title VII"). *Rene* collects cases involving various offensive sexual touchings, including groping an employee and patting an employee's genitals. *Id.*

36. *See, e.g.,* Tyrone A. Forman, *Social Psychological Costs of Racial Segmentation in the Workplace: A Study of African Americans' Well-Being*, 44 J. HEALTH & SOC. BEHAV. 332 (2003); Jules P. Harrell et al., *Physiological Responses to Racism and Discrimination: An Assessment of the Evidence*, 93 AMER. J. PUB. HEALTH 243 (2000). The social science literature on the psychological effects of employment discrimination is surprisingly sparse. Much of what has been written on the subject deals with effects of sexual harassment on working women. *See, e.g.,* Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69 (2002) (arguing that the effects of sexual harassment satisfy the clinical definition of PTSD); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28 (1993) (reviewing social science data on the psychological responses to sexual harassment); Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 401-04 (1997) (collecting studies detailing a wide variety of negative psychological and other health-related effects of sexual harassment).

your demoralizing day behind you. What if you simply are incapable of switching gears that quickly? What if you are unable to come home and pretend like nothing happened to you at work? What if you simply cannot bring yourself to sit and talk about your day or sit and listen to your partner tell you about her/his "bad" day?

Employment discrimination disrupts the activities of family life because employees export the effects of that discrimination to their families. Once inside the home, the effects of discrimination manifest themselves in employees' relationships with their children and partners. When an employee is too stressed to play with her child, both she and the child are harmed. Similarly, when an employee is too distracted to spend quality time with her partner, both she and her partner suffer harm. To balance the competing pressures and obligations of work and family, employees must be able to switch hats, often quickly and seamlessly. But as discrimination affects employees personally and profoundly, it moves with them between spheres in a way that often leaves the seams painfully exposed. To understand why and how employment discrimination affects an employee's family, we must first consider the mechanics of disruption.

1. *The Mechanics of Disruption*

My concept of disruption harm has its roots in the theories of workplace scholars who frame work and family as two interdependent, mutually-affecting spheres of life. These scholars, consisting of organizational and management theorists and sociologists, study the relationship between work and family in the context of stress³⁷ and how the stress generated in one sphere affects activities in the other sphere.³⁸ These scholars refer to the process by which work stress is transmitted to the home as "work-to-family spillover."³⁹ The central premise of spillover is that an employee's workplace stress bleeds into her family life.⁴⁰ Thus an

37. See, e.g., Peggy A. Thoits, *Stress, Coping, and Social Support Processes: Where Are We? What Next?*, 35 J. HEALTH & SOC. BEHAV. 53 (1995) (extra issue).

38. See Edwards & Rothbard, *supra* note 13, at 180.

39. See, e.g., Tammy D. Allen et al., *Consequences Associated with Work-to-Family Conflict: A Review and Agenda for Future Research*, 5 J. OCCUPATIONAL HEALTH PSYCHOL. 278 (2000); Niall Bolger et al., *The Contagion of Stress Across Multiple Roles*, 51 J. MARRIAGE & FAM. 175 (1989); Ann C. Crouter & Matthew F. Bumpus, *Linking Parents' Work Stress to Children's and Adolescents' Psychological Adjustment*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI. 156, 156-59; Joseph G. Grzywacz et al., *Work-Family Spillover and Daily Reports of Work and Family Stress in the Adult Labor Force*, 51 FAM. REL. 28 (2002); Daphne Pedersen Stevens et al., *Differences in Work-to-Family and Family-to-Work Spillover Among Professional and Nonprofessional Workers*, 24 SOC. SPECTRUM 535 (2004) (examining spillover between professional and nonprofessional workers from both home to work and work to home); Stephen A. Small & Dave Riley, *Toward a Multidimensional Assessment of Work Spillover into Family Life*, 52 J. MARRIAGE & FAM. 51 (1990) (constructing a framework that assesses spillover in terms of time, energy, and psychological interference).

40. Other scholars study spillover in areas besides stress. For instance, some scholars examine the ways employees' attitudes about their jobs and about life in general spill over between work and

employee who is stressed in the workplace may bring that stress home with her and express it in a way such that her family will recognize that she is stressed.

The concept of spillover also encompasses what social scientists call “work-to-family crossover,”⁴¹ which picks up where spillover itself ends.⁴² Crossover refers to how an employee’s stress spillover moves from affecting just the employee at home to affecting the employee’s family members, also causing them problems.⁴³ When an employee who is stressed at work brings that stress home, the members of her family may try to help her to cope with the stress by doing her chores for her or consoling her about her troubles at work. In attempting these tasks, however, the members of the employee’s family expose themselves to the stress of bearing additional responsibilities. Thus the employee’s spillover stress from work has crossed from her to her family members, creating stress for them as well.

Disruption harm is analytically similar to the spillover framework social scientists use to examine the effects of work-related stress on an employee’s home life.⁴⁴ Employment discrimination disrupts family life for both employees (like spillover) and their family members (like crossover). That is, just as an employee suffers when the effects of discrimination prevent her from enjoying and participating in her family life, so too does her family.

family life. See, e.g., Joseph C. Rode, *Job Satisfaction and Life Satisfaction Revisited: A Longitudinal Test of an Integrated Model*, 57 HUM. REL. 1205 (2004) (finding that one’s life satisfaction was not correlated with one’s job satisfaction); Joseph C. Rode & Janet P. Near, *Spillover Between Work Attitudes and Overall Life Attitudes: Myth or Reality?*, 70 SOC. SCI. INDICATORS R. 79 (2005). Another area scholars have studied is whether spillover explains one’s drinking behaviors. See, e.g., Joseph G. Grzywacz & Nadine F. Marks, *Family, Work, Work-Family Spillover, and Problem Drinking During Midlife*, 62 J. MARRIAGE & FAM. 336 (2000) (finding that marital disagreement and work pressures were related to increased problem drinking).

41. See, e.g., Mina Westman, *Stress and Strain Crossover*, 54 HUM. REL. 717 (2001). Westman defines crossover as “the reaction of individuals to the job stress experienced by those with whom they interact regularly.” *Id.* at 717. The distinction between spillover and crossover was first identified by Bolger et al., who characterize crossover as the “stress experienced by an individual’s spouse in the workplace which leads to stress being experienced by the individual at home.” See Bolger et al., *supra* note 39, at 175. A useful example of crossover is as follows: an employee’s bad day at work leads to arguments at home. See *id.* at 176. Crossover likewise operates in both directions, which means that an employee’s problems in the home can cross over to the employee’s coworkers. *Id.*

42. It is also worth noting, as the title of the Stevens paper suggests, that spillover can also occur in the opposite direction, moving from the family to the workplace. See Stevens et al., *supra* note 39; see, e.g., Diana M. Doumas et al., *The Relationship Between Daily Marital Interaction, Work, and Health-Promoting Behaviors in Dual-Earner Couples: An Extension of the Work-Family Spillover Model*, 24 J. FAM. ISS. 3 (2003).

43. See, e.g., Bolger et al., *supra* note 39, at 175-76; Westman, *supra* note 41, at 717-19.

44. That said, I do not claim to be conducting a spillover analysis. Such an analysis involves complex statistical analysis that is well beyond the scope and intent of this Essay.

2. *Disruption Harm Manifestations*

How do families suffer disruption harm from employment discrimination? Consider the case of Employee and her family: When she experiences discrimination in the workplace, Employee may export to Partner and Child the effects of that discrimination, putting all three members of the family at risk of suffering harms because of it. Employee may suffer disruption harm similar to the harms accompanying stress spillover as a result of the discrimination she faces in the workplace. Partner and Child may also suffer disruption harm similar to harms accompanying stress crossover as a result of Employee exporting her discriminatory workplace experiences. I explore each of these harms in turn.

a. *Employee*

Victims of discrimination experience damaging social and psychological effects, many of which are documented in the social science literature and provide a basis for the legal condemnation of discrimination.⁴⁵ On a daily basis the experience of discrimination is likely to affect Employee in profound and devastating ways. Because of the way discrimination implants itself in her psyche, Employee cannot leave her work identity at work. Rather, she exports it home, making the discrimination a part of her private life. Once home, Employee might be less interested in participating in familial activities such as doing household chores or spending time with Partner and Child, or she may be too anxious to relax. Haunted by thoughts of her work situation, Employee is incapable of contributing meaningfully to her family life, or as meaningfully as she would like. Employee is harmed at home by the discrimination she experiences at work because she cannot fully enjoy the time she spends with her family.⁴⁶

Family life is widely recognized as one of the greatest sources of personal happiness and satisfaction. But because of employee's inability to detach herself from the stress of discrimination in her public life, she is unable to enjoy the benefits of living and sharing her life with those closest to her in her private life. Thus the discrimination she experiences in the workplace is depriving her of the enjoyment of an essential part of her

45. See sources cited *supra* at note 36.

46. Seana Shiffrin pursues a similar argument in her recent paper on compelled association. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 Nw. U. L. REV. 839, 867-73 (2005). Shiffrin argues that people's social interactions and associations are essential to the development and formation of personal autonomy and a sense of self. Compelled association is problematic for purposes of the First Amendment because associations are integral to the formation of ideas, and forcing someone to associate with others restricts the person's ability to formulate ideas. See *id.* at 869.

happiness, causing her to suffer privately because of discriminatory acts taking place in the public sphere.

b. Partner

Partner is also harmed by Employee's workplace discrimination. When Employee comes home after enduring discrimination in the workplace, her impulse might be to rid herself of the burden she carries. Her family can be helpful in this effort. Sociologists Joe Feagin and Karyn McKinney have written extensively about the importance of family members and other close social networks for helping victims of discrimination deal with its psychological effects.⁴⁷ According to Feagin and McKinney, victims of discrimination often turn to their loved ones for support in dealing with the psychological effects of discrimination, as their family members know them well and are most able to provide them with the kind of support they need.⁴⁸

Organizational theorists also recognize that employees seek support from family to deal with problems at work, referring to the process as "compensation,"⁴⁹ in that employees who are unhappy at work compensate for it by seeking satisfaction at home, whether by merely spending time with family members or by affirmatively seeking comfort from them.⁵⁰ This support, or compensation, manifests itself in different ways. Once home, Employee might turn to Partner for consolation and sympathy, or Partner might offer to do Employee's share of the household chores so Employee can take some time to collect herself and put her work day behind her, perhaps by watching television, taking a walk, or engaging in another recreational activity by herself.⁵¹

Hopefully, Partner will be willing and able to help alleviate some of Employee's distress.⁵² But whether or not Partner is happy to care for Employee in this context or is successful in doing so on any given day, the actions involved in providing comfort and consolation result in attendant costs, constituting additional and perhaps major household responsibilities for Partner. For instance, one important cost relates to caring for the couple's child. If Employee is too emotionally distraught to help Child with her school work or make sure Child eats a healthy dinner and takes a bath before going to bed, then Partner alone must ensure Child learns her

47. See JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM* 105-14 (2003) [hereinafter FEAGIN & MCKINNEY, *THE MANY COSTS*]; Feagin et al, *supra* note 2, at 1331-32.

48. See FEAGIN & MCKINNEY, *THE MANY COSTS*, *supra* note 47, at 107-08.

49. See Edwards & Rothbard, *supra* note 13, at 180; see also S.J. Lambert, *Processes Linking Work and Family: A Critical Review and Research Agenda*, 43 *HUM. REL.* 239 (1990).

50. See Edwards & Rothbard, *supra* note 13, at 180-81.

51. See FEAGIN & MCKINNEY, *supra* note 47, at 113; Feagin et al., *supra* note 2, at 1332.

52. For a classic paper on the social process of coping in families, see Donald G. Unger & Douglas R. Powell, *Supporting Families Under Stress: The Role of Social Networks*, 29 *FAM. REL.* 566 (1980).

multiplication tables, eats a nutritious meal, and goes to sleep clean. Without Employee's contributions, all of the parenting duties fall to Partner. Over time Partner will effectively perform the work of two parents, which may cause irrevocable friction in the couple's relationship. Consequently, Partner suffers disruption harm when Employee brings the effects of her workplace discrimination home.

Another serious cost of Employee's workplace discrimination to Partner, related to the cost of his additional familial burdens resulting from his support of Employee, is Employee's inability to provide Partner with the support he needs.⁵³ For instance, Employee's stress may be so overwhelming that she cannot give Partner the level of emotional support he requires, the very same kind of support that Partner must consistently provide to Employee so that she can endure the discrimination at work. This too may cause friction in the couple's relationship.

In the end, Partner experiences multiple manifestations of disruption harm as a result of Employee's workplace discrimination. When Employee exports home the discrimination she faces in the workplace, Partner's ability to flourish in their private sphere is disrupted by the additional responsibilities he must take on in order to support Employee and by the lack of support he is able to receive from Employee.

c. Child

Child may suffer harm from employment discrimination in a manner similar to Partner. Yet, as a minor and a dependent, she is even more vulnerable to harm. When Employee arrives home from work feeling worn out and stressed, she is unable to give Child the kind of attention she wants or needs. Rather than helping Child with her school work or playing ball with her, Employee must first stifle the effects of the day's discrimination before she can turn her full attention to Child. Child, in turn, must also compensate for Employee's inability to spend time with her by looking to her other parent for greater support or, if Partner is otherwise occupied, by shouldering the burden alone. It is even possible that Child might play the parent role, such as taking charge of planning daily activities because Employee is too distracted as a result of her diminished emotional state.⁵⁴ Further, depending on Child's age and maturity level, Child may try to comfort Employee and ease her anxiety. Child should not be expected to assume such significant, adult burdens.

Sociologists Feagin and McKinney are particularly concerned about how the effects of discrimination inhibit the parents' abilities to parent. One example they repeatedly discuss is the child who is forgotten at

53. *Id.* at 113.

54. Feagin et al. offer an example of a child who took to reminding her mother when she needed to be picked up after school. See Feagin et al., *supra* note 2, at 1354-55.

school.⁵⁵ Imagine that because Employee was so overwhelmed by the stress of discrimination, she simply forgot that it was her turn to pick up Child. The consequence of a child waiting at school for a distracted parent who failed to arrive implies that workplace discrimination is keeping the parent from fulfilling his or her parental obligations, and is a powerful example of how “discrimination can lead to a variety of suffering for others.”⁵⁶ In short, Employee’s failure to pick up Child is a type of disruption harm caused by Employee exporting her workplace discrimination.

B. Exclusion Harm

In addition to disruption harm, employment discrimination also produces exclusion harm. Like disruption harm, exclusion harm is a product of the exporting process. Unlike disruption harm, where discrimination is exported home and subsequently disrupts family life, exclusion harm results when the exporting process causes what organizational theorists call “segmentation.”⁵⁷ Segmentation refers to the strategies and practices employees use to separate work and family life. Exclusion harms result when employees segment work and family to the point of completely excluding their families from their work.

I develop my account of exclusion harm in three sections. First, I develop the mechanics of exclusion by discussing the concept of segmentation. Second, I return to the hypothetical family and use Employee’s workplace discrimination experience as a lens through which to identify multiple manifestations of exclusion harm to her family. Third, to further support my account of exclusion harm, I consider its possibilities in the context of workplace assimilation, focusing on lesbian and gay employees who pass as straight in the workplace.

1. The Mechanics of Exclusion

Exclusion harm is the product of a process that organizational theorists call segmentation. The concept of segmentation can best be understood by imagining a continuum registering how employees conceive of and relate to work and family life.⁵⁸ On one end of the continuum is “integration”; on the other end is “segmentation.”⁵⁹ The integration side of the continuum represents those employees who equate work with home

55. See, e.g., FEAGIN & MCKINNEY, *supra* note 47, at 109-11.

56. *Id.* at 111. Of course, Feagin and McKinney are not blaming these parents for their failure to attend to their children. It is important to see that Employee’s failure to pick up Child is not a case of inherently bad parenting, but rather is a harmful result of workplace discrimination.

57. See Edwards & Rothbard, *supra* note 13, at 181.

58. See Christina Nippert-Eng, *Calendars and Keys: The Classification of “Home” and “Work”*, 11 SOC. FORUM 563, 567-70 (1996) [hereinafter Nippert-Eng, *Calendars and Keys*].

59. *Id.*

without placing any conceptual barriers between the two;⁶⁰ thus their work and home lives are integrated. The segmentation side of the continuum represents those employees who keep work and home strictly separate physically and conceptually;⁶¹ thus their work and home lives are segmented.

Sociologist Christina Nippert-Eng offers useful examples of people who experience integration and segmentation. One such person is John, an experimental scientist whose work life and private life are fully intermingled.⁶² John and his ex-wife, who is also his scientific collaborator, discuss both work and domestic matters freely, whether in the lab or at home.⁶³ John lacks any “private time” because most of his social life consists of discussing his work with his ex-wife or having get-togethers with visiting colleagues.⁶⁴ Having embraced the norms of the experimental scientist subculture, John experiences the time and space of work and home as fluid and interchangeable. In fact, it would not be outside the realm of possibility for John to “work in bed and bed people at work”,⁶⁵ he eagerly reported to Nippert-Eng that “I’ve had my share of sex in the lab over the years.”⁶⁶

John’s experience is contrasted with that of Ed, a machinist who works in the same lab, whose situation falls on the opposite side of the integration/segmentation continuum.⁶⁷ For Ed, work time and space are exclusively for work; he never socializes with his coworkers and only rarely discusses his private life with them, as he believes that the less his coworkers know about his private life, the less they can use it against him.⁶⁸ He applies a similar rule to his private life: when Ed leaves the lab, he does his best to forget about work.⁶⁹ He never talks to his wife about his work because he does not want to “drag it into the living room behind him.”⁷⁰ Thus, whereas John conceives of his work and home life as fully integrated, Ed conceives of them as fully *segmented*, with no conceptual or temporal overlap between the two.⁷¹

60. *Id.* at 567-68.

61. See Blake E. Ashforth et al., *All in a Day's Work: Boundaries and Micro Role Transitions*, 25 ACAD. MGMT. REV. 472, 473-75 (2000).

62. See *id.* 565-67.

63. See *id.*

64. See *id.*

65. *Id.* at 566.

66. NIPPERT-ENG, HOME AND WORK, *supra* note 9, at 1.

67. Nippert-Eng, *Calendars and Keys*, *supra* note 58, at 565.

68. See *id.* at 565-67.

69. See *id.*

70. *Id.* at 565.

71. See *id.* at 568.

Unlike John and Ed, however, most employees fall somewhere in the middle of the integration/segmentation continuum.⁷² Because navigating the relationship between work and family is a dynamic process, in order to do it successfully employees must use both integrating and segmenting strategies.⁷³ Within organizational theory, then, complete segmentation is an ideal type rather than a practical description.⁷⁴ However, complete segmentation is the key to understanding exclusion harm. When faced with workplace discrimination, employees export the effects of that discrimination by trying to completely segment their work and home lives. Not wanting to expose their families to their workplace discrimination and, in certain cases, seeking to shield their families from the discrimination's harmful effects, employees may exclude their family members from their work lives as a segmentation strategy. But by excluding their families, employees thereby deny their families the benefits of being integrated into their work lives.

2. *Exclusion Harm Manifestations*

Return to the case of Employee and her family. The daily experience of workplace discrimination may change how Employee navigates the spatial and temporal boundaries of work and family, and consequently cause her to exclude her family from her work. By exclusion, I mean not only exclusion from the actual physical workplace (the site of the discrimination), but also from any off-site, work-related social functions where Employee's coworkers would be present, such as the annual company picnic or the weekly "happy hour." This exclusion, like disruption harm, negatively affects all three family members.

a. *Employee*

Employee, though not harmed by exclusion in the same way as Partner and Child, still experiences ill effects from feeling forced to segment her work and her family upon experiencing workplace discrimination. Even if she need not conceal her work situation from her family because they are sympathetic and provide her with ample support, she may still be hesitant to integrate them into her workplace for at least three reasons. First, she risks exposing them to the discrimination. This is particularly true for employees whose families are stigmatized, such as same-sex or interracial couples. Second, Employee may not want her family to see her in such a compromising, inherently vulnerable situation. Third, Employee may simply want to shoulder the burden herself, whether

72. See also NIPPERT-ENG, *HOME AND WORK*, *supra* note 9, at 1-3 (using John and Ed to explain the mechanics of boundary work).

73. See *id.* at 6.

74. Nippert-Eng, *Calendars and Keys*, *supra* note 58, at 567-68.

because she has internalized the myth of the autonomous worker and has come to see the discrimination as just another cost of participating in the world of work,⁷⁵ or because she does not want to burden her family with any additional hardships.

b. Partner

Partner suffers exclusion harm resulting from Employee's workplace discrimination and subsequent segmentation of her work and family. There are at least two kinds of costs to Partner from being excluded from Employee's workplace: emotional costs and social costs.

i. Emotional Costs

Work plays an important role in shaping a person's identity; it is a central part of who we are and how we come to understand our place in society.⁷⁶ An employee's work life also affects how the members of her family organize their own lives. Because families have so much invested in work, there may be emotional costs associated with being excluded from a loved one's work life, including damage to the marital relationship.

In her celebrated book, *Men and Women of the Corporation*, organizational theorist Rosabeth Moss Kanter discusses the interrelationship between private and public spheres in the lives of corporate wives.⁷⁷ Kanter shows how work not only informs employees' behavior and identity,⁷⁸ but also how it shapes the way their wives live, "defining how [wives] spent their time and influencing what was possible in their relationships with their husbands."⁷⁹ When wives were excluded from their husbands' work, Kanter observed a "vicious cycle" of deterioration in their marital relationships.⁸⁰ As the women were shut out completely from the daily functioning of the company, they tended to respond to their exclusion by shutting out their husbands from the family.⁸¹

Kanter's portrayal of the costs of exclusion suggests that it not only affects partners' private lives, but that it also makes it difficult for couples to maintain healthy relationships. In our example, the barrage of workplace discrimination forcing Employee to erect a wall between her partner and

75. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 18-25, 243 (2004).

76. See Schultz, *supra* note 175, at 1890-92; see also Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523, 530-33 (1997).

77. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 104-26 (2d ed. 1993).

78. See *id.* at 3 (noting "the job makes the person"); Schultz, *supra* note 15, at 1890 (discussing Kanter's contributions to the relationship between work and identity).

79. KANTER, *supra* note 77, at 105.

80. *Id.* at 114.

81. *Id.*

her workplace may cause the couple to suffer additional damage to their relationship because Partner may respond to his exclusion from Employee's workplace by in turn excluding Employee from the home.

ii. Social Costs

In addition to emotional costs, there are also social costs that accompany exclusion because employees are increasingly spending more time at work.⁸² As Estlund's "working together" theory explains, the workplace is gradually replacing other spaces as the principal site for employees' social lives.⁸³ Through social interactions at work, employees begin to transform their professional relationships into personal ones.

For example, in her classic book, *The Time Bind*, sociologist Arlie Hochschild uncovers a surprising trend among the employees at "Amerco," a Fortune 500 company regarded as a leader in promoting work/family balance.⁸⁴ According to Hochschild, work and home have become "reversed worlds" for these employees, in that they organize their social lives around their work relationships.⁸⁵ Furthermore, these employees actually reported being happier and more content at work than at home. Instead of wanting to spend time at home with their families, they preferred spending time with coworkers, whether inside the physical workspace or at a bar or some other social space.⁸⁶ For these employees, the workplace has become the primary locus of their private lives. Hochschild sums up the trend well in describing the experiences of one employee: "The social life that once might have surrounded her at her home she now found at work. The sense of being part of a lively, larger, ongoing community—that, too, was at work."⁸⁷

If we are to take seriously Estlund's claim that, given the widespread decline in "social capital,"⁸⁸ the workplace has emerged as "the single most important site of cooperative interaction and sociability among adult

82. See JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY AND GENDER INEQUALITY* (2004). For an expanded discussion of the increase in work hours and the decline in leisure time, see JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1992). See also ILENE PHILIPSON, *MARRIED TO THE JOB: WHY WE LIVE TO WORK AND WHAT WE CAN DO ABOUT IT* (2002).

83. This is the main point of Estlund's "working together" theory. See *supra* discussion accompanying notes 29-34 (discussing Estlund's theory on the value of social interactions at work).

84. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997).

85. See *id.* at 35.

86. Granted, many of the employees took to socializing at work rather than at home because they were unhappy in their private lives, whether because they were overwhelmed by their domestic obligations or because family life had become tedious. See *id.* at 35-52.

87. *Id.* at 40.

88. See ROBERT D. PUTNAM, *BOWLING ALONE, THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

citizens outside the family,”⁸⁹ what then are the consequences of exclusion for partners who are estranged from employees’ work lives? Partners often piggyback on employees’ social networks in order to build their own social circles. This is especially true for families in which one partner works and the other stays home. In such situations, the employee’s work life provides an important avenue for the stay-at-home partner to develop social ties. However, if the partner is excluded from the employee’s work life, he or she loses opportunities to become acquainted with the employee’s colleagues and their partners, as well as any other members of the coworkers’ extended social circles. Exclusion therefore may potentially diminish the ability of partners to forge the relationships necessary to create a flourishing social existence.

Recall that in our example Partner does not work outside the home; he spends most weekdays at or near the couple’s home. Because Partner’s social life is circumscribed by his family care obligations, it would be beneficial for Partner to engage socially with Employee’s colleagues and their significant others. Such opportunities might be limited, however, if Employee’s exclusion of Partner extends to all work-related social events. Of course, Employee may be able to navigate the social culture of her workplace so that she will find a “safe” colleague whom she and Partner can trust. But while Employee might be able to mitigate Partner’s exclusion by exposing him to a handful of her coworkers, most work-related social events are less controllable than a smaller, private social gathering. With other social obligations—such as entertaining clients and all-company gatherings—Employee cannot choose to associate only with “safe” coworkers. Such obligations are increasingly becoming part of the job, and Partner may lose out on the social benefits of taking part in this aspect of Employee’s work.

c. Child

Children are more vulnerable to exclusion harm stemming from workplace discrimination than adults because they cannot fully comprehend the politics of discrimination and thus have a harder time understanding the dilemmas their parents experience. Parents who want to protect their children from the discriminatory nature of the workplace—like Employee and Partner—must carefully negotiate which messages children are exposed to and try to control how children will interpret the residual effects of exclusion. Ultimately, Child may experience exclusion harm in the form of mixed messages about the value of work and premature exposure to discrimination.

89. ESTLUND, *supra* note 20, at 7.

In most cases, parents are a child's most important teachers and primary role models;⁹⁰ a child is critically shaped by the lessons her parents teach her. Situating the family in liberal political theory, philosopher Susan Moller Okin points to these parent-child interactions and describes the family as a "school of justice."⁹¹ Children first begin to develop their moral and political capacities in the home, among their families. This is where they learn about forming healthy relationships with others, and where they develop a sense of self and how they fit into civil society.⁹²

Because work plays a fundamental role in society, an important part of parenting involves teaching children about work, which includes instilling in them a strong work ethic and an appreciation of the value of work.⁹³ Both the identity-constituting and the educational elements of work are demonstrated in the Ms. Foundation for Women's description of its *Take Our Daughters and Sons to Work* program.⁹⁴ The program is designed to "expose [children] to what adults in their lives do during the work day, show them the value of their education, and give them an opportunity to share how they envision their future."⁹⁵ The program emphasizes the idea that by exposing children to work, parents encourage their children to think about what it takes to be a responsible citizen.

Despite the formative lessons a child learns from exposure to her parent's workplace, Employee may keep Child from visiting her at work in an attempt to protect her. On a practical level, Employee may not want Child to participate in such a program, as the basic principle of the program—exposing children to a professional work setting—conflicts with Employee's desire to shield Child from her experience with discrimination. How then can Employee teach Child the value of work when at the same time she is going to great lengths to separate Child from the workplace? How will Employee be able to use her own work experiences to teach Child if discrimination keeps Employee from integrating Child into her work life?

A related teaching problem concerns the lessons about discrimination children inevitably learn because of exclusion. Child may eventually

90. Indeed, the strength of the parent-child bond is what gives force to the constitutional protections for the parental relationship. *See, e.g.,* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

91. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 17 (1989). She describes families further as "a crucial place for early moral development and for the formation of our basic attitudes to others." *Id.* at 18.

92. *See* LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 50-51 (2006) (examining families as "seedbeds of civic virtue").

93. *See* O'Connor-Felman, *supra* note 1, at 1297-1300 (highlighting pressures of the new economy).

94. *See* Ms. Foundation for Women, *About Take Our Daughters and Sons to Work*, <http://www.daughtersandsonstowork.org/wmspage.cfm?parml=293>.

95. *See id.*

wonder why she has never seen her mother's workplace and why she is unable to accompany her mother to work events. When Child begins to ask these questions, the reaction of Employee and Partner—whether it involves frank discussion of Employee's unhappiness in the workplace or an attempt to sidestep the issue—will convey an important message to Child. If the parents directly discuss issues of discrimination, Child may suffer on her parents' behalf or feel uncertain about how it affects her own life. Alternatively, if the parents avoid addressing Child's inquiries, Child may suffer from a sense of dissonance, produced when the messages she receives from her parents do not comport with her own observations of reality. While there is a chance that Employee and Partner can turn their experiences of discrimination into a positive teaching moment for Child, employment discrimination has inflicted serious manifestations of exclusion harm on Employee's family.

3. *Assimilation and Exclusion*

There has been a great deal of scholarship recently on the discriminatory nature of pressures to assimilate in the workplace. Although this scholarship has documented many of the costs associated with such demands, none of it has addressed the ways in which pressure to assimilate at work harms the family. In this section, I draw on the experiences of lesbian and gay⁹⁶ employees who pass as straight in the workplace to show how assimilation produces exclusion harms.⁹⁷

Unlike other marginalized groups, such as racial minorities, lesbians and gay men constitute an invisible minority;⁹⁸ that is, their stigmatizing trait—homosexuality—is not perceived by the naked eye.⁹⁹ In general, all people are presumptively heterosexual until proven otherwise, the product of what poet and theorist Adrienne Rich termed “compulsory heterosexuality.”¹⁰⁰ In order for lesbians and gay men to assert a gay identity, they have to “come out” as gay. For lesbian and gay employees, coming out at work can be risky. Though the social science literature

96. In terms of locution, it is worth at least noting that the terms “lesbian” and “gay” are problematic and contested. See Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 367 n.10 (2001) (“Instead of the awkward (but perhaps more accurate) locution ‘what we think of as the lesbian and gay communities,’ . . . I shall say, more simply, ‘the lesbian and gay communities.’”).

97. Passing and other assimilation strategies may also produce disruption harms. Indeed, exclusion and disruption harms can occur simultaneously and sometimes share a causal relationship.

98. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728-31 (1985).

99. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 946 (1989) (describing homosexuality as a “marked” identity).

100. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980) (describing a pervasive cultural system that erases lesbian, gay, and other non-normative sexual experiences).

suggests that lesbian and gay employees substantially benefit from coming out in the workplace,¹⁰¹ being out at work exposes lesbian and gay employees to a wide range of potential discrimination. Despite all the gains the gay civil rights movement has made in recent years, sexual orientation discrimination is still a widespread problem, spanning the entire spectrum of workplaces.¹⁰² Federal law still does not protect employees against sexual orientation discrimination in the workplace.¹⁰³ And even where lesbian and gay employees' heterosexual colleagues are not outwardly hostile toward them, they may still hold negative stereotypes about homosexuality.¹⁰⁴ Thus, rather than risk being discriminated against or take the time to do the considerable work of challenging such stereotypes, many lesbian and gay employees opt instead to assimilate into their organizations' predominantly heterosexual work cultures.¹⁰⁵ One way to do this is to pass as straight.¹⁰⁶

101. See Nancy E. Day & Patricia Schoenrade, *Staying in the Closet Versus Coming Out: Relationships Between Communication About Sexual Orientation and Work Attitudes*, 50 PERSONNEL PSYCH. 147 (1997) (finding that being "out" may reduce employees' anxiety at work); Allen L. Ellis & Ellen D. B. Riggle, *The Relation of Job Satisfaction and Degree of Openness About One's Sexual Orientation for Lesbians and Gay Men*, 30 J. HOMOSEXUALITY 75 (1995) (finding that employees who are "out" report greater levels of satisfaction with their coworkers); Kristen H. Griffith & Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians*, 87 J. APPLIED PSYCHOL. 1191 (2002) (finding that being "out" at work tends to increase employees' job satisfaction).

102. See HUMAN RIGHTS CAMPAIGN, DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACE (2001), <http://www.hrc.org>.

103. See Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. Ill. L. Rev. 465, 471 (2004).

104. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267-70 (2000).

105. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002).

106. In order to pass, lesbians and gay men often must do more than simply conceal their attractions and desires. In most cases, passing requires affirmative actions; it is, in the words of sociologist Erving Goffman, a performance. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 28 (1959). In his classic study on stigma, Goffman describes the active, performative processes by which stigmatized persons manage a "spoiled" identity, which includes passing as who or what they are not. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 73-91 (1963). For lesbian and gay employees who are passing as straight, the process of managing their homosexuality depends on their ability to perform a straight identity. See Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1145, 1152-56 (1997). For instance, a gay man might put a picture of himself and one of his female friends on his desk so as to confirm his heterosexuality. See, e.g., *id.* at 1156. To support his performance, he may also wear a wedding ring and speak of his "wife" rather than his "partner." See, e.g., JAMES D. WOODS WITH JAY H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 76-85 (1993). Seeing the picture and the ring and hearing about his wife will confirm the employee's colleagues' assumptions that he is straight.

The literature on sexuality in the workplace is filled with stories of straight performances by gay employees.¹⁰⁷ In communication scholar James Woods' classic study of gay corporate America, *The Corporate Closet*,¹⁰⁸ he recounts the story of Louis, a tax lawyer poised to make partner at a prestigious Boston law firm.¹⁰⁹ As a gay man, Louis feared that his sexuality would alienate his coworkers or, worse yet, that he would be discriminated against because of his sexual orientation.¹¹⁰ Like countless lesbian and gay employees, Louis decided that the safest path to partnership would be to pass as straight.¹¹¹ In the hope of winning over his supervising partners, as partnership was just within his grasp, Louis hosted a holiday dinner party for some key members of the firm.¹¹² Though his long-time partner was instrumental in planning the party and prepared all the food for it, he could not be present during the dinner because Louis's soon-to-be law partners were expecting the party's hostess to be a devoted wife, not a gay man.¹¹³ As Louis apologized for his wife's conspicuous absence, explaining that she was unexpectedly called away at the last minute, Louis's partner hid in the garage for the duration of the party.¹¹⁴

Woods tells the story from Louis's perspective, offering it as empirical proof of the kinds of social burdens closeted gay employees like Louis face in the workplace.¹¹⁵ Yet the story of Louis's dinner party is as much a story about the garage as it is about the closet.¹¹⁶ The image of Louis's partner concealing himself from Louis's work life is a powerful example of exclusion harm stemming from exported workplace discrimination. There is a discriminatory workplace norm: Louis knew that he would be better positioned for partner as a straight man than as a gay man.¹¹⁷ There is an employee who exports work to his family: Louis's work life quite literally came into his private life, pushing his partner out to

107. Nor is the literature limited to gay passing. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-14 (1993) (describing how the author's grandmother, a black woman, passed as white).

108. See WOODS, *supra* note 106.

109. See *id.* at 38-39.

110. See *id.* at 38.

111. See *id.* at 39.

112. See *id.*

113. See *id.* at 39.

114. See WOODS, *supra* note 106 at 39.

115. Woods recounts Louis's story in a section of his study looking at how gay men must conceal their private lives at work in order to maintain a norm of asexuality in the workplace. See *id.* at 31-52 (exploring the norm of the gay "asexual professional").

116. Indeed, in this light, the garage is a metaphorical substitute for the closet. See *id.* at 25-28 (discussing various incarnations of the closet metaphor). Perhaps the most widely recognized discussion of the closet as a metaphor comes from queer theorist Eve Sedgwick. See EVE KOSOFKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990).

117. See Carbado & Gulati, *supra* note 104, at 1262, 1307-08; see generally Yoshino, *supra* note 105, at 772. That such identity discrimination in the workplace does not yet lead to an actionable discrimination claim is certain. However, it is still a form of workplace discrimination.

the safety of the garage. There is a high degree of segmentation: Louis took great care to separate his private, emotional life as a gay man from his public identity as a straight man, which included excluding his gay partner from his work life. And there is a family harm resulting from the exclusion: Louis's partner suffered from the knowledge that he represented a liability when it came to Louis achieving professional success.

III

FAMILY HARMS IN EMPLOYMENT DISCRIMINATION LAW

I have described how employment discrimination affects family life and how individual family members suffer particular harms from such discrimination. The next question is whether employment discrimination doctrine recognizes any of these family harms as compensable. Perhaps surprisingly, Title VII doctrine does recognize familial harms resulting from employment discrimination. A close look at Title VII case law reveals recognition of a type of harm strikingly similar to the family harms identified in this Essay. Title VII plaintiffs may seek to recover for emotional harms suffered when workplace discrimination harmed their familial relationships.

Before turning to the doctrine, it is important to note that the case law in this area is sparse. In the handful of published cases involving these compensable harms, judges spend little time describing and analyzing how families suffer from employment discrimination. This is most likely because in none of these decisions is the compensability of the harms to an employee's family the primary legal issue facing courts. As a result, courts' analyses in this area tend to be brief and weakly theorized. In order to begin remedying this deficiency, I suggest a framework for categorizing the existing employment discrimination case law on family-related, emotional harms.

A. Compensatory Damages Under Title VII

In this section I briefly discuss the development and parameters of Title VII compensatory damages available for family harms resulting from employment discrimination. The remedial provisions of Title VII were originally limited to providing plaintiffs with equitable relief, such as reinstatement, hiring, or back pay.¹¹⁸ Monetary damages were not available to plaintiffs until Congress amended Title VII as part of the Civil Rights Act of 1991 (the 1991 Amendment),¹¹⁹ which expanded the remedial

118. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-51 (2001) (discussing Title VII's damages provisions).

119. See Civil Rights Act of 1981, Pub. L. No. 102-166, tit. 1, § 102, 105 Stat. 1071, 107273 (codified at 42 U.S.C. § 1981(a) (2006)).

provisions of Title VII to cover compensatory and punitive damages.¹²⁰ Plaintiffs can now recover compensatory and punitive damages in cases of “intentional discrimination,” which includes disparate treatment, harassment, and retaliation but exclude disparate impact.¹²¹ The 1991 Amendment caps the amount of compensatory and punitive damages a plaintiff may recover depending on the size of the employer.¹²² Moreover, recovery under Title VII does not foreclose plaintiffs from further recovery under state antidiscrimination statutes, which often have higher damage caps or no cap at all.¹²³

All told, a plaintiff in an intentional discrimination action may now recover equitable remedies and compensatory and punitive damages¹²⁴ under both Title VII and state antidiscrimination laws. The 1991 Amendment expressly lists the types of harms for which courts can award compensatory damages.¹²⁵ According to the statute, compensable harms include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”¹²⁶ The harms I have identified in this Essay tend to fall within the recoverable categories of “emotional pain,” “loss of enjoyment of life,” and “other nonpecuniary losses.”¹²⁷

120. See Cheryl L. Anderson, *Damages for Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, But Are the Remedies the Same?*, 9 BYU J. PUB. L. 235, 244 (1995).

121. See 42 U.S.C. § 1981(a)(1) (2006) (“In an action brought by a complaining party under [Title VII] against respondent who engaged in unlawful intentional discrimination (*not an employment action practice that is unlawful because of its disparate impact*) . . . the complaining party may recover compensatory and punitive damages.”) (emphasis added).

122. The cap rises as the number of employees in the defendant’s organization increases. See 42 U.S.C. § 1981 (b)(3)(A)-(D) (2006) (setting the cap limitation according to employer size). Thus a defendant who employs between 14 and 100 employees can only be held liable for up to \$50,000 in damages, whereas a defendant who employs 500 or more employees can be held liable for \$300,000 or more in damages. See 42 U.S.C. § 1981 (b)(3)(A)-(D) (2006).

123. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (holding that Title VII does not preclude a plaintiff from recovering under other remedial statutes); *Alexander v. Gardner-Denver Co.*, 415 U.S. 94 (1974) (holding that the federal antidiscrimination structure does not supplant existing state frameworks, enabling plaintiffs to recover under both statutes).

124. See 42 U.S.C. § 1981(b)(1) (2006) (“A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”). Although a plaintiff can recover both compensatory and punitive damages, this Essay only looks at compensatory damages.

125. The 1991 Amendment is not retroactive. In *Landgraf v. USI Film Products*, the Supreme Court ruled that the damage provisions are not applicable to claims that precede the 1991 Amendment. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280-86 (1994).

126. See 42 U.S.C. § 1981(b)(3) (2006).

127. *Id.*

B. Doctrinal Family Harms

Courts have found familial harms compensable under Title VII in three contexts. First, courts award compensatory damages for harm to an employee's family life resulting from workplace discrimination.¹²⁸ Second, courts award compensatory damages for harm to an employee's relationship with her partner resulting from workplace discrimination.¹²⁹ Third, courts award compensatory damages for harm to an employee's relationship with her children resulting from workplace discrimination.¹³⁰

It is also important to note that categorizing this case law is difficult, primarily because courts' passing references to familial harms offer limited guidance on how the law appreciates employees' relationships with their families. We must be mindful that courts characterize harms to plaintiffs' familial relationships as harms *to the plaintiff*. Often courts cannot award compensatory damages to plaintiffs' family members because of standing requirements and statutory limitations on who can be a party to the employment relationship in a discrimination law suit. As a result, recognition of familial harms under the Title VII compensatory scheme does not allow courts to award damages to family members for the harms they suffer because of the workplace discrimination experienced by their partners or parents.

But even though courts are awarding damages only to employees and not to their families, they are still taking note of the ways in which discrimination harms families. For a court to determine, for instance, that an employee presents compensable emotional harms because her marriage suffered as a result of her workplace discrimination, the court must implicitly recognize that the employee's spouse has also suffered harm from the discrimination, as he is a partner in their suffering marriage. This implicit recognition of family harms is enough—for purposes of this essay—to establish that employment discrimination already recognizes family harms.

128. See, e.g., *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493 (9th Cir. 2000); *Velez v. Roche*, 335 F. Supp. 2d 1022, 1038 (N.D. Cal. 2004); *Moussa v. Commonwealth of Penn. Dep't of Pub. Welfare*, 289 F. Supp. 2d 639 (W.D. Penn. 2003).

129. See, e.g., *Kucia v. Se. Ark. Cmty. Action Corp.*, 284 F.3d 944 (8th Cir. 2002); *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002), *remanded to* 330 F.3d 1051 (8th Cir. 2003); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046-47 (5th Cir. 1998); *Kuper v. Empire Blue Cross & Blue Shield*, 2003 WL 359462 (S.D.N.Y. 2003); *Flockhart v. Iowa Beef Processors, Inc.*, 192 F. Supp. 2d 947 (N.D. 2001); *Salinas v. Rubin*, 126 F. Supp. 2d 1026, 1030 (S.D. Tex. 2001), *vacated in part*, 286 F.3d 827 (5th Cir. 2002); *Walla v. Vivek Purmasir & Assocs., Inc.*, 160 F. Supp. 2d 380 (E.D.N.Y. 2000).

130. See, e.g., *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004); *Rowe v. Hussmann Corp.*, 381 F.3d 775, 783 (8th Cir. 2004); *Whitten v. Cross Garage Corp.*, 2003 WL 21744088 (S.D.N.Y. 2003); *Salinas v. Rubin*, 126 F. Supp. 2d 1026, 1030 (S.D. Tex. 2001), *vacated in part*, 286 F.3d 827 (5th Cir. 2002).

1. *Employee Family Harms*

The first type of recoverable family harm occurs when an employee is disrupted from participating meaningfully in family life because she exports to the home the stress of workplace discrimination. In *Passantino v. Johnson & Johnson*,¹³¹ the plaintiff brought suit against her employer, alleging that the employer retaliated against her in violation of Title VII and state antidiscrimination laws after she complained to supervisors that her advancement at the company was being stalled because of her sex.¹³² In addition to giving the plaintiff unusually low performance ratings and transferring accounts out of her sales portfolio after she complained,¹³³ the employer imposed strict conditions on the plaintiff's prospects for promotion, requiring her to accept a series of demotions before she could advance at the company.¹³⁴

In *Passantino*, the plaintiff testified and her husband and sister corroborated that she suffered a series of emotional difficulties as a result of this workplace mistreatment.¹³⁵ She cried often, felt worried and upset, and suffered multiple physical ailments that grew out of her stress, including stomach problems, rashes, and headaches.¹³⁶ Additionally, the court noted that the plaintiff's increased stress levels negatively affected her ability to participate in her home life.¹³⁷ After her performance ratings declined, the plaintiff felt forced to spend more time at work and less time with her family in order to avoid losing her job.¹³⁸ The court determined that these harms were recoverable under both Title VII and the state antidiscrimination statute.¹³⁹

Plaintiffs in other cases have similarly recovered damages to compensate for their inability to participate in family life.¹⁴⁰ Generally,

131. 212 F.3d 493 (2000).

132. See *id.* at 503-04 (detailing *Passantino's* claims).

133. See *id.* at 501-04, 506.

134. See *id.* at 503 (noting that she rejected a position that was "two steps backwards").

135. *Id.* at 513-14. The husband's and sister's corroboration was important for the court in order to distinguish *Passantino's* case from a similar case arising in another circuit. See *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996). There, the Fourth Circuit ruled against a plaintiff facing similar circumstances. The *Passantino* court distinguished *Hetzel*, even though it was not binding precedent, on the ground that the plaintiff there "offered no corroborating evidence for her emotional damages." *Passantino*, 212 F.3d at 513-14. But, in certain situations a plaintiff's testimony alone may suffice to prove emotional distress. See, e.g., *Bryant v. Aiken Reg. Med. Ctrs., Inc.*, 333 F.3d 536, 546-47 (4th Cir. 2003), *cert. denied* 540 U.S. 1106 (2004) (mem). Nevertheless, the general trend is that plaintiffs who allege emotional distress must provide witnesses to substantiate the claims.

136. See *Passantino*, 212 F.3d at 503.

137. As with most opinions that address family harms the court's discussion in this case is brief, spanning only a few sentences.

138. See *Passantino*, 212 F.3d at 503.

139. See *id.*

140. See, e.g., *Velez v. Roche*, 335 F. Supp. 2d 1022, 1038 (N.D. Cal. 2004); *Moussa v. Commonwealth of Penn. Dep't of Pub. Welfare*, 289 F. Supp. 2d 639 (W.D. Penn. 2003); *Salinas v. Rubin*, 126 F. Supp. 2d 1026, 1030 (S.D. Tex. 2001), *vacated in part*, 286 F.3d 827 (5th Cir. 2002).

courts recognize two circumstances in which workplace discrimination obstructs an employee's ability to participate meaningfully at home. The first circumstance is the one seen in *Passantino*, where the stress of managing workplace discrimination prevented plaintiff from leaving work, severely limiting her time with her family.¹⁴¹ The second circumstance is where the stress and emotional byproducts of workplace discrimination preclude an employee from participating in specific activities with her family members even though she has come home, such as playing with her child.¹⁴² This situation arises when the effects of workplace discrimination impair an employee's ability to care for and be emotionally available to her family members,¹⁴³ most likely because the employee feels withdrawn and distant from her partner and child.¹⁴⁴

These two circumstances concern the effect that discrimination has on employees themselves in their capacities as members of a family. Just as a child benefits from having her parent care for her or participate in activities with her, so too does the parent obtain a benefit from spending time with her child and fulfilling the role and obligations of parenthood. The same is true for an employee's romantic relationship with her partner. Both the employee and her partner gain significantly from the process of caring for one another and sharing a life together. Thus, by awarding damages in these situations, courts demonstrate that they recognize employees as active members of the family who suffer harm in the home because of discrimination they face in the workplace.

2. Partner Relationships

The second type of recoverable family harm occurs when an employee's relationship with her partner is disrupted because the employee

141. See *Passantino*, 212 F.3d at 503; see also Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683 (2002) (arguing that lost time should be compensable); see also generally CIULLA, *supra* note 331 (same). In his discussion of the compensability of personal time, Gross notes that the family is one of the reasons why personal time is so valuable. According to Gross, "studies have shown that the time spent with one's family is the most important factor in maintaining family cohesion." Gross, *supra*, at 691 (citing Ramon B. Zabriskie & Bryan P. McCormick, *The Influences of Family Leisure Patterns on Perceptions of Family Functioning*, 50 FAM. RELATIONS 281 (2001)). He also notes the trend in employment toward greater flexibility and family-friendly policies, such as "flex time" and other forms of part-time work schedules designed to facilitate greater ease in balancing work and family. See *id.*

142. See, e.g., *Velez v. Roche*, 335 F. Supp. 2d 1022, 1038 (N.D. Cal. 2004) (noting that after suffering workplace discrimination, the plaintiff "became so depressed that she could not sleep, that she had no interest in doing anything, that she stopped hobbies and activities such as working out, gardening, painting, *doing things with her children*, and that she could barely get things done") (emphasis added).

143. See, e.g., *Moussa*, 289 F. Supp. 2d at 666. Although the court in *Moussa* unequivocally confirmed the harms to the plaintiff's family relationships, it also granted the defendant's motion for directed verdict and conditionally granted the defendant's motion for a new trial.

144. See, e.g., *Rubin*, 126 F. Supp. 2d at 130; see also *Moussa*, 289 F. Supp. 2d at 666.

is exporting the stress of workplace discrimination home.¹⁴⁵ The Equal Employment Opportunity Commission (EEOC) saw fit to mention marital stress in its guidelines for interpreting the scope of the 1991 Amendment's damages provisions.¹⁴⁶ The EEOC guidelines make clear that emotional harm is one form of nonpecuniary loss that is recoverable under the compensatory damages provision of Title VII¹⁴⁷ and list a number of examples of emotional harm. "Marital strain" is one potential manifestation of emotional distress.¹⁴⁸

This recognition is significant, as courts generally defer to the rules laid out in the EEOC guidelines, even though they are not bound to follow them.¹⁴⁹ Consider the case *Madison v. IBP, Inc.*,¹⁵⁰ where the plaintiff, a white woman married to a black man, worked on the line in a meat processing plant.¹⁵¹ The plaintiff's coworkers subjected her to persistent verbal and physical harassment concerning her husband and children, as well as interracial relationships more generally.¹⁵² Because she dealt with the discrimination on a daily basis, the plaintiff suffered severe emotional distress, which manifested both physically and in her relationships with her family. She testified that the stress resulting from being harassed strained her relationship with her husband, leading them to separate several times¹⁵³ and nearly causing the couple to divorce.¹⁵⁴ The court ultimately approved the jury's compensatory damage award,¹⁵⁵ as other courts have when workplace discrimination led a couple to separate.¹⁵⁶

145. See, e.g., cases cited *supra* note 129.

146. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991, at 7 (1992).

147. See *id.*

148. *Id.* ("Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, *marital strain*, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown.") (emphasis added).

149. See, e.g., *Gen. Elec. v. Gilbert*, 429 U.S. 125, 141 (1976) (discussing how courts can use EEOC guidelines in resolving legal issues that arise under Title VII). For a critical look at the relationship between the Supreme Court and the EEOC, see Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937 (2006).

150. 257 F.3d 780 (8th Cir. 2001).

151. See *id.* at 785.

152. See *id.* at 785-91. Plaintiff's coworkers subjected her to verbal harassment, grabbed her and carried her around the factory floor, and rubbed themselves up against her. The harassment was infused with both racial and sexist language, making particular note of interracial relationships and biracial children. For instance, one coworker asked the plaintiff what she was "doing with a fucking nigger having fucking nigger babies," and told her that she had ruined herself by having biracial children. *Id.* at 785. The general supervisor referred to women as "whores" and "dykes." *Id.*

153. See *id.* ("Her relationship with her husband suffered, and the couple separated several times."); *id.* at 802 ("The couple separated several times during the course of her employment at IBP.").

154. *Id.* at 802 ("Her working conditions strained her relationship with her husband and nearly caused the breakup of their marriage.").

155. *Id.* at 802-03 (holding that the jury's damage award was not excessive in light of the evidence of emotional harm the plaintiff produced).

156. See, e.g., *Kucia v. Se. Ark. Cmty. Action Corp.*, 284 F.3d 944, 947 (8th Cir. 2002); *Flockhart v. Iowa Beef Processors, Inc.*, 192 F. Supp. 2d 947, 961-62, 975 (N.D. 2001).

A marriage need not be on the brink of dissolving, however, before a court will acknowledge harm to a couple's relationship because of workplace discrimination. A plaintiff may recover for what some courts have called "garden variety" marital stress,¹⁵⁷ which is a less extreme type of marital stress that is also envisioned by the EEOC guidelines.¹⁵⁸ Additionally, even though the EEOC guidelines refer explicitly to *marital* stress, a plaintiff may also recover damages for the strain that occurs in a non-marital relationship.¹⁵⁹ In fact, one court awarded a plaintiff damages to compensate for the harms that her same-sex relationship suffered after she was the victim of unlawful sex discrimination in the workplace.¹⁶⁰

Courts' analyses of harms to a marital relationship caused by workplace discrimination comport with both the exporting process and my description of disruption harm. The relationship stress recognized in these cases is a textbook example of how an employee's harms are exported from the workplace to the home and then transferred from the employee to her partner. That courts award plaintiffs compensatory damages for such relationship stress suggests not only that courts understand how difficult it is to balance work and family, but that courts acknowledge the possibility that an employee's interactions at work can negatively affect her family life. In awarding a plaintiff compensatory damages, one court alluded to this dynamic almost casually, noting that the plaintiff's "family life was affected by what went on" at work and that "her working conditions strained her relationship with her husband."¹⁶¹ Such casual reference belies the significance of the court's compensatory damage award. By allowing employees to recover for the harm to their partnerships resulting from workplace discrimination, courts embrace a progressive attitude toward work/family relations, acknowledging that the spheres are not separate, and that employment discrimination can harm others beyond the employee.

157. See, e.g., *Kuper v. Empire Blue Cross & Blue Shield*, 2003 WL 359462 (S.D.N.Y. 2003) (awarding a plaintiff damages after he was fired and the stress of being fired strained his relationship with his wife). In the context of emotional damages, the term "garden variety" seems to be a term of art, referring to a claim of emotional distress "that did not require medical treatment." *Id.* at *12 (quoting *Epstein v. Kalvin-Miller Intern., Inc.*, 139 F.Supp. 2d 469, 480 (S.D.N.Y. 2001)); see also *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 673 (E.D.N.Y. 1996) (discussing the standard for a claim of garden variety emotional distress).

158. See, e.g., *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046-47 (5th Cir. 1998) (discussing EEOC guidelines and noting that plaintiffs claims of "marital hardship" and "marital strain" are consistent with the EEOC guidelines); see also, e.g., *Moore v. Frceman*, 355 F.3d 558, 561 (2004) (noting that the stress of being fired strained the plaintiff's relationship with his wife); *Shepard v. Wapello County*, 303 F. Supp. 2d 1004, 1021 (S.D. Iowa 2003) (noting that the plaintiff, raising a section 1981 claim, testified that the loss of his job affected his relationship with his wife, leading him to question "whether he is a good husband and father").

159. See, e.g., *Walia v. Vivek Purmasir & Assocs., Inc.*, 160 F. Supp. 2d 380 (E.D.N.Y. 2000); *N.Y. State Dep't of Corr. Servs. v. State Div. of Hum. Rts.*, 207 A.D.2d 585, 586 (3d Dep't 1994) (noting that the plaintiff had arguments with her fiancé after suffering job discrimination).

160. See *Flockhart*, 192 F. Supp. 2d at 961-62, 975.

161. See *Madison v. IBP, Inc.*, 257 F.3d 780, 803 (8th Cir. 2001).

3. Parent-Child Relationships

The third type of recoverable family harm occurs when an employee's relationship with her child is disrupted because the employee is exporting the stress of workplace discrimination home. Even though the EEOC guidelines are silent on the issue, courts nevertheless accept that workplace discrimination strains the relationship between parent and child, and allow employees to recover damages under Title VII for the emotional harms flowing from this strain.¹⁶² Courts generally recognize three circumstances where harm to the parent-child relationship is compensable. The first circumstance relates to the amount of time an employee is able to spend with her child in the home. For example, the employee's child may suffer when the employee has to spend more time at work—and less time at home—in an attempt to overcome the discrimination¹⁶³ when the employee must take multiple jobs to support her family.¹⁶⁴

The second circumstance is more tangible, dealing with harm to the relationship flowing from the economic effects of discrimination.¹⁶⁵ When an employee is terminated, the employee's family loses a stream of financial support. Case law reveals a number of situations where employees recover damages when sudden financial problems stemming from workplace discrimination strain their relationships with their children.¹⁶⁶ For example, after losing his job—and with it his and his family's health insurance—because of unlawful race discrimination, an employee suffered strain in his relationship with his children when he had to pull them out of their soccer league in order to avoid injury while the

162. See, e.g., *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 653 (4th Cir. 2002); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 503 (2000); *Moore*, 355 F.3d at 561; *Shepard*, 303 F. Supp. 2d 1004 (D. Iowa 2003); *Moussa v. Commonwealth of Penn. Dep't of Pub. Welfare*, 289 F. Supp. 2d 639 (W.D. Penn. 2003).

163. See, e.g., *Passantino*, 212 F.3d at 503.

164. See *Dennis*, 290 F.3d at 653 (noting that the plaintiff and her family felt added strain because "she was less able to spend time with her child after leaving [her former employment] due to the fact that she had to take multiple jobs"). The *Dennis* court ultimately affirmed the district court's decision to nullify the jury award for emotional distress. Both the trial and appellate court found that the plaintiff's evidence supporting her claims of emotional distress was lacking. What is important here, however, is that neither court questioned a plaintiff's ability to recover compensatory damages for emotional distress harms related to family life. In this case the plaintiff's proof was insufficient.

165. See, e.g., *Moore*, 355 F.3d at 561 (discussing the economic effects of employment discrimination); *Shepard*, 303 F. Supp. 2d at 1021-22 (noting the economic harms to the employee's family); *Moussa*, 289 F. Supp. 2d at 666 (discussing how the employee's family was harmed financially because of job discrimination).

166. See, e.g., *Moore*, 355 F.3d at 561 (describing how plaintiff worried about his family's finances after he lost his job because of his race); *Moussa*, 289 F. Supp. 2d at 666 (describing how plaintiff suffered emotionally when he had to cash in his savings after losing his job because of unlawful discrimination); *Shepard*, 303 F. Supp. 2d at 1021 (describing how plaintiff suffered emotionally when he could not afford to buy insurance or spend money on his children).

family was uninsured.¹⁶⁷ In another example, harm to a laid-off employee's relationship with his children was recognized because he could not afford to purchase COBRA insurance for his family and he had less money to spend on his children.¹⁶⁸ In a third example, the victim of unlawful national origin discrimination suffered recognizable harm to his relationship with his children when he was forced to cash in their college savings bonds.¹⁶⁹

The third circumstance deals with the emotional distress employees suffer when discrimination disrupts their care responsibilities.¹⁷⁰ Like the harms to the employee's partner, these are stress-based harms exported first from the workplace to the home, and then transferred from parent to child. Courts note that the added stress of discrimination impedes employees from caring for their children.¹⁷¹ In one case, an employee's relationship with his child became so strained due to workplace discrimination that the child drew a picture of him as a monster.¹⁷² Ultimately, these cases demonstrate that courts do to some extent appreciate the relationship between employment discrimination and family life.

IV CAPTURING FAMILY HARMS

That existing legal norms within employment discrimination doctrine already capture some family harms is a potentially transformative finding. At the very least, such recognition opens the door for renewed examination of the process by which employees negotiate the relationship between their

167. See *Moore*, 355 F.3d at 561 (“[The plaintiff] said that he worried about paying the family’s bills and that he lost his health insurance and had to pull his children out of their soccer league because he feared that they might get injured at a time when he had no insurance coverage.”).

168. See *Shepard*, 303 F. Supp. 2d at 1021-22 (“The economic effects have added to the stress. He could not afford COBRA insurance and it bothers him that he does not have the money he once had to spend on his children.”).

169. See *Moussa*, 289 F. Supp. 2d at 666 (noting that “due to loss of income, [the plaintiff] was forced to cash in savings bonds that he had put aside for his children’s education”).

170. See, e.g., *Rowe v. Hussmann Corp.*, 381 F.3d 775, 783 (8th Cir. 2004) (discussing the strain on the parent-child relationship); *Moore*, 355 F.3d at 561 (same); *Moussa*, 289 F. Supp. 2d at 666 (same); *Whitten*, 2003 WL 21744088, at *6 (S.D.N.Y. 2003) (same); *Salinas v. Rubin*, 126 F. Supp. 2d 1026, 1030 (S.D. Tex. 2001) (same).

171. See, e.g., *Moussa*, 289 F. Supp. 2d at 666 (noting that because of the stress and anxiety of losing his job, the plaintiff “was unable to care for his family”); *Whitten*, 2003 WL 21744088, at *6 (noting that the employer’s discriminatory conduct made the plaintiff “feel ‘mad’ and ‘angry,’ and that this affected his ability to have a relationship with his children”); *Rubin*, 126 F. Supp. 2d at 1030 (noting that the stress of discrimination caused the plaintiff to have a *more* distant relationship with his son).

172. See *Moore*, 355 F.3d at 561 (noting that the plaintiff “also testified that the stress of having lost his job affected his relationship with his children . . .”). This was the same father who had to take his kids out of their soccer league because he no longer had insurance coverage. Although *Moore*’s case arose under the FLSA, the standards for emotional distress and compensatory damages are the same as under Title VII. See Fair Labor Standards Act, 42 U.S.C. § 216(b) (2006); see also *Moore*, 355 F.3d at 563 (concluding that FLSA’s damages provision allows for mental and emotional damages).

public and private lives. By awarding damages to plaintiffs for the harm employment discrimination causes in their familial relationships, courts are implicitly rejecting the notion that work and family are autonomous spheres and that employees are the only people harmed by workplace discrimination. In the next section, I propose a way to map family harms onto the compensatory damages provisions of Title VII, showing how the harms I have identified fit into existing legal doctrine. By mapping family harms onto existing doctrine, my proposal provides a path for courts to recognize a more robust account of harms resulting from workplace discrimination.

A. *Mapping Family Harms*

Families already play a crucial role in employment discrimination litigation by corroborating employees' accounts of emotional distress. When family members take the stand to substantiate an employee's claims, they are also explaining how they themselves have suffered because of the discrimination experienced by their partners and parents. By testifying to corroborate employees' claims of discrimination, family members' harms are effectively "mapped" onto the employee's harms, increasing the chances of compensation for the employee and increasing the legal recognition of employment discrimination harms beyond those of the employee.

Under existing law, there is some debate about whether the testimony of a plaintiff employee, by itself, is sufficient to support a compensatory damage award for emotional distress.¹⁷³ According to one commentator, although there is no clear rule controlling this issue, courts generally have answered this question in one of four ways.¹⁷⁴ First, some courts have found a plaintiff's own testimony, standing alone, sufficient to support an emotional distress award.¹⁷⁵ For these courts, a plaintiff need not offer witnesses to corroborate her emotional distress claims. Second, and in partial disagreement, other courts have found a plaintiff's testimony standing alone insufficient to support a large award, but potentially sufficient to support a smaller award.¹⁷⁶ Third, yet other courts found such

173. See HAROLD S. LEWIS ET AL., *LITIGATING EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CASES* VOL. I § 6.26, at 668 n.34 (2005).

174. See *id.*

175. See, e.g., *Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003); *Kucia v. Se. Ark. Cmty. Action Corp.*, 284 F.3d 944 (8th Cir. 2002); *Williams v. Trade Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999); *Moore v. KUKA Welding Systems*, 171 F.3d 1073 (6th Cir. 1999); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998); *Forsyth v. City of Dallas*, 91 F.3d 481 (5th Cir. 1996); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1986).

176. See, e.g., *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002); *Koster v. Trans World Airlines*, 181 F.3d 24 (1st Cir. 1999); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349 (8th Cir. 1997); *Hetzl v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996).

corroboration desirable, though not necessary.¹⁷⁷ Finally, the remaining courts found corroboration indispensable.¹⁷⁸

When we synthesize these four “alternatives,” the message from courts is not only that employees’ families *can* serve to corroborate employees’ emotional harm, but that they *should* do so. Employees seeking to maximize damages should use their family members to corroborate their claims of emotional distress. As litigation success often comes down to effective storytelling,¹⁷⁹ family members are considered important in litigation strategy as the supporting characters in an employee’s discrimination narrative. And this message is not just coming from the courts. For instance, one employment discrimination litigation manual explains that “it [is] helpful, even necessary, for other witnesses such as family members . . . to testify regarding the plaintiff’s emotional distress.”¹⁸⁰ According to the manual, “such testimony, particularly regarding the plaintiff’s loss of enjoyment of life, especially when accompanied by stories supporting their observations, will sound less self-serving to the jury.”¹⁸¹

Other litigation manuals offer similar advice.¹⁸² One plaintiff-side litigation guide suggests that plaintiff’s counsel introduce evidence of the employee’s “loss of position in the family” to bolster the employee’s claim for emotional damages.¹⁸³ Where family members are effective communicators, the manual suggests that they provide this evidence.¹⁸⁴ In a section titled “indispensable nonexperts,” a third manual lists the people in an employee’s life whose corroborating testimony is even more effective

177. See, e.g., *Demus v. Dunlap*, 330 F.3d 919 (7th Cir. 2003); *Alston v. King*, 231 F.3d 383 (7th Cir. 2000); *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996); *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996).

178. See, e.g., *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002), *aff’d*, 540 U.S. 614 (2004); *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998); *Koopman v. Water Dist. No. 1 of Johnson County*, 41 F.3d 1417 (10th Cir. 1994).

179. See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9, 11 (1994); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); Graham B. Strong, *The Lawyer’s Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 780 (1998); see also Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 565 (1994).

180. See WILLIAM SAILER & JOHN TRUE, CALIFORNIA EMPLOYMENT LITIGATION: STRATEGIES AND TACTICS (2002).

181. *Id.*

182. See, e.g., EMPLOYMENT LITIGATION HANDBOOK 8 (Jon W. Green & John W. Robinson IV eds., 1998) (noting that family can be “quite helpful” in supporting employees’ emotional damage claims); SEXUAL HARASSMENT IN EMPLOYMENT LAW 316-17 (Barabara T. Lindemann & David D. Kadue eds., 1999) (cumulative supp.) (noting that family can corroborate plaintiffs’ emotional distress claims).

183. See KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE ACTIONS § 33.03, at 33-71 (2004 Supp).

184. *Id.* at 33-81.

than an expert witness's testimony.¹⁸⁵ This list includes an employee's spouse and older children. While the spouse "can testify about the general deterioration in the relationship, and the absence or lessening of a meaningful sexual relationship," older children "can testify about the changes they have observed in the plaintiff's behavior at home."¹⁸⁶

Nor is this lesson lost on lawyers who actually litigate employment discrimination cases. One practitioner with over twenty years of litigation experience explained that family and friend "witnesses are key, if not indispensable to obtaining substantial emotional distress verdicts in these cases."¹⁸⁷ Their indispensability, he explains, comes from their anecdotal testimony about how the employee suffers emotionally because of workplace discrimination and how these harms manifest in the employee's personal relationships.¹⁸⁸ Echoing the tenor of the litigation manuals, this attorney's comments suggest that employees would be wise to have their family members tell each of their sides of the story, as they will reinforce the employee's narrative about emotional distress.

Taken together, the litigation manuals and the attorney's comments suggest that introducing evidence of family harms is good litigation strategy for plaintiffs. But in addition to increasing the plaintiff's chances for recovery, presenting family harms as evidence of emotional distress simultaneously gives the plaintiff's family members an opportunity to explain how they suffered because of the discrimination experienced by their partners and parents at work. The psychological benefit to individual and family of participating in an exercise that publicly recognizes the harms they have suffered should not be underestimated.

In the legal context there are at least two valuable consequences that flow from mapping family harms onto existing legal norms. The first is strategic: employees can maximize their compensatory damage recovery by introducing evidence of family harms to corroborate emotional distress. The second is jurisprudential: mapping provides an avenue through which family harms can be folded into existing legal doctrine. Understanding the relationship between family harms and the compensatory damages provisions of Title VII encourages greater use of family harms in court. When such evidence is successfully presented, the resulting case law will register a broader acknowledgment of family harms in employment discrimination doctrine.

185. *Id.* at 33-75.

186. *Id.*

187. E-mail from Michael H. Crosby, Attorney at Law, San Diego, CA, to Zachary A. Kramer, Williams Teaching Fellow, UCLA School of Law (March 15, 2006, 13:47 PST) (on file with author).

188. *Id.*

B. Beyond the Status Quo

The fact that it is possible to map family harms onto an employee's compensable emotional distress claim does not mean our inquiry is at its end. Indeed, there are at least two reasons why we should still consider other ways to recognize and perhaps even compensate family harms beyond their current legal recognition as derivatives of an employee's claim of emotional distress. The first reason involves potential for the statutory damage caps to squeeze out the harms suffered by employees' family members.¹⁸⁹ The second concerns the fact that employment discrimination law fails to recognize fully—and therefore fails to compensate—the harms imposed directly on the family.

As to the first issue, the statutory cap on damages may effectively prevent a plaintiff from mapping her family's harms onto her own compensable harms. For example, an employee at a small company of twenty workers may face discrimination that causes her severe emotional distress as well as other compensable harms, and as a result of the strain the discrimination placed on her relationship with her partner, she and her partner come to the brink of separation. However, because the employee's firm only has twenty workers, federal statutory law limits her compensatory and punitive damages to \$50,000.¹⁹⁰ Under the current legal framework, if the employee's emotional harms are so serious that they meet the cap on their own,¹⁹¹ then the partner's harms are irrelevant, as mapping the harms onto the plaintiff's claim will make no difference in the damages awarded.

If the couple is unable to weather the rough patch and ultimately separates, the partner's suffering is completely immaterial in the eyes of the law. Even if the employee's now ex-partner is kind enough to corroborate the employee's claims of emotional distress, the partner has little to no chance of sharing in the employee's damages award if the two are no longer together. Because the partner's relationship with the employee's company is mediated through the employee, and because the partner's harms are derivative of the couple's relationship, the existing legal norms provide no way for the ex-partner to recover damages for the

189. See 42 U.S.C. § 1981a(b)(3) (2006). According to the statute, the aggregate damage caps are: \$50,000 (organizations with 15 to 100 employees); \$100,000 (101 to 200 employees); \$200,000 (201 to 500 employees); and \$300,000 (more than 500 employees).

190. See Civil Rights Act of 1991, 42 U.S.C. 1981 § 102(b)(3)(A) (2006) (limiting damages to no more than \$50,000 when a defendant employer has between 15 and 100 employees).

191. The inclusion of punitive damages is especially significant. As Catherine Sharkey notes, "Punitive damages play a pivotal role in employment discrimination cases. In fact, juries are more likely to award punitive damages to prevailing plaintiffs in employment discrimination cases than in most other types of civil cases." Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEG. STUD. 1, 6 (2006); see also Catherine M. Sharkey, *Punitive Damages as Social Damages*, 113 YALE L.J. 347 (2003).

significant harms he has suffered, including the emotional distress stemming from the couple's breakup.¹⁹²

As to the second issue, existing legal norms strip the family of its own legal voice on matters relating to employment discrimination. The law does not recognize families as parties to the employment relationship. Except in cases where discrimination is aimed at or involves the employee's family—for instance, a situation involving a fetal protection policy¹⁹³ or a case of an employer refusing to provide domestic partnership benefits for unmarried same-sex¹⁹⁴ (or different-sex)¹⁹⁵ couples—statutory employment discrimination law does not recognize the family as relevant to either the employment relationship in general or to particular instances of employment discrimination. In geographical terms, statutory employment discrimination law patrols relationships that inhabit the public sphere. Therefore families are not able to articulate their own legal claim for family harms outside of the employee's claim because they exist in the private sphere. But ultimately an employee's emotional distress, even where it flows from the strain on her relationships with her partner and child, is different from the harms of employment discrimination suffered by her family. To say that discrimination caused an employee emotional distress because of the strain it placed on her relationship is not the same as saying that the employee's partner suffered on her own because of the discrimination. As interrelated as they are, it is important that we not conflate the employee's and the partner's harms, as it risks erasing the family's own stake, both in the employment relationship in general and in what happens to employees at work in particular.

Recall the story of the employee's child who drew a picture of the father as a monster.¹⁹⁶ In that case, the court referred to the child's actions as evidence that the employee was suffering severe emotional distress

192. The employee might still be able to recover under state antidiscrimination law or in a tort action. See Ann Scales, *Nooky Nation: On Tort Law and Other Arguments from Nature*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 307 (Catherine A. MacKinnon & Reva Siegel eds., 2004).

193. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), *remanded to* 935 F.2d 272 (7th Cir. 1991) (involving a company's fetal protection policy that prevented female employees from working in positions that exposed them to substances potentially dangerous to a fetus).

194. See NICOLE RAEBURN, *INSIDE OUT: THE STRUGGLE FOR LESBIAN, GAY, BISEXUAL RIGHTS IN THE WORKPLACE* (2004).

195. See *Irizarry v. Bd. of Ed. of the City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (involving employment policy making domestic partnership benefits available only to same-sex couples). Living in a committed relationship with the same man for over twenty years, Milagros Irizarry sought but was denied domestic partnership benefits for her and her partner. Siding with the City's denial of benefits, the court, per Judge Posner, ruled that the purpose of the City's policy was to attract gay teachers, not to provide benefits for unmarried different-sex couples. In other words, if they wanted spousal benefits, Irizarry and her partner could have married, an option then and still unavailable for same-sex couples in Illinois.

196. *Moore v. Freeman*, 355 F.3d 558, 561 (6th Cir. 2004).

rather than as an example of how the child was suffering.¹⁹⁷ Undoubtedly the employee was suffering: the court noted he also had trouble sleeping, had neck pain, lost his appetite, and became moody and short-tempered.¹⁹⁸ But the story of the monster picture is as much about the harm to the employee's child as it is about the employee's emotional distress. What is missing from the court's analysis is any real recognition that the child was also suffering. This discussion illuminates the fact that employment discrimination doctrine does not yet capture the full picture of the costs of discrimination.

Existing employment discrimination doctrine is only able to categorize the harms of employment discrimination in terms of how those harms are experienced by the employee. This is an incomplete picture of the costs of discrimination, as it excludes the different ways in which the effects of discrimination are exported into the private sphere and harming the family. If we are ever going to understand the full scope of the harms of discrimination, we must consider the effects of discrimination that are felt beyond the walls of the workplace. I hope this Essay will inspire greater discussion not only about how discrimination impedes life in the private sphere but also about what else we can do to protect families against the discriminatory norms that are exported from the workplace.

CONCLUSION

Employment discrimination law and scholarship do not adequately attend to the harms of discrimination that befall employees' families. In an attempt to change this, my Essay has offered a framework for theorizing the relationship between employment discrimination and family life. The foundation of this framework is the idea that employees export their work, as well as the effects of their work experiences, from the workplace to their families, causing at least two types of family harm. Disruption harm results when employees export their discriminatory work experiences home, exposing their partners, children, and other members of the household to the discrimination and disrupting family life. Exclusion harm results when employees respond to workplace discrimination by renegotiating their work/family relationships to a state of extreme segmentation, which thereby denies their family members meaningful access to the workplace and blocks their family members from some of the social and political benefits associated with work. Although existing employment discrimination norms capture a small slice of family harms, these norms ultimately prove doctrinally incomplete and theoretically unsatisfying. Additional thought should be dedicated to the question of how employment

197. *See id.* (“[Plaintiff] also testified that the stress of having lost his job affected his relationship with his children—one of whom drew a picture of him as a monster.”).

198. *Id.*

discrimination law can more fully account for family harms caused by discrimination in the workplace. This Essay is intended to stimulate that conversation. My hope is that it introduces central principles upon which these further excursions may rest.

