IT'S TIME THAT YOU KNOW: THE SHORTCOMINGS OF IGNORANCE AS FAIRNESS IN EMPLOYMENT LAW AND THE NEED FOR AN "INFORMATION-SHIFTING" MODEL

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I. INTRODUCTION

Knowledge is power; so, too, is the ability to control access to knowledge, and it must be wielded with awareness and purpose. This is equally as true in the employment context as in other realms, and it is paramount at the hiring stage. During the hiring stage, employers have a wealth of information about what criteria they are looking for in their ideal employee: the characteristics, experience, skills, and education of the job applicants, the nature of the job available, the maximum salary and benefits they will offer, the concessions on working conditions they are willing to make, and a host of other knowledge that typically lends the employer an upper hand in bargaining power at this beginning stage. Despite the availability of information, employers' hiring decisions can be shaped by reliance on stereotypes—heuristics that form the basis for judgments when full information is not available. And hiring discrimination persists: studies show that people of color and women continue to fare worse in the hiring process than equally qualified white men despite decades-old laws prohibiting such practices.[1]

Continued hiring discrimination is troubling, particularly in light of the fact that banning certain bases for hiring decisions—including race, sex, age, disability, religion, and national origin, to name a few—has proven to be a largely ineffective tool for rooting out hiring discrimination.[2] This is caused by an information imbalance between job applicants and employers. When an applicant is turned down for a job, that applicant knows almost

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[1] *See infra* notes 129–131 and accompanying text.

[2] *See infra* notes 143–147 and accompanying text.

nothing about the employer's decision process—why she was denied the job, the qualifications of the other applicants and the selected applicant, and the decision-making process of the employer—to suggest that she was denied the job for discriminatory reasons. Moreover, because hiring decisions are often quite subjective, hiring discrimination claims can be some of the most difficult cases to prove.

In recognizing that knowledge provides the power to discriminate, employment law regulates what information is available to employers during the hiring process. Specifically, both federal and state law place limits on an employer's ability to inquire about certain aspects of a prospective employee's identity at the hiring stage.[3] In this way, in the absence of an effective mechanism to rectify hiring discrimination after it has occurred, employment law utilizes ignorance as a means of achieving fairness by blocking access to information that would otherwise enable employers to make discriminatory hiring decisions.

These regulations on preemployment inquiries not only inhibit employers' ability to make discriminatory hiring decisions; they also play a role in defining and determining which of an employee's traits are and are not relevant to the employment relationship. Once these regulations are in place, however, there is no institutional mechanism to reintroduce the protected traits back into the employment relationship. Thus, the boundaries drawn at the outset are never formally adjusted. In this way, regulation of preemployment inquiries is an overinclusive attempt to prevent hiring discrimination. Blocking access to employees' protected traits not only impedes the exercise of bias in hiring on the basis of these traits, it also places these traits outside of working life for the duration of the employment. The extensive breadth of these regulations has ramifications not currently addressed in employment law.

The regulation of information and its correlating construction of boundaries can be seen in John Rawls's seminal work of liberal political theory, *A Theory of Justice*,[4] in which Rawls recognizes the powerful influence knowledge has on decision making. In attempting to arrive at just principles with which to govern society, Rawls imagines a hypothetical original contracting position in which these principles will be fairly devised.[5] He concludes that if parties in the original position know their stations in life, they will undoubtedly try to construct principles benefiting their respective positions.[6] To counter this, Rawls imposes a "veil of ignorance" on the parties to prevent self-interested, and ultimately biased, decision making.[7] In this way, Rawls implements ignorance as a mechanism to achieve fairness.

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[3] *See infra* notes 12–16 and accompanying text.
[4] JOHN RAWLS, A THEORY OF JUSTICE (The Belknap Press of Harvard Univ. Press 1971).
[5] *See infra* notes 32–38 and accompanying text.
[6] *See id.*
[7] *See id.*

Rawls's feminist critics make clear the dangers of drawing boundaries around the access to information: specifically, that Rawls wrongly devises the bounds of justice and places the family outside of its scope, and that his conception of people under the veil of ignorance as wholly unencumbered and unconnected fails to acknowledge the role played by relationships and ties to others in moral decision making.[8] The lines drawn by the regulation of preemployment inquiries can be criticized on similar grounds. By barring access to information about certain traits, including family status, at the hiring stage, and failing to provide a mechanism by which to reintroduce these traits once the employment relationship has commenced, these regulations perpetuate an artificial public-private divide in the lives of employees, relegating family responsibilities to the private realm. These regulations also fail to value adequately the connections employees have with others, namely those to whom they provide care and with whom they have close relationships. Each of these shortcomings has disproportionately negative effects on women, who tend to shoulder a greater share of caregiving duties than men.[9] The regulations on preemployment inquiries place these caregiving responsibilities outside the scope of the employment relationship, burdening caregiving employees by forcing them to satisfy the simultaneous demands of work and family without accommodation by their employers.

With regard to impartiality, these limitations on preemployment inquiries are flawed in much the same way that Rawls's theory is flawed: both take certain characteristics outside the public, political realm and place them in the realm of the personal, outside the scope of justice. This leads to both a lack of neutrality and a failure to interrogate injustices in the private sphere, thus allowing them to persist. Again, these shortcomings disproportionately harm women and result from a failure to address the division of labor within the family and its effects on the labor market. Although ignorance in the employment context serves the vital function of protecting against discrimination, it also reifies the view of the model employee as unencumbered, thereby marginalizing those employees who do not fit this norm, and prevents the possibility of accommodation by placing certain traits outside the employment relationship. This disserves women by failing to take into account their disproportionate caretaking duties or to provide any mechanism for accommodation.

This Article explores the use of ignorance as a device to achieve fairness, the resulting negative consequences, and how those consequences can be remedied. I rely on Rawls and his critics as a lens through which to examine the operation of the law's imposition of ignorance on employers at the hiring stage. I argue that prohibitions on preemployment inquiries are necessary to restrict hiring discrimination but that the information

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[8] *See infra* Part III.A.

[9] *See infra* notes 116, 242–246 and accompanying text.

blocked by such regulations should be reintroduced into the employment relationship once the hiring process is complete and the regulations have served their purpose. I focus on the traits of family status and its correlative childcare responsibilities because they are integral to the goal of gender equality in employment.

I begin by explaining the law related to the regulation of preemployment inquiries in Part II. I then discuss Rawls's theory of justice and how his use of ignorance as a means to achieve fairness relates to regulations on preemployment inquiries. Next, in Part III, I explore several feminist critiques of Rawls's construction of the public-private divide and the atomistic conception of the self under the veil of ignorance, and how similar criticisms can be applied to the boundaries constructed by limiting the exchange of information between employers and prospective employees. I also discuss discourse ethics as an alternative to Rawls's theory. Despite their flaws, in Part IV, I explain why these limitations are still necessary in the face of continuing hiring discrimination, including against mothers. I then argue that our approach to regulating information related to protected traits should be more narrowly tailored, by reintroducing these traits into the employment relationship using a model of discourse ethics once the hiring process is complete. In Part V, I advocate reintroducing the protected traits by employing an information-shifting model like that used under the Americans with Disabilities Act of 1990 ("ADA"),[10] which combines regulations on employers' access to applicants' information at hiring with a "reasonable accommodation" requirement to introduce employees' concerns into employment relationships.[11] I explain how an information-shifting model prevents access to employees' information when it might bias hiring decisions, but then allows employees to reveal their needs in the employment relationship once such bias is no longer a concern. I focus on the benefits of an intersubjective communicative process, which flows from the reasonable accommodation process, and how engaging in such processes remedies the negative effects of ignorance imposed by regulations on preemployment inquiries.

II. Line Drawing in Liberal Theory and the Regulation of Preemployment Inquiries

A. The Law of Preemployment Inquiries

Title VII of the 1964 Civil Rights Act ("Title VII")[12] and the ADA[13] are two federal laws that limit the scope of preemployment inquiries. Under

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[10] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of the U.S.C.).

[11] 42 U.S.C. § 12112 (2000).

[12] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

[13] 42 U.S.C. § 12112.

Title VII, which prohibits discrimination in employment, including hiring decisions, on the basis of race, sex, national origin, and religion, employers' inquiries into these traits prior to hiring can serve as evidence of discrimination.[14] The ADA, which prohibits employment discrimination on the basis of disability and requires employers to make reasonable accommodations for disabled employees, makes it unlawful to inquire into a prospective employee's disability status during the hiring process.[15] State law varies on this subject. In some states, a prohibition on certain preemployment inquiries, including, for instance, those on the basis of the applicant's race or color, national origin, sex, religion, age, disability, pregnancy, sexual orientation, marital status, family status (e.g., number of dependents), child care responsibilities, height and weight, hair and eye color, citizenship, birthplace, native language, arrest record, criminal record, relatives, military service, organizational affiliations, or economic status (e.g., credit ratings), has been codified within the state's employment discrimination statute or implementing regulations.[16] In other states, the employment discrimination laws and regulations do not explicitly prohibit preemployment inquiries. Instead, the respective state commissions responsible for enforcing the state equal employment laws have issued technical assistance guides on preemployment inquiries that advise employers that it may be unlawful to inquire into these aspects of an applicant.[17]

Note that while employers are capable of accommodating some of these traits (e.g., disability, religion, and dependents), others, usually, are unlikely or unable to be accommodated (e.g., criminal record). Federal law already requires employers to accommodate religion[18] and disability.[19] Although the language of "reasonable accommodation" is the same in both statutes, the requirements for accommodating disability are more stringent than those for religion.[20] The Family and Medical Leave Act of 1993

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[14] "[I]nquiries which either directly or indirectly disclose [information about an applicant's race, color, religion, sex, or national origin], unless otherwise explained, may constitute evidence of discrimination prohibited by Title VII." EEOC, PRE-EMPLOYMENT INQUIRIES (Office of Pub. Affairs ed., 1981).

[15] 42 U.S.C. § 12112(d) (2000).

[16] *See, e.g.*, N.J. STAT. ANN. § 10:5-12(c) (West 2004); N.Y. EXEC. LAW § 296(1)(d) (McKinney 2005), *available at* http://www.dhr.state.ny.us/employment.html; UTAH ADMIN. CODE r.606-2-2 (2006), *available at* http://www.rules.utah.gov/publicat/code/r606/r606-002.htm; WASH. REV. CODE § 49.60.180(4) (2006); WASH. ADMIN. CODE § 162-12-140 (2006).

[17] *See, e.g.*, Maryland Office of Equal Opportunity and Program Equity, Guidelines for Pre-Employment Inquiries Technical Assistance Guide, http://www.dllr.state.md.us/oeope/preemp.htm (last visited Dec. 2, 2006); Michigan Department of Civil Rights, Pre-Employment Inquiry Guide (2003), http://www.nmu.edu/aaeo/forms/pre_emp_guide.pdf; Commission on Human Rights, Missouri Department of Labor and Industrial Relations, Pre-Employment Inquiries, http://www.dolir.mo.gov/hr/interview.htm (last visited Dec. 2, 2006); Oregon Technical Assistance for Employers, Pre-Employment Inquiries, http://www.oregon.gov/BOLI/TA/T_FAQ_Tapreemp.shtml (last visited Dec. 2, 2006).

[18] *See* Title VII, 42 U.S.C. § 2000e(j) (2000).

[19] *See* ADA, 42 U.S.C. § 12112(b)(5).

[20] *See* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 627–28 (2001) (explaining that Title

("FMLA") also provides a guarantee under federal law to some form of accommodation for family responsibilities.[21] The FMLA grants employees who work for employers with more than fifty employees twelve weeks of unpaid family and medical leave for limited purposes.[22]

Although Title VII ushered in fundamental changes to the nature of the employment relationship and enacted crucial limits on the exercise of employers' decision making on the basis of sex,[23] its foundation in principles of formal rather than substantive equality has led to gaps in its ability to bring about equality in the workplace. Title VII is limited to prohibiting discrimination in fairly discrete situations—hiring, firing, promotion[24]—and has developed primarily to bar workplace harassment and hostile work environments. Title VII does not address many of the structural inequalities that have made it difficult for women to achieve equality in the workplace.[25] The gaps resulting from this focus on formal equality, discussed in more detail below,[26] reflect shortcomings infused more generally in liberal theory. Formal equality provides that all people, regardless of their situations, should be treated equally. But because people are situated differently on the basis of gender—most importantly, for my pur-

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VII's religious accommodation requirement has been narrowly interpreted due to First Amendment concerns and that the absence of these concerns in the disability context and the congressional intent for a broader accommodation requirement under the ADA leads to a more robust duty to accommodate under the ADA); Condon A. McGlothlen & Gary N. Savine, *Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act:* Eckles v. Consolidated Rail Corp.*: Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DePaul L. Rev. 1043, 1054 (1997) (noting that the legislative history of the ADA indicates that the standard for employers to demonstrate that an accommodation is an undue burden is much higher in the context of disability accommodations under the ADA than religious accommodations under Title VII).

[21] *See* Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1) (2000).

[22] *Id*.

[23] Title VII, 42 U.S.C. § 2000e-2 (2000).

[24] *Id.* at § 2001-2(a)(1).

[25] Title VII bars discrimination resulting from employment practices with a disparate impact on the basis of a protected trait. *See* 42 U.S.C. § 2000e-2(k) (2000); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that a black woman's claim of discrimination under a subjective promotion system is properly analyzed under the disparate treatment model); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (striking down a company's requirement that persons applying for a manual labor position either pass a general intelligence test or have a high school diploma because the requirements had a disparate impact on blacks and were not shown to be linked to successful job performance). Courts, however, have generally taken a very narrow view of disparate impact, thus limiting Title VII as a tool to challenge structural discrimination. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 Tex. L. Rev. 1487, 1492–94 (1996); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 783 (2005).

[26] *See infra* notes 239–246 and accompanying text (discussing the consequences of the lack of childcare accommodations for women). Importantly, however, Title VII's ban on sex discrimination has been used as a tool to challenge discrimination on the basis of family responsibilities. Mary Still, Center for WorkLife Law, University of California Hastings College of Law, Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities (2006), *available at* http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

poses, due to an inequitable division of carework—treating them equally will not result in substantively equal results.[27] Formal equality's deficiency results from overlooking ex ante differences, which create distinctions among people before the application of any antidiscrimination or other social policies. Title VII's prohibition on only a narrow range of employer decisions and conduct, like liberal theory, draws a line around what is considered relevant for public consideration and remedy. Elements that fall outside of this line, even if they are products of structural inequality, such as the gendered division of labor, are beyond its bounds. In this way, both Title VII and liberal theory demarcate the private and public realms and leave matters within the private realm to be addressed by individuals without the aid of the state.

Rawls's theory of justice, derived from a liberal theory focused on formal equality, similarly overlooks certain ex ante differences among parties in the original position that might require scrutiny to achieve substantive equality. In particular, Rawls's failure to interrogate injustices within the family reflects a failure to recognize the ex ante differences—due to both biological and social factors—between men and women, which call for attention and scrutiny to formulate a just ordering of society. The gap in Rawls's theory, like the gap in Title VII, results from an overemphasis on formalism and insufficient attention to structural differences, which must be addressed to achieve true substantive equality.

B. Justice as Fairness and the Original Position

Rawls's *A Theory of Justice* has become the archetypal universalist liberal political theory at which many modern criticisms of liberalism are aimed. Rawls's project was to discover the "principles of justice"[28] with which to govern society. In his deontological view, a just society is marked by the priority of the right over the good, as opposed to utilitarianism, which defines what is right in terms of what is good.[29] Rawls's liberal aim is to define what is right so that it is compatible with, and indeed is neutral among, competing visions of what is good. This allows those who view the good life differently, for example, a religious observer and an atheist, to be treated equally.

Rawls is troubled by the arbitrary distribution of rights and social goods on the basis of traits, such as money, talents, intelligence, and appearance, which he sees as morally irrelevant.[30] He believes no one should be helped or hampered by the random lottery of abilities and social positions when

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[27] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19–23 (1990) (discussing the dilemma of difference and the difficulty of remedying inequality).

[28] RAWLS, *supra* note 4, at 4–5, 11.

[29] *Id.* at 22–33, 396.

[30] *Id.* at 7, 18–19.

arriving at just principles.[31] He posits that, because people are self-interested, just principles cannot be derived without regard to morally irrelevant traits if people are aware of such traits.[32] To arrive at just principles, therefore, Rawls conceives of a thought experiment—the original position—in which a social contract is formed to remedy the arbitrary distribution of social goods.[33] In this hypothetical original contracting position, a "veil of ignorance" is employed to prevent parties' judgments from becoming distorted by their own self-interest.[34]

To prevent individuals in the original position from shaping the outcome of the principles to benefit their own circumstances, parties under the veil are ignorant of contingencies about themselves and others and thus are "mutually disinterested."[35] Parties know only that their society will be governed by the principles of justice, but do not know their own social, class, or economic status, the distribution of natural assets and abilities, their conception of the good, the particulars of their plan of life, their special features of psychology, the circumstances of their own society, or to which generation they belong.[36] The veil of ignorance allows parties to arrive at an agreement on the principles, on the theory that self-interested parties are unable to achieve unanimity if they can predict in advance how the principles will apply to themselves.[37] This "original position" forms the basis of Rawls's theory of procedurally generated fairness, which he refers to broadly as "justice as fairness."[38]

What results from contracting in this original position are the principles of justice: those principles "that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[39]

C. Relating the Veil of Ignorance to the Regulation of Preemployment Inquiries

In both Rawls's theory and the employment context, ignorance is used as a procedural mechanism to achieve substantively fair outcomes, based

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[31] *Id.* at 18.
[32] *Id*. at 18–19
[33] *Id.* at 141.
[34] *Id.* at 12, 19–20.
[35] *Id.* at 18, 139–40.
[36] *Id.* at 137.
[37] *Id.* at 137–40.
[38] *Id.* at 17.
[39] *Id.* at 11. Rawls predicts that parties in the original position formulating the basic structures of society would arrive at two principles. *Id.* at 60, 150–51. The first principle, also known as the fair equality of opportunity principle, requires that "each person . . . have an equal right to the most extensive basic liberty compatible with a similar liberty for others." *Id.* at 60. The second principle, also referred to as the difference principle, holds that inequalities in the distribution of social goods are just only if they enhance the welfare of the worst off in society as compared to an equal distribution. *Id.* at 14–15.

on the premise that the hidden traits are irrelevant. The comparison I am drawing here is twofold: *epistemological* and *political*.[40] First, both contexts share a common notion of epistemology—namely that a lack of information during the decision-making process leads to the neutrality of the resulting decision, and that this neutral decision must be fair precisely because it is neutral. Both are premised on the view that if people do not know the particulars about others (and in the case of Rawls, themselves), they will be objective, which will lead to fair results. Second, both contexts share a common political view that the distribution of social goods should not be based on certain irrelevant features. These two elements taken together are thought to guarantee just results through the use of a mechanism that I will refer to as "procedurally generated fairness." Both Rawls's original position and employment law assume that individuals are self-interested and unable to deny discriminatory motives.[41] They take these aspects of human decision making as given and immutable, or, in the employment context, at least both difficult to remedy and to prove, and posit that the best (or only) way to achieve just results from self-interested and potentially biased decision makers is to impose ignorance on them.

Despite these similarities, there are differences between Rawls's original position and the law's limitations on preemployment inquiries. In the original position, the parties (those deciding what principles should govern society) are not only ignorant of the social position, natural attributes, and interests of other parties; they are also ignorant of these features in themselves.[42] By contrast, employers acting pursuant to laws regulating preemployment inquiries are ignorant only of certain traits in the applicants, but do know these features about themselves.[43] The kinds of decisions being made are also quite different in the two contexts. In the original position, parties are choosing general principles to govern the basic structures and institutions in society,[44] from which a constitution and laws will

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[40] *See* Fred D'Agostino, *Original Position*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), *available at* http://plato.stanford.edu/entries/original-position (last visited Nov. 11, 2006) (noting distinction between epistemological and political elements of Rawls's original position).

[41] *See* Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229, 231, 234–35 (1989). In saying that individuals are unable to deny discriminatory motives, I mean that they retain basic psychological features, which include, as studies have shown, a tendency to discriminate. *See infra* Part IV.A.

[42] RAWLS, *supra* note 4, at 18–19.

[43] The fact that employers know their own station in life is, in fact, largely what makes the ignorance about employees' traits necessary: if employers were ignorant of their own station in life, they would be far less likely to make decisions on a discriminatory basis. Certain psychological processes that underlie discrimination—including the tendency to favor the in-group and disfavor the out-group, *see* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1191–93 (1995)—would be disabled. The employer's lack of knowledge about her economic and social position might also make her more concerned with the plight of those in all stations of life.

[44] Rawls's major institutions "define [individuals'] rights and duties and influence their

later be developed. In the employment context, employers are making hiring decisions regarding individual applicants. Because of the different nature of the decisions being made, the realm of traits Rawls considers morally irrelevant is considerably more expansive than the realm of traits considered morally irrelevant in the employment context. For instance, Rawls believes that intelligence and talent should not play a role in the allocation of social welfare,[45] whereas both these traits will often be relevant to hiring decisions. The greater number of traits that are morally irrelevant in the original position than in the hiring process is reflected in the scope of ignorance imposed on the decision makers in these two contexts: the ignorance imposed by Rawls's veil is much broader than in the hiring context. The original position is also an intellectual exercise through which we can develop the principles of justice,[46] whereas the legal limitations imposed on employers' access to information during the hiring process dictate the circumstances in which actual hiring decisions are made.

It is important to note that my point here is not to draw an exact analogy between the veil of ignorance and the law's regulation of preemployment inquiries. Rather, my goal is to highlight those ways in which Rawls's veil of ignorance operates similarly to the legal limitations on information in the hiring context to show how the shortcomings of ignorance in Rawls's theory can help us to understand the operation and consequences of laws premised on a model of procedurally generated fairness in the employment context. The ultimate aim is to use the critiques of Rawls's formulation of procedurally generated fairness to re-envision this area of employment law so that it can avoid similar shortcomings.

III. Applying Critiques of Rawls to the Employment Context

Although a procedural mechanism of ignorance is employed in both Rawls's original position and in the hiring context, this mechanism fails to achieve fully the desired ends of neutrality and justice. Feminist thinkers have criticized Rawls's use of ignorance of individuals' characteristics in the original position as a method for arriving at just principles.[47] Many of

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life prospects, what they can expect to be and how well they can hope to do." Rawls, *supra* note 4, at 7. They include "the political constitution and the principal economic and social arrangements" of society, such as "legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family." *Id.*

[45] *Id*. at 18.

[46] *Id.* at 12, 120.

[47] Some of the most prominent critiques of Rawls have come from communitarian thinkers, who take issue with one element of the liberal foundation of Rawls's theory: the priority of the right over the good. *See* Shane O'Neill, Impartiality in Context: Grounding Justice in a Pluralist World 16, 17 n.10 (citing Michael Sandel, Liberalism and the Limits of Justice (1982); Roberto Mangabeira Unger, Knowledge and Politics (1975); Alasdair MacIntyre, After Virtue: A Study in Moral Theory (1981); Charles Taylor, Philosophical Papers, II: Philosophy and the Human Sci-

these arguments are relevant to the limitations on preemployment inquiries in hiring. Of most interest here are the claims centered on the gaps in Rawls's theory—namely, the veil's achievement of unanimity at the significant cost of masking differences and its concomitant failure to achieve impartiality. In this next section, I will discuss a number of the critiques of the veil of ignorance made by feminist scholars. I will then explore how these critiques relate to the use of procedurally generated fairness through ignorance in the employment context.

A. Feminist Critiques of Rawls's Theory of Justice

Feminist theorists have explored a number of ways in which Rawls's theory of justice fails to address the problems of patriarchy. As discussed earlier,[48] Rawls employs the veil of ignorance for two primary purposes: to achieve unanimity in arriving at the principles of justice and to provide a fair moral basis for the principles of justice.[49] This strategy is not without its costs, as illustrated by a number of Rawls's feminist critics. These critics argue that through the use of the veil of ignorance, Rawls places certain traits and beliefs in the private realm and thus makes them irrelevant to public identity.[50] As feminists have long recognized, however, the personal is political, and relegating certain elements, such as internal family relations, to the private sphere, and thus beyond the scope of justice, can be harmful. Susan Moller Okin criticizes Rawls's assumption of what is relevant to public morality and what is not.[51] She argues that patriarchal power pervades all domains—including the family—and must be confronted.[52] Seyla Benhabib criticizes Rawls's atomistic and decontextualized conception of the parties in the original position as insufficient for participating in moral decision making because moral judgments require engagement with the concerns of concrete, particularized "others."[53] She

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ENCES (1985)). Michael Sandel, one of the leading communitarian critics of Rawls, argues that Rawls's conception of the right as prior to the good fundamentally misconceives how people are constituted. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 15–65 (1982). Rather than being able to choose freely among any life plan, as Rawls suggests, Sandel believes that people's interests and desires are in fact a product of their stations in life, their communities, and their identities. *Id.* at 51–52. Sandel also asserts that Rawls's separation of the right from the good assumes a certain vision of the person that is not neutral. *Id*. at 60–65. Rawls's epistemological claim relies on the notion of a subject independent of its desires and goals, but, according to Sandel, Rawls wrongly assumes that the self precedes its values and ends rather than being shaped by them. *Id.*

[48] *See supra* Part II.B.

[49] RAWLS, *supra* note 4, at 15.

[50] *See* O'NEILL, *supra* note 47, at 37; SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 93–100 (1989) (criticizing Rawls's relegation of the family into the private realm and his assumption of the existence of justice within the family as an institution).

[51] *See infra* Part III.A.1.

[52] *See, e.g.*, O'NEILL, *supra* note 47, at 40–43.

[53] *See infra* notes 84–89 and accompanying text.

notes how repression of difference in Rawls's theory for the sake of unity excludes the concerns of the marginalized "other."[54]

1. The Demarcation of the Realm of Politics, the Concomitant Failure To Interrogate "Private" Injustices, and the Public-Private Divide

Liberal political theory, including Rawls's, assigns differences other than those of narrowly defined political opinion to the private rather than the public sphere.[55] Shane O'Neill has explored Rawls's demarcation of the political from the nonpolitical and has highlighted Rawls's attempt, especially in his later work,[56] to isolate "political morality . . . from the rest of our comprehensive moral views."[57] O'Neill writes that the political domain is isolated by

> limiting it to matters of formal civil and legal rights of individuals while ignoring the effects of social and economic structures on the effective exercise of those rights. . . . From Rawls's point of view, it would appear that for each of us morality has a political aspect that relates to questions regarding the regulation of the basic structure of society, and a nonpolitical aspect that relates to other dimensions of our lives.[58] [59]

O'Neill critiques Rawls's attempt to distinguish the political from the nonpolitical in moral reasoning as implausible and problematic.[60] He argues that isolating the political realm unfairly restricts moral reasoning about justice by unwarrantedly placing some things outside its bounds.[61] For example, Rawls contends that the reasonable outcome of balancing the political views at stake in the question of the morality of abortion would allow women the right to an abortion.[62] But, O'Neill counters, this is at odds with the views of anyone whose comprehensive moral vision leads her to

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[54] O'NEILL, *supra* note 47, at 38.

[55] *See* Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE 171, 171 (Seyla Benhabib ed., 1996).

[56] *See generally* JOHN RAWLS, POLITICAL LIBERALISM 30–31 (1996) (positing that political and nonpolitical commitments and attachments shape moral identity).

[57] O'NEILL, *supra* note 47, at 21–22.

[58] *Id.* at 13, 22.

[59] Many feminist thinkers, including Susan Moller Okin, would take issue with O'Neill's characterization of Rawls because, in their view, Rawls's theory of justice fails to interrogate one of the basic structures of society that is a harbor of inequality—the family. *See infra* notes 64–70 and accompanying text.

[60] O'NEILL, *supra* note 47, at 37–40.

[61] *Id*. at 26.

[62] *Id.* at 27 (citing RAWLS, *supra* note 56, at 243 n.32).

oppose abortion.[63] O'Neill thus makes clear that there are implicit normative judgments embedded in the demarcation of the political.

Susan Moller Okin has highlighted the normative implications of one particular dividing line drawn by Rawls—the placement of the family outside the realm of public morality.[64] Rawls's extraction of the family from the political realm is of central importance to feminists because the family is an institution at the root of much gender inequality. Okin has criticized Rawls's placement of the family outside the scope of justice by noting how injustices within the family, which disproportionately harm women, are not interrogated by the principles of justice and thus remain largely intact.[65] She explores how Rawls's flawed attempt to isolate the political leads to his theory's inability to plumb the deeply entrenched gender structures in society and expose and remedy the foundations of sexual inequality.[66]

According to Okin, Rawls begins by claiming that the family is one of the basic structures of society that will be regulated by the principles of justice, but his later treatment of the subject belies this claim and supports the conclusion that he simply assumes the justness of internal relations within the family.[67] He never discusses how justice as fairness would apply to the family as he does with other basic social institutions, nor does he question whether the traditional division of labor within the family is just.[68] He states that the parties in his original position are heads of families rather than individuals without addressing the implications this might have for injustices within the family—namely, that they would avoid inquiry.[69] Notwithstanding his placement of the family outside political scrutiny, Rawls asserts that the family should be the primary institution responsible for inculcating the values of justice as fairness in children without ever explaining why families are just—presumably a prerequisite for the family to serve as the principal site for the transmission of just values.[70] In his later work, *Political Liberalism*, Rawls confirms the view of the family as nonpolitical, thereby allowing the family to evade scrutiny, even though it is one of the primary domains of gender injustice.[71] Rawls thus instantiates a theory of "separate spheres":[72] placing the family outside the

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[63] *Id.* at 27–28.

[64] *See* OKIN, *supra* note 50, at 89–101.

[65] *Id.*

[66] *Id*.

[67] *Id.* at 91–100; Okin, *supra* note 41, at 235–38; O'NEILL, *supra* note 47, at 40–43.

[68] Okin, *supra* note 41, at 235–36.

[69] *Id.* at 235–37; OKIN, *supra* note 50, at 91–100; O'NEILL, *supra* note 47, at 43, 45, 50.

[70] RAWLS, *supra* note 4, at 462–72; Okin, *supra* note 41, at 235–37.

[71] RAWLS, *supra* note 56, at xxxi; O'NEILL, *supra* note 47, at 43–46; Amy R. Baehr, *Toward a New Feminist Liberalism: Okin, Rawls, and Habermas*, 11:1 HYPATIA 49, 57 (Winter 1996).

[72] Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89–171 (1998). Williams emphasizes the relatively recent construction of the home/market structure of the "separate spheres"

realm of public morality leads Rawls's theory to accept injustices within the family as private and natural rather than to subject them to scrutiny as he does injustices in the public sphere.

It is worthy of note that despite his theory's reliance on interdependence as the mechanism for moral education, Rawls does not question the notion of the purely autonomous individual. Even in recognizing the role that parents play in providing their children with a moral education, Rawls fails to acknowledge the special nature of children as dependents, the unique position that caregivers fill, and the issues of interrelation, connection, and dependence that flow from these relationships.[73] The nonpolitical nature of the family in Rawls's theory leads these familial relationships to be seen as private as well.[74]

Rawls's theory, like other liberal theories, draws a sharp, constructed distinction between the public sphere, the market and politics, on the one hand, and the private sphere, the home, on the other. Carole Pateman writes that "[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle."[75] Although early feminists accepted the "separate spheres" doctrine of the home and the market,[76] feminists in recent decades have emphasized its harmful gendered consequences caused by the failure to interrogate the justness of the private sphere—namely, internal family relations—and its concomi-

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notion. She argues that domesticity as a gender system organized by market work on the one hand and family work on the other came about around 1780. *Id.* at 110–12. She claims that gender norms justify, sustain, and reproduce that organization. *Id.* at 113–34. *See also* JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (exploring the concepts of the caretaker and the ideal worker, and locating their roots in the nineteenth-century ideology of domesticity, from which we inherited the notion that the ideal worker is one who can devote his or her time and energy to wage work without caretaking responsibilities).

[73] OKIN, *supra* note 50, at 93–100.

[74] The ambivalence Rawls displays towards the family—his simultaneous reliance on the family for a crucial public function, the intergenerational transmission of moral values, and his relegation of the family to the realm of the nonpolitical beyond public scrutiny—has also been seen in history. In the nineteenth century in Western democracies, as the divide between the home and market arose, the home was glorified as a sacred haven for morality and emotion, which were under threat by the increasing ubiquity of the commercial spirit. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983). However, the home was also scorned for failing to meet the conditions of rationality, discipline, and objectivity that were valued in the market. *Id.* at 1499–1500. Although Rawls elevates the family to some extent by designating it to the realm of moral education and thus the protector of values, RAWLS, *supra* note 4, at 462–72, he also devalues it by placing it outside the scope of justice.

[75] Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* 1 FEMINISM 327, 327 (Susan Moller Okin & Jane Mansbridge eds., 1994). In the early nineteenth century, the private sphere was seen as a place to safeguard sanctity, virtues, and emotions, but was also scorned for failing to meet the conditions of rationality, discipline, and objectivity, *see* Olsen, *supra* note 74, at 1499–1500, and this same characterization persists, at least in part, to this day.

[76] *See* Olsen, *supra* note 74, at 1516, 1524 (discussing the historical acceptance of the market and the family as separate yet dependent spheres, with each gaining legitimacy from the existence of the other).

tant devaluation of the private sphere. The dichotomy "obscures the subjection of women to men within an apparently universal, egalitarian and individualist order."[77] This cannot be remedied simply by universalizing liberal principles to extend to women in the public sphere because it leaves intact "the patriarchal structure of private life."[78] Because public factors, including childcare policies and the sexual division of labor in the market, structure personal circumstances, "'[p]ersonal' problems can thus be solved only through political means . . . ."[79]

Some theorists have extended even further the challenge to the public-private divide as it relates to the family. In a seminal article on the construction of this dichotomy in the law, Frances Olsen argues that the idea of intervening in "private" family relations is incoherent, because there is no such thing as "private" family relations: the state is so intimately involved in constructing the family in a wide variety of ways that it simply does not make sense to speak of the family apart from state regulation.[80] "[T]he everyday common sense of modern, democratic, political, and legal cultures—that the family is a private haven from the public realms of market and government—ignores the intimate, indispensable, and legally constructed connections between these social spheres."[81] Placing the family outside the political sphere denies the ways in which economic life is intertwined with the private sphere and how legislation and judicial action (and inaction) shape the family.[82] Most importantly for my purposes, the distinction of these two social spheres denies that "the production of goods and services for the market by *paid* workers depends on the subsidy of *unpaid* care-givers'—predominantly women's—labour."[83]

2. The Failure To Recognize the Concrete Other

Another strand of feminist criticism, most notably offered by Seyla Benhabib, questions the basis of Rawls's notion of ethics—the primacy of justice and the absence of care.[84] Building on the work of Carol Gilligan's *In a Different Voice*,[85] Benhabib notes that Rawls's focus on auton-

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[77] Pateman, *supra* note 75, at 329.

[78] *Id.* at 339.

[79] *Id.* at 341.

[80] *See generally* Olsen, *supra* note 74.

[81] Lucy A. Williams, *Beyond Labour Law's Parochialism: A Re-envisioning of the Discourse of Redistribution*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 93, 96–97 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2002).

[82] OKIN, *supra* note 50, at 93–100, 124–33; O'NEILL, *supra* note 47, at 43–46. The consequences of failing to recognize the interrelatedness of the public and private spheres in the context of employment are discussed in greater detail below. *See infra* Part V.D.1.

[83] Williams, *supra* note 81, at 97 (emphasis in original).

[84] *See* SEYLA BENHABIB, *The Kohlberg-Gilligan Controversy and Moral Theory*, *in* SITUATING THE SELF 148 (1992); O'NEILL, *supra* note 47, at 49.

[85] *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (highlighting gender differences in moral reasoning and finding that care-related reasoning was employed much

omy and individualism without acknowledging the importance of interconnection underestimates care and our responsibility to concrete others.[86] She takes issue with the epistemological grounding of Rawls's theory, arguing that "ignoring the standpoint of the concrete other leads to epistemic incoherence in universalistic moral theories."[87] She argues that "moral reciprocity involves the capacity to take the standpoint of the other, to put oneself imaginatively in the place of the other, but under conditions of the 'veil of ignorance' the *other as different from the self* disappears. . . . Differences are not denied; they become irrelevant."[88] It is impossible to define the self "with reference to its capacity for agency alone. Identity does not refer to my potential for choice alone, but to the actuality of my choices, namely to how I, as a finite, concrete, embodied individual, shape and fashion [my] circumstances . . . ."[89] Along these lines, Professor Marilyn Friedman has argued that the exercise of autonomy properly conceived—living in accord with one's wants, needs, concerns, and commitments—in fact relies on our connection to others, not complete individualism and self-sufficiency.[90]

Therefore, according to Benhabib, one cannot fully exercise one's moral capacity with selves that are completely decontextualized, because moral decisions require drawing on the specific needs of concrete others.[91] When parties are behind the veil and completely unencumbered, no one is capable of articulating the particular needs of the least advantaged, specifically the ways in which their needs differ from the dominant group.[92] Rawls's "equivalence of all selves qua rational agents dominates and stifles any serious acknowledgment of difference, alterity [their irreducible distinctness and difference from the self] and of the standpoint of the 'concrete other.'"[93] The veil thus brings unity at the cost of overlooking difference.[94]

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more often by women than men).

[86] BENHABIB, *supra* note 84, at 166; *see also* O'NEILL, *supra* note 47, at 47.

[87] BENHABIB, *supra* note 84, at 161.

[88] *Id.*

[89] *Id.* at 161–62.

[90] Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 350–53 (2005) (discussing the relational conception of autonomy proposed in MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS (2003)).

[91] BENHABIB, *supra* note 84, at 163–64; O'NEILL, *supra* note 47, at 48.

[92] BENHABIB, *supra* note 84, at 166–68; O'NEILL, *supra* note 47, at 49.

[93] BENHABIB, *supra* note 84, at 167.

[94] Okin and Benhabib ultimately disagree on Rawls. Okin is a Rawlsian and has attempted to resuscitate Rawls in the face of critiques like the one offered by Benhabib. Okin asserts that Rawls's theory *does* implicitly rely on notions of dependence and identification with others, Okin, *supra* note 41, at 235–46, and highlights that under Rawls's theory, moral education is achieved by transmission from parent to child within the family. *Id.* at 235–37. She also posits that the parties in the original position would have to put themselves in the position of every other possible individual in arriving at the principles of justice. *Id.* at 245–46. In response, Benhabib maintains that ethical interactions cannot be based on abstract notions of others and thus still questions Rawls's theory. BENHABIB, *supra* note 84, at 164–68. Okin, on the other hand, believes that Rawls's shortcoming is

The veil of ignorance's reliance on the abstract rather than concrete other to achieve neutrality exemplifies what Professor Iris Marion Young calls the "ideal of impartiality."[95] Professor Young criticizes the ideal of impartiality in liberal democratic theory on the ground that it "expresses a logic of identity that seeks to reduce differences to unity."[96] Young argues that this supposed impartiality results only by stripping away "the particularities of situation, feeling, affiliation, and point of view."[97] However, these particularities are still part of what make up the individuals within the theory, and, according to Young, these "particularities of context and affiliation cannot and should not be removed from moral reasoning."[98] The position of the dominant group is often viewed as the neutral baseline, and the particularities of nondominant groups are what distinguish these groups from this baseline position. By removing these distinguishing characteristics, the ideal of impartiality obscures how "particular perspectives of dominant groups claim universality."[99]

This explication of impartiality highlights Benhabib's criticism described above—namely, the implausibility and undesirability of a moral theory based on disembodied selves—but also adds an understanding of how the "ideal of impartiality" reifies bias against those who do not fit the norm by universalizing the particular.

> Where social group differences exist, and some groups are privileged while others are oppressed, this propensity to universalize the particular reinforces that oppression. The standpoint of the privileged, their particular experience and standards, is constructed as normal and neutral. If some groups' experience differs from this neutral experience, or they do not measure up to those standards, their difference is constructed as deviance and inferiority.[100]

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largely a matter of line drawing and would be resolved by extending the principles of justice to the family. *See* OKIN, *supra* note 50, at 89–101. *But see* Baehr, *supra* note 71, at 56–61 (arguing that "adjusting the family to the requirements of justice may not meet with the kind of overlapping consensus" required by Rawls's political liberalism and that Rawls and Okin have fundamentally different conceptions of the division between the political and nonpolitical). For Benhabib, the flaws in Rawls's theory run much deeper and could not be so easily remedied. BENHABIB, *supra* note 84, at 164–68. Despite these differences, both Okin and Benhabib agree on the significant role that relationships and carework play in women's lives, and the need for any sex-equal moral theory to take into account a variety of forms of interdependence. For further discussion of Okin's and Benhabib's views, see *infra* Part IV.C.

[95] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 97 (Princeton Univ. Press 1990).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 116.

Moreover, when oppressed groups question the seeming impartiality of the governing policies and structures and the assumptions underlying them and assert their views from their unique perspectives, their perspectives and interests appear biased because they depart from the allegedly neutral common interests. "Commitment to an ideal of impartiality thus makes it difficult to expose the partiality of the supposedly general standpoint, and to claim a voice for the oppressed."[101] Despite this, because neutrality is a largely uncontroversial goal, and because it is difficult to see the ways in which formally neutral rules have disproportionate effects on marginalized groups, impartiality is a powerful discursive tool for implementing seemingly neutral rules that favor more powerful groups.[102]

B. Application of Critiques to the Limitation of Information in the Hiring Context

Both Rawls's veil of ignorance and the regulations on preemployment inquiries are aimed at achieving objectivity and neutrality through ignorance. To do so, however, they must make certain assumptions about what characteristics are essential to the notion of the self and to the nature of human interaction, which features are or are not morally relevant, and where the line between the public (the realm of justice) and the private (the realm of care) should be drawn. The consequences of these assumptions threaten to compromise both the resulting effectiveness and neutrality of these projects.

1. The Disembodied Applicant: Ignorance and the Concept of the Self in Employment Law

Rawls's original position has been criticized because parties under the veil are conceived of as completely unencumbered. As explained above, according to several of Rawls's feminist critics, imagining people as disembodied, without any conception of their identity, and disconnected, without ties to others, can compromise the justness of the resulting moral judgments. This is true in the employment context as well. Like Rawls's veil of ignorance, the prohibitions on preemployment inquiries decontextualize applicants. These laws require employers to make hiring decisions in the realm of sanitized abstraction without knowledge of traits that are often quite salient in making an applicant who she is—traits that particularize people and define, at least in part, their individuality, identity, and distinctive needs and interests. Benhabib argues that thinking of individuals in such an unencumbered way wrongly devalues our identities and connections with others.[103] Blocking employers' access to information at the

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[101] *Id*.
[102] *See* O'NEILL, *supra* note 47, at 44.
[103] BENHABIB, *supra* note 84, at 161–62.

hiring stage conceives of employees without connections or identities and the responsibilities that accompany them, including childcare responsibilities. These elements then come to be seen as unrelated to the employment relationship. As many scholars have noted, in addition to its regulative function, the law serves an expressive function.[104] Here, the law makes a strong statement about what is and is not salient to the identity of individuals as employees and what traits are relevant to the employment relationship. This is problematic because connections to others have a great impact on the employment relationship that goes unacknowledged and unaccommodated. Although these elements of employees' identities should be irrelevant to the hiring process, they are not irrelevant to their ability to balance work and family.

In this way, prohibitions on preemployment inquiries construct an impoverished employment relationship that does not comport with a complete view of the self and thus fails to address adequately the needs of employees. This construction harms employees because it does not allow for the recognition of the self embedded in a community, as well as other associations and values, including family and other group identities and connections. As the employment relationship controls ever-growing amounts of an employee's time and space in the new economy,[105] this construction of the individual increasingly diminishes the conception of employees as human beings.

Prohibitions on preemployment inquiries might also lead to the bifurcation of the employee not just on a theoretical level, but also on an individual, subjective level.[106] The regulations on hiring inquiries construct

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[104] *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

[105] Work has increasingly begun to encroach on employees' personal lives, both in terms of increased work hours and in terms of invading employees' homes and personal time through technology. Peter Kuhn & Fernando Lozano, *The Expanding Workweek? Understanding Trends in Long Work Hours Among U.S. Men, 1979–2002*, at 1 & n.1 (Mar. 2005), http://www.irs.princeton.edu/seminars/Kuhn.pdf (noting that the length of the average American man's workweek has increased since the 1970s, and that the average American woman's workweek has increased even more significantly during the same time period).

[106] The subjective discomfort resulting from the bifurcation of self is an example of identity harm. Identity harm can be described as the harm that results from either being forced to deny one's identity or from not having one's identity adequately recognized and valued. *See* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 208–12 (2004) (discussing the identity harm at issue in *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981), a case that denied relief to a plaintiff who challenged her employer's grooming policy prohibiting employees with high customer contact from wearing an all-braided hairstyle, despite the plaintiff's claim that this discriminated against her as a black woman because this hairstyle had cultural and historical significance to her); Kristine Shaw, *Local Sexual Orientation Non-Discrimination Laws: A Means of Community Empowerment*, 10 CORNELL J.L. & PUB. POL'Y 385, 387 (2001) (discussing the identity harm to gay men and lesbians when their sexual orientation is not made public). Employment discrimination law in the United States generally does not protect against identity harm unless it rises to the level of harassment. *See, e.g.*, *Rogers*, 527 F. Supp. at 232–33 (noting that "[a]lthough [Title VII] may shield employees' psychological as well as economic fringes from employer abuse . . .

who the applicant is to the employer and legally define this person. The law's requirement that applicants isolate certain traits of their identity as irrelevant, and thus inappropriate for the workplace, might lead to an uncomfortable bifurcation of identity that causes the applicant psychic harm. Some applicants' identities might be so essential to who they are that they do not want to separate from them. Having certain elements of identity forced outside of the employment relationship and working life might harm especially these applicants' sense of self. For example, an employee might want to discuss her children with her coworkers or superiors but may feel uncomfortable doing so because children are seen as irrelevant and even detrimental to work. The psychic burden of disentangling one's "public" face as an employee from one's full self might also disproportionately affect women, who tend to hold more roles in their lives, and these roles might tend to take on a different significance for them.[107]

2. Constructing the Boundaries of the Employment Relationship: Replicating the Artificial Public-Private Divide

Just as Rawls's theory is biased towards conceptions of the good that are liberal and individualistic, so, too, does employment law favor autonomous employees. In the employment context, this is achieved by conceiving of employees as isolated from any associational ties, including family, community, identity groups, and others. In this way, the privileging of justice over care, and thus of autonomy and individualism over connections to others, is replicated in the law. The ordering of justice over care and autonomy over dependence is evidenced by the traits that receive accommodation under federal law and how these accommodations operate. Federal employment law requires employers to accommodate disability, which allows an employee to become more self-sufficient and decreases dependence, but does not accommodate everyday parenting responsibilities, which derive from human interdependence.[108] Title VII does, however, require employers to accommodate religion.[109] This could be seen as the law's

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plaintiff's allegations do not amount to charging [her employer] with a practice of creating a working environment heavily charged with ethnic or racial discrimination, or one so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . .) (internal citations omitted).

[107] For instance, due to the societal tendency to emphasize the role of women in relationship to others, women might tend to place more emphasis on their roles as daughters, wives, mothers, and caregivers than men do on their correlative roles. *Cf.* Jacquelyn H. Slotkin, *Should I Have Learned to Cook? Interviews with Women Lawyers Juggling Multiple Roles*, 13 HASTINGS WOMEN'S L.J. 147, 150, 153, 157 (2002) (discussing the role conflict that women lawyers experience).

[108] *But see* Ruth O'Brien, *A Subversive Act: The Americans with Disabilities Act, Foucault, and an Alternative Ethic of Care at the Global Workplace*, 13 TEX. J. WOMEN & L. 55 (2003) (framing an ethic of care in terms of human need and arguing that the ADA's employment provisions are revolutionary because they exemplify this ethic by accommodating employees based on need rather than any essential identity).

[109] Title VII, 42 U.S.C. § 2000e(j) (2000).

recognition of the associational ties of a religious community. However, religion can also be seen as an individualistic pursuit, and Title VII's accommodation requirement is less stringent than that under the ADA. The FMLA's requirement of unpaid, job-protected leave for the birth or adoption of a child or provision of care for an ill family member recognizes an employee's ties to others.[110] However, the accommodation granted by the FMLA is limited to the discrete situations of illness and childbirth and does not extend to regular, daily caregiving responsibilities.[111] By exempting coverage for typical parental responsibilities, the FMLA expresses a view of dependence as anomalous and aberrant, thereby reinforcing the individualistic nature of the model employee and ignoring the reality of women's lives and the primacy of connectedness and its correlative duties.[112] This reifies in law the view of employees as disconnected individuals, regardless of whether this reflects reality, and expresses something about the value of ties to others—namely, that they are of little worth.

Liberal political theory relies on isolating the political domain from other domains of life, and anything that falls outside this political domain is outside the realm of justice.[113] This distinction between the political domain and the rest of life is a manifestation of the feminist critique of liberalism's division between the public and the private spheres. As Okin argues, the family, one of the primary realms of gender injustice, is considered nonpolitical in Rawls's theory, and thus is beyond scrutiny.[114] This blindness to gender injustice through the cordoning off of the family is also seen in the employment realm. The limitations on preemployment inquiries delimit the scope of life that laws relating to the fairness of the employment relationship will reach. By extricating certain "personal" traits from the employment relationship, prohibitions on preemployment inquiries reinforce the distinction between public and private, deemphasizing and devaluing the latter. These prohibitions also result in the law's failure to recognize the interdependency of the public and private spheres in the form of the market and the family and the way the law regulates both of these arenas: the structure of the market depends upon the structure of the family, and both of these domains are structured in large part through the law.[115] Prohibitions on preemployment inquiries mask these connections by sharply demarcating the supposedly "public" traits from the "private" traits. This allows employers to consider certain elements, including childcare responsibilities, outside the realm of the employment relation-

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[110] 29 U.S.C. § 2612(a)(1)(A)–(C) (2000).

[111] *See id.*

[112] I am in no way advocating that women should bear a disproportionate amount of child-, elder-, and homecare responsibilities, but failing to acknowledge and attempt to remedy this continuing truth exacerbates the burden on women.

[113] O'NEILL, *supra* note 47, at 13.

[114] OKIN, *supra* note 50, at 93–100.

[115] *See supra* text accompanying notes 76–79.

ship, even though their businesses are dependent on and benefit from these activities in the "private" sphere. In this way, the public-private dichotomy that leads to Rawls's failure to confront injustices in the family also leads to the same failure in employment law.

And, of course, the manner in which the boundaries of employment relationships are drawn will affect employees and might disproportionately affect one group more than another. Placing childcare obligations outside the scope of the employment relationship, and thereby making them private concerns, disproportionately affects women's ability to engage in market work, because women currently perform a greater share of childcare duties than men.[116] Therefore, regulations on inquiries in hiring are subject to the same critique put to Rawls: what seems like neutrality is just an obscured form of partiality.[117] The limitations on preemployment inquiries construct who the applicant is to the employer, determining which characteristics are relevant to the employment relationship and which are relegated to the realm of the personal. Removing these facets of people's lives from consideration creates a very particular vision of the model employee—white, male, straight, middle-class, not primary caregiver, not disabled, of an unobtrusive religious faith, speaking English as a primary language—because these are the default traits that are assumed to fit the structure of the overwhelming majority of American workplaces today.[118] By placing employers behind the veil of ignorance, they construct the model employee as unencumbered and autonomous, and those employees who do not fit this model are forced to resolve whatever conflicts exist between their life and their job on their own. The default conception of the archetypal employee burdens those employees who do not fit this model.

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[116] *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 431–32 & n.329 (2001) (noting how feminist legal scholars "have exposed the ways in which concepts of privacy have been used . . . to privatize the cost of caregiving work done by women") (citing Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1224 (1989); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 133 (1989); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 469 (1990); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 158 (1998); Martha A. Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 955–56 (1991); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1120 (1986)).

[117] *See supra* notes 95–100 and accompanying text.

[118] *See* WILLIAMS, *UNBENDING GENDER*, *supra* note 72, at 58–59 (explaining that work is structured around "the ideal worker" who works full time and takes little or no time off for childbearing or childrearing).

3. Maintaining the Artificial Public-Private Divide and the "Ideal of Impartiality" by Failing To Accommodate Employees' Needs

The segregation of employees' particularities outside of the scope of the employment relationship through regulations on applicants' information at the hiring stage not only creates an anemic employment relationship but also frequently imposes material consequences on employees in the form of a lack of accommodation for traits and responsibilities that are placed outside the scope of employment. Once the employment relationship commences, and the previously prohibited traits enter the workplace, they are often seen as "personal"—outside the scope of the employment relationship—and thus unworthy of accommodation.[119] Regulations of preemployment inquiries and their concomitant ideal of neutrality privilege unencumbered employees who fit the statutory norm while burdening "deviants" who require accommodation. These prohibitions were instituted to avoid discrimination at the hiring stage, but they also play a role in constructing the parameters of the employment relationship; once the relationship begins, these traits remain outside the relationship and the employer has no responsibility to accommodate them, even if the employee requires accommodation in order to work (e.g., childcare). This construction of the employment relationship and the devaluation of connections to others in both liberal theory and the law lead to the lack of accommodation for caregiving responsibilities.[120] And although maintaining the allocation of family responsibilities beyond the easy reach of legal interrogation keeps the burden of house- and carework on women, it also has negative consequences for men by rigidifying gender roles.[121]

Both Rawls and regulations on information at the hiring stage presume the irrelevance of certain characteristics and that a just employment relationship (and society) can be constructed without considering them. However, in some instances, we might want to question the irrelevance of the traits that are currently hidden from view.[122] Regulations on preem-

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[119] Employment law more generally struggles with questions related to the public-private divide in the employment relationship and how elements deemed "personal" should be handled in many forms. The Supreme Court recently addressed the question whether the Portal-to-Portal Act, 29 U.S.C. § 252 (2000), requires employers to compensate employees for the time it takes them to walk from where they put on protective gear to their worksites. IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005). The Court decided that employees must be compensated for the time they spend walking to and from changing areas to work areas but not for the time they spend waiting to change. *Id.* at 525, 528. Whether or not this time is compensable turns on the text of the statute and its accompanying regulations, but also implicates an underlying view of what constitutes an element of personal life and what constitutes an element of work.

[120] I will return to this discussion of the importance of accommodation when I argue for the application of the ADA model of reasonable accommodation to other traits, namely employees' care for dependents. *See infra* Part V.D.1.

[121] *See infra* Part V.D.1.

[122] For example, the Seventh Circuit held that it was not unconstitutional to give preference to black officers for promotions in a "boot camp" rehabilitation program for juve-

ployment inquiries focus on formal equality and bias based on identity but stop short of a fuller conception of equality, which can only be attained by requiring employers to play a more active role in accommodating employees. By making certain characteristics (e.g., childcare responsibilities), which may require some form of accommodation to enable the employee to work, irrelevant, this approach fails to interrogate deeper structural inequalities that are not reached by seemingly "impartial" antidiscrimination laws. As Professor Young argues, these sorts of formally neutral rules disguise how the particularized views of dominant groups appear universal and thereby make the claims of oppressed groups for things such as accommodation appear as particularized claims for special interests rather than elements that have been ignored by the supposedly neutral standard.[123] Again, the maintenance of an artificial public-private divide is harmful because formal equality in the public sphere is insufficient to give equal opportunities to workers when inequalities remain in the private sphere.

Affirmative action policies are another manifestation of the principle that neutrality cannot effectively address inequality on the basis of particularity and that these inequalities can be remedied only by recognizing particularities and addressing them specifically.[124] For proponents of affirmative action, ignorance cannot lead to fairness because historical unfairness can only be remedied by taking into account applicants' particularities. "Equality, defined as the participation and inclusion of all groups in institutions and positions, is sometimes better served by differential treatment,"[125] and this requires knowing people's particularities. The con-

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niles that had a 70% black population because expert evidence showed that "black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp." Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996) (Posner, J.). Thus, having a black lieutenant was seen as essential for the facility to "succeed in its mission of pacification and reformation." *Id.* I do not think that one's identity in any way dictates what he or she is capable of, and I would be highly suspicious of any public or private forces channeling employment opportunities on the basis of any characteristic. I am simply positing that in a society in which the effects of a history of discrimination, as well as both ongoing overt and covert discrimination, continue to be felt, and people's lives are thus shaped in part by their identity, it might be necessary to take these traits into account, both in framing principles of justice and in making hiring decisions. This is made clearer through examples discussing the need for accommodation and affirmative action on the basis of certain traits.

[123] YOUNG, *supra* note 95, at 97.

[124] For a more extended discussion of how affirmative action policies contravene the neutral principle of equal treatment and assume a distributive model of social justice, *see id.* at 192–225.

[125] YOUNG, *supra* note 95, at 195. The regulations promulgated pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793, 794 (2000), the predecessor of and model for the ADA, acknowledge this. For almost twenty years before the passage of the ADA, the Rehabilitation Act prohibited discrimination on the basis of disability by the federal government, federal contractors, and entities receiving federal funds. The regulations to section 504 of the Rehabilitation Act specify that covered entities may inquire into applicants' disability status

tinuing need for affirmative action in many industries highlights the insufficiency of formal equality and ignorance in the hiring context.

The view of formal equality embodied in prohibiting preemployment inquiries also perpetuates the false dichotomy between antidiscrimination and accommodation. Professor Christine Jolls has persuasively argued that many observers wrongly dichotomize antidiscrimination and accommodation.[126] She notes that "antidiscrimination" is often thought to focus on "equal" treatment and "accommodation" to focus on "special" treatment.[127] She highlights the overlap between these two forms of labor market regulation—that some parts of antidiscrimination law (especially disparate impact) are requirements of accommodation—and the similarities between these two forms of regulation—that both impose costs and require the employer to change the norms of the workplace.[128] By assuming only requirements of formal equality but refusing to recognize employees' needs for accommodation, prohibitions on preemployment inquiries maintain the illusion of legally and conceptually distinct categories of identity-based regulations of the labor market. This is problematic because it is difficult to address the needs of marginalized workers when their claims are viewed as requests for accommodation or affirmative action rather than remedies for discrimination.

IV. The Case for the Purposeful Use of Preemployment Inquiries

A. Regulation of Preemployment Inquiries Is Needed To Address Discrimination

While we might wish that hiring discrimination were a relic of the past, research suggests that it persists despite the more than forty years since the passage of Title VII. Therefore, although I have criticized the effects of prohibitions on preemployment inquiries, in this section, I will

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> in situations where a federal fund recipient is taking remedial action to correct the effects of past discrimination; where the recipient is taking voluntary action to overcome the effects of conditions that resulted in the limited participation in its programs by people with disabilities; or where a recipient is taking affirmative action pursuant to the requirements of section 503 of the Rehabilitation Act.

Feldblum, *infra* note 207, at 542–43 (citing 45 C.F.R. § 84.14(b) (1990)). In such situations, the employer must make clear to the applicant that answering such inquiries is strictly voluntary, that their purpose is remedial, and that refusal to answer the inquiries will not result in adverse treatment of the applicant. *Id.* at 543 (citing 45 C.F.R. § 84.14(b)(1)–(2)). These provisions, however, were not incorporated into the EEOC's regulations implementing the ADA. *Id.* at 544.

[126] Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001) (arguing that antidiscrimination and accommodation models overlap and have many similarities and thus should not be thought of as legally or conceptually distinct concepts).

[127] *Id.* at 644.

[128] *Id.* at 645.

explain why they remain necessary, and why we must remedy their effects rather than eliminate them. I will also discuss and respond to additional potential criticisms of limiting employers' access to information at the hiring stage.

There is convincing empirical evidence of the continuing problem of hiring discrimination, mostly on the basis of race[129] and sex.[130] Tester studies show that whites as compared to minorities and men as compared to women tend to fare better in applying for the same job.[131] Perhaps more surprising, a recent study demonstrates that motherhood is also a basis for hiring discrimination and that knowledge of motherhood status at the application stage can have extremely detrimental effects on job applicants who are mothers.[132] The study sent out pairs of equivalent résumés from fe-

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[129] *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 203–04, 295–96 & nn.10–12, 294 (citing CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Michael Fix & Raymond J. Struyk eds., 1993) [hereinafter CLEAR AND CONVINCING EVIDENCE] (collecting studies showing racial discrimination in employment and other contexts); HARRY CROSS ET AL., URBAN INST., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 61–62 (1990) (reporting that in controlled study with white and Latino testers, white job applicants received 33% more job interviews and 52% more job offers than similar Latino applicants, and Latino testers were three times more likely to face unfavorable treatment); JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM (1994) (using in-depth interviews to chronicle racism faced by middle-class African Americans in, among other situations, the workplace); MARGERY AUSTIN TURNER ET AL., URBAN INST., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991) (reporting that, in controlled study of matched African American and white job applicants, white applicants were significantly more likely to obtain favorable outcomes); GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 21–23 (July 19, 1995) (presenting a number of "tester" studies demonstrating race discrimination in employment); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 5–11, 17–26 (1994) (setting forth evidence of continuing race discrimination in employment)).

The Urban Institutes looked at hiring responses to black and white male applicants in Washington, D.C. and Chicago, Illinois. *See* Anthony F. Spalvieri, Note, *Employment Testers: Obstacles Standing in the Way of Standing Under § 1981 and Title VII*, 52 CASE W. RES. L. REV. 753, 756–58 (2002) (citing TURNER ET AL., *supra*). In a study of 476 "hiring audits" with one white and one black tester, the white applicant was able to advance further in the hiring process than his equally qualified black partner in 20% of cases; in 15% of the audits, the white applicant received a job offer but the equally qualified black counterpart did not. *Id.* at 756–57.

[130] *See* Merritt & Reskin, *supra* note 129, at 201 & n.3 (citing Martha Foschi et al., *Gender and Double Standards in the Assessment of Job Applicants*, 57 SOC. PSYCHOL. Q. 326, 327 n.1 (1994)); Spalvieri, *supra* note 129, at 757 & n.26 (citing *Sex Discrimination: Employment Testing Project Shows Bias Against Female Mechanics in San Francisco*, DAILY LAB. REP. (BNA) No. 119, at A-5 (June 20, 2000)) (discussing study where forty matched pairs of testers of one male and one female sought immediate openings in San Francisco automobile service shops, and reporting that the male applicant was preferred in 60% of cases whereas the female applicant was preferred in 15% of cases).

[131] *See* sources cited *supra* notes 129–130.

[132] Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, AM. J. SOCIOLOGY (forthcoming 2007); *see also* STILL, *supra* note 26 (citing a vast increase in the number of suits filed alleging discrimination on the basis of family

male applicants, one of which indicated that the applicant was a mother of two children and one of which did not mention children, to undergraduates, who were to consider these applicants for a job as a marketing director for a communications firm.[133] When the résumés were pretested without indicating any difference in family status, the candidates were equally preferred.[134] However, once the difference in family status was included, 84% of the participants would have hired the non-mother candidate, compared with only 47% of participants who would have hired the mother.[135] Participants evaluated mothers as significantly less competent and committed to work than non-mothers.[136] Additionally, the salary offered to non-mothers by the participants was on average $11,000 more than for mothers.[137] Moreover, when asked how many times the candidate could arrive late without it affecting the participants' view of the candidate as "management material," mothers were permitted substantially less lateness than non-mothers.[138] To be considered a qualified candidate, mothers, as compared to non-mothers, also needed to attain a better score on the "management profile exam," which was described to participants as providing evidence about potential for advancement.[139] When the study was conducted with male candidates, the results were reversed: fathers were not harmed by their family status and indeed were *benefited* by it.[140] Participants offered fathers on average a $4,000 higher salary than non-fathers.[141] The researchers also sent these résumés to actual job postings and found that the résumé from the non-mother received 2.1 times as many calls from prospective employers as the résumé from the mother.[142] The results of this study demonstrate that a bar on preemployment inquiries regarding family status is vital to protect mothers from discrimination and to achieve gender parity regarding the effect of parenthood on job prospects.

Many wrongly assume that hiring discrimination is not a serious problem because there are many more claims alleging discriminatory promotions and terminations than failures to hire.[143] However, the lack of discriminatory hiring claims is better explained

> by the heightened difficulty of detecting and proving such claims. Indeed, "[c]ontact between the applicant and the employer dur-

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responsibilities).

[133] Correll, Benard & Paik, *supra* note 132, at 15–20.

[134] *Id.* at 19.

[135] *Id.* at 24.

[136] *Id*.

[137] *Id*.

[138] *Id*. at 28.

[139] *Id*. at 24, 22.

[140] *Id.* at 30.

[141] *Id*. at 29.

[142] *Id.* at 38.

[143] Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 382 (1993).

> ing the hiring process is typically fleeting, the eventual outcome is unknown to the candidate, and the process itself rarely signals exclusionary intent." Accordingly, victims of hiring discrimination are less likely to know that they have been discriminated against, and to have access to information needed to prove it.[144]

In this way, unsuccessful job applicants are also behind a veil of ignorance and unable to pursue claims of discrimination due to a lack of information regarding the basis for a prospective employer's decision not to hire them. Because of the difficulty of ascertaining that one has been a victim of hiring discrimination and the special challenges involved in proving a hiring discrimination claim, it is particularly important to combat discrimination at the hiring stage, and thus prevention is, at least under current law, almost certainly the best way to address this problem.

Unfortunately, even a perceived reduction in overt discrimination does not indicate that the tides of hiring discrimination have turned. Research on human psychology and decision making suggests that decreases in express discriminatory attitudes might not improve (at least not to the extent one might imagine) the hiring prospects of disadvantaged groups. It is difficult for people to put aside their biases fully, even if they truly desire to act in a nondiscriminatory manner and believe that they are doing so.[145] Studies show that people do act, consciously or not, in discriminatory ways on grounds that employment discrimination law has deemed irrelevant and banned. For example, implicit association tests, which are designed to test subconscious biases (i.e., what people actually believe, not what they say they believe), indicate widespread bias against various protected groups, even by those who claim that they feel no bias towards these groups.[146] Further, the field of psychology has long recognized the tendency to use group identification as a mental heuristic for judgments and the tendency to favor the in-group and disfavor the out-group.[147] In this way, employers may be ignorant of even more than the information that regulations on preemployment inquiries screen out; they also may not be aware

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[144] *Id.* (quoting Michael Fix & Raymond Struyk, *An Overview of Auditing for Discrimination, in* CLEAR AND CONVINCING EVIDENCE, *supra* note 129, at 23–24).

[145] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512–14 (2005) (discussing studies revealing that people may self-report positive feelings towards a group even when implicit bias tests reveal that these same people have negative feelings towards that group).

[146] *Id.* at 1512 (explaining that studies of implicit bias conducted in the U.S. have found bias against Blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH, & PRACTICE 101 (2002) (finding, based on a large data set of internet surveys, implicit racial bias by whites against blacks and that implicit bias weakly correlates with explicit bias, i.e., those who expressed the most biased attitudes tended to also exhibit the most implicit bias as measured by the implicit attitudes test).

[147] *See, e.g.*, Kang, *supra* note 145, at 1512; Krieger, *supra* note 43, at 1191–93.

of the stereotypes and discriminatory beliefs that are influencing their hiring decisions.

Because these studies show that discrimination is often unconscious, regulating information at the hiring stage may be the only effective means of preventing hiring discrimination. In addition, employees' lack of information regarding the basis for hiring decisions means that discrimination often goes unnoticed. Thus, laws prohibiting discrimination at the hiring stage cannot adequately deter this discrimination or sufficiently encourage employers to implement mechanisms to address it. In addition, the undeniable history of discrimination against many protected groups has created a legacy of stereotypes that continue to linger, despite efforts to combat them.[148] I am not arguing that such biases are inevitable, but given our country's history, the amount of continuing discrimination,[149] and the lack of sufficient attempts both inside and outside of the law to counter such discrimination, these biases are, regrettably, likely to remain for the foreseeable future. For this reason, in addition to the difficulties of proving hiring discrimination, preventing the opportunity for such biases to operate is incredibly important, and in this respect, regulating information at the hiring stage is crucial.[150]

B. Criticisms of Regulating Information at Hiring: Do They Accomplish Their Purposes?

Limitations on preemployment inquiries can be seen as serving two related functions. First, they can be a way of smoking out discriminatory intent. This function is served by the approach taken in Title VII, which does not ban preemployment inquiries, but rather allows plaintiffs to utilize such inquiries as evidence of discrimination.[151] Second, limitations on preemployment inquiries can also be used to limit the grounds of information on which hiring decisions are made so that certain irrelevant traits are not part of the consideration. This view is taken by the ADA, which prohibits employers from inquiring into applicants' disability status at the

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[148] *See supra* notes 129–132 and accompanying text.

[149] *See supra* notes 129–132 and accompanying text; *see also* Charge Statistics from the U.S. Equal Employment Opportunity Commission FY 1992 Through FY 2005, http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2006) (noting that over 75,000 charges of discrimination were filed with the EEOC in 2005); NAT'L P'SHIP FOR WOMEN & FAMILIES, WOMEN AT WORK: LOOKING BEHIND THE NUMBERS (2004), *available at* http://www.nationalpartnership.org/portals/p3/library/CivilRightsAffAction/WomenAtWorkCRA40thAnnReport.pdf (explaining that from 1992 to 2002, the number of sex discrimination, sexual harassment, and pregnancy discrimination charges filed with the EEOC increased significantly).

[150] There is a need for continuing research to discover how hiring discrimination operates with respect to different disadvantaged groups and across different industries to combat such discrimination more effectively.

[151] *See supra* note 14 and accompanying text.

hiring stage except in several discrete circumstances.[152] These two functions of preemployment inquiries are related because allowing such inquiries to be used as evidence of discrimination will deter the inquiries, thereby reducing access to the information and the ability to make decisions on those grounds.

One can criticize limits on preemployment inquiries as failing at both of these goals. Criticism of the limitations of the first function— its failure to smoke out discriminatory intent—can take two approaches. First, it is arguable that such inquiries do not reliably indicate that hiring decisions are being made on the basis of the prohibited information. This is a weak objection. It is a reasonable conclusion that if our society has deemed certain traits to be irrelevant, both morally and in terms of employment capabilities, an employer's inquiry into such information indicates that it will play a role in his hiring decision. It is difficult to fathom for what other purpose such inquiries would be made at this stage in the employment relationship. Regardless of whether the stereotype on which an employer relies is based on a "positive" or "negative"[153] view of the group of which the individual is a member, most of the equality law of the United States considers these judgments harmful because any sort of stereotyping prejudices people on the basis of traits over which they have little or no control.[154] To be sure, in the context of hiring discrimination, the primary concern tends to be that of conscious or unconscious stereotypes about a group that lead an employer to deny a job to an individual at least in part on the basis of her membership in that group. However, equality law is concerned more generally with stereotypes of any sort that limit people's life

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[152] *See* ADA, 42 U.S.C. § 121129(d) (2000); *see also infra* notes 208–212 and accompanying text.

[153] It is often difficult to determine whether a stereotype is "positive" or "negative" because even seemingly positive notions of what a group is like can have harmful effects. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." (footnote omitted)).

[154] The issue of control is a controversial one in the law of equality. Protective status under antidiscrimination law is usually justified in part on the basis of the immutability of the protected trait, such as race and sex. However, certain protected traits, such as religion, do not fit this criterion. Moreover, postmodern scholarship on identity has questioned the permanence of even seemingly "immutable" traits, such as sex. *See generally* JUDITH BUTLER, GENDER TROUBLE (1990) (arguing, using transsexuals as a metaphor, that all gender is a performance, a form of "drag," thus calling into question the immutability and rigidity of sex and gender).

Because having children is typically viewed as a choice, one might expect that the law generally would not consider this a protected characteristic or require accommodation on this ground. However, women choose neither the fact of pregnancy nor the disproportionate amount of carework expected of them. The intractable nature of the gendered distribution of home and childcare responsibilities, despite women's increasing entrance into full-time employment, *see* Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 20–21 (2005), indicates that it is difficult for women to opt out of this gendered division of labor.

plans. Second, one might criticize these limitations as inadequate to smoke out discrimination because employers frequently make discriminatory hiring decisions without relying on such inquiries. This failure, which will be discussed in detail below, is really a criticism on the ground of the second function—barring access to information to prevent this information from influencing a hiring decision—and does not signal a deeper objection to the evidentiary function of these limitations.

One might also criticize regulating preemployment inquiries because they fail to serve the second function—screening out information about morally irrelevant traits. In other words, even if certain grounds for hiring decisions are banned and employers cannot ask about them, they might still play a role if the information is available through other means. Most obviously, some traits will become visible during the hiring process without the employer making any inquiries, either through (at least partially) voluntary disclosure of information on an applicant's résumé (e.g., membership in certain affiliation groups), or through involuntary disclosure through a face-to-face interview, during which an applicant's sex and race (and perhaps disability and age) are likely to become apparent. In addition, this criticism might have even broader reach. An inventive study similar to the motherhood discrimination study cited above[155] demonstrates how bias can affect hiring decisions even when identity has not been made explicit.[156] The experimenters sent out virtually identical fictitious résumés in response to help-wanted ads in two American cities.[157] The only variation among the résumés was that half were given white-sounding names and half were given black-sounding names.[158] Résumés with "white" names had a 50% higher chance of receiving a call from a prospective employer than résumés with "black" names, and this was true across several types of jobs—managerial, sales, and clerical.[159] Even when the résumés—both "black" and "white"—were manipulated to present higher quality candidates, "black" résumés still got lower returns than "white" résumés.[160] Because employers will use gender and age, which are usually apparent from either a résumé, an interview, or both, as proxies for family responsibilities,[161] regulations of preemployment inquiries regarding family status also may not prevent discrimination on the basis of childcare responsibilities. Given this limitation in the ability of regulations at the hiring stage to screen access to information about protected traits, one's view of the usefulness

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[155] *See supra* notes 132–142 and accompanying text.

[156] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (studying race in the labor market by sending fictitious résumés to help-wanted ads in Boston and Chicago newspapers).

[157] *Id.* at 991.

[158] *Id.* at 992.

[159] *Id.*

[160] *Id.*

[161] *See* Lester, *supra* note 154, at 23–24.

and importance of these regulations will depend in part on the empirical question of how often this limitation arises.

There is, however, a more fundamental criticism of these regulations: that it might be better to address these issues candidly rather than by barring access to information that permits discrimination. Those who feel that limiting access to information does not force employers to confront and address their biases, thus impeding change, might favor an open approach. Although this is a fair objection, I believe, and the empirical evidence suggests,[162] that such limitations on information at the hiring stage are, at this point, still necessary to guarantee equal employment opportunity. I advocate the continued use of the limitation on preemployment inquiries, but I also urge that we acknowledge their harmful effects and attempt to remedy them. Although regulation of preemployment inquiries should be seen as an important stopgap measure towards the goal of equality in employment, I do not foresee them becoming unnecessary in the near future. Biases are typically slow to change, and prohibitions on hiring discrimination alone are not a sufficient deterrent to their operation because hiring discrimination is extremely difficult to detect and prove. We can expect that bringing more disadvantaged groups into positions in which they are underrepresented will serve to combat biases and break down stereotypes, reducing discrimination in the future.[163] However, because of the unconscious operation of many biases and stereotypes and the particular challenges involved in relying on hiring discrimination claims to disincentivize such discrimination, limiting access to information may be the most effective way to remedy hiring discrimination.

As discussed above, because regulations regarding preemployment inquiries often do not bar access to all information that could bias hiring decisions,[164] these regulations are not the only measure that needs to be taken to address hiring discrimination. We must also continue to pursue other measures that will address bias—including education and affirmative action programs—to achieve a more fair labor market.

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[162] *See supra* notes 148–150 and accompanying text.

[163] *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 261–81 (1954) (setting forth the "contact hypothesis," which asserts that contact among members of different groups will reduce prejudice in those members); Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 951–52 (2002) (explaining the operation of the "contact hypothesis" in the context of diverse schools); Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 SOC. SCI. Q. 385 (1994) (exploring the relevance of the "contact hypothesis" for the distribution of racial attitudes in the black population).

[164] *See supra* notes 145–150 and accompanying text.

C. Lifting the Veil: The Reintroduction of Identity Information Under a Model of Discourse Ethics

A variety of measures have been proposed to address the shortcomings resulting from Rawls's use of ignorance to achieve procedural fairness—namely, an implausibly unsituated conception of the self, false impartiality, construction of a specious public-private divide, and the failure to interrogate injustices within the family. Many feminist communitarian thinkers, including Benhabib and Young, have advocated for some form of discourse ethics, based on the work of Jürgen Habermas.[165] In this section, relying primarily on the work of Seyla Benhabib, I will discuss how discourse ethics can be applied to remedy the failings of Rawls listed above. I will then explore how a model of discourse ethics can be applied in the employment context to rectify the impoverished structure of the employment relationship that results from limiting access to employees' information at the hiring stage.

The original position is a hypothetical situation whose outcome is determined solely by its conditions rather than through a structured process. In the original position, ethical principles are deduced without interaction, exchange, reciprocity, collaboration, or compromise. Because the veil reduces differences to unity, all parties in the original position will inevitably arrive at the same conclusions (indeed, one of Rawls's goals is unanimity), thus making communication with and understanding of others unnecessary.[166] Therefore, "the choice in the original position [can be viewed] from the standpoint of one person selected at random."[167] Susan Moller Okin tries to defend Rawls against the allegations of his communitarian critics that the parties in the original position must think from the position of *nobody*, by suggesting that the parties must instead think from the position of *everybody*.[168] This means that each individual would try to incorporate the interests and concerns of each other individual and amalgamate them to arrive at an impartial view of justice. According to Okin, to do this we must "consider the identities, aims and attachments of every other person, however different they may be from ourselves, as of equal concern with our own,"[169] requiring, "at the very least, both strong empathy and a preparedness to listen carefully to the very different points

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[165] Several theorists have offered some model of discourse ethics to remedy the flaws of Rawls's theory as they see them. *See, e.g.*, JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984) [hereinafter HABERMAS, COMMUNICATIVE ACTION]; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996) [hereinafter HABERMAS, FACTS AND NORMS]; YOUNG, *supra* note 95; BENHABIB, *supra* note 84. Benhabib is one of the most prominent feminist advocates of such an approach. I will rely primarily on her work, as well as references to the work of Professor Iris Marion Young, as a model.

[166] *See* RAWLS, *supra* note 4, at 139.

[167] *Id.*

[168] OKIN, *supra* note 50, at 101; O'NEILL, *supra* note 47, at 51.

[169] Okin, *supra* note 41, at 246.

of views of others."[170] This makes some move away from Rawls's disengaged mode of arriving at the principles of justice.

Benhabib argues from a perspective of discourse ethics that Okin's proposal falls short of remedying the failings of Rawls's theory.[171] Discourse ethics, derived from the work of Jürgen Habermas, holds that an isolated individual thinking about a moral claim cannot legitimate the validity of that claim.[172] Rather, only intersubjective argumentation between individuals—a dialectic—can legitimate the validity of the claim.[173] Under discourse ethics, the mutual agreement resulting from discourse among individuals determines the normative correctness of any claim.[174] On this basis, Benhabib criticizes Okin's "substitutionalist" model because it does not require parties to face the particular experiences of others and thus fails to produce intersubjectivity.[175] In other words, Benhabib does not think it is possible for any individual to take account of everyone else's interests without a dialogue in which particular needs are expressed by concrete others.[176]

Benhabib maintains that properly arriving at moral decisions requires drawing on the particular needs of embodied others through political engagement and dialogue.[177] She argues that we need to know the particular concerns and interests of others to account adequately for them, and that the lack of information about concrete others, either imposed by a veil of ignorance or other means, stifles discourse and the recognition of the other.[178] She distinguishes between the "substitutionalist universalism" of Rawls and Okin, which "dismisses the concrete other behind the facade of a definitional identity of all as rational beings," and her own theory of "interactive universalism," which "acknowledges that every generalized other is also a concrete other."[179] She highlights three basic distinctions between discourse ethics and the original position. First, while the original position presents a hypothetical situation, discourse ethics involves a real dialogue between real people.[180] Second, whereas the original position relies on ignorance, discourse ethics benefits from the maximum availability of information because, under that theory, increased knowledge results in

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[170] OKIN, *supra* note 50, at 101.

[171] BENHABIB, *supra* note 84, at 165–68.

[172] *See generally* HABERMAS, COMMUNICATIVE ACTION, *supra* note 165; BENHABIB, *supra* note 84, at 24.

[173] BENHABIB, *supra* note 84, at 24.

[174] *Id*.

[175] *Id*. at 165–68; O'NEILL, *supra* note 47, at 52–53. Professor Iris Marion Young also criticizes Okin's proposal of a "particularist notion of impartiality" on the grounds that it still retains a "totalizing urge" and "denies the difference among subjects." *See* YOUNG, *supra* note 95, at 105.

[176] *See* BENHABIB, *supra* note 84, at 169.

[177] *See id.* at 161–70.

[178] *Id.* at 161–65.

[179] *Id.* at 164–65.

[180] *Id.* at 169.

better judgments.[181] Third, unlike the original position, discourse ethics allows participants to vary levels of reflexivity, "that is[,] they can introduce metaconsiderations about the very conditions and constraints under which such dialogue takes place and they can evaluate their fairness."[182]

Importantly, Benhabib emphasizes that although those behind the veil still bring with them prejudices and stereotypes, these prejudices and stereotypes are never addressed—"that is[,] confronted, discussed, worked out and worked through in an open dialogue with concrete others"—but rather they are merely disabled by the veil.[183]

> [I]n not making room to confront the "otherness" of the other, the original position . . . can leave all our prejudices, misunderstandings and hostilities in society, just as they are, hidden behind a veil. By contrast, only a moral dialogue that is truly open and reflexive and that does not function with unnecessary epistemic limitations can lead to a mutual understanding of otherness.[184]

Rather than a specious "ideal of impartiality" arrived at through ignorance, "a conception of impartiality [is needed] that can make room for public articulation of the differing perspectives and comprehensive moral views that characterize modern pluralism."[185] A model of communicative ethics is necessary because it "institutionalizes an actual dialogue among actual selves who are both 'generalized others,' considered as moral agents, and 'concrete others,' who are individuals with irreducible differences."[186] Therefore, "all citizens must be allowed to speak for themselves[,] and the only way that we can hear them is if we reason without the veil of ignorance in a real dialogue where our prejudices and hostilities could be tested and worked through interactively."[187]

The discourse model proposed to remedy the shortcomings of the universalized impartiality of Rawls can also be applied to the employment context. Although in the employment context, the concerns about bias and distortion at the hiring stage outweigh the need for access to information,[188]

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[181] *Id.* This contravenes one of the principal arguments of this Article: that more information does not always lead to fairer results. Specifically, when increased access to information results in the ability to discriminate, more information is not better. Although making discriminatory hiring decisions on the basis of stereotypes generally results from incorrect information or a lack of information, until these informational errors can be corrected, access to additional information allowing employers to discriminate will not necessarily result in better judgments.

[182] *Id.*

[183] *Id.* at 167.

[184] *Id.* at 167–68.

[185] O'NEILL, *supra* note 47, at 55.

[186] BENHABIB, *supra* note 84, at 169 (applying Jürgen Habermas's theory of discourse ethics).

[187] O'NEILL, *supra* note 47, at 53.

[188] See *infra* Part IV.A for a discussion of the need for regulation of information at the hiring stage.

drawing these boundaries at the hiring stage has effects that can and should be countered. Once the employment relationship commences, there is no need to retain the boundaries, and the traits should be reintroduced to remedy the defects caused by imposing ignorance on employers and to allow for accommodation by employers.

Discourse ethics supports this view. The epistemological basis of discourse ethics holds that those who are uniquely situated in particular contexts are in the best position to know their own needs and interests.[189] As Benhabib explains, it is simply not possible for one to understand or adopt the views of others without those views being expressed directly by these others.[190] It is important, therefore, for employees to articulate their own needs in their own voices. Without knowing the particular needs of their employees, employers cannot address these needs nor develop adequate policies to adapt the workplace to satisfy the needs of diverse employees. These needs, then, must be met in the private sphere, often by the family, without accommodation. A genuine dialogue among employees and employers is required to acknowledge fully employees' concerns and take advantage of a diverse labor market. Because dominant groups (e.g., whites, men, noncaregivers) are still more likely to have power in the vast majority of American workplaces, it is especially important for marginalized groups to be able to express their needs, interests, and concerns to their superiors, because employers might have few alternatives to access this information.

There are reasons beyond epistemology that discourse ethics provides in favor of the reintroduction of employees' traits into the employment relationship. First, introducing these elements into the employment relationship would force employers to confront their stereotypes of employees with certain identities. A personal conversation between employer and employee provides an opportunity for employers to gain valuable information about employees that will allow employers to revise their views of employees and to empathize with their needs. Second, allowing employees who are members of marginalized groups to announce their specific concerns in their own voices allows these groups to develop solidarity, which facilitates groups' abilities to gain political recognition and make demands on the dominant group. Third, allowing employees and employers to engage in discussion reflexively—that is, to question the parameters of the discussion and restructure it to maximize fairness—would increase employees' input into the conditions of their own working lives, which is important to job satisfaction.[191] Fourth, reintroducing these traits into the employment relationship would help bring certain aspects of em-

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[189] *See* BENHABIB, *supra* note 84, at 161–64; *see also* YOUNG, *supra* note 95, at 115–16 (criticizing the "ideal of impartiality" on the ground that it "allows the standpoint of the privileged to appear as universal" when it is in fact their particular view).

[190] BENHABIB, *supra* note 84, at 168.

[191] *See infra* Part IV.D.

ployees' lives, including childcare responsibilities, into the public realm, thereby helping to break down the artificial public-private divide and challenging the false ideals of impartiality and self-sufficiency supported by liberal theory. Finally, the more regular, normalized, and institutionalized the reintroduction of these traits into the employment relationship becomes, the less these traits will appear aberrant and the less the accommodations they require will appear as "special pleas," thereby remedying the harms imposed by the ideal of impartiality.

D. The Need To Reintroduce Information in the New Economy

The employment relationship is based on a psychological contract, which consists of a belief that some kind of reciprocal exchange agreement has been made and both parties have accepted the terms and conditions of the agreement.[192] The concept of the psychological contract "both captures the fact that parties bring expectations of reciprocal obligation to the employment relationship and accounts for the intense sense of injustice that can result when these expectations are not met."[193] In other words, when employees do not feel that employers are meeting their end of the bargain they become quite dissatisfied. In recent decades, the psychological contract between employers and employees has changed. The old contract was an exchange of career development and promotions by the employer for loyalty and commitment to the job, and to the organization, by the employee.[194] The new contract, in contrast, incorporates lower expectations for long-term employment on the part of both parties, and employees are now seen as responsible for their own career development and more committed to work than to the particular job or organization.[195] In the past, with smaller employers, longer employment relationships, and greater loyalty on the part of both employers and employees, the employment relationship was more personal and intimate. Perhaps in earlier times, elements of employees' identities became part of the employment relationship organically because of this more developed connection between employee and employer. However, the employment relationship in the new economy is more arms-length and anonymous: employees have become more fungible and work has become more contingent.[196] Because of this, prohibitions on preemployment inquiries and their construction of disembodied employees might have more harmful effects today because employers are

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[192] KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 88–89 (2004).

[193] *Id.* at 90.

[194] *Id.* at 91 (citing Marcie Cavanaugh & Raymond Noe, *New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 324 (1999)).

[195] *Id.*

[196] *See* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 564–70 (1996).

less likely to get to know their employees. This creates a greater need now to reintroduce formally certain traits into the employment relationship to allow employees to have their particular identities and needs recognized.[197]

A recent study in Canada suggests that communication between employees and employers, opportunities for employees to provide input in the employment relationship, and employers' recognition of and support for employees are integral to employees' job satisfaction.[198] The study provides a "new definition of a good job, a definition based on the social dynamics in the workplace as summarized in the quality of the relationship between employer and employee. The key elements of that relationship are trust, commitment, communication, and influence."[199] The authors find that "[g]ood employment relationships are the key ingredient of a 'good job,'" even more important than pay or benefits to overall job satisfaction.[200] They report that "[w]orkers in weak employment relationships desire better communication, fairness and respect, recognition, and a more supportive work environment. They want more opportunities for meaningful input and participation."[201] Creating positive employment relationships requires employers to consider "the physical, social and psychological aspects of the workplace—everything from workloads to respect and the resources needed to do an effective job. Equally important is how work is organized. . . . Workplaces organized to give more scope for participation have somewhat stronger employment relationships."[202]

Incorporating the findings of this study into the idea of the psychological contract between employer and employee indicates that employees are likely to feel that an injustice has occurred when they are not given the opportunity to communicate with, give input to, and get fair, respectful treatment and recognition from their employers. Reintroducing employees' needs and interests into the employment relationship could help to build these elements into that relationship, leading to greater job satisfac-

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[197] Elements of what Stone terms the "boundaryless workplace" of the new economy further support the need to institute formal mechanisms through which employees can communicate their needs to employers. STONE, *supra* note 192, at 165. This "boundaryless economy" is characterized by "diffused and invisible authority" and "informal and decentralized" decision-making processes, which "makes discrimination hard to identify and difficult to challenge" and implementation of formal procedures through which employees can reintroduce elements of themselves that require accommodation still more essential. *Id.* at 165–66. Whereas systems of rules used to check the abuses of "favoritism, cronyism, and patronage networks" that most often serve the interests of those who share the traits of those already in power—white men—the new economy's lawlessness makes it particularly important to introduce formal means through which employees can express their needs to employers. *Id.* at 166–68.

[198] GRAHAM S. LOWE & GRANT SCHELLENBERG, WHAT'S A GOOD JOB? THE IMPORTANCE OF EMPLOYMENT RELATIONSHIPS, CAN. POL'Y RES. NETWORKS STUDY NO. W/05 31–35 (2001).

[199] *Id.* at ix.

[200] *Id.* at xi.

[201] *Id.* at xv.

[202] *Id.*

tion and reducing material and psychic harms imposed by the boundaries constructed by prohibiting preemployment inquiries. This suggests that institutionalized mechanisms by which employees can express their needs and interests to their employers should be implemented. Discourse ethics also supports the institutionalization of channels of communication between employers and employees.[203] Institutionalizing communication in this way has the potential for employees and employers together to create the possibility for progressively reenvisioning the employment relationship.[204]

V. Employing an ADA-Like "Information-Shifting" Model

A. The ADA's Regulation of Information

The ADA employs what I will call an "information-shifting model" to the problem of employers' access to knowledge about applicants' disability status. The ADA breaks down information access into three stages: (1) the application or pre-offer stage, (2) entering employees or post-offer stage, and (3) current or existing employees.[205] At the pre-offer stage, an employer may not perform "a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability" unless otherwise expressly allowed under the statute.[206] This prohibition was instituted to root out hiring discrimination on the basis of disability. Otherwise, were a disabled person denied a job, it would be difficult for her to determine whether this denial was due to her disability or some other reason.[207] The ADA does allow for three exceptions to the general rule of banning disability-related inquiries during the application phase.[208] First, an employer may "make preemployment inquiries into the ability of an applicant to perform job-related functions" if the inquiry is made to each applicant for the same job.[209] Second, "an employer may ask an applicant" to show how she "would perform the essential functions of the job" to which she has applied.[210] Third, if an applicant's disability or impairment is obvious to the

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[203] *See* Benhabib, *supra* note 84, at 169–70 (discussing the need for "*actual* dialogue") (emphasis in original).

[204] *See generally* Roberto Mangabeira Unger, Passion: An Essay on Personality (1984) (arguing for the implementation of mechanisms into our social and political institutions through which creativity, transcendence, and surprise would be maximally encouraged and developed).

[205] Robert Belton & Dianne Avery, Employment Discrimination Law 709 (6th ed. 1999) (citing ADA, 42 U.S.C. § 12112(d)).

[206] *Id.* at 709–10 (quoting 42 U.S.C. § 12112(d)(2)(A)).

[207] *Id.* at 710 (citing Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 Temple L. Rev. 521, 531–32 (1991)).

[208] *Id.*

[209] *Id.* (quoting 42 U.S.C. § 12112(d)(2)(B)).

[210] *Id.*

employer, the employer may ask what accommodation the applicant might need.[211] For example, if the applicant is blind, the employer can ask how she would perform the essential functions of the job, but not how long she has been blind or how she became blind.[212]

At the post-offer stage, the employer may ask certain questions of "entering employees," defined under the statute as those to whom an offer of employment has been made but who have not yet commenced their employment duties.[213] At this stage, if certain conditions are met, an employer "may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination."[214] These conditions are that: (1) the same examination is given to all entering employees, regardless of disability, (2) the information gathered is kept on separate forms and medical files and becomes part of a confidential medical record,[215] and (3) the knowledge acquired is employed only to conform to the terms of the ADA.[216] An employer cannot revoke an offer of employment to an entering employee based on the information obtained from a medical examination unless it is both "job-related" and "consistent with business necessity."[217] If the entering employee's condition presents a "direct threat" to other employees, i.e., her condition might harm their health or safety, then the employer may also withdraw the offer.[218]

Once the employee has begun working, employers are barred from requiring an "existing employee" to undergo a medical examination or from asking whether the employee has a disability or the nature or severity of the disability, unless such examination or inquiries are "job-related" and "consistent with business necessity."[219] The Equal Employment Op-

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[211] *Id.*

[212] *Id.* (citing EEOC, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT (1995), *available at* http://www.eeoc.gov/policy/docs/medfin5.pdf); *see also* EEOC, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT (2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[213] *Id.* at 710–11 (citing 42 U.S.C. § 12112(d)(B)(3)).

[214] *Id.* at 711 (quoting 42 U.S.C. § 12112(d)(2)(B)(3)).

[215] The information collected is available to supervisors and managers who "need to know" for purposes of work restrictions and accommodations, first aid and safety personnel who would "need to know" if emergency treatment were needed, and government officials who need the data to check compliance with the ADA. *Id.*

[216] 42 U.S.C. § 12112(d)(2)(B)(3) (2000); BELTON & AVERY, *supra* note 205, at 711.

[217] 42 U.S.C. § 12112(d)(4)(A) (2000); BELTON & AVERY, *supra* note 205, at 711.

[218] BELTON & AVERY, *supra* note 205, at 711; 42 U.S.C. § 12111(3) (2000).

[219] 42 U.S.C. § 12112(d)(4)(A) (2000); BELTON & AVERY, *supra* note 205, at 711. The "job-related" and "consistent with business necessity" exception resulted from a legislative compromise over the extent to which the ADA would incorporate Title VII's disparate impact jurisprudence after *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which held that plaintiffs must show a specific employer practice that is causally related to the statistical disparities to prove disparate impact and made it more difficult to prove dispa-

portunity Commission ("EEOC"), the federal agency responsible for implementing and enforcing many of the federal employment discrimination laws, including Title VII and the ADA, has interpreted the ADA to allow employers to conduct medical examinations and make inquiries of existing employees when this is necessary to ensure that they can still perform the essential functions of their jobs.[220] This construction has been upheld, largely because such inquiries and examinations might be job-related and consistent with business necessity when an employee's injury or condition interferes with her ability to perform the essential functions of her job.[221] The final element of the information-shifting model is the ability of employees to introduce their needs into the employment relationship through the ADA's "reasonable accommodation" requirement, which will be discussed below.[222]

This model is a positive step towards constructing information access in such a way that is sensitive to both the needs of the employment relationship and the operation of bias. It recognizes that the amount and type of employee information that is available to employers should vary depending on the amount and type of harm that discovery of such information by an employer would cause an employee. In this way, it acknowledges the necessity of a flexible, time-sensitive approach to employers' access to information about applicants and employees. The ADA's information-shifting approach treats access to such information as potentially harmful at the preemployment stage and protects employees from having such information revealed in ways that would be detrimental. As I have argued above, it is equally important for the law to acknowledge how the denial or availability of such information also plays a role in the construction of the employment relationship and, in particular, the possibility for employer accommodation. The ADA's information-shifting approach incorporates this aspect of information access through the "reasonable accommodation" requirement.

B. The ADA's Reasonable Accommodation Requirement

The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified in-

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rate impact under Title VII. BELTON & AVERY, *supra* note 205, at 711 (citing Feldblum, *supra* note 207, at 545–48). Congress returned the law of Title VII disparate impact to its pre-*Wards Cove* state with the 1991 Civil Rights Act, 42 U.S.C. § 2000e-2(k)(1)(B) (2000), which stated that where employer's practices cannot be separated, a plaintiff can satisfy showing that specific employer practices led to statistical disparity by proving that some of the employer's practices together led to such a disparity, but the decision was still in place when the ADA was passed.

[220] BELTON & AVERY, *supra* note 205, at 711 (citing 29 C.F.R. pt. 1630, app. § 1630.14(c)).

[221] *Id.* (citing *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997)).

[222] *See infra* Part V.B.

dividual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]."[223] Reasonable accommodations

> may include: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[224]

This reasonable accommodation requirement allows employees with disabilities to reintroduce their particularized needs—as well as elements of their identity—into the employment relationship. Although access to this information is blocked to the employer prior to the commencement of the employment relationship because of its power to bias the hiring process, the reasonable accommodation requirement provides a mechanism through which the information can be reintroduced so that the employer can take reasonable measures to accommodate the employee's particular needs. Moreover, the EEOC's regulations promulgated pursuant to the ADA state that

> [t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, *interactive* process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[225]

This mechanism for reintroducing employees' particularities into the employment relationship remedies many of the problems that result from the imposition of the "veil of ignorance" on employers at the hiring stage.[226]

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[223] ADA, 42 U.S.C. § 12112(b)(5)(A) (2000). It is additionally unlawful for an employer to "deny[ ] employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant." *Id.* at § 12112(b)(5)(B).

[224] *Id.* at § 12111(9).

[225] 29 C.F.R. § 1630.2(o)(3) (2000) (emphasis added); *see also* O'Brien, *supra* note 108, at 56–57, 66 (on the individual assessment of what is required to make "reasonable accommodations" as an example of the ethic of care).

[226] Although I am choosing to focus on the ADA's reasonable accommodation requirement in this paper because it best fits the "information-shifting" model, the reason-

Articulating her particular needs to her employer allows the employee to become an embodied, encumbered self that is more complete and integrated. It allows the employee to incorporate a fuller conception of self, thereby reducing identity harm. Enabling employees to express their needs to employers and providing an opportunity for employers to fulfill those needs helps to build trust, mutual respect, and communication into the employment relationship. The reasonable accommodation requirement's recognition that elements of employees' identities will enter into and affect the workplace helps to break down the artificially constructed division between employees' "public" and "private" lives by acknowledging the interrelatedness and interdependency of the public and private spheres. By requiring employers to accommodate employees' traits that fall outside the stereotype of the model employee, the ADA's accommodation requirement aids in overcoming the bias resulting from the ideal of impartiality that accompanies prohibitions on preemployment inquiries.[227] The accommodation of employees' needs—both disability and otherwise—leads to greater equality in employment opportunities by better providing for the needs of diverse employees.

Although the reasonable accommodation provision of the ADA does not specify any formal procedures by which the information exchange would occur, the EEOC acknowledges the importance of communication between employers and employees in its reference to the "interactive process" by which a reasonable accommodation is determined. This provision for negotiation between employers and employees fits with the model of discourse ethics described above.[228] As methods for institutionalizing communication are essential,[229] the EEOC should consider promulgating regulations that require employers to implement formal mechanisms through which employees would articulate their needs to their employers.

C. An Alternative: Workplace Flexibility "Right To Request" Laws

The United Kingdom has already recognized the importance of this communicative process in the context of workplace accommodations for

able accommodation requirement for religion in Title VII and the accommodation requirements of the FMLA also help to remedy the impoverished nature of the employment relationship resulting from barring employers' access to applicants' information. *See supra* notes 18, 20–22 and accompanying text.

[227] To further combat the ideal of impartiality, the EEOC, in its regulations for the ADA, might consider allowing voluntary preemployment inquiries for remedial or affirmative action purposes, as is the case with the Rehabilitation Act. *See supra* note 125. *But see* Feldblum, *supra* note 207, at 545 (arguing that the best approach to remedial or affirmative action with regard to disabled employees is not voluntary questionnaires but recruiting from local disability organizations because those with "hidden disabilities" (*e.g.*, heart disease, epilepsy, or HIV), the type most identified through questionnaires, generally do not need affirmative action).

[228] *See supra* Part IV.C.

[229] *See supra* note 186 and accompanying text.

childcare responsibilities. In April 2002, Parliament passed legislation requiring employers to provide employees with an opportunity to request accommodations in the form of modified work hours or work location in order to care for a child.[230] Employment Act 2002 ("Employment Act") guarantees workers in the U.K. the right to ask for working conditions—unconventional work hours, part-time or job-sharing possibilities, or the ability to telecommute—that better suit their needs in the face of their dual roles as workers and caregivers.[231] Unlike the ADA, the Employment Act does not mandate that employers provide the accommodation; it merely imposes the compulsory duty to consider requests for accommodation.[232] The Employment Act, like the ADA regulation cited above, specifically acknowledges the value of discourse: it requires that a regulation be promulgated providing "for the holding of a meeting between the employer and the employee to discuss an application under section 80F within twenty-

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[230] Employment Act, 2002, c. 22, § 47 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2002/20020022.htm (adding 8A to the Employment Rights Act, 1996, 44 Eliz. 2, c. 18 (U.K.), *available at* http://www.emplaw.co.uk/load/4frame/era96/list.htm). The provisions of Employment Act 2002 relating to workplace flexibility have been amended, effective April 6, 2007, by the Work and Families Act, 2006, c. 18, § 12 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2006/60018—a.htm#16, which was passed on June 21, 2006. *See* http://www.emplaw.co.uk/load/4frame/era96/era9680F.htm. The amendments leave it to the Secretary of State to determine the maximum age of the child for whose care the employer can request accommodation. Work and Families Act, 2006, c. 18, § 12(2)(b)(i), 12(5) (U.K.). The current statute sets the age at six, except in the case of a disabled child. Employment Rights Act, 1996, c. 18, § 80F(3) (U.K.), *available at* http://www.emplaw.co.uk/load/4frame/era96/list.htm. Setting the age this young is unrealistic and does not fit workers' needs given that older children still require care when they are sick.

[231] Employment Rights Act 1996, c. 18, § 80F (as amended by the Employment Act 2002), *available at* http://www.emplaw.co.uk/load/4frame/era96/list.htm; *see also* Katherine Van Wezel Stone, George Gonos, Stephen F. Befort & Michelle A. Travis, *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMPL. RTS. & EMPLOY. POL'Y J. 233, 266 (2006). *See generally* JODIE LEVIN-EPSTEIN, CTR. FOR LAW & SOC. POLICY., WORK-LIFE BALANCE SERIES BRIEF NO. 3, HOW TO EXERCISE FLEXIBLE WORK: TAKE STEPS WITH A "SOFT TOUCH" LAW (2005), http://www.clasp.org/publications/work_life_brf3.pdf.

[232] *See* Employment Rights Act, 1996, c. 18 § 80G (U.K.); *see also* Van Wezel Stone et al., *supra* note 231, at 266. An employer can refuse an application for a childcare accommodation on the following grounds:

> (i) the burden of additional costs, (ii) detrimental effect on ability to meet customer demand, (iii) inability to re-organise work among existing staff, (iv) inability to recruit additional staff, (v) detrimental impact on quality, (vi) detrimental impact on performance, (vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes, and (ix) such other grounds as the Secretary of State may specify by regulations.

Employment Rights Act, § 80G(1)(b). There is a right to appeal the employer's decision. *Id.* at § 80G(2)(d). The Employment Act provides that a regulation should be promulgated to require that within fourteen days after an appeal is noticed, the employee and employer hold a meeting to discuss the appeal, *id.* at § 80G(2)(g), acknowledging the importance of discourse throughout the process.

eight days after the date the application is made."[233] The Employment Act further requires some amount of specific intersubjective discourse and a recognition of the needs of the other. It details that in making an accommodation request, an employee must "specify the change applied for and the date on which it is proposed the change should become effective," "explain [to the employer] what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with," and explain how the child for whom care is requested meets the appropriate age or disability status requirements.[234] Although it is clear that this requires the employee to identify and take seriously the needs of the employer, by requiring consideration of the request, the employer must also, at least to a significant extent, become aware of and take seriously the needs of the employee. Interestingly, the Employment Act specifically introduces the individual for whom the employee is caring directly into the employment relationship by requiring that the employee specify how that individual meets the act's requirements. Similar legislation is being considered in the United States.[235]

Despite the similar intersubjective communicative process, the "right to request" legislation can be distinguished from the ADA's reasonable accommodation requirement because it does not guarantee a substantive outcome—an accommodation—but instead guarantees the right to process.[236] Although this legislation can be criticized easily by those who favor accommodation for merely codifying a right to request accommodation rather than the right to the accommodation itself, at least one scholar has supported this approach's potential to provide employees with an effective mechanism to introduce and express their needs in the workplace. Professor Michelle Travis has noted this approach might more easily gain political traction than alternatives guaranteeing particular substantive rights.[237] She also commented on the potential for achieving positive substantive outcomes through procedural mechanisms:

> In my experience as a former employment lawyer, many employers willingly provided accommodations that went well beyond what was legally required by the ADA (for example, by giving accommodations to workers who would not have met the statutory definition of a disabled employee) as a result of the interac-

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[233] *Id.* at § 80G(2)(a).

[233] *Id.*

[234] *Id.* at § 80F(2)(a).

[235] This information is based on a recent interview with a congressional staff member. The notion of a guaranteed right of employees to express their particular interests and needs is not entirely foreign to U.S. law. The National Labor Relations Act ("NLRA") guarantees employees the right to articulate the terms and conditions of their employment through the right to bargain with employers. *See* 29 U.S.C. § 157 (2000).

[236] *See* Van Wezel Stone et al., *supra* note 231, at 266–67.

[237] *Id.* at 268.

> tive process. By establishing an institutionalized forum for employers and workers to discuss potential workplace changes, the ADA provides a means for employers to discover that there often are no significant financial, administrative, or practical downsides to modifying workplace practices as workers desire.[238]

Professor Travis's experience supports the notion that providing the opportunity for workers to reintroduce their particularities into the workplace allows employers to consider these particularities and to evaluate the concrete consequences of the intersection of work and family. Although a substantive guarantee would undoubtedly better ensure that workers' childcare accommodation needs were met, cementing the legal right to request accommodation is a positive first step towards reintroducing employees' traits, particularities, and needs for accommodation into the employment relationship. Such legislation has promise to change the culture of the workplace to normalize the expression of employees' interests and needs and employers' consideration of them. This can benefit the employment relationship and employees' abilities to meet the dual pursuits of work and family.

D. Applying an "Information-Shifting Model" to Childcare Responsibilities

1. Accommodating Childcare Responsibilities in an Information-Shifting Model

The ADA model of information-shifting and reasonable accommodation should be applied to childcare responsibilities. I focus my argument on childcare because I believe the lack of provision for these needs is the gap in employment law that has had the most detrimental consequences, chiefly for women, but also for men.[239] There is a vast and growing body of literature on workplace accommodations for childcare responsibilities.[240] Because a complete defense of such accommodations is beyond the scope of this paper, I will rely on this literature and only briefly remark on the

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[238] *Id.*

[239] Although I use childcare as my primary example, there are certainly other traits and responsibilities that are worthy of accommodation, including caring for an elderly or sick family member.

[240] *See, e.g.*, Lester, *supra* note 154, at 20–25; Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403 (2001); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (2001); Kessler, *supra* note 116, at 448–67; Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding, and Childcare*, 44 VILL. L. REV. 355, 368 (1999); Eichner, *supra* note 116, at 158; Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305 (2004); WILLIAMS, *supra* note 72; Abrams, *supra* note 116; Leslie Bender, Sex *Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 942–43 (1989); Dowd, *The Gender Paradox*, *supra* note 116.

importance of accommodations for childcare responsibilities. I will then explain how my argument regarding information-shifting and accommodation is particularly relevant to the context of childcare accommodations.

Although there are a multitude of justifications for a proposal to accommodate family responsibilities,[241] my primary rationale is gender equality. Women face certain distinct challenges because of their gender in pursuing a variety of career paths. Aside from having to confront continuing discrimination, sex segregation, and harassment in the workplace, women are also impaired in their workforce attachment and career potential because of the gendered division of childcare and home responsibilities.[242] The disproportionate burden of childcare and home duties that women currently fulfill imposes significant "career costs" on working women, including a 10% to 15% wage penalty for having children, which is not experienced by men.[243] This could be due to a multitude of factors: because women have less time to allocate to market work, they might choose more flexible, lower-paying jobs, resulting in an underutilization of their human capital, and might invest less in that human capital knowing they have more commitments outside the labor market.[244]

Whatever the exact causes, the gendered division of child and home labor and its effects in the labor market have other negative effects on women, in terms of their self-worth and human potential, economic status, and general status in relation to men.[245] The current gendered division of labor and the lack of remedial measures to address it shape the world of opportunities that girls and women imagine are possible, and thus these limitations are self-reinforcing.[246] Accommodation is necessary to address gender inequalities in the "private" sphere that are intimately intertwined with inequalities in the market. Allowing accommodation of childcare responsibilities and thus the advancement of women would facilitate the de-gendering of childcare responsibilities, making it easier for women *and* men to pursue any conception of the good life they choose, including acting as a caregiver, without regard to gender. Accommodation would serve to

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[241] For example, one might argue that childcare responsibilities warrant accommodation because raising children is essential to the reproduction of society and thus to the public good.

[242] *See, e.g.*, Lester, *supra* note 154, at 20–25 (citing and discussing studies showing that women consistently invest more time then men on childcare responsibilities, even when they work full time).

[243] *Id.* at 22. Married men seem to benefit from this gendered allocation of labor, as married men, on average, actually experience a 10% to 15% wage *premium*. *Id.*

[244] *See id.* at 22–23.

[245] *Id.* at 20–25.

[246] Many theorists view gender as a product of social construction. *See, e.g.*, Nancy J. Hirschmann, *Revisioning Freedom: Relationship, Context, and the Politics of Empowerment*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 51, 56–57 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996). "[I]n human society nothing is natural and . . . woman, like much else, is a product elaborated by civilization." SIMONE DE BEAUVOIR, THE SECOND SEX 806 (H. M. Parshley trans. & ed., Vintage Books 1974) (1949).

break down rigid gender roles and interrupt the self-reinforcing nature of the current gendered division of childcare responsibilities and the gender divisions in the labor market. Given these social facts, the failure to accommodate childcare responsibilities affects individuals' abilities to choose and pursue their desired life plan on the basis of their gender.

Allowing employees to articulate their needs for reasonable accommodation of childcare responsibilities to their employers in an information-shifting model will help to remedy the problems created by the prohibitions on preemployment inquiries discussed above.[247] Such a model retains the ban on preemployment inquiries related to family status at the hiring stage, which is needed to prevent hiring discrimination on the basis of childcare responsibilities.[248] In addition, just as the ADA accommodation requirement accomplished in the disability context, applying an information-shifting accommodation model to childcare duties will allow employees to become fuller, embodied, and integrated selves and to be recognized as such by their employers, thereby reducing identity harms; help to erase the artificial public-private divide and recognize the interdependence between the two spheres; build trust, communication, and stability into the employment relationship; and correct the bias that results from a neutral vision of employment equality by providing for accommodation based on particularity.

An accommodation requirement will also allow employment law to promulgate a better understanding of autonomy, as compared to the impoverished view embedded in classic liberal theory and replicated under current law. As Martha Fineman writes, the relegation of care to the private sphere is based on a misconceived view of autonomy that fails to acknowledge the ubiquitous and important nature of care and dependency throughout our lives.[249] She explains that our lives are marked by dependency in that each of us was dependent as a child and many of us will again be dependent as we age.[250] Accommodation of childcare needs will allow for the recognition of a view of autonomy that better comports with human experience—i.e., that the exercise of autonomy relies on connections to others rather than their denial. [251]

Regulations limiting access to information about job applicants' family status and responsibilities will fall short of remedying discrimination on

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[247] My proposal goes beyond the FMLA, which requires employers to accommodate employees' care responsibilities due to anomalous circumstances, such as illness or childbirth, but fails to acknowledge that caring for others is a typical and necessary everyday part of many employees' lives. See *supra* notes 110–112 and accompanying text for further discussion of this point.

[248] *See supra* notes 130–150 and accompanying text.

[249] *See* Ball, *supra* note 90, at 373 (discussing the theory of autonomy presented in MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004)).

[250] *Id*.

[251] Marilyn Friedman also proposes a feminist relational view of autonomy. *See supra* note 90 and accompanying text.

the basis of family responsibilities. As demonstrated by the race-related résumé study discussed above,[252] despite prohibitions on employment inquiries, employers will often use proxies in an attempt to determine information about applicants. In the context of gender and childcare, many employers will assume that a woman of a certain age either has children or will have children and further assume that this will negatively affect her attachment to her job and her job performance.[253] Even if there are regulations in place barring employers from inquiring about gender or family, an applicant's gender, usually even more so than race, will be apparent to a prospective employer, either by the person's name or appearance. Because gender is such a visible characteristic, it is easy for employers to use gender as a proxy to discriminate against those prospective employees whom they assume will have more childcare responsibilities that might interfere with their performance at work—namely, women of childbearing age. A ban on inquiries into family status might make employers rely more heavily on the available proxy of gender.

This proxy results in part from the employer seeing the employee as an abstract other and without knowledge of her particular situation. By formally reintroducing these traits into the employment relationship, not only is there an opportunity for accommodation, but also one for breaking down sex-role stereotypes. Having employees engage in discourse with their employers about their actual needs can weaken these sex-role stereotypes. When employees express their particular needs to their employers, they become concrete others and not simply a member of a defined group. These conversations can show the variety of situations and needs of different employees and thereby serve to break down rigid notions of what being a working mother means. Moreover, having employers relate to their employees as concrete others provides employers with more accurate information about an employee's actual needs to replace their stereotypes. Not all women will request childcare accommodations from their employers—either because they are not mothers or because they are but do not require particular accommodations—and some men will request accommodations. Through this repeated interactive process, employers may start to view employees in concrete, embodied ways, and perhaps this will reduce the power of the gender proxy. As these conversations become more regular, they allow for the accumulation of institutionalized knowledge about how best to address particular needs of employees. The more regular these conversations become and the more regularly accommodations are made to meet the needs of employees, the norms and structure of the workplace will begin to change.

Workplace accommodations for family responsibilities can take many different forms, among them modifications to the number of hours worked;

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[252] *See supra* notes 156–161 and accompanying text.
[253] *See* Lester, *supra* note 154, at 23–24.

modifications to the time when those hours are worked; the ability to work from home; time off to care for children, fulfill other parenting responsibilities, or attend children's recreational events; last-minute flexibility for parenting responsibilities that arise unexpectedly; time and facilities to pump breast milk; and onsite daycare facilities or other employer-provided childcare arrangements. Employees with caregiving responsibilities often have different accommodation needs. Reintroducing family responsibilities into the employment relationship through a conversation about accommodation allows employees to request the accommodations they need, further giving voice to the diversity of needs and interests among concrete employees. This expression of variation among employees might also loosen the grip of employers' stereotypes regarding caregiving. Moreover, caregiving means different things to different people. Allowing employees the opportunity to request the particular accommodations they need to meet their childcare obligations enables employees to define what being a parent means to them. It also makes it possible for employees to develop a schedule and method of caregiving that is comfortable for them and fits their lives.[254]

2. Differences Between Accommodating Care and Disability

There are differences, however, between gender and disability that should be considered when applying the ADA information-shifting and reasonable accommodation model to childcare. First, employers' reliance on proxies, discussed in the last section,[255] is much more likely in the context of gender and childcare than disability. Because an applicant's caregiving responsibilities are not visible, but are correlated with a trait that is—gender—employers can rely on the latter trait as a proxy for the

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[254] Some might take issue with placing any burden on employers to accommodate employees' childcare responsibilities. I believe it is entirely appropriate to require employers to do so. Private industry has played a large role in structuring the workplace so as to make fulfilling childcare duties at the same time as succeeding in the workplace a difficult combination. Employers have shaped the labor market, and as such, they have constructed gender divisions and sex segregation at work, which reinforces the gendered division of labor at home. The status quo construction of the labor market determines in large part what people consider possible, and employers should be held accountable for structuring the workplace so as to make it difficult to combine market work and childcare responsibilities. *Compare* EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (holding that Sears was not liable for sex discrimination due to lack of women in sales positions because the court found that women simply were not interested in such positions), *with* Vicki Schultz, *Telling Stories About Women and Work*: *Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (criticizing "lack of interest" defense on grounds that it fails to recognize the role of employers in shaping women's work aspirations). And, as discussed above, the dichotomy between antidiscrimination and accommodation measures is artificial; both impose costs on employers. *See* Jolls, *supra* notes 126–128 and accompanying text. Therefore, we should not be so concerned about imposing accommodation requirements on employers where we would not be concerned about imposing an antidiscrimination measure.

[255] *See supra* Part V.D.1.

former.[256] By contrast, disabilities are usually either apparent, e.g., the need for a wheelchair, or hidden, e.g., HIV, and thus proxies do not operate in a similarly harmful manner in the disability context. Because proxies are readily available as a means to discriminate against caregivers, there is reason to believe that the hiring discrimination against this group, which persists despite a prohibition on preemployment inquiries, will be more insidious than that in the disabilities realm. This is because a disability will usually be either hidden—and thus the employer will be unable to discriminate on that ground—or apparent—and thus the employee will be primed to consider that he or she was not hired due to her disability. A woman who is not hired because an employer assumes that she will have less commitment to her job because of family responsibilities is less likely to detect that she was discriminated against by proxy of her gender. Therefore, in the context of family responsibilities, there is an even greater need to raise awareness so that hiring discrimination suits can serve more effectively to deter such discrimination.

Encouraging men to share in childcare responsibilities and to request accommodations to do so becomes crucial not only for lessening the burden on women, but also for dismantling the gendered division of childcare that leads to this discrimination by proxy.[257]

VI. Conclusion

The use of ignorance as a mechanism to achieve fairness is flawed, as can be seen in both Rawls's *Theory of Justice* and the prohibitions on preemployment inquiries in employment law. The inaccurate view of the self as disembodied and decontextualized in Rawls's original position and the consequences this has for privileging certain individuals, namely, those who fit the unencumbered norm, is replicated in the hiring context

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[256] *See* Lester, *supra* note 154, at 23–24.

[257] Professor Peggie Smith argues that the ADA model might not be the best for accommodating childcare and that Title VII's religious accommodation provision is a better template. Smith notes that "[t]he typical ADA accommodation involves adjusting the manner in which a job is usually executed so as to enable a disabled person to perform that job. A key analytical question in ADA case law concerns whether the individual, once accommodated, can perform the essential functions of the job." Smith, *supra* note 240, at 1464. In this way, the ADA is primarily aimed at bringing individuals with disabilities into the workplace. *Id.* at 1464–65. She argues that this problem of workplace *entrance* is not at issue with those requiring accommodation for childcare responsibilities, which are needed to prevent these individuals from *exiting* the workplace by addressing conflicts between parental obligations and job duties. *Id.* at 1465. This argument fails to acknowledge the hiring discrimination on the basis of caregiving responsibilities occurring at the preapplication stage, which does create problems with workplace entrance for caregivers. *See supra* notes 132–142 and accompanying text. Moreover, whether these conflicts are recognized at the beginning of the employment relationship or only later on when they arise, the same issue is present: can the employee perform the essential functions of the job with a reasonable accommodation? Therefore, the ADA model of information-shifting and accommodation comports with the theoretical underpinnings of childcare accommodations.

by barring certain information about applicants from prospective employers. The veil of ignorance employed in both Rawls's theory and employment law also constructs an artificial public-private divide that ignores the relationship and interdependence between these realms and fails to interrogate injustices in the private realm. Despite these shortcomings, imposing ignorance on employers at the hiring stage is still a necessary mechanism to combat bias in hiring. However, the negative repercussions of imposing a veil of ignorance at hiring can and should be remedied. This can be done by implementing an "information-shifting" model similar to the ADA that restricts information at hiring but allows employees' particularities to be introduced into the employment relationship through requests for accommodation. This model should be expanded and formalized by institutionalizing channels of communication between employees and employers, to improve and build the employment relationship, increase employee job satisfaction, and enhance workplace equality. This model can be utilized to accommodate childcare responsibilities, as the current absence of such provisions is one of the most notable examples of liberal theory's and employment law's failure to acknowledge the importance of interdependence and connections to others and their use of an artificial public-private divide to deny injustices in the private realm. Only by lifting the veil can we see employees for who they are—with needs, interests, connections, and concerns—and accommodate them to allow them to lead full and productive lives, regardless of what is behind the veil.