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The New Old Legal Realism

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The New Old Legal Realism

Tracey E. George
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Judges produce opinions for numerous purposes. A judicial opinion decides a case. The parties learn why one side won and the other lost. But the most important function of the opinion, and particularly the appellate opinion, in a common-law system is to educate prospective litigants, lawyers, and lower court judges about the law: what it is and how it applies to a specific set of facts. In effect, the judicial opinion is a tool that enables actors on the ground to predict how cases will turn out in the future. Under this predictive conception, when an opinion suggests a change in how a particular legal regime will apply in the future, one would expect individuals to adjust their behavior. The judicial system is leveraged in that appellate courts issue opinions only in a small set of disputes. However, the explanations for how and why the appellate court reached its decisions in particular cases are used by the players on the ground to predict outcomes across a range of varying factual scenarios.

The importance of judicial opinions to legal education cannot be overstated. Case law is the dominant teaching tool for the vast majority of law school classes, especially in the first year. Law professors parse the language and logic of opinions in critical analyses of the answers to legal questions. The higher the court, the more care taken in parsing the texts that the court produces, with the wording of Supreme Court opinions sometimes given the type of care ordinarily reserved for religious texts. Indeed, it is arguable that the primary skill that law schools teach ("thinking like a lawyer") is the ability to carefully parse judicial opinions.[1] By contrast, other materials that might be thought to contain information about the operation of law – statutes, contracts, property deeds, and academic studies – are typically used only as supplements to the cases.

[•] Faculty at the law schools of Vanderbilt University, Duke University, and University of Nevada-Las Vegas, respectively. Earlier versions—in some instances, a mere idea of a paper--were presented at the Northwestern University School of Law-Searle Center Program on Political Science and Law, Duke Law School, Vanderbilt Law School, Haifa University, and UNLV Law School. We benefited from the feedback we received from participants in those workshops. We thank Samuel Alito, Kate Bartlett, Lissa Broome, Devon Carbado, John Conley, Frank Easterbrook, Lee Epstein, Keiran Healy, Tonja Jacobi, Sung Hui Kim, David Klein, Jack Knight, Kim Krawiec, Bill Landes, David Levi, Stewart Macaulay, Lynn Mather, Eric Posner, Richard Posner, Sunita Parikh, Pat Shin, Nancy Staudt, Jeff Stempel and Kim Yuracko for their input. We also thank Duke, Vanderbilt, and UNLV law schools for providing support for the substantial data collection required for this project. Finally, our special thanks to the numerous individuals who agreed to be interviewed.

[1] In his article on the topic of "How to Read a Judicial Opinion", Orin Kerr explains that "[l]earning to 'think like a lawyer' often means learning to think like a judge, which means learning how to evaluate what rules and explanations are strong, and what rules and explanations are weak." *See* Orin Kerr, *How to Read a Judicial Opinion: A Guide for New Law Students* (available at http://euro.ecom.cmu.edu/program/law/08-732/Courts/howtoreadv2.pdf) (draft dated August 2005).

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Although generally skeptical of the importance that legal academics attach to textual parsing of judicial opinions, social scientists who study law also use opinions as sources of insight. For example, some scholars use opinions as evidence of underlying preferences and institutional dynamics.[2] Indeed, the sometimes heated debate between traditional legal scholars and political scientists centers on what to make of the reasons offered by judges.[3] An often unstated assumption of scholarship and education is that judicial opinions—the reasons the judges offer—are central to understanding law.[4] They either explain why an outcome is dictated by the law, or they reveal underlying policy views while serving to justify and legitimize the exercise of judicial authority. Either way, they tell the consumers of law what they should expect courts to do in the future.

But do the pronouncements in these appellate opinions matter in the real world? We find indications that they may not matter much. It is not that they are irrelevant. They may actually help predict how lower courts will act in the future. But there is much that has to happen before a case actually shows up in federal district court and unless the case shows up, the dictates of an appellate opinion can become irrelevant. In the context that we examine – appearance discrimination cases in the casino industry in Las Vegas – the local social and economic realities swamp any effect that the dictates of the Ninth Circuit might have in determining whether cases are brought.

The answer to the question of how the reasoning in appellate opinions translates to those on the ground is important. The communication of law to those governed by it is central to the lawmaking processes of courts. More narrowly, the on-the-ground understanding of judicial rulings informs the everyday life of real people: it is "the law" in the real world. Two classic studies – Stewart Macaulay's examination of how business people in Wisconsin understood their contracts[5] and Robert Ellickson's study of property disputes among

[2] For examples of early political science scholarship analyzing the content of judicial opinions either to make predictions about future court behavior or to gain insights into judicial preferences, *see* Glendon Schubert, *Jackson's Judicial Philosophy: An Exploration in Value Analysis*, 59 AM. POL. SCI. REV. 940 (1965); S. Sidney Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 J.L. & CONTEMP. PROB. 164 (1963); Fred Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI REV. 1, 11 (1957). For more recent examples, see Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals,* 36 AM. J. POL. SCI. 963 (1992), Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U.L. REV. 612 (2004); Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CAL. L. REV. (forthcoming 2010).

[3] An excellent window on this debate is available through an exchange between two long-time federal appellate judges – and former law professors – over these very assumptions. *See* RICHARD A. POSNER, HOW JUDGES THINK (2008); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177 (2010).

[4] Some have argued that the reasons offered are far more important than the outcome reached in a particular case. *See, e.g.,* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

[5] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

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neighboring ranchers in Shasta County[6] – examined the influence of formal law in social context. In both these studies, social realities turned out to be far more important than formal law in shaping behavior. Both Macaulay and Ellickson were building on the insights of the original Legal Realists: Go out and see what the law means to people whose actions are governed by it. Macaulay looked at contracts, Ellickson at statutes. Seeking to build on their work, our focus is on that primary teaching tool of the law professor – the appellate opinion.

The Legal Realists' original idea was to understand law by looking at how it worked in the real world. The old realism was premised on the idea that legal scholars would go out into the field and collect data. As it turned out, there was perhaps more theorizing than empirical analysis. However, in recent years, building on the increasing influence of both political science and economics on legal scholarship, there has emerged a "New Legal Realism," whose proponents are often skilled empiricists and whose focus is on how lawyers and judges in fact operate in context.[7] New Realists look at lawyers and judges in context and seek to test models of judicial behavior (the typical one being that judicial behavior is driven by the policy preferences of the judges).[8] Oversimplifying, the New Legal Realism generally has a top down feel to it where the scholars posit models and test them against the data. We have no quarrel with this method of study (to do so would be more than a bit hypocritical for at least two of us). But it strikes us as a bit at odds with the Old Legal Realism.[9] The old realism was more oriented toward studying law from the bottom up, where the researcher looked to the operation of law on the ground to help understand how law operated. It wasn't all about understanding judicial behavior and courts in context, but about the operation of law in context.[10]

The current project seeks to add to our knowledge of the relevance of case law by focusing on an area that has received little examination: how pronouncements about employment discrimination law by appellate courts translate into understandings and behavior of affected employees and employers as well as their attorneys. As our lens, we use evidence of how people *talk* about the relevance of changes in the law. Law professors typically assume lawyers read appellate cases carefully and then translate their nuances into instructions for their clients. That is, after all, our justification for spending three years teaching law students

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[6] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

[7] *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

[8] *Id.*

[9] To be fair, Nourse and Shaffer, in their articulation of what the new legal realism covers, do include "bottom up" contextual studies. And the primary example of this kind of work is Macaulay's classic study of contracting practices among Wisconsin businessmen. See Victoria Nourse & Gregory Shaffer, Varieties of New Legal Realism, THE LEGAL WORKSHOP (January 15, 2010) (available at http://legalworkshop.org/2010/01/15/varieties-of-new-legal-realism-can-a-new-world-order-prompt-a-new-legal-theory).

[10] Karl Llewellyn in his classic *The Cheyenne Way*, co-authored with E. Adamson Hoebel, used the techniques of anthropology to study the quasi-legal institutions and norms (which he described collectively as "law-ways") of the Cheyenne Indians, including substantive rights and dispute resolution bodies. KARL LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1953).

how to read these cases. But there has been little attempt to inquire into the details of that assumption (once again, the "on the ground" realities).

We examine the impact of an *en banc* Ninth Circuit employment discrimination decision from 2006*, Jespersen v. Harrah's Operating Company.*[11] At issue was a new policy requiring, among other things, that female, but not male, bartenders wear "[m]ake up (foundation/concealer and/or face powder), as well as blush and mascara... and lip color... at all times."[12] Darlene Jespersen, a veteran bartender at Harrah's Reno casino, sued claiming sex discrimination.[13] Jespersen lost at every stage, but did make it all the way to the en banc court.[14] And, the en banc court granted a small victory to Jespersen's supporters: the majority signaled a greater receptivity to challenges to appearance standards on the grounds that they were based on sexual stereotyping. Many workplace grooming guidelines would not survive such a test.[15] Few other appellate cases from that period generated anywhere near the amount of attention among legal academics that this case did. Arguably, it represented a significant change in the law regarding appearance discrimination. At the least, it added clarity to a highly ambiguous area of law. Either way, this was precisely the type of case that should have influenced understandings of law on the ground.

We begin in part I by describing the scholarship and ideas behind the work of the original Legal Realists and our reasons for utilizing their techniques. In Part II, we explain our choice of *Jespersen* as a case study using New Old Realism methods. Part III lays out methodology and data. Part IV describes our findings from interviews with three sets of local actors: casino employees, lawyers, and judges. Part V concludes by asking if and when case law is relevant locally.

I. Old Legal Realism

Legal Realists, beginning in the 1930s, advocated for a more realistic view of courts and law than the dominant Formalist view which emphasized the constraining role of legal text on

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[11] 444 F.3d 1104 (9th Cir. 2006) (en banc).

[12] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 n.2 (9th Cir. 2004) (three-judge panel) (reprinting the relevant portions of the challenged appearance code).

[13]Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002). Jespersen concurrently filed tort and contract claims in state court. Jespersen v. Harrah's Operating Co., 131 P.3d 614 (Nev. 2004) (unpublished table decision), No. 40587, slip. op. (Nev. June 7, 2004) (affirming state district court grant of summary judgment).

[14] Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd* 392 F.3d 1076 (9th Cir. 2004), *rehearing en banc granted* 409 F.3d 1061 (9th Cir. 2005), *aff'd* 444 F.3d 1104 (9th Cir. 2006) (en banc).

[15] *See, e.g.,* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 279-280 (2007) (concluding that casino cocktail waitress uniforms would not meet BFOQ standards); Kimberly Yuracko, *Sameness, Subordination, and Perfectionism,* 43 SAN DIEGO L. REV. 857, 892-893 (2006) (arguing that strictly speaking, a sex stereotyping prohibition should prohibit sex-specific grooming codes, but observing that no court had yet struck down such a grooming code on stereotyping grounds).

the behavior of judges and other actors.[16] A loosely connected group of lawyers, judges, and legal academics, the Realists were united more by their opposition to formalism than by agreement with any particular theory of law. Some of them emphasized the role of personal beliefs and values in shaping judicial decisions; other focused on describing the divergence between the law on the books and the law in action.

The first Legal Realists were law professors who went out into the world to see how law operated in action.[17] Underhill Moore and Charles Callahan literally looked outside their office windows to see how parking and driving regulations affected the actions of automobile drivers in New Haven, Connecticut. [18] While focused on an inconsequential legal issue (except when one is actually hunting for the elusive urban parking space), Moore and Callahan's methodology was significant, reflecting as well as anticipating a movement to examine the relationship between law and context.[19]

A true Old Realist in his methods, Karl Llewellyn in his life-long study of state courts, *The Common Law Tradition: Deciding Appeals*, explained that he attempted "to use the child's-eye approach advocated by the realistic realists of the late '20's and the early '30's."[20] Realism, argued Llewellyn, "is a method: rather than a philosophy."[21] Llewellyn counseled scholars to "see it fresh...", to "see it as it works."[22] Llewellyn was seeking to explain how judges reached certain decisions given the law that existed at the time. How did judges use the law? And, when and how would they set it aside?

Numerous scholars followed Llewellyn's advice to "see [the law] as it works." [23] The Warren Court's criminal procedure rulings, for example, inspired several studies of the effects

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[16] For a history of American Legal Realism, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

[17] *See*, *e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930) (applying psychological model to study of modern legal mind); Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930) (Llewellyn would later claim to have introduced the "realist" label into legal scholarship in this *Columbia Law Review* article. (KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 512 (1960))); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

[18] *See* Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control,* 53 YALE L.J. 1 (1943); *see also* John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

[19] *See* F.S.C. Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L.J. 196 (1950).

[20] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 508 (1960). *See also* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

[21] *See id.* at 509 & n.2.

[22] *See id.* at 510.

[23] *See, e.g.,* H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189 (1968) (investigating the effect of the Court's First Amendment religion clause decisions on school boards and personnel).

of such rulings on the behavior of police officers and criminals.[24] An enterprising group of Yale law students observed New Haven police interrogations, interviewed detectives, lawyers, and suspects, and collected arrest, charge, and conviction numbers to evaluate the impact of *Miranda*.[25] But after the initial burst of interest, such empirical studies disappeared for two decades even though debates over *Miranda* continued.[26]

"We are all Realists now"[27] or so it is said. The "New Legal Realism" can be found in the work of Law and Economics, Cognitive Psychology and Law, Empirical Legal Studies, Sociolegal Scholarship, and so on.[28] But New Legal Realism has deviated a bit from the original goals of Legal Realism.[29] These various approaches often make crucial assumptions about the communication of law – the awareness of legal rules – when examining the influence or possible effects of law on behavior. But, this scholarship rarely tests that assumption. Ellickson, for example, sought to bring some "realism" to law and economics' embrace of the Coase Theorem by interviewing real cattle ranchers like those imagined by Coase.[30] "It turns out, perhaps counterintuitively," and counter to the assumption of Coase, he reports, that "legal rules hardly ever influence the settlement of cattle-trespass disputes" among the ranchers in his study.[31]

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[24] The most studied decisions were Mapp v. Ohio, 367 U.S. 643 (1961) (adopting the Exclusionary Rule which prevents the introduction of evidence obtained as a result of an unconstitutional search and seizure) and Miranda v. Arizona, 384 U.S. 437 (1966) (requiring police officers to advice custodial suspects of their rights prior to interrogation). *See, e.g.,* JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES (1974); NEAL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971); Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974). *See also* Lawrence Baum, *Police Response to Appellate Court Decisions: Mapp and Miranda,* 7 POL'Y STUD. J. 425 (1978) (building a theory of the possible effects of exclusionary rules on police investigations and briefly reviewing empirical research examining police response); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621, 631 n. 72 (1996) (citing studies published shortly after Miranda was issued).

[25] *Interrogations in New Haven: The Impact of* Miranda*,* 76 YALE L.J. 1519 (1967).

[26] Richard Leo found that empirical studies of the impact of *Miranda* disappeared by 1973. After two decades without any real world study, Leo and others have returned to the field to examine the effect of *Miranda. See, e.g.,* Richard A. Leo, *Inside the Interrogation Room,* 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

[27] Judge Posner has expressed some skepticism of this general claim: "Though Holmes is venerated by lawyers and judges, the legalistic view continues to dominate professorial discourse about judging," a problem he attempts to tackle. Richard Posner, *A Reply to Edwards and Livermore,* 59 DUKE L.J. 1177, 1178 (2010).

[28] For a discussion of the rise and scope of New Legal Realism, see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61 (2009) (the authors "map the precursors to an emerging 'new legal realism,' address how the varieties of new legal realism build from their realist forbears, critique these varieties, and attempt to provide a new framework for moving forward").

[29] For Stewart Macaulay's own review of the evolution of Legal Realism from the old to the new, see Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WISC. L. REV. 365.

[30] Coase hypothesized that when parties may privately exchange rights and face no transaction costs, then the efficient allocation of property rights (or liability) will result regardless of the original distribution of those rights. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Parties will respond to the rule by buying (or selling) their rights to the appropriate relative value to both sides.

[31] Ellickson, *supra* note 6, at 141.

A revival of the original Legal Realist ideas is in order. The methodology of old Realism has much to offer – to inform our study of law and legal institutions and our models of human behavior. The case studies of old Realism should work side by side with both schools of new realism: the realistic doctrinal work as well as the statistically sophisticated empirical studies. Both types of scholarship are richer when informed by and even constrained by the law as described by parties. More significantly, from our perspective, the theory of judicial decisionmaking has made meaningful progress to expand and enrich our understanding of courts, and our approach can serve to connect some of the seemingly disparate pieces.

We, like Llewellyn, want to look at the law and "how it has been working."[32] And we share his skepticism for the method of teaching that focuses almost exclusively on the parsing of appellate cases. But, we are interested in the same subjects as fascinated Ellickson and Macaulay: the people who are acting in the shadow of the law. How do they perceive that shadow? How do they talk about it? Does the law guide and influence their actions in the ways that legal scholars assume? We seek to answer that question by focusing on a specific legal rule and how it has been understood by its intended audience.

II. A Case for Study: *Jespersen v. Harrah's Operating Company*

Our project examines how the dictates of appellate opinions are understood on the ground. In order for judicial decisions to operate effectively as law, lawyers must interpret and transmit them to those whose behavior should be governed by the new ruling. To examine that assumption, we focus our study on the impact of one case, *Jespersen v. Harrah's Operating Company*. Why this case? What can one, possibly idiosyncratic, case tell us about the general phenomenon of how appellate cases get translated to daily realities? *Jespersen* is the type of case that makes its way into both the academic canon and the practitioner playbook; and that then gets used to teach law and advise clients. In this section, we describe the case, its litigation history, and its visible impact on the legal academy, law firm practice, and public media.

A. The Case: Dispute, Litigation, and Outcome

In 2001, Harrah's Operating Company, a major U.S. gaming company, adopted a "Personal Best" policy, requiring employees to achieve their personal best in terms of their appearance.[33] This policy was part of the organization's attempt to do a makeover: to upgrade

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[32] *See id.* at 510.

[33] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077-1078 (9th Cir. 2004) (The opinion describes Harrah's "'Beverage Department Image Transformation' program" and its stated goal "to create a 'brand standard of excellence' throughout Harrah's operations, with an emphasis on guest service positions." The centerpiece of the BDIT program was new appearance standards called the "Personal Best" program which was implemented in 20 of Harrah's locations.).

and professionalize itself.[34] As part of this program, women had to wear makeup, style their hair, and polish their nails every day consistent with a post-makeover photograph.[35] Men, for their part, were prohibited from wearing makeup and were required to keep their nails clean and hair short.[36] Reno bartender Darlene Jespersen, who worked in a Harrah's casino for more than 20 years before she was fired for failing to wear make-up, filed her Title VII sex discrimination lawsuit against Harrah's on July 6, 2001.[37] Two Reno solo practitioners, Kenneth McKenna and Jeffrey Dickerson, represented Ms. Jespersen in the trial court. On June 19, 2002, Harrah's counsel moved for summary judgment.[38] The first judicial ruling on Jespersen's claim came from Senior District Judge Edward Reed, who found, contrary to conventional wisdom about the state of the law, that grooming requirements could not violate Title VII because they did not involve an immutable characteristic.[39] He granted summary judgment in favor of Harrah's.

The Lambda Legal Defense Fund, the preeminent gay rights litigation organization in the United States, took the lead on Jespersen's appeal because they saw the case as an opportunity to urge for an expansion of Title VII to include more claims by lesbian, gay, bisexual and transgendered ("LGBT") employees.[40] Courts have uniformly interpreted Title VII as

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[34] Defendant's Motion for Summary Judgment, June 29, 2002, Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (2004) available at 2001 WL 34878539 (explaining that "Harrah's implemented the Beverage Department Image Transformation ('BDIT') program... [as] a comprehensive initiative to raise the total service performance of the Harrah's beverage team"). Although our focus is on the litigation in the federal courts, Jespersen also filed a wrongful discharge suit in Nevada state court, where her tort and contract claims were dismissed with little treatment of the issues. The evolution of the litigation, including both the state and federal court processes is described in Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007).

[35] 392 F.3d at 1083, 1084 (Thomas, S., dissenting) (explaining that an image consultant gave each woman a make-over and took a post-makeover photograph which was used as an "'appearance measurement tool'" to which the employee was held "'accountable'" daily, but did not give men a makeover or take a photograph to use as a benchmark for daily appearance).

[36] *See* Appellant's Opening Brief at 6, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), available at 2003 WL 25859577 (Harrah's dictated a common uniform for men and women, but set forth sharply contrasting grooming guidelines. Hair: Men had to keep it short while women had to wear their hair "down" and to "tease[], curl[] or style[] it every day". Makeup: Men could not wear it, but women had to wear "face powder, blush and mascara... in complimentary colors" and "[l]ip color... at all times.").

[37] Appellant's Opening Brief, *supra* note 32, at 2-7.

[38] Defendant's Motion for Summary Judgment, *supra* note 30, at 4.

[39] 280 F.Supp.2d 1189. The details of the lower federal court litigation are included in Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, in EMPLOYMENT DISCRIMINATION STORIES 105, __ (Joel W.M. Friedman & Jack M. Gordon, eds., 2006).

[40] Ann Rostow, *Lesbian Loses Dress Code Discrimination Suit*, Dallas Voice, April 20, 2006, available at http://www.dallasvoice.com/artman/publish/article_1892.php (quoting Lambda Legal Defense Fund lawyer Jenny Pizer as saying that the Jespersen case helped push the law on sex stereotyping forward).

inapplicable to sexual orientation discrimination.[41] But, the Supreme Court in *Price Waterhouse v. Hopkins* concluded that Title VII prohibited adverse employment decisions based on an employee's failure to adhere to sex stereotypes. [42] Gay rights advocates have tried, with limited success, to use *Price Waterhouse* to argue that an employer illegally discriminated against an LGBT employee based on the employee's failure to comply with sex stereotypes.[43] If Lambda could persuade courts to accept that appearance codes which involved sex stereotypes were a form of sex discrimination, then such claims, which often would be asserted by LGBT employees, could be brought under Title VII.[44]

The original three-judge appellate panel was divided on Jespersen's claim.[45] All three judges rejected Judge Reed's immutability theory.[46] However, two Clinton appointees – Judges Tashima and Silverman—concluded that appearance regulations which imposed different requirements on men and women were not necessarily discriminatory as a legal matter. For that, the requirements had to impose a greater burden on one sex than on the other. Tashima's opinion stated that while unequal burdens would be actionable, Jespersen failed to introduce evidence that women faced a greater burden than men.[47] Judge Sidney Thomas, another Clinton appointee, wrote a heated dissent, arguing that his colleagues had ignored the sex stereotyping and degradation inherent in the casino's policy.[48]

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[41] *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Sex Discrimination*, 43 U. MICH. J. L. REFORM 713, 714-15 (2010).

[42] 490 U.S. 228 (1989).

[43] McGinley, *supra* note 37, at 732-44; 750-57 (explaining that some courts interpret *Price Waterhouse* to protect gay, lesbian and transgendered individuals, but others do not).

[44] As one of our respondents, who had been involved with the litigation at an early stage, explained: "The Ninth was the circuit most likely to be receptive . . . you know, to an expansion of the law in the direction of giving gay and lesbian plaintiffs greater protection against discrimination in the workplace. There was already good precedent in the Ninth Circuit. Those prior cases could provide the necessary building blocks for a more robust anti-stereotyping doctrine. This was a good case with a sympathetic plaintiff. It was just a matter of getting the right panel." Two of those Ninth Circuit cases are: *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc) (striking down weight limits for female flight attendants); *Frank v. United Air Lines*, 216 F.3d 845 (9th Cir. 2000) (analyzing weight limits in striking down differential weight limits for men and women, where the ones for women were much stricter).

[45] Jespersen v. Harrah's Operating Co., 392 F.2d 1076 (2004).

[46] *Id.* at 1080 (explaining that while early decisions found that because appearance standards regulated "mutable" characteristics, such standards did not discriminate based on sex, "later cases recognized, however, that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only 'mutable' characteristics such as weight").

[47] *Id.* at 1081-1083.

[48] *Id.* at 1083, 1085 (Thomas, S., dissenting) ("Title VII does not make exceptions for particular industries, and we should not write them in. Pervasive discrimination often persists within an industry with exceptional tenacity, and the force of law is sometimes required to overcome it."). For a more thorough description of these opinions, see Carbado et al., supra note 35, at __. In particular, Judge Thomas faulted the majority for failing to follow the dictates of a prior Supreme Court case, *Price Waterhouse v. Hopkins*. 392 F.3d at 1084.

In a highly unusual move, a majority of Ninth Circuit judges granted Jespersen's suggestion for en banc rehearing.[49] A divided eleven-judge en banc panel upheld the panel's ruling as well as its conclusion that Jespersen failed to offer evidence of an unequal burden imposed by the Personal Best policy.[50] The majority went further and held that she also failed to prove the policy involved sex stereotyping, which could have been an independent basis for a viable Title VII claim. It marked the first time a federal appeals court stated that an appearance code could violate Title VII if the employer's policy stereotypes the employee based on sex.

Table1. Federal Court Litigation History[51]

	District Court	Three-Judge Appeals Court[52]	En Banc Appeals Court[53]
Holding	All grooming policies are permissible.	Grooming policies are permissible only if burden is roughly equal.	Grooming policies are permissible only if burden is roughly equal *and* if they do not reflect sex stereotyping.
Outcome	Casino wins	Casino wins	Casino wins
Majority Appointing President (#)	Carter	Clinton (2)	Carter, H.W. Bush, Clinton (2), Bush (3)

[49] 409 F.3d 1061 (2005). The Ninth Circuit decided 6,387 cases on the merits during the 2006 Term, but only eight cases en banc (or an en banc review rate of less than 0.2%) . *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2006, Table S-1 available at *http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/tables/s1.pdf.*

[50] Not all of the Ninth Circuit's judges sat in this case. The court used a mini-en banc procedure whereby ten randomly selected judges plus the circuit chief judge sit as the en banc court. Even though only a subset of judges sits, a majority of all active circuit judges must vote to grant en banc review. *See* 28 U.S.C. § 46(c), 9th Cir. R. 35-3.

[51] Appointing president information is drawn from the Federal Judicial Biographical Database on the Federal Judicial Center webpage. http://www.fjc.gov/history/home.nsf. Information on counsel and amicus are drawn from the docket sheets available on Westlaw or PACER

[52] Jespersen v. Harrah's Operating Company, Inc., 392 F.3d 1076 (9th Cir. 2004) (argued and submitted Dec. 3, 2003; filed Dec. 28, 2004) (The three-judge panel was divided with Judge Tashima writing the majority opinion joined by Judge Silverman, and Judge Sidney Thomas filing a dissenting opinion.).

[53] 444 F.3d 1104 (argued June 22, 2005, and filed April 14, 2006) (The eleven-judge en banc court was divided with Chief Judge Mary Schroeder writing a majority joined by Judges Pamela Rymer, Barry Silverman, Richard Tallman, Richard Clifton, Consuelo Callahan, and Carlos Bea; Judge Harry Pregerson filed a dissenting opinion joined by Judges Alex Kozinski, Susan Graber, and William Fletcher; and Judge Kozinski filed a dissenting opinion joined by Judges Graber and Fletcher.) A majority of non-recused judges voted to grant rehearing en banc on May 13, 2005. 409 F.3d 1061 (2005).

Dissent Appointing President (#)		Clinton	Carter, Reagan, Clinton (2)
Primary Counsel	Reno solo practitioners	Lambda LDF for Jespersen; Employment Law Defense-Side Firm for Harrah's	Same as first appeal
Amicus		*For Jespersen*: ACLU of Nev., Nw. Women's Law Ctr., Cal. Women's Law Ctr., Gender Pub. Adv. Coalition, Nat'l Empl. Lawyers Ass'n, Alliance for Workers' Rts., & Legal Aid Soc'y-Emp. Law Ctr. *For Harrah's*: Council for Emp. Law Equity, Am. Hotel & Lodging Ass'n, & Cal. Hotel & Lodging Ass'n	*Added at en banc:* *For Jespersen*: Hawaii Civil Rights Comm'n, Nat'l Ctr. For Lesbian Rights, Transgender Law Ctr. *For Harrah's*: Equal Emp. Adv. Council

Most relevant, for our purposes, is what the en banc panel said. Jespersen's claim of sex discrimination was premised on the notion that it was obvious that the burdens being imposed on women bartenders were greater than those on male bartenders. She also claimed that requiring women to wear makeup (and not men) constituted impermissible sex stereotyping – that is, requiring women to conform to a stereotype to which men were not required to conform. The court accepted the premise that it was indeed discrimination for a casino to impose different grooming requirements on men and women, but only if it were shown by evidence that the burdens on one sex were significantly greater than those on the other. However, Jespersen had not adduced evidence demonstrating the greater burden that she was claiming – she was simply asserting it.[54] If she had demonstrated the differential burden, with concrete evidence, the en banc majority suggested that she might have won. The dissenters, and Judge Kozinski in particular, saw the matter differently. It was obvious, Judge Kozinski observed, that imposing a makeup requirement on women and not on men created materially different burdens.[55]

One of the most surprising aspects of the case was where Judge Kozinski and Chief Judge Schroeder came out. Mary Schroeder, a prominent liberal judge, was part of a majority ruling against a woman plaintiff in a high-profile employment discrimination case (three of the

[54] The court stated that "none" of the policies' requirements "on its face places a greater burden on one gender. ... It is for the most part unisex... [not] adopted to make women bartenders conform to a commonly-accepted stereotypical image..." *Jespersen*, 444 F.2d at 1112.

[55] 444 F.3d at 1117.

four women judges on the panel voted against Jespersen).[56] Judge Schroeder not only voted against an exemplary female employee who was fired for refusing to bend to her employer's stereotype of women, but Schroeder even took a leadership role by writing the majority opinion rejecting Jespersen's claim. On the other hand, Alex Kozinski, one of the most prominent conservative judges in the country, was the leader of the dissenters.[57] Kozinski, in oral argument, appeared to put himself in Jespersen's shoes and decided that it was humiliating to be asked to wear makeup.[58]

Judge Schroeder's decision may have been a strategic one.[59] Based on her prior decisions, we would expect her to support a claimant like Darlene Jespersen. Her vote, however, would not have won the case for Jespersen. And, the majority's decision, because it was an en banc court, would supersede prior Ninth Circuit law including an important en banc employment discrimination case written by Schroeder invalidating weight limitations for female flight attendants.[60] Realizing the importance of gaining control of the majority opinion, Schroeder could have chosen to vote with the majority and, as Chief Judge, been able to assign the opinion to herself. While Jespersen would lose, women employees in general would be

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[56] This result is especially interesting in light of empirical studies finding that women circuit judges are more receptive to employment discrimination suits claiming gender bias than were their white male colleagues. *See, e.g.,* Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (concluding, after a systematic consideration of courts of appeals decisions from 1981-1996, that female judges were more likely than male judges to vote in favor of plaintiffs in employment discrimination cases claiming gender bias); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (finding both direct gender effects in sex discrimination cases in the courts of appeals (male judges are less likely than female judges to favor the employee) and indirect gender effects (male judges' are more likely to favor the employee if one of his co-panelists is a woman)).

[57] Kozinski is known for his free market views, which presumably include a high degree of deference to employers trying to figure out how to run their businesses. Shikha Dalmia, *Searching for Alex Kozinski*, Reason, July 2006, available at http://reason.com/archives/2006/07/01/searching-for-alex-kozinski. Nor is Kozinski known for prudish views regarding sexualized attire. Judge Kozinski recently got himself into a bit of a pickle over pornographic images. *See* Catherine Price, *Judge Alex Kozinski Regrets Posting Those Pictures*, Broadsheet: Salon.com (June 12, 2008 (available at http://www.salon.com/mwt/broadsheet/2008/06/12/kozinski_porn/).

[58] He wrote: "Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance." 444 F.3d at 1118. Conversely, Schroeder also may have put herself in Jespersen's shoes and decided that being asked to wear a minimal amount of makeup was not a big deal; that, in the fight for gender equality, this was not a battle worth winning. 444 F.3d at 1109 (concluding that the makeup "requirements... on their face, are not more onerous for one gender than the other").

[59] For a discussion of strategic voting to influence opinion content, see FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (Cambridge 2000); VIRGINIA HETTINGER, STEFANIE LINDQUIST & WENDY MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006).

[60] The case was *Gerdon v. Continental Airlines*, which struck down weight restrictions for women flight attendants more than two decades earlier. 692 F.2d. 602 (9th Cir. 1982) (en banc). The *Jespersen* panel relied heavily on this case for its conclusion that appearance standards could constitute sex discrimination in violation of Title VII. *Jespersen*, 392 F.3d at 1080-1081.

better off because Judge Schroeder could craft an opinion that not only preserved the existing protections against gender discrimination, but perhaps advanced those protections.[61]

The shape of the final opinion in *Jespersen* suggests some plausibility to a strategic theory of Judge Schroeder's behavior. While holding that Darlene Jespersen lost because she had not produced enough evidence, the majority opinion also laid out a road map for future plaintiffs.[62] More importantly, the opinion also added clarity to the emerging law on stereotyping. Judge Schroeder, in dicta, constructed a narrow stereotyping claim in discrimination cases involving appearance discrimination: plaintiffs (at least in the Ninth Circuit) could henceforth bring claims challenging appearance codes that unduly sexualized the claimant and, as a result, either subjected employees to a higher risk of sexual harassment or lead to unequal treatment.[63]

Jespersen appeared to change the rules of the game, significantly increasing the risk of litigation losses for casinos.[64] Casino cocktail servers, for example, wear highly sexualized

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[61] None of the *Jespersen* judges spoke with us about how they reached their decisions, but many people involved in the litigation shared their views on what have been behind the judges' actions. Specifically, a couple of respondents suggested that while Schroeder's sympathies were probably with Jespersen, she knew she was going to be in the minority if she voted for Jespersen.

[62] *See, e.g.,* Note, *Ninth Circuit Holds That Women Can Be Fired for Refusing to Wear Makeup*, 120 HARV. L. REV. 651, 654 (2006) (noting that the Ninth Circuit suggests that a showing can be made in the future of unequal burdens and stating that plaintiffs can and should make this showing); Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285, 313 (2007) (stating that the majority presented an evidentiary roadmap for future challenges to gender-based dress codes and that the dissenting opinions and the majority opinions taken together "moved the law forward in ways that may make future challenges to stereotypical dress and grooming rules easier to win").

[63] *See* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 270-80 (2007) (concluding that hiring exclusively women cocktail servers and dressing them in sexually-explicit costumes likely violates Title VII after *Jespersen*); *see also* Pizer, supra note 60, at __ (pointing to the language in the case and concluding that there may exist a good cause of action for discrimination by female cocktail servers wearing skimpy outfits under Title VII after *Jespersen).* We should note that not every discussion of Jespersen in the academic literature attaches importance to the portion of the opinion that suggests that unduly sexualized outfits might fall afoul of Title VII. *See* DEBORAH L. RHODE, THE BEAUTY BIAS 120-2 (2010). That aspect of the case is of greatest importance only in those industries where employers mandate the kinds of outfits that implicate issues of stereotyping, such as the casino industry.

[64] At a conference held by the Duke Journal of Gender, Law and Sexuality, soon after the release of the final *Jespersen* opinion, a senior casino lawyer told us that the he and others in the casino industry were concerned about the implications of the case for categories of employees other than bartenders, given certain language in Chief Judge Schroeder's opinion. Apparently, these questions were the subject of much discussion at a conference of entertainment industry managers and lawyers that occurred soon after the case came down. An interviewee who is high up in the management chain at Harrah's also told us that in the interviewee's opinion, it was ridiculous to hold Darlene Jespersen to the makeup requirement. This interviewee, however, believed that it was important to have makeup and other sex-specific requirements for cocktail servers.

uniforms which should support "easy" claims.[65] After *Jespersen*, women casino employees would simply introduce financial records, their own testimony, or an expert witness to prove that the dress and makeup requirements being imposed on them but not men were costly.[66] Casinos could overcome this evidence only by proving that the appearance requirements were necessary or integral to the job at hand: a "bona fide occupational qualification" ("BFOQ").[67] But courts traditionally have been willing to grant only the narrowest of BFOQ exceptions.[68]

B. The Impact: Popular Press, Legal Scholarship and Law Firm Alerts

The *Jespersen* opinions grabbed an extraordinary level of notice from law professors and students, journalists, and law firms. Legal scholars appreciated the importance of *Jespersen* while it was still working its way through the legal system.[69] Many hundreds of law journal pages were written analyzing it.[70] And, the opinion quickly became part of standard teaching

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[65] Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work after Jespersen v. Harrah's Operating Company, Inc.*, 42 U.S.F. L. REV. 299, 320-21 (2008) (internal citations omitted from quote):

> Even the Ninth Circuit is not likely to tolerate under Title VII an employer policy that makes baristas wear negligees in order to have the job of selling steamed coffee at a roadside stand. Such a policy, assuming the employer meets the numerosity requirements of Title VII, would signal an intent to make the employee "sexually provocative, and tending to stereotype women as sex objects." Dress codes mandating that female employees wear sexy, revealing tops, short skirts, and high heels should be the "easy" cases under existing Title VII doctrine, whether the theory is that such dress rules demean and objectify women or that they expose women to sexual harassment from supervisors, co-workers, and customers.

[66] For a discussion of possible future litigation, see *Recent Cases*, 120 HARV. L. REV. 651, 654 (2007) (noting that "the court left open the possibility that a future plaintiff who submits more evidence of unequal burdens may succeed in a Title VII action" and describing how plaintiffs could prove that makeup policies impose "unequal economic," "unequal physical," and "unequal psychological" burdens, any one of which would be sufficient under the court's language).

[67] *See* Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004); McGinley, *supra* note 58.

[68] Airline attendants, for example, do not fit the category. Southwest Airlines famously lost its argument that it needed to be able to do gender specific hiring so as to maintain its image as the "love airline"; the judge found that sexual titillation was tangential to the business in question. Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981); *see also* Kimberly Yuracko, *Sameness, Subordination, and Perfectionism,* 43 SAN DIEGO L. REV. 857 (2006) (discussing *Southwest*).

[69] The district court decision itself was the basis of academic attention. *See* David B. Cruz, *Making Up Women: Casinos, Cosmetics and Title VII*, 5 NEV. L.J. 240 (2004).

[70] As of this writing, in July 2010, more than 200 published articles have cited the case. Interest peaked when the en banc opinion was released. For example, from 2009, see, e.g., Elizabeth Malcolm, "*Looking and Feeling Your Best": A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 SAN DIEGO L. REV. 505 (2009); Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287 (2009); Deborah Rohde, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009); Michele Alexandre, *When Freedom is Not Free: Investigating the First Amendment's Potential for Providing Protection Against Sexual Profiling in the Workplace*, 15 WM. & MARY L. J. WOMEN & L. 377 (2009).

materials in courses examining gender discrimination in the workplace.[71] As the nature of employment discrimination has changed over the years from a focus on explicit and overt animus to more subtle forms of hostility, appearance issues have provided especially fertile ground for broader debates about the directions that discrimination law should take. In particular, the questions of whether the law protects against stereotyping and discrimination based on so-called mutable characteristics have taken center stage, to say nothing of the connection between these issues and the increasingly salient debates over whether there should be protections against sexual orientation discrimination. In some form or the other, the *Jespersen* case brought aspects of all of these issues in front of one of the most important courts in the country. Unsurprisingly, academics reacted with great interest. Concretely, an examination of all the published appeals court decisions for a dozen of the most prominent federal appeals court judges for the period 2004-06 showed that *Jespersen* was likely one of the most cited cases in the law review literature.[72] That means that, in terms of the academic interest it garnered, it outdid many cases on abortion, the death penalty, gay marriage and so on. Certainly, it was the most prominent employment discrimination case written during the three-year period 2004 to 2006.

The case also generated considerable attention in the press, both before and after the decision.[73] The media's interest can be explained by three considerations. First, the issue was straightforward and understandable: Is it gender discrimination for an employer to mandate that its female employees wear makeup? For some, cases like *Jespersen* symbolize the ludicrousness of anti-discrimination laws by encouraging litigation over trivial issues. For others, mandating that women wear makeup, with no similar restriction on men, demonstrated the willingness of employers and society more generally to constrain and discipline women while allowing men wide latitude in their workplace choices. Second, the case involved a casino. If casinos, which trade on a highly sexualized make-believe environment, could not require its female bartenders to wear makeup, did that mean that these employers could not require their female cocktail servers to wear skimpy outfits, high heels, and so on? Third, there was the undercurrent of conflict between the interests of the gay community and the women's

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[71] *See, e.g.,* MICHAEL J. ZIMMER, ET.AL, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 347 (7th ed. 2008); ROBERT BELTON ET AL., 2008 SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (2008); STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 504-13 (4th ed. 2008); KATE BARTLETT & DEBORAH ROHDE, GENDER AND THE LAW: THEORY, DOCTRINE AND COMMENTARY (4th ed. 2009); Carbado et al., *supra* note 35.

[72] Data on these twelve judges was collected for a different project analyzing Judge Sonia Sotomayor's publication and citation records during the 2004-06 period. The other judges in the group were all those rumored to be on President Obama's short list and all those who had been rumored to have been in President Bush's short list. In other words, these were among the most prominent federal appellate judges in the nation. *See* Eric Posner, More Data and a New Conclusion (2009) (available at http://www.volokh.com/posts/1243482653.shtml). For purposes of this paper, we compared the number of law review cites that the most cited opinions by any of these judges had garnered to the number that *Jespersen* had. Only one case had more law journal cites.

[73] *See, e.g.,* Stephanie Amour, *Your Appearance, Good or Bad, Can Affect the Size of Your Paycheck*, USA TODAY, July 20, 2005, at 18; Carol Kleiman, *Judges Embrace Mandatory Makeup*, CHICAGO TRIBUNE, Mar. 1, 2005, at C2; Henry Weinstein, *Court Rules Bartender was Justly Fired for Refusing to Wear Makeup*, LOS ANGELES TIMES, Dec. 29, 2004, at A18; Bob Egelko, *Court OKs Sex-Based Grooming Standards*, SAN FRANCISCO CHRONICLE, Apr. 15, 2006, at B1.

rights movement. The gay rights group litigating the case, Lambda Legal Defense Fund, saw it as an opportunity to move the law in a favorable direction for LGBT claimants. The prominent women's rights groups, by contrast, were largely absent from the litigation and the debates in the press.[74] And finally, when the case came down, the majority opinion was written by a prominent liberal woman judge, the then-Chief Judge Mary Schroeder. And the loudest (and most articulate) in dissent was her conservative colleague, the current Chief Judge Alex Kozinski. In sum, the case made for great theatre. [75]

Finally, employment and labor lawyers responded to the case in bar and industry journals and in their public communications to clients (and presumably with greater frequency in private communications).[76] That the Ninth Circuit, sitting en banc, had issued an opinion tackling appearance discrimination was unsurprisingly the focus of numerous law firm client alert memos. Most of those memos, while noting that Darlene Jespersen had lost her case, also cautioned employers that there was language in the Ninth Circuit's opinion that should cause them to be extremely careful with their dress and appearance policies.[77] The title of one memo cautioned clients: "Review Your Grooming and Appearance Policies for Possible Gender

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[74] Three relatively small women's rights groups— the Northwest Women's Law Center, California Women's Law Center, and Gender Public Advocacy Coalition—filed amicus briefs in the Ninth Circuit. For a discussion of this issue, see Carbado et al., supra note 35.

[75] Apart from press attention, the case even found its way into a documentary on American attitudes toward appearance involving, among others, Paris Hilton. America the Beautiful (2009) (Darryl Roberts, director) (available at http://americathebeautifuldoc.com/buy/)

[76] *See, e.g.,* E. Fredrick Preis Jr., Timothy W. Lindsay, & Reginald C. Johnson, *Employment in Gaming: Recent Discrimination Issues*, 8 GAMING L. REV. 89 (2004); Gregory J. Kamer & Edwin A. Keller, Jr., *Give Me $5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 335 (2003) (advising employers on how to avoid "the potential legal minefields gaming establishments face when working to create a particular image or theme for their casino and surrounding services"); BRENT A. OLSON, MINNESOTA PRACTICE SERIES: BUSINESS LAW DESK BOOK, FORMATION AND OPERATION OF BUSINESSES §13:11 (Gender Discrimination) (2009); Ellen M. Martin, *Evolving Theories of Sex, Race, and Color Discrimination Under Title VII*, PRACTICING LAW INSTITUTE: LITIGATION 441 (2008).

[77] Stoel Rives, Labor and Employment Law Alert, Hair-dos, Tattoos, and Body Piercings: Is Your Dress Code Lawful? (April 2006) (available at http://www.dlapiper.com/files/upload/Labor_Emp_060517.htm). Winston & Strawn, Labor and Employment Practice Briefing, Ninth Circuit Finds That Dress and Grooming Standards Policy Did Not Violate Title VII's Prohibitions Against Gender Discrimination and Sex Stereotyping (April 2006) (available at chttp://www.winston.com/siteFiles/publications/DressAndGroomingStandards.pdf); Hall, Render, Killian, Heath & Lyman, Employment Law Briefing (August 2005) (available at http://www.hallrender.com/library/newsletters/49/ELBja05.pdf); Nixon Peabody, Employment Law Alert, (August 2006) (available at http://www.nixonpeabody.com/linked_media/publications/ELA_08002006.pdf); Proskauer, Employment Training Tip of the Month (August 2009) (available at http://www.proskauer.com/news/detail.aspx?news=3065)

Discrimination, Ninth Circuit Suggests".[78] Another one said: "Ninth Circuit Upholds Make-Up Requirement – But Cautions Employers".[79]

C. Predicted Impact on the Ground

If the reasoning offered by judges in their opinions matters, then we would expect *Jespersen* to be a case to have such an effect for various reasons. First, the factual focus – appearance standards in casinos – is highly salient in the local community in which casinos are the dominant industry and sex and sexuality is treated as a commodity. Second, the court acted in the most significant way possible by hearing the case en banc. The Ninth Circuit is the largest appeals court in the country with more judges and rulings than any other court, and it covers a broad swath of the population. Hence, it would not be surprising if a panel opinion, especially if succinctly written, were overlooked. But, if any court of appeals decision gets attention, then one by a divided en banc panel with a long majority opinion and two dissents, including a very colorful one, should be noted. Third, the opinion itself turned new ground, laying out a way to meaningfully expand employee rights. Fourth, the language held a clear signal to potential litigants who could qualify for class action certification and/or damages sufficient to motivate entrepreneurial plaintiff-side lawyers. Evidence suggests that lawyers respond to such signals.

While the *Jespersen* opinion appears to have had a measurable impact based on legal scholarship, law school teaching, popular press accounts, and practitioners' writing, a change in casino workplace policies (or at least a review of those policies) and litigation challenging those policies would be the most direct measure of an effect. But, at least initially, the casinos did nothing, and no employees complained. Legal academics (including two of us), the judges on the Ninth Circuit (who had given the case an unusual amount of time and attention), the employment discrimination practitioners (who were cautioning employers to revisit their policies in light of the case) and Lambda (who had invested heavily in the litigation) might have been wrong in attaching so much importance to the reasoning in the opinion. The casinos' failure to respond is unexpected for another reason: The conventional wisdom on legal advice in the wake of ambiguous court decisions suggests that attorneys typically push their clients toward overcorrecting to protect against potential legal risk (the theory being that it is in the interests of lawyers to exaggerate legal risks because that both enhances their importance to the client and also gives them more work to do).[80] Reality, at least within the context of the Las

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[78] DLA Piper, Labor and Employment Law Alert, Review Your Grooming and Appearance Policies for Possible Gender Discrimination, Ninth Circuit Suggests (May 2006) (available at http://www.dlapiper.com/files/upload/Labor_Emp_060517.htm).

[79] Fenwick & West, Employment Brief (May 2006) (available at http://www.fenwick.com/docstore/publications/Employment/EB_05-10-06.pdf).

[80] Lauren B. Edelman, et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47 (1992). For other suggestions that lawyers overestimate legal risks, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U.L. REV. 487 (2003); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL.

Vegas casino industry, seems to point in the opposite direction – that lawyers, on both sides, are underestimating the implications of the relevant case law.

III. **Methodology and Data**

We seek to examine how *Jespersen's* reasoning translated to those on the ground. As our lens, we use evidence on how people *talk* about the relevance of changes in the law. Our data for this project consists of the stories that our one hundred or so respondents told us about their experiences with the Las Vegas casino industry. The stories help shed light on how these actors understand the role that law plays in their world, along with its contradictions and complications (none of which the world of Las Vegas casinos is short on).[81] The caution here that scholars using the narrative form typically give is that these stories are valuable as sources of insight into how people talk, and therefore think, about a phenomena. They don't necessarily tell us how these same people act.

A. The Interviews

From 2008 through 2010, we conducted more than 80 in-person interviews in the Las Vegas area.[82] The goal was to talk to people at three different levels of the litigation hierarchy: employees (potential litigants), lawyers (on both the defense and plaintiff sides) and judges (in both state and federal courts). We interviewed approximately 45 employees, 25 lawyers, and 10 judges. We also spoke to a small number of government officials and human resources personnel.

We identified subjects through the "snowball" method where our initial contacts yielded subsequent contacts.[83] This technique can produce a sample selection problem

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INTERDISC. L.J. 375, 375 (1997). *Cf.* JACK GOLDSMITH, THE TERROR PRESIDENCY (2007) (discussing the excessive risk aversion frequently displayed by lawyers for the government, such as those at the CIA).

[81] On the use of stories or narratives to shed light on how legal concepts are understood, see Patricia Ewick & Susan Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC. REV. 197 (1995); Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority* 108 AM. J. SOC. 1328, 1341 (2003); WILLIAM O'BARR & JOHN M. CONLEY, FORTUNE AND FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING 22 (1992); Lissa Broome et al., *Dangerous Categories: Narratives of Corporate Director Diversity*, __ UNC L. REV. __ (forthcoming 2010).

[82] We obtained IRB approval from each of our home institutions for this human subject study.

[83] At the end of every interview, we asked each subject whom he or she would recommend that we contact for additional interviews, which produces a snowball—or multiplication—effect on the sample. Snowball (or chain-referral) sampling is a non-probability method that makes it easier, quicker, and cheaper to identify subjects, but may not reflect a cross-section of the population. James S. Coleman, *Relational Analysis: The Study of Social Organizations with Survey Methods*, 17 HUMAN ORG. 28 (1958) (introducing this methodology); Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981). We used this method because of the difficulty of identifying and/or obtaining interviews from our target population. The referral acted as a means to identify current or former casino employees and as a way to gain access to casino employees and employment discrimination lawyers.

because subjects will be people known to other subjects. The risk of bias in the lawyer sample is small because the Nevada employment law bar is itself quite small. Employment lawyers all know each other, and our subjects were highly representative of the characteristics of employment attorneys practicing in Las Vegas. The same can be said of the sample of judges. Thus, we are confident that we have a representative sample of lawyers and judges. By contrast, the relevant employee population is sizeable; hence, any method of selection (other than random) poses the risk of bias.

Our initial attempts at asking for interviews from casino employees met with little success. No one was willing to talk to us; their immediate reaction was that we were trouble. One female bartender whom we attempted to interview at an early stage (in the mid afternoon) was kind enough to tell one of us:

> Honey, let me give you some advice. You aren't going to get anyone to talk to you unless you are spending money gambling. Otherwise, even if one of us wants to talk to you, it looks suspicious. And another thing. You can't find out anything coming here in the afternoon. You need to be out at night and that too at the clubs at places like the Hard Rock. That is where the action is. It isn't here.

Lacking the expertise and income necessary to be interesting as customers (to say nothing of the capacity to stay up late enough to go to the clubs at the appropriate hours), the enterprise seemed doomed to failure.

Teaching unexpectedly gave us a means to meet and interview employees.[84] As part of the research project, two of the authors taught a class at UNLV Boyd School of Law on "Dress and Appearance Regulation in the Casino Industry." We discussed our preliminary findings with our students. The class was made up of twenty-five students, many of whom had worked in the industry as dancers, models, servers, managers, executives, and auditors. The rest had a high degree of familiarity with the workings of the casino business. Every day, as we taught our intensive one-week class, which met for five hours a day, the students would bring their experiences to bear on our discussions of the theory—usually, to show us our understandings of the industry were flawed in light of their personal experiences and those of their friends and family. In addition, since part of the assignment for the class involved the students' observations of employment practices in two contrasting settings (e.g., a local casino versus a strip casino), they sometimes invited us to go along on their observation trips. The students introduced us to employees who agreed to participate in the study. In the end, we were able to speak to a wide variety of people working in the industry or aware of the industry. Moreover, the effect of any selection bias would be expected to undermine our hypothesis because the

[84] The class also provided an additional means of reaching out to the local legal community. Nevada attorneys and others working in the business spoke to our class about the gaming industry. Those invited lectures, in turn, gave us increased access to these lawyers as well as their contacts, who were generally willing to help us once they realized that the issues we were interested in were innocuous from their perspective.

employees whom we interviewed (casino workers seeking a law degree and their friends and family) would be more likely than other employees to believe court decisions affect behavior.

We conducted the interviews without a fixed set of questions but instead began by explaining the *Jespersen* decision and asking for the subject's view of its effects on the local community.[85] Our subsequent questions encouraged respondents to tell their story. The interviews ranged from roughly one to two hours each. We conducted all but a handful of our interviews with at least two investigators present because we bring different perspectives to the topic. We also decided at the outset, given the initial reluctance and suspicion we encountered, not to tape any of the interviews and instead took handwritten notes. Even with multiple sets of notes, our quotes are not perfect.

In Section III, we report on the common themes we perceived in the narratives. Our impressions are necessarily subjective. Our interest is in reporting patterns in the ways in which the various individuals in the industry talk about law and specifically, how they talk about a case that legal academics and the national employment bar consider important. Some of our interviewees may not have been candid with us, but they generally appeared comfortable and forthcoming, especially after 15 minutes or so of discussion. Even if they were spinning a story, our interest was in whether there were common themes in the spinning.[86] In addition, we were interested in whether the various respondents would tell common myths, stories, or vignettes.[87]

B. The Community

Almost all of our interviews were focused on the implications of the *Jespersen* case for the casino industry in Las Vegas. Las Vegas has the largest casino industry in the world and is directly under the jurisdiction of the Ninth Circuit, hence the impact of the case was most likely

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[85] We formally began each interview with a statement about the subject's rights of confidentiality and anonymity, repeating information included in our oral and written communication with them prior to the interview.

[86] For methodology, we draw from the work of the legal anthropologist John Conley. *See, e.g.,* John M. Conley, *Tales of Diversity: Lawyers Narratives of Racial Equity in Law Firms*, 31 L. & SOC. INQUIRY 831 (2006); John M. Conley et al., *Narratives of Diversity in the Corporate Boardroom* __ UNC L. REV. __ (forthcoming 2010) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415803).

[87] Stories about Dennis Rodman's visits to Las Vegas and his misbehavior were among those that we heard most often. Mr. Rodman was a professional basketball player who won NBA championships with both the Detroit Pistons and the Chicago Bulls. He was famous not only for his rebounding skills, but also for his periodic misbehavior. *See* James Jahnke, *Check It Out, Mate: Slick Digs for Chess Journal*, Detroit Free Press, Apr. 29, 2009, at 18; *The Buzz*, Newsday, Nov. 26, 2007, at A10 (describing lawsuits against Dennis Rodman for sexual assault in Las Vegas). Interview subjects repeatedly used these Rodman stories to illustrate the boundaries of what was considered acceptable behavior. Mr. Rodman's antics were not considered acceptable. Even some of our cab drivers, who were not interview subjects but liked to share their views of Vegas, told stories about him.

to be felt there.[88] A handful of idiosyncrasies about the Las Vegas legal market are worth noting.

Although one of the nation's largest cities with a metropolitan population close to two million, the legal market is underdeveloped relative to other major American cities.[89] Few large national firms have offices there, due in part to the State Bar Code of Professional Responsibility which made it difficult, although not impossible, to open a branch office in Nevada .[90] Most of the local law firms are small; twenty-five lawyers would be a big firm. [91] The plaintiffs' bar is smaller than comparably sized cities, and composed mainly of solo practitioners. Class action practice appears to be rare, at least in the employment law area. The immaturity of the local legal market may be due to the absence of an in-state law school until 1998 when the William S. Boyd School of Law was opened at UNLV. (The school's namesake is a major casino owner.) Higher education in general is less developed in Nevada than in some surrounding states, which may also affect the nature of legal practice.[92] Finally, the most sophisticated lawyers in the Nevada legal community may be those who practice before the State Gaming Control Board and the Nevada Gaming Commission, arguably the most powerful entity in the state. The Gaming Commission has the power to grant and revoke

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[88] Much has been written about the Las Vegas casino industry and the outsize personalities there. *See, e.g.,* CHRISTINA BRINKLEY, WINNER TAKE ALL: STEVE WYNN, KIRK KERKORIAN, GARY LOVEMAN AND THE RACE TO OWN LAS VEGAS (2008). More generally, on the dominance of Las Vegas in the casino industry, *see* RONALD PAVALKO, ON CASINO GAMBLING, IN INDUSTRY STUDIES (Larry L. Deutsch ed. 2002). The most enjoyable way to learn about Vegas's history is through the (slightly) fictionalized accounts in Ocean's Eleven (the original Warner Brothers 1960 version and the updated Warner Brothers 2001), Leaving Las Vegas (United Artists 1995), and Casino (Universal Pictures 1995).

[89] For population statistics for Las Vegas city (ranked 28th in 2009) and metropolitan area (ranked 48th in 2009), see U.S. Census Bureau, Population Estimates, http://www.census.gov/popest/estimates.html. According to the ABA, Nevada in 2009 had 6,395 lawyers, or one-half of one percent of the country's 1.18 million attorneys American Bar Association, National Lawyer Population by State, http://new.abanet.org/maretresearch/publicdocuments/2009_NATL_LAWYER_BY_STATE.pdf). On a per capita basis, Nevada has 2.4 attorneys for every thousand people compared to a national average of 3.8; that is, the national rate of lawyers per capita is fifty percent higher than the Nevada per capita. *Id.*

[90]Within the last five years, several National Law Journal top 250 firms have opened small offices (typically by acquiring existing firms) in Las Vegas, including Greenberg Traurig, Holland & Hart, and Ogletree Deakins. This may lead to or result from a change in the legal culture – probably a bit of both.

[91]According to May 2010 data, the average size of the 25 largest Las Vegas firms is 27 lawyers. *The List: Law Firms,* IN BUSINESS LAS VEGAS, July 16-22, 2010, at 12-13 (reporting results from a survey of firms); *see also* NEVADA LEGAL NEWS, NEVADA LEGAL DIRECTORY (July 2010) (listing by name attorneys in firms with at least two attorneys). The biggest firm, Lionel Sawyer & Collins, has 75 attorneys. http://www.LionelSawyer.com. Thirteen firms have more than 25 lawyers. *The List: Law Firms*, *supra*, at 12.

[92] According to the U.S. Department of Education, Nevada has 21 degree-granting institutions and branches (including public, not-for-profit, and for-profit institutions) or 0.79 per 100,000 residents which is lower than neighboring Utah's 38 (1.36 per 100,000) and Arizona's 75 (1.14 per 100,000). National Center for Education Statistics, Digest of Education Statistics: 3009, Table 266, http://nces.ed.gov/programs/digest/d09/tables/dt09_266.asp. Fewer than one-quarter of Las Vegas residents 25 and older have a bachelor's degree or higher. *Id.* at Table 14, http://nces.ed.gov/programs/digest/d09/tables/dt09_014.asp?referrrer=list. Las Vegas metro ranks 48th out of 52 metropolitan areas with populations greater than 1 million.

gaming licenses, and it strictly regulates businesses that hold gaming licenses. The State Gaming Control Board is an enforcement agency that conducts investigations and brings charges before the Nevada Gaming Commission.[93]

The state and federal judiciaries also are distinctive in terms of composition and process. State judges are elected, and casino contributions and/or endorsements are perceived to be crucial to election.[94] Federal judges obviously are not elected, but one person, Senator Harry Reid, is credited with playing an important role in most appointments. Women play an increasingly prominent role on the state bench in Nevada as they have in other states, but have not kept pace on the federal bench.[95] Racial minorities are underrepresented on both state and federal courts.[96] Forty percent of the Las Vegas federal judiciary belongs to the Church of the Latter Day Saints (LDS), even though members of the LDS church make up less than 15% of the population of the city.[97] In many states (including neighboring California), state

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[93] Gaming is tightly regulated in Nevada. State Gaming Control Board and Nevada Gaming Commission, Gaming Regulation in Nevada: An Update (July 2006), available at http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf. The State Gaming Control Board is an administrative agency of the State organized and existing under chapter 463 of the Nevada Revised Statutes. See generally *Nev. Rev. Stat. § 463* (2001). It is charged with the administration and enforcement of the gaming laws of Nevada. The gaming laws are set forth in Nevada Revised Statutes, title 41, and Regulations of the Nevada Gaming Commission. The Nevada Gaming Commission has the power to limit, condition, suspend, or revoke a gaming license or fine any person for a cause deemed reasonable. Id. § 463.310(4)(a)-(d). The Nevada Gaming Control Board is authorized by statute to observe the conduct of licensees to ensure that gaming operations are not conducted in an unsuitable manner, id. § 463.1405(1); Nev. Gaming Comm'n Reg. 5.040 (2006), and to conduct appropriate investigations to determine whether there have been violations of the gaming laws. *Nev. Rev. Stat. § 463.310(1)*.

[94] All state judges are chosen in nonpartisan elections. American Judicature Society, Judicial Selection in the States: Nevada, http://www.judicialselection.us/judicial_selection/index.cfm?state=NV. For investigative reporting on casino contributions to Nevada judicial campaigns, see, e.g., Sheila Kaplan & Zoe Davidson, *The Buying of the Bench,* THE NATION, Jan. 26, 1998; Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006. Justice (ret.) In 2009, Nevada ranked 8th in judicial campaign contributions; but in 2010, its citizens are considering a ballot measure to move to merit selection. Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. Times, May 23, 2010, at WK9.

[95] *See* Federal Judicial Center, Judicial Biographies Database, http://www.fjc.gov (a search of this database of all sitting federal judges revealed that 20% of sitting federal district judges are women compared to 10% of those in Nevada); National Association of Women Judges, Statistics: 2009 Representation of United States State Court Women Judges, http://www.nawj.org/us_state_court_statistics_2009.asp (reporting that 30% of Nevada state judges are women compared to 26% of all state judges); Mark Curriden, *Tipping the Scales*, ABA J., July 2010 (examining the increasing number of women on state courts).

[96] *See* Judicial Biographies Database, *supra* (a search of this database of all sitting federal judges revealed that 16% of federal district judges are racial minorities compared to 10% in Nevada (the only female judge is also a minority)); AMERICAN BAR ASSOCIATION, DIRECTORY OF MINORITY JUDGES (4th ed. 2008).

[97]The Federal Judicial Center does not report religious affiliation of judges. The authors collected the religious affiliation data from various secondary sources, including newspaper reports from the time of nomination to biographies listing volunteer activities. Where we could not clearly ascertain religion, we treated the judge as non-Mormon. Based on informal conversations, we expect our count is an underestimate. For statistics on the Mormon church in Las Vegas, go to http://www.onlinenevada.org/Las_Vegas_Mormon_Temple

employment discrimination remedies are more attractive than federal remedies; but, Nevada state courts offer no such comparative advantage over federal courts. Thus, plaintiffs may find federal court a more appealing forum for claims. The federal district court channels most employment suits through an innovative pre-litigation magistrate-supervised mediation process in which a federal magistrate judge sits down with the parties, evaluates evidence, and provides the litigants with the magistrate's sense of how their case is likely to fare.

Government lawyers and legal reform organizations who might have an interest in employment cases, particularly those seeking widespread changes in industry practices, are generally absent from Nevada. The EEOC has had little or no presence in Las Vegas until very recently, and even now, has only a minimal presence. Most national legal reform organizations such as NAACP LDF, Lambda, and the ACLU have their main regional offices in Los Angeles or San Francisco. While the Nevada affiliate of the ACLU has grown rapidly over the past ten or fifteen years, only three paid lawyers are on staff.[98] ACLU-Nevada is the only public interest group that focuses on civil rights and civil liberties in Nevada.

Unions play a significant role in the Las Vegas casino and hospitality industries, and are a much more important part of the employment law story here than elsewhere. The Culinary Workers of America is a particularly prominent player. Most of the major casinos have at least a partially unionized workforce, and the industry and the unions appear to have learned to cooperate on major issues. Some of our employee-respondents mentioned the importance of the unions in looking out for employee rights.

IV. On the Ground Realities

We predicted that the *Jespersen* decision would garner attention in the legal community in Las Vegas for multiple reasons. First, Las Vegas is dominated by the casino industry and this case squarely tackled appearance discrimination in the casino setting. Second, the casino industry in Las Vegas attaches, to put it mildly, a high degree of importance to appearance; and particularly, gender-differentiated and sexualized appearance. The prior case law on appearance discrimination was thin; this case was not only going to be influential in shaping the future law on the subject, but it constituted binding precedent on the federal district courts in Nevada. Third, the casinos tend to require a high degree of uniformity in appearance from their employees. That means that the casinos have to issue their employees explicit instructions and explicit instructions are easier to challenge than the informal social pressures that other employers might use. In sum, this was not a case whose dictates could be easily ignored. Or, so we thought.

We especially expected lawyers to embrace this case and hype its importance to their clients. The literature on lawyer behavior suggests that lawyers look for opportunities to emphasize their importance to clients. Either because of risk aversion or the desire to generate work for themselves, empirical studies suggest that lawyers overemphasize legal risk to their

[98] *See* American Civil Liberties Union of Nevada, *About the ACLU of Nevada*, http://www.aclunv.org.

clients.[99] Even if the Ninth Circuit had done nothing other than clarify the existing law, the release of this case, with its multiple opinions, should have given lawyers an opening to write numerous client memos, provide legal updates, run training sessions for human resources officials, help revise training manuals, and prepare for litigation offense and defense.

At first cut, the practitioner literature suggested that we were on the right track. Right from the district court level, the case garnered attention from practitioners around the country. And this included some of the leading lawyers in Nevada, who produced both client alert memos and wrote articles for Gaming Law Review.[100] The Gaming Law Review even reproduced both the en banc and the three-judge panel opinions in full for its readers.[101] Finally, the memos and articles that tackled the en banc decision generally cautioned clients that, while the casino had won in this case, the door had been left open to future litigation on the appearance issue.[102]

What we found at the ground level, however, turned out not to match our predictions. We begin with some general impressions from the interviews, before moving to the specifics.

A. General Impressions

From what we were told, the impact of the case on the casino community in Las Vegas was, at most, negligible. No more than a handful of lawyers we spoke to – all of whom spent significant portions of their time tackling employment issues – were familiar with the specifics of the case and the nuances of the language. Most of these lawyers appeared to have barely skimmed the decision (and often that was in preparation for their meetings with us). At least a couple of the plaintiff-side lawyers did not seem to realize that the case had been decided at the en banc level. On the defense side, there were numerous client alert memos that were circulated immediately after the case that urged employers to pay attention to the case and perhaps review their appearance codes and policies.[103] But no one we talked to gave us the

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[99] *See supra* note 86 (citing materials).

[100] *E.g.,* Gregory Kamer & Edwin A. Keller, Jr., *Give me $5 Chips, a Jack and Coke – Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335, 336-37 (2003) (reporting on the district court decision in *Jespersen)*; E. Frederick Preis et al., *Employment in Gaming: Recent Discrimination Cases*, 8 GAMING L. REV. 89, 89-91 (2004) (same); Courtney Brevelle, *A Grooming Standards Win for Employers*, 4 HOTELIERS (27 October 2005) (available at http://www.4hoteliers.com/4hots_fshw.php?mwi=978) (reporting on the three-judge opinion on the appeals court); Patrick Hicks & Veronica Hall, *Makeup rule Upheld by Ninth Circuit*, HR.com (August 2005).

[101] 10 GAMING L. REV. 379 (2006) (en banc opinion); 9 GAMING L. REV. 187 (2005).

[102] Patrick H. Hicks, et al., *Reasonable Dress and Grooming Requirements Survive Court Scrutiny*, 10 Gaming L. Rev. 343, 345-46 (2006); Gregory Kamer, *Special Alert! – Ninth Circuit Issues Final Decision on Harrah's Appearance Policy Requiring Certain Female Employees to Wear Makeup*, Kamer Zucker Abbott Employee Report, Volume 5, Issue 3 (April 2006) (available at http://www.kzalaw.com/printreport.php?vol=5&iss=3&art=1).

[103] *See supra* note 82-83 (citing to client alert memos from national firms) & 106-108 (citing to client memos and articles by lawyers in Nevada).

impression that the case had generated much new work, in terms of designing new techniques of compliance or litigation protection. We also found, from the lawyers, judges and government officials, no indication that anyone had seen an increase in litigation against the casinos building on the guidance provided by *Jespersen*. There didn't seem to be a single Las Vegas case involving appearance discrimination that anyone pointed us to in the three years between the *en banc* decision in *Jespersen* and the last of our interviews. Nor did we find any evidence that settlement amounts in appearance discrimination cases had increased, after *Jespersen*.[104] That said, our findings are not inconsistent with the possibility that lawyers representing casinos had advised their clients before *Jespersen* was decided about possible strategies and tactics to avoid litigation based on appearance and dress codes. We discuss some of the strategies below.

As for whether there had been on-the-ground reactions to the case, in terms of training sessions or alterations in instruction manuals or incentive schemes, our questions were generally met with puzzlement from non-lawyer employees we spoke to. In effect, we got a "Why would you expect any reaction from the casinos?" From the forty-plus employee interviews, we did not have one single respondent who thought that there had been any perceptible response to the case. More than a few of our respondents, however, asked, typically as the interview was winding down: "Didn't the casino win the case?"

What follows are the themes we discerned in our interviews. These syntheses of the narratives of the various respondents are necessarily subjective and interpretive in that they are based on our readings of the interviews. From what our initial set of about a dozen respondents reported, we got a uniform starting point for our discussions (with some caveats having to do with bevertainers and model-servers that we describe later), which was that there had been little on-the-ground reaction to *Jespersen*. So, we explained our project to our respondents (that we were interested in how this case translated on the ground). But we also told our respondents that we were puzzled by our initial findings which seemed to be that not much had happened in reaction to the case. We explained that we were curious as to whether we were wrong in terms of our initial findings and, if not, what the explanation was.[105] The narratives therefore are stories about why there wasn't a reaction.

The narratives are reported in the next two sections. The first section reports on the reactions from employees at the various casinos. The majority of these are interviews with women working as servers and bartenders, although we also spoke to some male employees

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[104] We are grateful to Frank Easterbrook for raising the question about settlement amounts. We also made inquiries as to whether there was any perception in the insurance community as to whether the price of litigation insurance for the casinos had increased as a result of this case. We found no indication of this either.

[105] In effect, by telling our later interviewees what we found in the initial dozen interviews, we may have produced something of a framing effect – in that a cognitive bias might have been induced causing our later respondents to also report that they had not perceived any change in the wake of *Jespersen*. We expected, however, that any such bias would be swamped in cases where our respondents had seen a real change in appearance policies.

and some executives and managers. The second section reports on our interviews with lawyers and judges who work with the industry.

B. The Employees/Non-Lawyers

i. Assumption of Risk ("We would choose to wear makeup")

With our non-lawyers respondents, we began conversations by describing the basics of *Jespersen.* After that, we explained what we were interested in learning about through the lens of this case; that is, how the law in judicial opinions translates into behavior on the ground. In response to our introductions, even though we never asked anyone whether they had heard about the case, a number of respondents professed to having at least heard about the *Jespersen* case (typically, they referred to it as the "makeup case").[106] No one had a clear memory of the issues, but many remembered that the case had been in the news. The ones who did remember something about the case would frequently mention that they knew that the case had occurred out of Reno. This mention of Reno appeared to be significant in that the respondents were explaining that Reno was different. We heard statements along the lines of: "Reno is different; the casino industry there is older; something like this would not have happened here."

The theme of Las Vegas being different from Reno and, in effect, special, came up frequently. The perception appeared to be that the Las Vegas casino industry was younger, hipper, more attractive, and more sexualized. We heard, for example, multiple versions of: "Las Vegas does not just sell gambling; it sells a fantasy." Statements to that effect would generally lead to the punch line, which was that employees in Las Vegas know that they are signing up for a job that is different from the types of jobs in Reno. The portrait of the Reno jobs that was painted for us was that they were less glamorous – almost depressing. Las Vegas casino workers were not as likely to bring a lawsuit, because they understood the requirements of the job included being part of the construction of a fantasy experience for customers. Some employee-respondents used the term "assumption of risk" to describe their point. The other explanation that we frequently got was that Nevada was a "right to work" state.

Perhaps because the three of us are trained as lawyers, we found the invocations of these legal terms by non lawyers (and at times, lawyers as well) fascinating. Not only are "assumption of risk" and "right to work" legal terms of art, but they did not fit the context. When someone would invoke those terms, we would typically follow up by trying to clarify that because Title VII, the federal anti-discrimination law, was mandatory, the casino defendant could not use the excuse that the employee had assumed the risk. Often, the example we used to illustrate our point was along the lines of: "The employer cannot escape liability for race discrimination by telling all its racial minority employees ahead of time that it plans to give

[106] This was less true with our last set of employee interviews in early 2010, where none of our approximately half dozen interviewees gave us an affirmative indication of remembering the case (although they didn't say they had not heard of it either).

them lower salaries and plans not to promote them. The same applies here. Employers cannot impose the application of antidiscrimination law simply by warning female employees ahead of time." On the invocation of the "Nevada is a 'right to work' state" argument, we were initially confused as to what the term even meant because our understanding of the term, "right to work" was that it referred to legislation regarding union membership (essentially, anti-union legislation).[107] Here though, while invoking this term, respondents seemed to be talking about another legal concept, "employment at will." However, again, the idea of employment at will, which is about how employers, absent an explicit employment contract stating otherwise, can fire employees without any need to show cause, is again inapplicable to federal anti-discrimination law. In sum, these employees told us that they were restricted in their ability to sue in ways that they were actually not.

This consistent underestimation of legal rights was not what we were expecting. Prior scholarship on employee perceptions suggested that employees often think that they have more rights than they do. Indeed, Pauline Kim's now classic study on employee perceptions about "employment at will" showed that employees often think they have more rights than they do (in that case, the majority of employees thought that they could be fired only for cause).[108] In Las Vegas, we were seeing something different. There was something more as well, and this connects back to the distinction our respondents were drawing between Las Vegas and Reno. They seemed to be saying that the rules that applied in Las Vegas were different, particularly for this special category of younger and more attractive employees.

If we were expecting that our respondents (mostly young women working in various jobs in the casinos) would react in relief to the news that they had more legal rights to bring gender discrimination claims than they had believed, we would have been disappointed. It seemed not to matter that we had explained that bringing suit was actually a lot easier. The bottom line was still that these employees did not expect suits to be brought, which takes us to the next explanation we were invariably given.[109]

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[107] Specifically, "right to work laws" are statues that exist in a number of U.S. states which bar agreements between trade union and employers making union membership (or dues or fees) a condition on entry to the job. See, e.g., Lincoln Fed. L. U. v. Northwestern I & M Co., 335 U.S. 525 (1949) (upholding constitutionality of right-to-work laws).

[108] Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) ("Workers appear to systematically overestimate the protections afforded by law, believing that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract.").

[109] A caveat here is that our mode of questioning – where we said that we were puzzled by the lack of reaction to this big case in Las Vegas – may have induced a defensiveness in some of our respondents. We would like to think that we were careful not to attach value judgments to our questions. Plus, the three of us came into this project with very different sympathies and predictions regarding whether there would be a reaction to the case. That said, there is a literature on the stories and myths that develop in certain communities that help make sense of what might otherwise be inconsistencies. *E.g.,* Karl E. Weick, *The Collapse of Sensemaking in Organizations: The Mann Gulch, Disaster*, 38 ADMIN. SCI. Q. 628 (1993); KARL E. WEICK, SENSEMAKING IN ORGANIZATIONS (2005). These stories and myths sometimes have little basis in fact; they are just explanations (and perhaps explanations given to

ii. Bigger Tips for Bigger Breasts

Even before we had begun our interview with one union officer, after we had finished with introductions, he said: "You should know. I've had women members tell me that they get bigger tips if they have bigger boobs. I'm not going to do anything that hurts my members". The themes of breast size, and particularly breast augmentation surgery, were ones that our employee-respondents frequently brought up. Indeed, to the discomfort of at least one of us, students brought these matters up in our meetings with them; specifically to raise questions about whether certain casino employers were paying for these and other surgeries and whether the expenditures were tax deductible.

Generally, the transition in the conversation toward breast size occurred in the following fashion. *Jespersen* involved a female bartender who refused to comply with the casino's mandatory makeup requirement. Our conversations with casino employees though quickly turned from the bartenders to the implications of the case for cocktail servers. This appears to be the job that has the biggest gender differences in that there are hardly any men in any of the major casinos who work as servers. The women, for their part, wear high heels, skimpy costumes, and makeup – to say nothing of requirements regarding their hair and other aspects of their appearance. Things like high heels and skimpy outfits can have negative health effects. Carrying heavy trays of drinks for multiple hours in high heels is not good for one's ankles, nor is wearing minimal clothing in low temperatures.[110] The women working in these jobs are often slender in build, suggesting that the long-term costs of carrying heavy drinks trays and low temperatures might be especially problematic.

Our respondents had no problems whatsoever in understanding and articulating to us what the gendered burdens imposed on female cocktail servers were; especially with respect to the low temperatures and high heels. But even while articulating these burdens, they didn't perceive gender discrimination. They saw themselves as privileged vis-à-vis both men (who couldn't get these jobs) and older and less attractive women. The frequent refrain, to put it in the words of one cocktail server, was: "We earn more in tips because we wear makeup, short skirts, and have bigger . . . you know . . . breasts [laugh]. Men cannot get these jobs."

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outsiders asking stupid questions). Mark Weidemaier et al., *The Stories Lawyers Tell* (unpublished draft dated 2010, on file with authors).

[110] *See* D. Casey Kerrigan, *Knee Osteoarthritis and High-Heeled Shoes*, 351 THE LANCET 1399 (1998); *Cf.* Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, J. CORP. L. 295, 296 (Winter 1997) ("seventy-five percent of the problems eventuating in [the foot] corrections performed annually in the United States either result from or are greatly aggravated by the use of high-fashion footwear."). Then, there is also the symbolism associated with heels, which in Veblen's words (somewhat ironically, given the context here), are a symbol of "the wearer's abstinence from productive employment"? THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS 121 (1899).

We were told repeatedly that women cocktail servers, with the better shifts at the upscale casinos, could earn upwards of $150,000-200,000, including tips, a year. With those numbers, many of our respondents felt, there was little reason to sue. They had jobs that were hard to get; they were not going to upset the apple cart. We kept hearing that, if anything, it was the men who should be arguing that they were being discriminated against by not being given these jobs. But customers would not like male cocktail servers and would not tip them as well. One interviewee explained that there are male cocktail servers working at the pools, but they do not work on the "more formal" casino floor.[111]

The foregoing puzzled us for multiple reasons. The first had to do with the tips. Why did our respondents think that attractive appearance translated into bigger tips? We were not aware of any evidence to the contrary, but many of our respondents themselves made the point that tips were often a function of their being nice to the customers ("flirting" was the word used).[112] Ironically though, as one former server observed: "It is much harder to flirt with male customers when one is basically naked; one has to keep a distance otherwise some of these men very quickly get the wrong idea and that means trouble." And then there was the question about male servers. Many of the customers in Las Vegas are straight women and gay men. Even assuming that physical appearance was the key factor in determining tips, wasn't there a customer base that would prefer men (at least attractive men) or that women have somewhat more clothing? Often, while we were talking about the issue of tips and appearance, the respondents themselves would point out that not all the cocktail servers, especially at older casinos with powerful unions, were thin and young. On a couple of occasions, we were advised to go to casinos such as Caesar's Palace and observe servers working the afternoon shifts; apparently the disjunction between the outfits and the people wearing them was extreme, according to our (generally younger) respondents. The point seemed to be that even these women who were older and perhaps heavier were required to wear the high heels and skimpy outfits.[113] In the end, tips appeared to be only part of the equation and that having the attractive female cocktail servers was key to the casino's image

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[111] Some months after the interview that we quote in the text, we happened to interview a male server who worked at the pools. He explained that it was not only that he couldn't be server inside the casino, but that his job – because it was out at the pool – was seasonal. We asked him whether he felt this was unfair. He responded that he did not mind the seasonality of the job. His explanation was that he and the other servers could do other jobs or take classes during the year. He valued the flexibility that having to work this job only in the summer gave him.

[112] Maybe we were wrong to have been skeptical though. As we were in the process of revising this article, we came across multiple press references to the following article that found that, among other things, that tip size increased with breast size (lower weight and blonde hair also correlated positively with tip size). *See* Michael Lynn, *Determinants and Consequences of Female Attractiveness and Sexiness: Realistic Tests With Restaurant Waitresses*, 38 ARCHIVES OF SEXUAL BEHAVIOR 1573 (2008). Note, however, that the data in the study on both breast size and tip size is based on self reports.

[113] Some interviewees also suggested that the costumes in the older casinos with the older waitresses who were represented by the union had more modest uniforms. Based on what we could tell, the uniforms were still skimpy, but less so relative to some of the newer casinos. And at least one HR executive thought that the outfits at places like the Mirage and Caesar's were more modest because you didn't want to put the really skimpy costumes on the older women servers. We were also told that there are some casinos where there is a choice of costumes (all pretty much the same, but some longer, etc).

As a technical matter, there are a couple of points here. First, our respondents brought up an interesting and difficult legal question. That is, whether an employer who refuses to hire men for a job then gets carte blanche to impose whatever restrictions it wants on the women, including imposing stereotyped images? Our instincts here are that it is unlikely that a federal judge will have much sympathy for the argument that employers can opt out of gender discrimination law by engaging in a different kind of discrimination against men. But this also raises a different question. If these cocktail server jobs are so good, why are no men suing to get them (especially today, when Las Vegas is reeling from the financial crisis)? Do the men in Las Vegas who might be potential cocktail servers also believe that even if they got these jobs that they would not be able to earn tips? Given that many of the casinos have tip sharing arrangements, it is not clear why the men would be worried about their individual tips. Or, are the men who would apply for these jobs deterred by their efforts to maintain their dignity and their masculinity?

Masculinities theory posits that men are driven by a need to prove their masculinity and to demonstrate that they are different from women and that which they perceive as feminine.[114] The job of cocktail server is definitely considered a woman's job by employees and employers, and it would take a brave man to apply for a job that is traditionally associated with female sexuality. Furthermore, there may be encouragement from the casinos for a man's hesitation to apply for a cocktail server job. One HR executive told us that she had anticipated the "problem" of a man's applying for a cocktail server job. She considered it a problem because she believed customers prefer to see women as cocktail servers.[115] In order to avoid a lawsuit and deter men from applying for the job, she had a very skimpy costume to show to male applicants that they would be asked to wear. Interestingly, there is only one major casino that has male cocktail servers on the casino floor. The male and female cocktail servers are called "bevertainers." The women are dressed in lace teddies, while the men wear a costume that appears to be like pajamas with long pants and short-sleeve shirts with a v-neck. There is a clear difference in the amount of flesh displayed between the male and female costumes.

The second point, which was reinforced by the HR executive described above, has to do with customer preferences. Respondents frequently made the point that the casinos had to employ female cocktail servers who fit a certain mould because this was what customers wanted. More specifically, they would emphasize that the cocktail servers were a key element

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[114] *See* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence* in the CONSTRUCTION OF GENDER IDENTITY, IN FEMINISM & MASCULINITIES 185-86 (PETER F. MURPHY ED., 2004); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in FEMINISM & MASCULINITIES, id, at 57, 61-62.

[115] Along a similar vein, a male blackjack dealer complained that when he applied for his job at a local casino, he was told that the casino wanted to hire female dealers because the clientele liked attractive women. For a number of years, the management "kicked all of the men (dealers) out of the high limit pit." Recently, the dealer noted, the casino has moved more men into the high limit pit because the women complained about the clientele acting up. See also *Brooks v. Hilton Casinos, Inc.,* 714 F. Supp. 1115 (D. Nev. 1989) (holding that defendant Hilton Casinos, Inc. had violated Title VII by firing thirty-seven former male dealers and floor men and replacing them with twenty-four women and fourteen men, a disproportionate number of women compared to the hiring pool).

in creating the special and unique Las Vegas image. But, as a matter of discrimination law, employers are not allowed to justify discriminatory practices on the basis of customer preferences. The exception here is a narrow set of cases that fit within the BFOQ category. But commentators, the courts, and the EEOC all seem to agree that entry into the BFOQ category is highly restricted; it applies to narrow sets of jobs where sex or gender is essential; playboy bunnies and private nurses being frequently invoked examples.[116] Assuming that neither the lack of men in the job nor the BFOQ exception poses barriers to women bringing a case there, the cocktail servers in Las Vegas casinos would likely have a case of unequal burdens on men and women and also a claim for sex stereotyping that created vulnerability to sex harassment. In other words, precisely the type of case that *Jespersen* seemed to be saying would result in victory for the plaintiffs. Our respondents saw matters differently. They saw us as failing to understand the casino industry, and especially the culture of Las Vegas. And they seemed invested in making the Vegas "fantasy" model work.

iv. Looking in all the Wrong Places

A persistent theme in the narratives was that makeup issues were simply not that important. Our respondents were also readily able to identify the areas where they thought the casinos were concerned about legal regulation. First and foremost, was the issue of weight. Casino executives, especially those in the high-end places, care desperately about the weight of the women servers. Our respondents were convinced that the casino lawyers and managers were constantly thinking of ways to get around anti-discrimination laws that might restrict employers from imposing weight restrictions.[117] This frequent refrain about weight puzzled us because we were not aware any explicit laws (federal or local) that restricted weight discrimination. To make a weight discrimination claim under federal anti-discrimination law, some kind of argument about stereotyping would have to be made. So, employers were paying attention to issues of weight discrimination but were not paying attention to the other types of discrimination that were at least also arguably illegal under *Jespersen*?[118]

Second, and relatedly, we were also told that the casino management worried about dealing with pregnancy; not only what to do ("how to hide them", according to one executive) with the pregnant women, but what to do to get them back to their original weights once they returned to the job. Third – although this did not come up as often as we thought it might –

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[116] *See* Yuracko, *supra* note __; McGinley, *supra* note 58.

[117] Consistent with what our non lawyer respondents suggested, a number of the lawyer respondents confirmed that a major concern of the casinos was dealing with overweight cocktail servers. A story that came up a couple of times was one where a prominent casino owner was misheard by a group of cocktail servers to have called them "blue whales". That apparently caused a great deal of unhappiness among the servers. According to our respondents, this owner, while famously concerned about regulating the weight of his female employees, had said something else with the prefix blue, but had been misheard.

[118] A different possibility is that the union agreements that apply in some casinos have protections against weight discrimination. But none of our respondents pointed to these.

was the question of how to tackle the problem of these cocktail servers getting older (and, the implication was, less attractive and heavier).

A number of our respondents were convinced that some of the casinos had come up with strategies to get around the law. Among the strategies we heard about included some casinos changing the definition of the jobs from cocktail servers to dancers or entertainers. The theory being that dancers could be required to be young and thin because they had to be fit to be able to dance; because they were dancers, the management could put them through fitness trials and weigh them (according to some of our respondents). Another example we were given was of certain casinos defining their server jobs as a combination of model and server – the model part of it, the respondents who brought it up explained, made it okay to impose even more stringent weight restrictions than those for the cocktail waitress job. A third strategy was the use of subcontractors and independent contractors. Apparently, for some of the female dancers at the high end clubs, the casinos prefer to subcontract out the work (and the subcontracting firm, in turn, hired independent contractors). A final strategy is the recent opening of private clubs within the casinos that are open to adults only. These clubs, which are often operated by companies other than the casinos, advertise an atmosphere of heightened female sexuality, with women bartenders and cocktail servers wearing skimpy outfits and with admission advertised as free for women in an effort to attract male customers. Because these clubs are open to adults only, the casinos would have a better argument that imposing a sexy dress code on female employees is a BFOQ. We confess that we weren't clear on how well any of the other strategies would work to bypass legal requirements, but a number of our respondents pointed to the independent contractor phenomenon and wondered whether it was part of a strategy to impose greater restrictions on the employees.[119] Our guess is that at least some federal judges would be skeptical about, if not hostile toward, these strategies. What our respondents emphasized, though, was that, with the exception of the growth of the club culture, none of these strategies or concerns on the part of the employers was new. They had predated *Jespersen*.

C. Lawyers and Judges

This section reports on conversations with roughly 25 lawyers and 10 judges in the Las Vegas area. The lawyers were roughly equally divided between those on the plaintiff side and those on the casino defense side. The vast majority of our respondents among the defense lawyers were male. On the plaintiff side, the gender balance was more even. At the outset of this project, we were concerned about sample bias problems, since we were using the snowball method of collecting interviews. However, the small size of the pool of lawyers and judges in Las Vegas who do employment discrimination work and might have been able to talk about the impact of *Jespersen* on casino industry practices is small. We suspect we have spoken to at least 30%-40% of the population of those who might be meaningfully studied.

[119] One respondent speculated that the independent-contractor technique might be a method of getting particular jobs, where the casinos wanted the dancers or servers to be especially young and attractive, out of the ambit of the union's collective bargaining agreements. In other words, that it was not about avoiding Title VII liability at all.

Although we report the lawyer narratives as a whole, there were some structural differences between the practices of the plaintiff side and defense side lawyers. The former tended to be in rather ramshackle small practices (often solo practitioners) whereas the latter appeared better heeled and tended to be in larger practices (including, of course, those in-house at the casino management companies). In places where there were systematic differences in the narratives of the plaintiff and defense side lawyers, we note those.

We report on the judge interviews last because the judges, more than any of our other respondents, attempted to step back and provide explanations for the phenomenon that we had observed. Also, perhaps because judges, like legal academics, are socialized to attach importance to judicial reasoning, they seemed to understand what we were puzzled by. It is hard for us to know how seriously any of our respondents took our inquiries. But, as a group, the judges were the most gracious in that they gave us the most time (almost all our interviews went well over the one hour that we typically scheduled).

i. Weight Problems (Again)

A frequent refrain from the lawyers – consistent with what we heard from the employees -- was that the employment discrimination issues that the casinos cared about were different from the ones we were investigating. Specifically, legal issues relating to makeup requirements and dress codes were not a big concern of the casino clients. If anything, the problem the casinos had with makeup and dress codes was that they had to ensure that the employees did not wear too much makeup and wear clothing that was too sexualized. In this context, a number of respondents sought to tell us the "real" story about the Harrah's litigation. They recounted that the company had been attempting to make its operation, and particularly that in Reno, more "professional".[120] Apparently, a number of casinos were concerned that their employees were not taking adequate care of their appearances. Harrah's, in particular, was trying to bring in scientific management techniques to create greater uniformity and accountability among its employees. And as part of a package of reforms that were put in place, Harrah's took the step of imposing uniform appearance standards. If Harrah's and the other casinos had wanted its employees to be more sexualized, one respondent explained, they only needed to relax their appearance codes. The servers, seeking more tips, would themselves have shown up in outfits more outrageous and sexualized than anything the casino could have come up with. People like us who did not understand the casino industry that the employees who worked there, this respondent triumphantly concluded, were getting the problem exactly backwards. The casinos were often in the position of having to desexualize their employees and strictly regulate their behavior with customers so that they did not harm the reputation of the casinos in the desire to gain more income in tips. As an aside, the adjective "professional" frequently came up in conversations with employees as well, who appeared to attach significant importance to the professional nature of their jobs.

[120] This story is consistent with the research reported in Avery & Crain, *supra* note __.

It did not matter that in some cases these were jobs that required minimal clothing, such as serving cocktails or attending to customers poolside. If anything, the lower the amount of clothing, the more important it was for the employees in question to describe themselves as professional.

The issue that employers really cared about, we were told repeatedly, was weight. And this was particularly so with respect to female cocktail servers and dancers. Employers very much wanted and needed to impose strict weight restrictions, but were concerned about running afoul of anti-discrimination law. The lawyers we spoke to all indicated familiarity with the airline cases from the 1970s and 1980s, where the airlines had lost on multiple occasions in litigation over whether they could impose more stringent weight restrictions on female employees.[121] To the extent counsel for the casinos were thinking about strategies to protect their employers from discrimination cases, their task was to figure out how to avoid suit over weight restrictions. In this context, the strategy used by one casino, where it had redesignated the jobs of its cocktail servers as entertainers ("bevertainers," to be specific) came up often. As noted, this story had also come up frequently in the employee narratives. That strategy, some lawyers speculated, might have allowed the casino to impose more stringent weight restrictions. After all, everyone knows that dancers have to be thin and fit. We found the bevertainer strategy particularly interesting when we made our own "reconnaissance" trip to the casino in question. The female bevertainers, dressed in outfits best described as lace teddies were moving around the casino floor with heavy trays of cocktails. Their few male counterparts, dressed in long pajamas and loose fitting tops, also served drinks. But after waiting for nearly an hour to see any dancing or entertainment, and asking various employees when the dancing would start, we finally had to go up to one of the bevertainers and ask her whether she also did the dances that we had been told about. In response, she asked us to wait for a few minutes and then got up on a small stage in the middle of the casino floor and lip-synched a song into a microphone. There was minimal dancing and entertainment value. To be fair to her, it was probably early evening (not exactly peak casino time) and four middle-aged law professors hardly looked to be big tippers. After doing her song and dance routine, our bevertainer took her tip, grabbed her tray, gave us a puzzled look and ran off to serve more drinks.

As with the employee interviews, we found the repeated invocation by the lawyers of concerns about weight discrimination laws puzzling, given that they did not react the same way to the sex stereotyping language of *Jespersen*. If an employee had brought a Title VII suit alleging weight discrimination, she would not have had a clear cut case. Title VII does not expressly prohibit discrimination on the basis of weight. The old airline cases that our respondents invoked involved differential requirements being imposed on male and female employees and the issue was that the restrictions imposed on female employees were more

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[121] *See, e.g.,* Laffey v. Northwest Airlines, Inc., 740 F.2d1071 (D.C. Cir. 1984) (holding that weight restrictions on women and not on men was disparate treatment under Title VII); Gerdom v. Continental Airlines, 692 F. 2d (9th Cir. 1982) (holding that employer's weight restrictions on women that were more severe than those on men constituted discrimination).

stringent. But in the case of the cocktail servers, most of the casinos had only female employees. Plus, the casinos, if they needed to, would have probably had little problem in applying equally stringent weight restrictions to the handful of male employees.[122] At one of the lawyer interviews, one of us, in response to a respondent bringing up the concern about weight discrimination lawsuits asked: "If this is such a big concern, why not simply hire some men and subject them to equally stringent weight restrictions? After all, that would produce a scenario with equally bad treatment of both genders." In response, the lawyer we were interviewing didn't say anything; he just looked incredulous that we would have brought up such a ridiculous hypothetical.[123]

In theory, there is a way in which gender discrimination law could be brought to bear on the weight discrimination issue even if the casino in question has only female employees. But that would require stretching the logic of the sex stereotyping line of cases to apply to the weight case. The female plaintiffs would have to argue that the female employees who were subjected to these weight restrictions were being unduly stereotyped. The irony here is that the most important case on stereotyping – and one that would have controlled any cases decided in Las Vegas – was *Jespersen*. Put differently, if the biggest concern for casino lawyers was about handling weight discrimination lawsuits, then that should have resulted in their being intimately familiar with the discussion of stereotyping in *Jespersen*. Specifically, *Jespersen* could be read to say that gender stereotyping could fall afoul of Title VII when the stereotyping resulted in making job performance unduly difficult (such as by requiring employees to wear the type of outfits that then subjected them to harassment by customers). But not only did none of our respondents bring up this connection between weight discrimination and *Jespersen*, but, to our chagrin, did not show the least bit of interest in hearing us talk about it. In sum, there was clearly a concern about weight discrimination. But it seemed somewhat attenuated from the legal restrictions on discrimination. Something else was going on.

ii. Not Remunerative Enough

The explanation most often given by the judges mirrored one that we received also from the lawyers. It was that the set of cases that might be generated by the roadmap laid out in *Jespersen* – high heels, sexy outfits, makeup, etc. – were not profitable enough for plaintiff-side lawyers to take them on. This explanation intrigued us because, elsewhere in the country, federal employment discrimination litigation has been one of the highest growing areas over

[122] Of course, if a woman gains weight because she is pregnant, she will be protected by the Pregnancy Discrimination Act, which is an amendment to Title VII. Moreover, there are some cases under the Americans with Discrimination Act that prohibit discrimination based on the disability of being morbidly obese. But the concern about weight in the casinos, while also applicable to pregnant women, went beyond pregnant women and occurred long before a women could be considered "morbidly obese."

[123] A similar point to the one we made in our interview, however, was made in an article in the Gaming Law Review by a prominent defense side lawyer in an article advising casino clients about weight discrimination issues. *See* Kamer, *supra* note __ (advising clients that if they were going to impose weight restrictions on female employees, they would have to impose similarly stringent restrictions on the male employees as well).

the past few decades.[124] Yet, in the area of appearance discrimination, with the casino industry, an area with well heeled defendants and (to our minds) winnable cases, there looked to be little or no litigation.[125]

One concern we had, as we began to discern that there had been little reaction to *Jespersen*, was that we were misreading the case. That may well be, but none of our judicial respondents raised significant issues with our reading of *Jespersen*. A couple of them pointed out that, despite the dicta we were pointing to, *Jespersen* had lost and that might be the lesson lawyers and litigants would take out of the case. But the judges themselves indicated that they would be guided by the reasoning in the en banc panel's opinion. Perhaps they were humoring us or being polite, but they seemed to recognize that the language in the Ninth Circuit's en banc decision potentially opened the gates wider for litigation against the casinos.

What we were missing, the judges explained, was an understanding of financial dynamics of these cases. The hypothetical plaintiff suing a casino on an employment discrimination claim is unlikely to generate a significant dollar amount of damages, so as to make the case worth investing in for a plaintiff's lawyer. Assuming the plaintiff was fired, she could at best hope to receive lost wages for a short period of time. Further, if she were someone who was working in the industry, it is likely that she would be already working at a new job and, if so, her damages would be even smaller (plus, she would probably be required to wear the same outfits, or something similar) to what she had had to wear at the prior job.

The next explanation was that the casinos were unlikely to readily settle a case attacking something basic to their image, such as the appearance rules governing cocktail server outfits. The plaintiff-side lawyers in Las Vegas, typically solo practitioners with limited assets, could not afford drawn-out litigation against the casinos. In the words of one senior judge, they would get "buried", if they tried to fight the casinos on an issue like this.

In addition, this was a "one industry town". If an employee developed a reputation as a troublemaker, she would get blacklisted. Once one was blacklisted in the casino industry, it was difficult to get rehired. These were scarce jobs; employees who wanted to keep working in the industry were unlikely to sue. Our respondents emphasized that the information sharing mechanisms in this industry were superior to those in most other settings. The reason being

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[124] Federal employment and accommodations civil rights civil case filings increased from 8,637 to 22,316 between 1990 and 2000. U. S. Courts, Table 4.4: U. S. District Courts. Civil Cases Filed by Nature of Suit, http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf . For the prior period, see John J. Donohue III & Peter Siegelman, *The* Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 998 (1991). More recent research suggests that filings in this area have declined over the past decade, with employment discrimination cases accounting for under six percent of the federal docket and no longer being the top category of cases. Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103 (2009).

[125] Nationwide, it is likely that appearance discrimination cases have not made up a signification portion of the increase in employment discrimination cases. The point though is that given the importance of appearances in the casino business, we expected more litigation on that front in Las Vegas.

that Las Vegas attracts more than its share of those with an inclination to misbehave; that in turn means that casinos spend significant resources in trying to identify troublemakers ahead of time. Casinos are also willing to cooperate with each other in policing problematic customers and employees even though there is a state law prohibiting blacklisting. Apparently, the security experts at the casinos have a network and regularly share information with each other about misbehaving guests and employees.

iii. The Missing Class Action Bar

The foregoing story about the high costs of these cases got us asking: What precisely was so costly about bringing this type of a case (especially given the possibility of recovering generous attorney's fees under Title VII)? As we conceptualized the hypothetical case, the facts were going to be simple: e.g., female servers are required to wear heels and short outfits that expose them to higher risks of foot injury and respiratory infection; whereas the men are not. Alternatively, the case might involve female cocktail servers who, because of their outfits, got subjected to harassment by male customers. With a large enough number of cocktail servers as plaintiffs, these case should be relatively easy – getting experts to testify as to the health burdens or likely levels of harassment should be not be difficult. Our respondents suggested that our assumptions might be wrong on multiple grounds. First, we were thinking in terms of class actions. Local employment lawyers in Las Vegas brought individual cases, not class actions. There was no meaningful class action practice in the employment discrimination area. Second, these employees not only valued their jobs, but they also valued the ability to switch jobs. With a minimal education, they could generate the kind of income that few other jobs could provide; they were unlikely to get together to form a class.

A couple of things puzzled us about the absence of a significant class action bar in Las Vegas. If there were profitable cases to be brought, why wouldn't a sophisticated class action firm from, for example, nearby California, show up to take on the case? As for the story about casino workers being unwilling to sue because their jobs were so remunerative, that also had some holes in it. Even if the jobs were paid well, they also tended to be short lived in many cases. Going back to the cocktail server context, the most remunerative of these jobs are reserved for the young and attractive. When these employees are no longer young and attractive and in danger of losing their jobs, shouldn't there be an incentive to sue? We frequently raised these questions, but didn't come away with clear answers. At the end of the day, it bears mentioning that the explanation about employees being reluctant to sue because they considered themselves to be fortunate to have highly remunerative jobs in the casino industry was consistent both with what we heard from the employees and the plaintiff-side lawyers.

iv. The EEOC's (Non) Role

Absent an adequate class action bar, why not the EEOC, the federal agency charged with policing anti discrimination law? The EEOC, unlike the Las Vegas plaintiffs' bar, is not substantially limited by either money or expertise. Our judicial respondents noted, however,

that while one might ordinarily expect the EEOC to step in, it didn't have a significant presence in Las Vegas. That led us to ask why not. Perhaps there was an interesting story here? Maybe the casinos had exerted their influence in Washington D.C. to make sure that the EEOC left the casino industry alone? The facts were that the local EEOC office had opened only a few years ago and had been staffed by a junior lawyer; a recent graduate of UNLV.[126] And that attorney quit relatively soon, leaving, for nearly a year, the Las Vegas office with no on-site attorneys. During that time period, Las Vegas matters were being handled out of the Los Angeles office.

As best we could tell, there was no sinister story behind the EEOC's limited presence in Las Vegas. It turns out that the Los Angeles office is responsible for a large geographic area, with a minimal staff. Moreover, with the limited staff available to the EEOC, the agency had brought a number of significant cases against the casinos for harassment occurring "in the back" of the casinos. The harassment alleged in these cases was severe, often constituting rape, and the EEOC believed that handling these cases first was a priority. We also heard that Washington D.C. had not shown any great enthusiasm for the aggressive policing of employment discrimination cases during the time of the two Bush administrations, but there was nothing specific about the casino industry.

That said, the EEOC has made choices regarding what kinds of cases to pursue in Las Vegas. And appearance discrimination cases that might have followed in the wake of *Jespersen* have not been on its agenda. The EEOC has been involved in investigations of the casinos, but its primary interest has been in sex harassment cases. The impression we got was that the EEOC's agenda was, in part, demand driven. That is, a function of the kinds of cases that came in the door, as opposed to a broader strategy that attempted to fill gaps in the litigation landscape. Not one of our respondents appeared to be laying blame at the feet of the EEOC, however. Most thought that the EEOC's presence in Las Vegas has improved matters on the anti-discrimination front, given that the state equal rights offices had been doing precious little.

v. Judicial Hostility

Given the rates at which federal judges grant motions for summary judgment in Title VII cases, we expected judges to treat our project with skepticism if not hostility. The rates of grants of summary judgment suggested that judges perceived a high fraction of employment discrimination cases to be baseless. If our assumptions were right, then the last thing judges would be interested in was a project asking why there weren't even more cases being brought. With respect to the judges in Las Vegas, we authors had different reactions to and perceptions of the interviews. At least one of us was more skeptical of the judges' openness to the concept of an appearance discrimination class action claim against the casinos. On the other end of the spectrum, one of us believed that the judges were being open and honest with us when they suggested that a lawsuit brought under the *Jespersen* language would have merit.

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[126] The announcement of the opening of the office was made on 08-09-06. http://www.eeoc.gov/press/8-9-06.html

What was clear was that the judges demonstrated no open hostility to either the broad category of Title VII cases or the sub category of appearance discrimination cases, although, as mentioned above, they questioned the value of our project. Indeed, the judges did not indicate that they perceived there to be an excess of cases in this area. Nor did they evince any unwillingness to follow the dictates of the Ninth Circuit. They recognized the same passages in *Jespersen* that we had flagged as potentially opening the doors to increased litigation in the appearance discrimination area. Unlike us, however, they were not surprised that there had been little on-the-ground reaction to *Jespersen*. The bottom line for these judicial actors was that appearance discrimination cases were simply not being brought. The judges we spoke to may have been socially conservative (they appeared that way), but they indicated interest in our puzzle and seemed willing to give us their time and intellectual energy to help figure out why *Jespersen* had had so little impact. In hindsight, it is not surprising that these judges displayed no hostility to *Jespersen*-type cases; they don't see enough of them to be hostile. As to Title VII cases generally, while we perceived no hostility, the plaintiffs' bar certainly believes, and statistics support their belief to a certain extent, that the judges, if not hostile, are aggressive in granting summary judgment.

The federal magistrate judges saw enough employment discrimination cases to understand their dynamics especially well. The federal courts in Nevada run a mediation program called "early neutral evaluation" where all employment discrimination cases go through a preliminary screening by a magistrate judge. The magistrate judge evaluates the complaint, sits down with the parties, and tries to give them a realistic picture of the strengths and weaknesses of their cases. If there had been even the smallest spike in employment litigation as a result of *Jespersen*, these magistrate judges would have seen it. The magistrate judges with whom we spoke saw no effect; not even in terms of preliminary mediations. As one judge observed, it was hardly surprising that the casinos had not reacted to *Jespersen* by altering their behavior. The litigation risk landscape had not changed as a result of the case, so why should they alter their behavior? [127]

vi. Dennis Rodman and the Wild Wild West

Like the various casino employees we spoke to, our judicial respondents took pains to try to explain to us the unique nature of the Las Vegas casino industry. This was a one-industry town, and one grown into a major metropolis relatively recently. The legal market was thin and nowhere near as sophisticated as in most other major U.S. cities. An illustration of that was the fact that it was only a decade ago that the state got its first law school, at UNLV. We also heard on multiple occasions that, as a cultural matter, people in Las Vegas did not like regulation. Most of them were attracted to it because it was the "Wild West".

[127] As noted earlier, conversations with those familiar with the insurance industry indicated that nothing had changed as a result of *Jespersen*. One interviewee, an expert in Nevada insurance law told us that there was nothing in the literature that even hints at appearance and dress codes litigation as a potential risk.

Most salient, the reality was that the casino industry was selling a sexualized product. Las Vegas had attempted becoming more family friendly about a decade or so ago, but that did not work and no one was pretending that attracting families was the primary goal any longer. The new promotion was, "What happens in Vegas, stays in Vegas," a motto that was decidedly not directed at filling the casinos with families. According to one respondent: "The industry quickly realized that these families simply did not spend enough, and they certainly did not spend irresponsibly." It is the twenty-three year old from Los Angeles who is going to drop $5,000 sitting at the craps table." Once the business model and the advertising switched away from families, the packaging changed. While Las Vegas was always known for commodifying sex even as it sold its "family-friendly" image, the new packaging was even more sexual than before. And the outfits of the cocktail servers were a crucial element of the fantasy being sold; the reality of the industry in Las Vegas was that the casinos were not going to alter their behavior in the ways that the language in *Jespersen* might have them do. They had tried the family resort model and it had failed; they were not going back.

The foregoing did not mean that there were no limits; our respondents took pains to emphasize. In illustrating these limits, multiple respondents brought up a set of highly publicized incidents involving the infamous former professional basketball player, Dennis Rodman. Apparently, Mr. Rodman used to be a frequent visitor to Las Vegas. He also was legendary for his misbehavior, particularly in terms of sexually harassing employees. In one incident that was recounted to us, he reached across the bar to grab an employee's breasts. These incidents resulted in legal action by the employees who were harassed, and the casinos themselves were quite unhappy with Mr. Rodman's behavior.[128]

V. Conclusion: The Irrelevance of Case Law?

An initial conclusion that might be drawn from our study is that case law, and specifically the nuances of judicial reasoning by appellate judges, is largely irrelevant to the day-to-day realities of those on the ground. Even when a case has myriad factors predicting a significant impact on the ground, it can in fact have only a negligible impact. Indeed, nothing changed as a result of *Jespersen*.[129] In light of this finding, we sought to discover the factors which limited the opinion's impact. What our respondents gave us were their explanations, as daily observers of this particular setting, for why there was not an impact.

Those explanations suggest a view of legal impact that puts social and economic factors at the center of the model of legal impact. Cases cannot have an impact, if the local social and

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[128] *E.g.*, http://celebgossipjunkie.blogspot.com/2007/11/dennis-rodman-needs-to-keep-his-hands.html

[129] The observation that even the most canonical of cases can sometimes have little real impact on on-the-ground realities, however, is not new. For example, the question of what impact, minimal or not, *Brown v. Board of Education* had, has been the subject of much debate. *See, e.g.,* GERALD ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991); DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); David Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994).

economic variables are not aligned in a fashion that allows the impact to occur. Sociologist Kieran Healy's research on presumed consent laws and organ donations is helpful here.[130] Healy examined the effects of presumed consent laws on rates of cadaveric organ donation (donations from the dead). The general assumption in the literature on organ donation is that presumed consent laws are crucial in inducing higher rates of donation – and the high rates of organ donation in Spain are frequently invoked in the context.[131] Healy's cross-country empirical analysis, however, suggests that differences in the legal regimes cannot explain differences in behavior. Altering the relevant law, he finds, makes little difference unless there are changes in the relevant social institutions. In the Spanish case, the key was a "proactive donor detection program performed by well trained transplant coordinators, the introduction of systemic death audits in hospitals, and the combination of a positive social atmosphere with adequate economic reimbursement for the hospitals have resulted in success."[132]

A number of factors in the casino industry might have combined to negate any possible impact of *Jespersen*. Those include the high wages that casino industry workers make, the information sharing mechanisms of the casinos, the nature of the legal market, the absence of a strong developed class action bar, the strength of the unions, the possibly low level of education of the workforce, and the lack of a significant EEOC office. At bottom, the point is not that case law is irrelevant or unable to produce social change. But rather that its relevance on the ground is likely dependent on the operation of local social and economic dynamics. The case law can change radically, but if local actors earn such high wages that they have no incentive to sue or if local plaintiff lawyers lack the ability to coordinate and finance the appropriate lawsuit or if the defense lawyers and their clients are simply too strong and too wealthy to allow any lawsuit against them to succeed, the end result will be that there are no cases. And that in turn will result in minimal on-the-ground impact.

One study of one case does not undermine the central assumption of the common law system that case law matters. But, it does tell us something about how judicial opinions may or may not influence law in the real world. This, in turn, should inform our scholarship and teaching.

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[130] *See* Kieran Healy, *Do Presumed Consent Laws Raise Organ Procurement Rates*? 55 DEPAUL L. REV. 1017 (2005-2006).

[131] *Id.* at 1018.

[132] *Id.* at 1080.