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CONDESCENDING CONTRADICTIONS: RICHARD POSNER'S PRAGMATISM AND PREGNANCY DISCRIMINATION*

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*Jeffrey W. Stempel****

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[W]ork will be judged, however, by the standard set by the person's previous work, and if it fails to come up to that standard it will be criticized.

Richard Posner¹

Dick is a little remote from the squalor of the real world. He should visit a prison occasionally.

Norval Morris²

I. INTRODUCTION: THE POSNERIAN CONTRADICTION

Richard Posner, the Chief Judge of the United States Court of Appeals for the Seventh Circuit, has taken law and the legal establishment by storm. As a newly appointed judge,³ he rapidly churned out well-written and influential opinions that began to pull this appellate court in what some regarded as a direction too conservative and too academic.⁴ Labeled

1. RICHARD A. POSNER, *CARDOZO—A STUDY IN REPUTATION* 69 (1990) (emphasis omitted).

2. James Warren, *Richard Posner Shakes Up the Bench—The Seventh Circuit's Youngest Member Tests His Free Market Theory*, *AM. LAW.*, Sept. 1983, at 75, 77 (quoting former University of Chicago Law School Dean Morris).

3. Posner was appointed to the bench by President Ronald Reagan in 1981. David Ranii, *The Next Nominee?*, *NAT'L L.J.*, Nov. 26, 1984, at 1. In his first year on the bench, he authored 90 opinions, "more than any other federal jurist in the country over the same period of time." *Id.* at 26; accord Warren, *supra* note 2, at 76.

4. See Paul M. Barrett, *Influential Ideas—A Movement Called "Law and Economics" Sways Legal Circles*, *WALL ST. J.*, Aug. 4, 1986, at 1; *Posner: Admired by Ally and Foe*, *L.A. L.J.*, Nov. 25, 1981, at 5; Warren, *supra* note 2, at 76-77. In some quarters, Posner's ascension to the bench was regularly praised. See, e.g., Gordon Crovitz, *Winds of Change on the Bench*, *WALL ST. J.*, Mar. 15, 1985, at 26.

Although reasonable observers can argue over whether to praise or decry conservatism, there is little doubt that the Seventh Circuit has more of it since Judge Posner's arrival. See Noreen Marcus, *Rule of Law (and Economics)—Posner and Easterbrook Have Taken the "Chicago School" Onto the Bench. Together, They've Helped Transform a Circuit*, *AM. LAW.*, June 1988, at 38 Supp. In addition to Posner, President Reagan successfully appointed a number of prominent conservatives to that bench, including former University of Chicago Law Professor and lawyer-economist Frank Easterbrook, former Wisconsin Supreme Court Justice Richard Coffey, and former Warren Burger law clerk and Notre Dame Law School Professor Kenneth Ripple. *Id.* at 39; BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 352-53 (1979). President Reagan also appointed the briefly notorious Daniel Manion, a South Bend practitioner who faced significant Senate opposition because of his conservatism and doubts as to his competence. See Stephen J. Adler, *Not That Dumb*, *AM. LAW.*, Jan.-Feb. 1988, at 32 (reporting that Manion is now performing well on the Seventh Circuit); Marcus, *supra*, at 39. Easterbrook and Ripple joined Posner on the panel that produced the opinion in *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994), which is the focus of this article's criticisms.

As to the issue of the Seventh Circuit's willingness to look beyond theory toward reality, the

by one reviewer as the law's "most successful agenda entrepreneur since Oliver Wendell Holmes, Jr.,"⁵ Posner has continued his academic tradition of prolific publication outside the judicial context with a score of law review articles⁶ and several books⁷ written since ascending to the bench.

Posner's writing has seen both lavish praise and harsh criticism. For example, reviewers frequently describe him as a towering figure in Ameri-

record is at least mixed. To be sure, many Seventh Circuit opinions during the 1980s and 1990s have a highly abstract and theoretical quality that some feared might result from the arrival of two Chicago school economic theorists. *Compare* *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J.) (displaying test for grant of preliminary injunction as a mathematical formula) *with* *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1434-35 (7th Cir. 1986) (seemingly backing away from Posner's injunction formula). *See also* Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 543 (1987) (arguing that Posner's injunction formula is "an abomination in theory and practice"). During this same time, however, the Seventh Circuit also has produced some well-reasoned and pragmatic applications of doctrine. *See, e.g.*, *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987) (opinion of Judge Manion) (holding excessive force in arrest claim is a Fourth Amendment claim, not a substantive due process claim). The reasoning of *Lester* was unanimously adopted, without citing the court of appeals, by the Supreme Court, over the competing approaches of other courts, in *Graham v. Connor*, 490 U.S. 386, 395 (1989). Occasionally, the court is downright bold and penetrating in looking behind the facade of a matter to discern its true content. *See, for example*, *Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1156-59 (7th Cir. 1990), an opinion written by the normally formal, theoretical, textualist Easterbrook, which characterized floor statements by a U.S. Senator as strategic behavior attempting to create and insert bogus legislative history. *Id.* at 1158.

5. William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 333 (1992) (book review).

6. *See, e.g.*, Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989) [hereinafter Posner, *A Primer*]; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) [hereinafter Posner, *Legal Formalism*]; Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) [hereinafter Posner, *Cautionary Observations*]; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) [hereinafter Posner, *Classroom and Courtroom*]. By 1983, Posner had authored more than 100 articles and had authored or co-authored ten books. Warren, *supra* note 2, at 76. Posner continues to publish in spite of his caseload at the Seventh Circuit.

7. *See* RICHARD A. POSNER, *OVERCOMING LAW* (1995) [hereinafter POSNER, *OVERCOMING LAW*]; OLIVER W. HOLMES, JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (Richard A. Posner ed., 1994) [hereinafter Posner, (ed.), *ESSENTIAL HOLMES*]; RICHARD A. POSNER, *SEX AND REASON* (1992) [hereinafter POSNER, *SEX AND REASON*]; POSNER, *supra* note 1; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter POSNER, *JURISPRUDENCE*]; RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) [hereinafter POSNER, *LAW AND LITERATURE*]; RICHARD A. POSNER, *THE FEDERAL COURTS—CRISIS AND REFORM* (1985) [hereinafter POSNER, *FEDERAL COURTS*]. Make that eight books, if you count the two most recent editions of his classic, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS*, 3d] and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*, 4th]. Or ten books, counting works Posner has co-authored. *See* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH—THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993).

can law⁸ and view Posner's words as important simply because of his stature.⁹ Posner also has more than his share of critics. One reviewer explained Posner's productivity with a decidedly negative cast: "[p]art of the answer, apparently, is that Posner works incessantly and has few outside interests. The other part of the answer is that Posner's stuff is not that good."¹⁰ Posner's *Sex and Reason*¹¹ stirred perhaps even more than the usual Posner post-publication debate, immediately engendering several reviews in major legal periodicals, including a mini-symposium with a markedly testy exchange between Posner and four women reviewers.¹² His previous books also were lightning rods for criticism¹³ as well as praise.¹⁴

Posner's judicial actions also have been criticized, primarily for incon-

8. See, e.g., Martha C. Nussbaum, *Venus in Robes*, NEW REPUBLIC, Apr. 20, 1992, at 36, 36-37 (reviewing POSNER, *SEX AND REASON*, *supra* note 7).

9. See, e.g., Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1222 (1991) (reviewing POSNER, *JURISPRUDENCE*, *supra* note 7).

10. Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 7 (1991). More recently, a legal columnist who generally praises Posner confirmed that Posner has an insatiable work ethic. See Jeffrey Rosen, *Overqualified*, NEW REPUBLIC, Apr. 4, 1994, at 42 (reporting that in addition to his day job as a judge, Posner "works most evenings, from dinner until midnight").

11. POSNER, *SEX AND REASON*, *supra* note 7.

12. See Katharine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L. REV. 473 (1993); Martha A. Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 CONN. L. REV. 503 (1993); Gillian K. Hadfield, *Not the "Radical" Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 533 (1993); Ruthann Robson, *Posner's Lesbians: Neither Sexy Nor Reasonable*, 25 CONN. L. REV. 491 (1993). His response, Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515 (1993), characterizes some of the reviewers as left-wing extremists pouncing on him rather than fairly evaluating his work. *Id.* at 516. Posner's response is in turn described by one of the participants as "hyperbolic," see Hadfield, *supra*, at 536, and "rather defensive," see Fineman, *supra*, at 512. Professor Fineman paints a favorable reviewer of Posner as blinded by admiration. *Id.*

13. See, e.g., Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1146, 1161 (1985) (reviewing POSNER, *FEDERAL COURTS*, *supra* note 7) (referring to Posner as "a captive of a thin and unsatisfactory epistemology"); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 777-78 (1988) (reviewing Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1988)) (finding Posner's assumptions oversimplified or inaccurate). See also Hager, *supra* note 10, at 7 (reviewing POSNER, *JURISPRUDENCE*, *supra* note 7) (concluding that Posner is often "glib and shallow").

14. See, e.g., Bator, *supra* note 13, at 1161 (reviewing POSNER, *FEDERAL COURTS*, *supra* note 7) (generally praising Posner and the book); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1447 (1990) (reviewing POSNER, *JURISPRUDENCE*, *supra* note 7) (calling his own critique a "positive" review); Jason S. Johnston, *Not So Cold an Eye: Richard Posner's Pragmatism*, 44 VAND. L. REV. 741, 744 (1991) (reviewing POSNER, *JURISPRUDENCE*, *supra* note 7) (calling it "refreshing"). Ironically, Professors Bator and Fish were also somewhat critical of Posner. See *supra* note 13. Other prominent scholars gave basically positive but lukewarm reviews to Posner's efforts. See, e.g., Henry P. Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 345 (1985) (reviewing POSNER, *FEDERAL COURTS*, *supra* note 7) (stating that while Posner's economic analysis is incomplete, he does highlight a crisis of having no theory of adjudication).

sistently commingling economic analysis with other approaches to decisionmaking in an effort to reach personally pleasing results that are at odds with Posner's professed commitment to methodological rigor.¹⁵ Although criticism of Posner's judging is diverse, a common theme is that he too frequently marshals his argumentative force merely to uphold the economic rights of the powerful. In other words, according to the critics, after the rush of intellectual excitement subsides, litigants and the justice system are left with case results little different from those of the nineteenth century Supreme Court dominated by advocates for commercial interests.¹⁶

It appears that Posner has through his working life reached certain predispositions about the world and the characteristics of certain types of litigation.¹⁷ In scholarly writings, Posner has suggested more than a little disaffection with national anti-discrimination policy and with employment discrimination cases. His misgivings first surfaced in truncated form in his

15. See, e.g., Jennifer G. Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117, 1123-24, 1176-78 (1992) (finding Posner's market analysis of prisoners' civil rights claims flawed and his judicial views better explained by use of conservative pragmatism masquerading as economic analysis); George M. Cohen, *Posnerian Jurisprudence and Economic Analysis of Law: The View From the Bench*, 133 U. PA. L. REV. 1117, 1118 (1985) (arguing that Posner "has applied economic analysis selectively and incompletely; he has used his unique position as the intellectual force behind the law-and-economics movement to support his conservative political ideology").

16. See Hager, *supra* note 10, at 7 (Posner's views, although seemingly eclectic, "form a jurisprudence of zealous attack on challenges to private economic power"); Robin P. Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209, 212 (1988) (comparing Adam Smith's theories of law with Posner's and concluding that Posner is "not a Smithian" but a "status quo conservative"); Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1046 (1987) (Posner has "failed to adhere to his ad hoc policy recommendations for various kinds of judicial restraint." Rather, he "adheres to principles of judicial restraint as and when it suits him, and he happily violates these to advance his own particular neoclassical conceptions of the economics of labor and antitrust law" producing "nothing more than thinly veiled ideology to legitimate the inequities wrought by market systems."). But see Richard A. Posner, *On Theory and Practice: A Reply to "Richard Posner's Praxis"*, 49 OHIO ST. L.J. 1077, 1077 (1989) (replying to Shapiro, *supra*).

On the pro-business conservatism of the nineteenth century Supreme Court and the legal establishment generally, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 9-107 (1992) and LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 488-571 (2d ed. 1985).

17. See, e.g., Peter B. Edelman, *Mandated Minimum Income, Judge Posner, and the Destruction of the Rule of Law*, 55 ALB. L. REV. 633, 640-41 (1992) (criticizing Posner's legal argument against mandated minimum income); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 488-90, 502 (1992) (reviewing POSNER, *SEX AND REASON*, *supra* note 7) (criticizing Posner's assessment of sex roles); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 390, 400-01 (1985) (criticizing Posner's assumptions that consumers always consent to wealth maximizing transactions, regardless of their perceived morality); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2414, 2421-22 (1993) (describing Posner's theories that economic factors drive sexual behavior); accord Malloy, *supra* note 16, at 212 (arguing conservative ideological assumptions taint Posner's logic).

books promoting economic analysis of law.¹⁸ Beginning in 1987, he engaged in a continuing debate with a more liberal scholar over the merits of Title VII.¹⁹ At a 1988 Symposium commemorating the fiftieth anniversary of the Federal Rules of Civil Procedure, he derisively referred to cases of federal age discrimination litigation as “sacred cows” which should be among the first to lose federal jurisdiction.²⁰

Posner’s dislike of discrimination law was expressed in more comprehensive academic form with his publication of *An Economic Analysis of Sex Discrimination Laws*,²¹ in which he concluded that “it is possible that women as a whole have not benefitted and have in fact suffered” from laws against gender discrimination²² and that the “price tag” carried by such laws “might be thought too high by society.”²³ He essentially reiterated these views in the most recent edition of his text, *Economic Analysis of Law*.²⁴

An everpresent question for the legal community is the degree to which Posner’s personal opinions affect his judicial opinions. In particular, one must ask whether Posner has acted as an agenda entrepreneur when judging as well as when writing as a scholar. A recent pregnancy discrimination case, *Troupe v. May Department Stores Co.*,²⁵ provides a window on Posner’s jurisprudence and judging. Disturbingly, *Troupe* suggests that Posner’s personal hostility to gender discrimination law has infected his adjudication; it also suggests possible infirmities in Posner’s ever-evolving jurisprudential views.

18. See POSNER, *ECONOMIC ANALYSIS*, 3d, *supra* note 7, § 27.4 (focusing on race discrimination and concluding that antidiscrimination laws are necessarily inefficient); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 359-61 (1981).

19. See Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 513-14 (1987) [hereinafter Posner, *Efficiency and Efficacy*] (commenting on John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) [hereinafter Donohue, *Title VII*]). The debate between Posner and John J. Donohue III continued in several law review articles, including John J. Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987), Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989) [hereinafter Posner, *Sex Discrimination*], and John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337 (1989) [hereinafter Donohue, *Prohibiting Sex Discrimination*].

20. Richard A. Posner, *Coping With the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989). Ironically, of course, decisions such as the Posner opinion in *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994) may indeed prompt liberals to support state court jurisdiction over more discrimination claims. See generally *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that state and federal courts have concurrent jurisdiction over Title VII matters).

21. Posner, *Sex Discrimination*, *supra* note 19, at 1311.

22. *Id.* at 1334.

23. *Id.* at 1335.

24. POSNER, *ECONOMIC ANALYSIS*, 4th, *supra* note 7, § 11.7.

25. 20 F.3d 734 (7th Cir. 1994).

Kimberly Troupe, a former sales clerk at a Chicago-area Lord & Taylor department store (part of the May Organization), sued her employer for violating the Pregnancy Discrimination Act²⁶ when it fired her the day before she was to go on maternity leave.²⁷ The lower court granted defendant's motion for summary judgment.²⁸ In an opinion authored by Posner,²⁹ the Seventh Circuit panel affirmed, precluding Troupe from obtaining trial scrutiny of her case.³⁰ This article demonstrates that in *Troupe*, Posner erred as a matter of Title VII and summary judgment law and created a dangerous precedent in the employment discrimination area.

Troupe casts Posner in a poor light in other ways as well. The opinion reflects complete disinterest in the experience of the working person; in particular, a woman struggling with morning sickness but attempting to continue to work and to retain her job.³¹ The tone of the opinion deprecates Troupe and characterizes her as lazy.³² *Troupe* also provides an example of the tensions and contradictions that arise between the competing scholarly views advanced by Posner in his academic writings. In *Troupe*, it appears that the judicial Posner fell prey to his own personal prejudices against pregnancy discrimination law as expressed in his books and articles³³ while at the same time contradicting his professed belief that judges generally should show deference to the legislature on matters of social policy.³⁴ In addition to this basic contradiction—that Posner may not be practicing the jurisprudence he seemingly preaches—*Troupe* illustrates the potential in Posner's jurisprudential construct for producing judgments ostensibly defensible on the surface, but which serve merely to enforce the

26. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076-77 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)). The Pregnancy Discrimination Act defines discrimination "because of sex" to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." The Act requires that pregnant women "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . ." *Id.*

27. *Troupe*, 20 F.3d at 735-36.

28. *Id.* at 736.

29. *Id.* at 735.

30. *Id.* at 739.

31. *See id.* at 735, 737.

32. *See id.* at 735 ("[B]ecause she slept later under the new schedule, noon was 'morning' for her, she continued to experience severe morning sickness at work, causing what her lawyer describes with understatement as 'slight' or 'occasional' tardiness.')

33. *See, e.g.,* POSNER, *ECONOMIC ANALYSIS*, 4th, *supra* note 7, § 11.7, at 337 (arguing an employer's refusal to pay pregnancy disability benefits is actually efficient discrimination).

34. *See* Crovitz, *supra* note 4, at 24 (reporting Posner's distaste for "liberal" judges' lack of judicial restraint). We term the interplay of these tensions the "Posnerian Contradiction." Although, as discussed in parts II and IV, *infra*, one might mount a defense of Posner on consistency grounds; such a defense in our view leads to a most serious indictment of Posner's jurisprudential thought by casting it as a formula for result-oriented judging (by our definition rather than Posner's). *See infra* notes 470-71 and accompanying text. Ironically, Posner condemns the lack of candor displayed by other result-oriented judges. Crovitz, *supra* note 4, at 24.

judge's own personal preferences.

Troupe is therefore a useful case study for examining the tension between Posner's academic writings and judicial performance. Ironically, the suspect reasoning of *Troupe* eerily echoes that of another prominent conservative jurist, Chief Justice William H. Rehnquist, whose sophisticated view of Title VII in *General Electric Co. v. Gilbert*³⁵ quickly prompted Congress to overrule the Court by passing the Pregnancy Discrimination Act.³⁶ Notwithstanding Posner's acknowledgement of the Act and of its history,³⁷ *Troupe* demonstrates both a crabbed reading of the law and a visceral aversion to a broad concept of protection against pregnancy and gender discrimination similar to that displayed in *Gilbert*.³⁸ But despite its comparative anonymity, *Troupe* is an even more radical assault on Title VII. In contravention of the intent expressed by the legislature in passing the Act, *Troupe* attempts to recreate the law, molding it into an ineffective protection for working women who are pregnant.

This article posits that in *Troupe*, Posner's dislike for the discrimination law and his disaffection for claimants invoking gender discrimination law overcame his professed commitment to judicial activity constrained by deference to legislative direction. In contrast, we argue for a more faithful view of the Pregnancy Discrimination Act. Part II describes Posner's jurisprudential journey from his early works to his latest book, *Overcoming Law*.³⁹ Part III describes *Troupe*, demonstrating why it fails as a matter of statutory interpretation and summary judgment law while also highlighting the derogatory language and tone of the opinion. Parts IV and V review Posner's writings on gender discrimination law. We examine Posner the scholar in an attempt to explain his decision in *Troupe* and find a case-specific exercise of personal policy preference. As a result, we have further examined Posner's stated jurisprudence of pragmatism and practical reason.⁴⁰ The Posnerian cast of these schools of thought proves unfor-

35. 429 U.S. 125, 133-36 (1976) (holding that pregnancy discrimination is not sex discrimination under Title VII). To be fair, we note that Justice Rehnquist's *Gilbert* opinion, despite what we and others regard as its absurd formalism, commanded the votes of six Justices, with only Justices Brennan, Marshall, and Stevens in dissent. *Id.* at 146 (Brennan, J., dissenting); *id.* at 160 (Stevens, J., dissenting). Of course, *Gilbert* was overruled by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)). See *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 678 (1983).

36. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

37. See *Troupe*, 20 F.3d at 735 ("The pregnancy-discrimination amendment overruled *Gilbert*, but, as the text [of the Act] makes clear, goes further. How much further is the issue in this case.") (citations omitted).

38. See *infra* Part III.C.

39. POSNER, *OVERCOMING LAW*, *supra* note 7.

40. See *infra* Part IV (discussing Posner's jurisprudential philosophy).

tunately susceptible to judicial decisionmaking based on personal preferences and more linked to his earlier preoccupation with economic analysis than Posner has portrayed it.

II. POSNER'S JURISPRUDENTIAL JOURNEY

In his recent legal writings, Posner portrays himself as a pragmatic,⁴¹ but we feel his pragmatism is also largely positivist.⁴² It would be incorrect to simply call Posner a conservative who has moderated with age and experience (as one could characterize some Supreme Court Justices of the last thirty years). By his own characterization, Posner has gone through at least three distinct stages in his approach to statutory construction and law in general.⁴³

During Posner's second stage—the 1970s—he “pushed the economic interest-group line hard.”⁴⁴ This was the Posner of *Economic Analysis of Law* (1973)⁴⁵ and *The Economics of Justice* (1981),⁴⁶ who applied the economics of public choice to statutes⁴⁷ and at least implicitly rejected the Hart and Sacks view that legislation was dependably rational, purposeful, and public-spirited.⁴⁸ Although Posner might dispute this, his cynical

41. See Posner, *A Primer*, *supra* note 6, at 434.

42. *Id.*; see *infra* text and notes 101-06. In addition, other observers of Posner's nonjudicial writings have detected a trend toward moderation. See Levinson, *supra* note 9, at 1251 & n.130. It also may be a possible attempt to increase his political marketability as a potential Supreme Court nominee. Accord David A. Logan, *The Man in the Mirror*, 90 MICH. L. REV. 1739, 1768 (1992) (discussing vulnerability of Posner as a nominee because of his writings).

By positivist, we mean that Posner has generally supported the view that the law to be obeyed is that expressed by the legitimately sovereign lawmaker which is, in most statutory cases, Congress or the relevant state legislature. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (delivering a positivist outlook on the role of the judiciary).

43. See Posner, *A Primer*, *supra* note 6, at 434.

44. *Id.*

45. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973).

46. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

47. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 876-77 (1975).

By public choice perspective, we mean the school that has applied microeconomic concepts to political behavior and conceived of legislation as the product of a marketplace populated by competing interests. See *id.* at 877. Various interests attempt to obtain favorable legislation just as consumers pursue desired purchases and manufacturers seek new markets and sales. See *id.* In particular, legislators and other “self-interested actors” seek to maximize their own well-being irrespective of their view of the merits of proposed legislation. See, e.g., Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126-28 (1989).

48. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). By the Hart and Sacks view, we refer to the school of thought dominant in American law during the late 1940s and 1950s, associated with Harvard Law Professors Henry Hart and Albert Sacks. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (according to the editors, Hart and Sacks' legal process view was the

focus on economics and the true motives of the legislature can be seen as suggesting that judges treat legislation much like common law in rendering decisions.⁴⁹ Under this approach, statute interpreting courts, like common law courts, would seek wealth-maximizing outcomes and would have substantial creative freedom unless the “contract” made by legislators with interest groups was highly directive to the courts or required a certain interpretation because of reliance interests.⁵⁰

As his second stage continued—during the early and mid-1980s—Posner gained judicial experience and advocated a statutory approach that was essentially one of originalism⁵¹ and positivism,⁵² albeit without the constraint normally associated with this view of the judge as “faithful agent” of the legislature.⁵³ This was the Posner of *The Federal*

dominant school of jurisprudential thought during the 1950s).

To grossly oversimplify: the Hart and Sacks approach instructed judges to seek to vindicate the purpose of a statute when construing the statute and to take a functional approach to implementing the law so that the statute would achieve the legislature’s goals. However, Hart and Sacks also stressed that judges should not substitute their personal assessments for those of the legislature by defining statutory purpose too broadly or flexibly.

49. This was, of course, exactly what former Yale Law School Dean (now Second Circuit Judge) Guido Calabresi proposed in 1982. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); see Allan C. Hutchison & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1756-58 (1982). Posner criticized this as too large a shift of power from the legislature to the judiciary. See POSNER, *FEDERAL COURTS*, *supra* note 7, at 292. *But see* Hutchison & Morgan, *supra*, at 1764-66 (addressing separation of powers issue). In light of Posner’s performance in *Troupe* and his subsequent embrace of a judge-empowering form of pragmatism (a “self-styled pragmatic” view, in the words of Robin West; see West, *supra* note 17, at 2413), Posner can be viewed as perhaps always giving less deference to the legislative and executive branches than he and his (largely politically conservative and judicially restraintist) supporters have let on. *But see* Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 22 (1983) [hereinafter Posner, *Judicial Self-Restraint*] (pointing out that true judicial restraint, ironically, may require a broader reading than a strict constructionist might prefer). See generally *id.* (revealing Posner’s views on the role of the judiciary circa 1983).

50. *Accord* Landes & Posner, *supra* note 47, at 877-79 (introducing “contract” concept between legislature and relevant pressure groups, where a freer or truly independent judiciary could undermine the arrangement).

51. By originalism, we mean the view that an interpreting court should attempt to ascertain the meaning of the statute as constructed by the enacting legislature rather than attempting to “update” a statute to conform to more contemporary attitudes among legislators or the public. Most approaches to statutory interpretation, particularly the popular methods of textualism, intentionalism, and purposivism are originalist in their goals. See Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 812-31 (1994).

52. See generally Scalia, *supra* note 42 (articulating a positivist view of statutory interpretation).

53. See Posner, *Legal Formalism*, *supra* note 6, at 185-90. Posner offers *Brown v. Board of Educ.*, 347 U.S. 483 (1954), as an example of a situation where original intent had to be disregarded. Posner, *Legal Formalism*, *supra* note 6, at 212-15; see also Posner, *Classroom and Courtroom*, *supra* note 6, 817-22. By “faithful agent” conception of the judicial role, we refer to an element of legal positivism that demands at least a core of judicial deference to legislative judgments. We take issue with those who view Posner as willing to disregard original intent, because Posner expresses some deference to it. Posner, *Legal Formalism*, *supra* note 6, at 189-92. However, the judge, as Posner has

Courts—Crisis and Reform,⁵⁴ who was seeking to decide statutory cases as the enacting legislature would have wanted,⁵⁵ but was permitting himself room for creativity and wisdom.⁵⁶

Essentially, Posner sought to combine Chicago School law and economics with a Harlanesque conservative's commitment to separation of powers, legislative supremacy, and judging divorced from personal preferences. Posner expressly rejected evolutionary or dynamic statutory interpretation⁵⁷ and embraced originalism; the view that the judge acts largely as an agent of the enacting legislature, which is the body in our political system holding authority to set national policy via legislation.⁵⁸ According to Posner:

The judge who follows [Posner's] suggested approach will not only consider the language, structure, and history of the statute, but also study the values and attitudes, as far as they can be known today, of the period when the legislation was enacted. . . . The judge's job is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations they did not foresee.⁵⁹

analogized to any other agent, is permitted some discretion to carry out the commands of the principal in situations not specifically envisioned by the principal. *Id.* Legal commentators may differ substantially, of course, over how much discretion to accord courts while still calling them faithful to the statutes in question, in addition to disagreeing over whether the posited gains from permitting discretion outweigh the greater opportunities for "unfaithful" statutory interpretation. *See id.* at 199-201 (pointing out flaws in Posner's own agency analogy).

54. POSNER, *FEDERAL COURTS*, *supra* note 7.

55. *See* Posner, *A Primer*, *supra* note 6, at 441-49 (exploring several alternative approaches to statutory interpretation and concluding by advocating a positivist pragmatism which seeks to decide cases in accord with legislative intent, as discerned in particular cases, through practical reason). Even when being pragmatic, however, Posner's expressed preference is clearly originalist rather than evolutionary in his statutory construction. *See* POSNER, *FEDERAL COURTS*, *supra* note 7, at 286-93.

56. POSNER, *FEDERAL COURTS*, *supra* note 7, at 286-93.

57. For illustrative examples of these approaches, which permit more judicial freedom to apply a statute according to current legal norms and social needs, notwithstanding the original intent of the legislature, see CALABRESI, *supra* note 49, at 120-62; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481-82 (1987). Although proponents of dynamism describe as constrained by sufficiently clear statute drafting or other strong indicia of resolute original intent, *see, e.g.*, Eskridge, *supra*, at 1481 & n.8, Posner disapproves of the evolutive approach and seems to regard it as illegitimate under the American governmental scheme. *See* POSNER, *FEDERAL COURTS*, *supra* note 7, at 292 ("Although premised on a public-interest conception of legislation, Calabresi's proposal is not friendly to the legislative process; it contemplates a big shift of legislative power from the legislatures to the courts."); *see also* Redish & Chung, *supra* note 51, at 840-58 (making similar criticisms of dynamism).

58. *See* POSNER, *FEDERAL COURTS*, *supra* note 7, at 286-93. For more recent discussion of originalist statutory interpretative thought, *see* Redish & Chung, *supra* note 51, at 810-14.

59. POSNER, *FEDERAL COURTS*, *supra* note 7, at 287.

This approach, labeled “imaginative reconstruction,”⁶⁰ thus gives the judge some room for creativity and flexibility so long as she remains faithful to the enacting legislature’s objectives.⁶¹ It differs from the textualism championed by more conservative jurists⁶² in several ways. Posner expressed a willingness to consider matter outside the text in determining statutory meaning.⁶³ Although originalist, he observed a need for and legitimacy in having judges fill statutory gaps that might otherwise fall through textual cracks, and having judges resolve conflicting statutes by sanding off the rough edges of text to choose the better view among competing constructions when faced with ambiguous language.⁶⁴ Posner himself characterizes this approach as purposive—attempting to imaginatively reconstruct the result that the enacting legislature would have wanted in the instant case in order to effect the statute’s purpose.⁶⁵ Others have characterized this facet of Posner’s statutory interpretation methodology as intentionalist or modified intentionalist.⁶⁶ For purposes of our analysis of *Troupe* and Posner’s interpretative model, the distinction appears unimportant.⁶⁷

Posner, in his third stage today, purports to be more eclectic.⁶⁸ In his

60. Posner, *Classroom and Courtroom*, *supra* note 6, at 817.

61. *See id.*

62. *See, e.g.*, Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 534 (1983) (arguing for greater inquiry into whether statutes are even applicable before beginning the construction analysis); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582-83 (1989-90) (arguing that judges should neither construe statutes liberally to expand their meaning, nor strictly to constrict their meaning, but rather to get their meaning precisely right); Scalia, *supra* note 42, at 1178 (advocating use of general rules over fact-specific determinations for the judiciary). Posner professes to reject this view just as he rejects dynamism, finding that the Easterbrook position is “unfriendly to legislation.” POSNER, *FEDERAL COURTS*, *supra* note 7, at 292; *see also* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 27-32 (1994) (discussing the two Justices’ ostensible desire to minimize judicial tampering with original texts of the Constitution or statutes).

63. *See, e.g.*, Posner, *Classroom and Courtroom*, *supra* note 6, at 818 (advocating use, for example, of contemporary attitudes prevalent at the time of enactment).

64. *Accord id.* at 818-19 (outlining a broad approach to the statute itself and external factors for a judge to consider in construction).

65. Posner, *A Primer*, *supra* note 6, at 445-46.

66. *See* Redish & Chung, *supra* note 51, at 813-15.

67. According to a recent explanation of the sometimes elusive distinction between intentionalism and purposivism: “Intentionalism asks how the enacting legislature would have decided the interpretive question facing the court.” Redish & Chung, *supra* note 51, at 813. Meanwhile, “purposivism entails a more abstract inquiry.” *Id.* at 815. Purposivism does not seek to ascertain the legislature’s precise intent and assumes a reasonable purpose behind the statute (even if the actual objective was a naked giveaway of public resources to a special interest). *Id.* at 817. “In addition, rather than dealing with individual statutes in isolation, purposivism seeks to weave statutes into the whole fabric of statutory law” and “would tolerate more judicial discretion than would intentionalism.” *Id.*; *accord* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332-33 (1990) (contrasting intentionalism in discussion of purposivism).

68. *See* POSNER, *JURISPRUDENCE*, *supra* note 7, at 71-78, 269-74, 423-469; Posner, *A Primer*,

most recent writings on statutory interpretation, Posner describes himself as a philosophical pragmatist who applies practical reason to render decisions.⁶⁹ According to Posner's description of his current statutory views, he remains largely an originalist who seeks to discern and apply the specific intent or general purpose of the enacting legislature in construing statutes, at least in cases where legislative intent or purpose can be discerned with relative ease and accuracy.⁷⁰ But Posner also has relaxed his originalist views to permit him to interpret laws flexibly in order to save the enacting legislature from foolish errors and to seek the optimal result in particular cases where legislative guidance is lacking or garbled.⁷¹ This approach may even allow him to interpret laws in reference to the legal landscape beyond the statute under consideration⁷² or to disregard laws that are clearly immoral.⁷³ This is the approach to statutes Posner advocates in *The Problems of Jurisprudence*⁷⁴ and other recent writing on statutory interpretation.⁷⁵ In the recently published *Overcoming Law*,⁷⁶

supra note 6, at 434, 448-50.

69. See POSNER, JURISPRUDENCE, *supra* note 7, at 71-123; Posner, *A Primer*, *supra* note 6, at 448-50.

70. See Posner, *A Primer*, *supra* note 6, at 449-50.

71. See POSNER, JURISPRUDENCE, *supra* note 7, at 278-302; Posner, *A Primer*, *supra* note 6, at 449-50.

72. See POSNER, JURISPRUDENCE, *supra* note 7, at 272-78.

73. See *id.* at 229-31; accord Posner, *A Primer*, *supra* note 6, at 449-50 (calling for courts, in rare instances, to disregard the will of the legislature).

74. POSNER, JURISPRUDENCE, *supra* note 7, at 229-31, 272-78.

75. *E.g.*, Posner, *A Primer*, *supra* note 6, at 449-50. Although others would surely debate us on this point, we also believe that this is the Posner of POSNER, SEX AND REASON, *supra* note 7, and of POSNER, *supra* note 1. Although Posner bases much of *Sex and Reason* on economic analysis, perhaps even primarily on economic analysis, see West, *supra* note 17, at 2414-16, he also attempts to support his views with an eclectic mix of history, politics, sociology, and biology. See *id.* at 2413; POSNER, SEX AND REASON, *supra* note 7, at 1-10. Although he may have gotten much of it wrong, see *supra* notes 12, 17, we do not see the book as an example of Posner consciously backtracking from pragmatism and practical reason to economics *über alles*. However, *Troupe* suggests that economics may in practice remain first among equals in Posner's house of statutory interpretation. See *Troupe*, 20 F.3d at 738 ("If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe [the plaintiff] not because she was pregnant but because she cost the company more than she was worth to it.").

Although *Cardozo* is styled in the manner of a scientific inquiry into the creation and maintenance of reputation, it also reveals Posner's admiration for Cardozo's approach to law which he likens to his own philosophy of pragmatism. POSNER, *supra* note 1, at 93; see also Posner, *A Primer*, *supra* note 6, at 449-50. Thus, the book seeks to link subject and author; the author's implicit message is that Posner is a lot like Cardozo and deserves similar acclaim and perhaps similar elevation to a higher judicial post. *But see* Logan, *supra* note 42, at 1768 (discussing the vulnerability of Posner as a Supreme Court nominee because of his writings).

76. POSNER, OVERCOMING LAW, *supra* note 7. This book was published after this article was largely complete, but suggests no major changes in Posner's view of legal analysis and judging. The attitudes reflected in *The Problems of Jurisprudence* are largely brought to bear upon additional topics. However, *Overcoming Law*, while fascinating, speaks far less to the craft of judging than do Posner's previous works cited in text, particularly *The Problems of Jurisprudence* and *The Federal Courts*. In

Posner does not address the judicial role in statutory interpretation as directly,⁷⁷ but reiterates generally his support for the pragmatic approach in a manner consistent with *The Problems of Jurisprudence*.⁷⁸

During his jurisprudential evolution, however, Posner has never officially spurned originalism or legislative supremacy.⁷⁹ Neither has he rejected economic analysis so long as other interpretative signals do not foreclose his application of economics to the case at hand.⁸⁰ For example, Posner states that in determining whether to act with freedom or constraint, judges should take their cues from the statute under consideration:

The judge will be particularly alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretative function. Sometimes a statute will state whether it is to be broadly or narrowly construed; more often the structure and language of the statute will supply a clue. If the legislature enacts into statute law a common law concept, as Congress did when in the Sherman Act it forbade agreements in restraint of trade, this is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle—in which event the legislators' values may not be controlling after all.

The opposite extreme is a statute that sets out its requirements with some specificity, especially against a background of dissatisfaction with judicial handling of the same subject under a previous

general, *Overcoming Law* shows Posner to continue on his path of pragmatism with somewhat more eclecticism and irreverence toward law itself as a discipline. In fact, he would perhaps ridicule the notion of judging as a "craft," at least to the extent it implies a precise reproduction of objective legal results. *See id.* at 39-70 (assessing changes in the market for the delivery of legal services and the production of law). In particular, *see id.* at 60.

With the benefit of hindsight, 1960 can be identified as the highwater mark of the American legal profession's cartel, and hence of jurisprudence as a guild ideology. It was the year Karl Llewellyn, quondam legal realist, can be said to have thrown in the sponge by publishing a book in which he celebrated in extravagant terms the ineffable "craft" (a word used obsessively throughout the book) of appellate judging.

Id.

77. His most explicit discussion of the judicial role focuses on constitutional adjudication. *See POSNER, OVERCOMING LAW*, *supra* note 7, ch. 8, at 233-36.

78. *See id.* ch. 19, at 405 (answering that pragmatist thinking can bring significant improvement to law even if it fails as a panacea). Posner's pragmatism in *Overcoming Law* appears to be at least as positivist as it was in *The Problems of Jurisprudence*. *See id.* ch. 7, at 220-23. Regarding labor and employment matters, Posner continues to have a restrictive view of worker prerogatives. *See id.* ch. 13, at 309-11.

79. *See, e.g.,* Steven Walt, *Some Problems of Pragmatic Jurisprudence*, 70 TEX. L. REV. 317, 330-31 (1992) (reviewing POSNER, JURISPRUDENCE, *supra* note 7) (containing Posner's view circa 1990); *supra* notes 49-50, 61, 70 and accompanying text.

80. *See* Posner, *A Primer*, *supra* note 6, at 434.

statute or the common law (much federal labor and regulatory legislation is of this character).

.....

Often when there are political pressures to do something about a problem but the legislature cannot agree exactly what to do about it, it will pass a statute the effect (as well as the undisclosed purpose) of which is to dump the problem in the lap of the courts . . . this implies that the courts are expected to try to solve the problem; they have a mandate, though no specific directions [and then] courts have a duty and not merely a power to solve the problem in a reasonable way.⁸¹

Although the Posner of *Problems of Jurisprudence* does not seem to place the same emphasis on economic and public choice factors,⁸² neither can one find the current Posner repudiating this aspect of the middle-stage Posner.⁸³ Although still a champion of microeconomic analysis of law, particularly in common law cases, the modern, moderate Posner professes to be willing to eschew the quest for efficiency when it conflicts with the command of the lawmakers.⁸⁴ Posner implies that personal political or social preferences should be strictly limited, if not banished, from judicial decisionmaking.⁸⁵ In construing statutes, judges are essentially implementing a "command," even the garbled ones, from legislatures.⁸⁶

What appears to make the third-stage Posner different from his intellectual predecessors is his candor in admitting that judges are often left with relatively little guidance in deciding cases, both common law claims and those governed by statute.⁸⁷ In these more difficult cases, Posner believes, judges should employ a varied mix of approaches and practical reason focusing on the consequences of alternative holdings to reach an acceptable decision.⁸⁸ Posner's concept of practical reason essentially

81. POSNER, *FEDERAL COURTS*, *supra* note 7, at 287-88, 290 (footnote omitted).

82. POSNER, *JURISPRUDENCE*, *supra* note 7, at 286-309 (discussing the interpretation of statutes and constitutions without relying on economic analysis). *Overcoming Law* continues in a less overtly economic vein, but suggests that Posner's pragmatism remains greatly influenced by economic analysis. *See, e.g.*, POSNER, *OVERCOMING LAW*, *supra* note 7, ch. 1, at 35-47; *id.* ch. 16, at 348-55; *id.* ch. 26, at 552 (representing "preference for homosexual acts" as a mathematical formula modeling economic incentives); as well as Part Five (philosophical and economic perspectives).

83. *See* Posner, *A Primer*, *supra* note 6, at 434.

84. *See id.*

85. *See* POSNER, *JURISPRUDENCE*, *supra* note 7, at 272-73; Posner, *A Primer*, *supra* note 6, at 450 ("Pragmatic concern with case-specific consequences will therefore be confined largely to those cases where mentalist [intentionalist] or purposive interpretation fails.").

86. *See* POSNER, *JURISPRUDENCE*, *supra* note 7, at 269-73; Posner, *A Primer*, *supra* note 6, at 448-49.

87. *See, e.g.*, Posner, *A Primer*, *supra* note 6, at 448 ("Often the legislative command is inscrutable. . .").

88. POSNER, *JURISPRUDENCE*, *supra* note 7, at 270-302; Posner, *A Primer*, *supra* note 6, at 448-

squares with that of other scholars.⁸⁹ Although a precise definition of practical reason has proven elusive, the term generally is regarded as advocating a school of adjudication suggesting that “actual and desirable decisions are made not by the judge specifying an abstract model and then deducing the correct rule, but by the exercise of a peculiar faculty called ‘judgment,’ ‘practical wisdom,’ or ‘practical reason.’ ”⁹⁰

According to two noted scholars writing specifically about the role of practical reason in statutory interpretation, the term derives from Aristotlean philosophy that “starts with the proposition that one can determine what is right in specific cases, even without a universal theory of what is right.”⁹¹ Practical reason theory recognizes that the “interpretative enterprise”⁹² is one of “concrete situatedness . . . which militates against overarching theories”⁹³ and “recognizes that different values will pull the interpreter in different directions”⁹⁴ but posits that there are “workable resolutions to complex questions,”⁹⁵ even, presumably, the problem of value-driven result-oriented interpretation.⁹⁶

This vision of a practical reason approach to statutory construction specifically incorporates the American pragmatic philosophical tradition into the approach.⁹⁷ Posner considers his approach pragmatic as well in that he endorses the antifoundationalist⁹⁸ approaches of notable American

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89. Compare Posner, *A Primer*, *supra* note 6, at 449-50 (Posner’s account of his pragmatic theory) with David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775, 782-87 (1991) (recounting other thinkers’ views of practical reason or common sense decisionmaking) and Eskridge & Frickey, *supra* note 67, at 345-62 (describing a combination of factors which should affect a judge’s decision); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 89-90 (1985) (introducing the author’s own theory of practical reasoning).

90. Van Zandt, *supra* note 89, at 778 (footnotes omitted). In addition, practical reason often is described as or labeled “pragmatism, intuitionism, prudence, [or] common sense.” *Id.*

91. Eskridge & Frickey, *supra* note 67, at 323.

92. *Id.*

93. *Id.*

94. *Id.* at 324.

95. *Id.*

96. “In practical reasoning we reason from ends to means—from our aims and needs to conclusions about what to do.” Wellman, *supra* note 89, at 87. “[W]e consider the merits of decisions and plans of action. We are not concerned whether some state of affairs is true or false, but whether instead the plan or decision will serve our purposes and gratify our desires.” *Id.* at 90.

97. Eskridge & Frickey, *supra* note 67, at 323.

98. By antifoundationalist, Posner means that the pragmatist philosophers had few or no absolutes but approached inquiry with a flexibility and a certain sense that virtually everything in life is a relative matter of degree. See POSNER, JURISPRUDENCE, *supra* note 7, at 78-82, 462-66 for Posner’s views on authority and truth as he understands those concepts. By contrast, a foundationalist “seeks [or endorses] an objective ground (‘foundation’) that will reliably guide the interpretation of all statutes in all situations.” Eskridge & Frickey, *supra* note 67, at 324-25.

Specifically, Posner describes his concept of pragmatism as “looking at problems concretely,

pragmatic philosophers such as William James, John Dewey, and Richard Rorty.⁹⁹ Posner paints his pragmatism as essentially down-to-earth common sense with a “ ‘future-oriented instrumentalism.’ ”¹⁰⁰

To be sure, a figure as prolific and complex as Posner is as hard to pigeonhole as are the pragmatist and practical reason movements in law. A significant portion of the academic legal community would probably dispute our reading of Posner's scholarship. Some find him facially inconsistent or ambiguous.¹⁰¹ Some argue that Posner continues to be dominated by the wealth-maximizing economist he claims to have left in the dust a decade or more ago.¹⁰²

Others see his proclaimed pragmatism as considerably less moored to traditional notions of judicial restraint and deference but have different reactions to the modern, more flexible Posner. For example, Stanley Fish and Sanford Levinson largely approve.¹⁰³ They perhaps see Posner's views becoming more like their own in his transition from economic analysis and standard conservative judging to a more sensitive and less rigid jurisprudence.¹⁰⁴ Others are less sanguine. In a brief but perceptive analysis, Jonathan Simon sees Posnerian pragmatism as a more disturbingly unleashed, undisciplined beast.¹⁰⁵

experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the ‘localness’ of human knowledge, the difficulty of translations between cultures, the unattainability of ‘truth,’ the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.” POSNER, JURISPRUDENCE, *supra* note 7, at 465.

99. See POSNER, JURISPRUDENCE, *supra* note 7, at 27-28; CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY—A GENEALOGY OF PRAGMATISM 69-70 (1989) (arguing that Dewey represents the pinnacle of American pragmatist thought).

100. POSNER, JURISPRUDENCE, *supra* note 7, at 28 (quoting WEST, *supra* note 99, at 5).

101. See, e.g., Eric Rakowski, *Posner's Pragmatism*, 104 HARV. L. REV. 1681, 1704 (1991) (reviewing POSNER, JURISPRUDENCE, *supra* note 7) (“Clear away the confused reflections on truth, objectivity, and demonstrability and little is left in the way of constructive argument.”).

102. See, e.g., Hager, *supra* note 10, at 9 (“There should be no mistake . . . about Posner's continuing allegiance to law and economics jurisprudence.”). In addition, scholars giving negative reviews to *Sex and Reason* can be seen as criticizing Posner for having returned to (or never having left) the single-mindedness of economic analysis. See *supra* notes 12 & 17. Professor Hadfield makes this criticism but also chides Posner for improperly applying his posited economic model. See Hadfield, *supra* note 17, at 480-82, 491-503.

103. See Fish, *supra* note 14, at 1447; Levinson, *supra* note 9, at 1222-28.

104. See, e.g., Fish, *supra* note 14, at 1456.

105. Jonathan Simon, *Pragmatic Jurisprudence: Power Without Guilt*, 56 REV. POL. 465, 466-67 (1991); accord Walt, *supra* note 79, at 327 (criticizing Posner's practical reason theory as relying on unreliable “intuitive or inductive judgments”). Posner presumably regards the pragmatist animal as more housebroken. In any event, he seems to see pragmatism and practical reason as the only path available to reflective judges. See POSNER, JURISPRUDENCE, *supra* note 7, at 33 & n.46 (quoting Voltaire's rejoinder when criticized for having offered no alternative to the Christianity he sought to debunk: “I save you from a ferocious beast and you ask me what I replace it with”!).

Whether Posner's judging has held steadfastly to his jurisprudential theory of adjudication and interpretation presents an interesting question. Several commentators have suggested that he has not.¹⁰⁶ A comprehensive evaluation of Posner's jurisprudence is obviously beyond the scope of our article. In the limited context of *Troupe* and Posner's approach to the Pregnancy Discrimination Act, it appears that Posner has not lived up to the intellectual tenets proffered in his academic writing. An equally disturbing prospect is that those intellectual tenets may themselves be faulty. We now turn to a description of *Troupe* to examine its failures in light of the basic tenets of discrimination law.

III. BELOW THE SURFACE OF POSNER'S *TROUPE* OPINION

A. *Twisting Title VII, Distorting Evidentiary Burdens, and Rushing to Summary Judgment*

On June 7, 1991, the day before she was to go on her maternity leave, Kimberly Troupe was fired from her job as a sales clerk at Lord & Taylor, a department store chain.¹⁰⁷ At the time of the discharge, her immediate supervisor told her that she was going to be fired because her supervisor believed that Troupe would not return after she had her baby.¹⁰⁸ Troupe had worked for Lord & Taylor, both full-time and part-time, for approximately four years.¹⁰⁹ Her work, according to the opinion, had been "entirely satisfactory."¹¹⁰

About three years after she began working at Lord & Taylor, in December 1990, Troupe had become pregnant and began suffering from morning sickness of "unusual severity."¹¹¹ As a result, in January she asked to return to her former status as a part-time worker, a request Lord & Taylor granted.¹¹² Troupe's morning sickness continued and she appeared late for work or left early a number of times during late January and early February.¹¹³ Lord & Taylor put Troupe on probation.¹¹⁴ Troupe was late a number of times during the probationary period.¹¹⁵ However, despite the defendant's claimed displeasure with Troupe's continued tardiness during probation, it did not fire her during or immediately

106. See, e.g., Cohen, *supra* note 15, at 1118; Shapiro, *supra* note 16, at 1046.

107. *Troupe*, 20 F.3d at 735-36.

108. *Id.*

109. *Id.* at 735.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Troupe "reported late to work, or left early, on nine out of the 21 working days." *Id.*

114. *Id.*

115. *Id.*

upon the expiration of the probationary period.¹¹⁶ Instead, the defendant waited for more than a week, until the eve of her maternity leave, to fire her.¹¹⁷

Troupe sued, alleging gender discrimination, contending that she was discharged in violation of the Pregnancy Discrimination Act.¹¹⁸ The defendant claimed that Troupe was fired solely because of her lateness and moved for summary judgment.¹¹⁹ The district court granted the motion,¹²⁰ and the Seventh Circuit panel affirmed with Posner authoring the opinion.¹²¹

The panel's decision appears to have rested on two related theories advanced by Posner. First, plaintiff was unable to create any triable issues of fact because, given the evidence in the record, a reasonable jury could not find that defendant had fired plaintiff because of her pregnancy.¹²² This conclusion rests on an improper application of the evidentiary constructs set forth in Supreme Court precedent, combined with an improper view of the use of summary judgment, to decide Title VII¹²³ cases.

The second theory is inextricably linked to the first. It posits that even if the plaintiff were able to prove that the defendant fired her because she was about to begin a maternity leave from which the defendant believed she would not return, this proof would not constitute a violation of the Pregnancy Discrimination Act unless the plaintiff were able to prove that the defendant had treated a similarly situated nonpregnant employee in a different manner.¹²⁴ This conclusion rests on a simplistic, narrow, crabbed reading of the Pregnancy Discrimination Act and ignores, once again, the well-established burdens of production and persuasion necessary to decide a Title VII case.

116. *See id.* at 735-36.

117. *See id.* at 735, 737. According to the opinion, the defense attorney stated at oral argument that Lord & Taylor employees generally receive one-half of their regular pay during a maternity leave. *Id.* at 736. It is unclear from the record and the court's opinion whether the maternity leave included health insurance or other employee benefits. *See id.* We interpret this omission to mean that the court assumed that any maternity leave plan providing for one-half pay also undoubtedly provided for continuation of the employee's health insurance during the leave. In our experience, employee leaves are actually more likely to provide for continued benefits during the time of the leave than to pay continued salary in whole or in part. The opinion found no indication of the length of the leave. *Id.* at 739.

118. *See id.* at 736.

119. *See id.* at 736, 737.

120. *Id.* at 736.

121. *Id.* at 735, 739. Judges Easterbrook and Ripple were the others on the panel. *Id.* at 735.

122. *See id.* at 737.

123. *Id.* at 737-39.

124. *Id.* at 738-39.

1. Ignoring the Mixed Motives Construct

Kimberly Troupe's complaint alleges a violation of Title VII of the Civil Rights Act of 1964,¹²⁵ as amended by the Civil Rights Act of 1991.¹²⁶ Troupe responded to the defendant's motion for summary judg-

125. See *id.* at 735-36 (relying on the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993))).

126. See *Troupe*, 20 F.3d at 735-36 (relying on Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (Supp. V 1993))). The defendant could argue, however, that the 1991 Act should not apply retroactively to the case because Lord & Taylor's allegedly discriminatory conduct took place before the enactment of the 1991 Act. Although the suit was litigated after the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C., 16 U.S.C., and 42 U.S.C.), neither the district court opinion nor Posner's opinion addresses the question of whether any or all of the provisions of the Act, conferring rights to a jury trial and compensatory and punitive damages, see 42 U.S.C. § 1981a(b)-(c) (Supp. V 1993), apply retroactively to the case. The 1991 Act was enacted into law on November 21, 1991 and contains a provision stating that the provisions of the Act "take effect upon enactment." Pub. L. No. 102-166, § 402(a), 105 Stat. 1071, 1099 (1991). In *Troupe*, the alleged illegal conduct occurred in June 1991, five months before the statute was enacted. *Troupe*, 20 F.3d at 735. The complaint was not filed until after enactment. See *Troupe v. May Dep't Stores Co.*, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751, at *2 (N.D. Ill. June 3, 1993). The trial and appellate courts should have discussed whether the provisions of the 1991 Act applied where the complaint was not filed until after the Act took effect but the alleged wrongful conduct took place before enactment.

The answer to this question is relevant to the *Troupe* result in two respects. First, if the Civil Rights Act of 1991 does not apply retroactively to *Troupe*, there would be no right to a jury. See 42 U.S.C. § 1981a(c) (Supp. V 1993) (granting jury trial in Title VII cases). That *Troupe* may not have had a right to a jury trial does not affect our conclusion, however, that the court of appeals wrongfully affirmed the lower court's grant of summary judgment. See *infra* Part III.A.1. The factfinder, whether it be the judge or jury, should decide issues of fact at trial when disputed intent exists upon which live witnesses will shed light on the issue. See FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (setting forth summary judgment standard). If there is a right to a jury trial, however, the improper grant of summary judgment will not only deny the statutory right but also may violate the Seventh Amendment. See U.S. CONST. amend. VII (granting a right to trial by jury in "suits at common law").

Second, the Act overrules in part the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (plurality opinion) (finding that defendants in mixed motive cases can be absolved of liability with a showing that they "would have made the same decision even" if impermissible discrimination had not occurred). Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m) (Supp. V 1993)) (permitting recovery where illegal discrimination "was a motivating factor" in an employment decision). If that section does not apply retroactively, *Price Waterhouse*, rather than the 1991 Act, sets the standard against which we must judge Posner's analysis assuming that *Troupe* presents a mixed motives case. See *infra* notes 132-44 and accompanying text.

After *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1506-08 (1994) (holding that the right to a jury trial cannot be applied retroactively in a case pending on appeal when the Civil Rights Act of 1991 was enacted because the Act links the right to a jury trial to the grant of compensatory and punitive damages) and *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1514-15 (1994) (holding that § 101 of the Civil Rights Act of 1991, which overruled *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), is not retroactive), it appears that the parts of the new statute granting a right to a jury trial, 42 U.S.C. § 1981a(c)(1) (Supp. V 1993), and overruling *Price Waterhouse*, 42 U.S.C. § 2000e-2(m), do not apply retroactively to *Troupe*. Arguably, *Landgraf* and *Rivers* could be distinguished because both cases were pending on appeal at the time the statute was enacted, whereas *Troupe* had not yet filed her suit at the time of enactment. See *Rivers*, 114 S. Ct. at 1514; *Landgraf*, 114 S. Ct. at 1488. But the

ment by submitting direct and circumstantial evidence of discrimination. The direct evidence was her supervisor's comment immediately before Troupe was fired that she "was going to be terminated because [the supervisor] didn't think [Troupe] was coming back to work after [she] had [her] baby."¹²⁷ Her superintendent's unsupported belief, either real or feigned, totally contradicted the evidence in the record. Troupe averred in her affidavit that she had never told her supervisor that she did not intend to return after the birth of her baby and that it was her intention to return to the job.¹²⁸ The defendant responded by claiming that it did not fire Troupe because of her impending maternity leave, but rather, it fired her because she had been late for work a number of times during her pregnancy.¹²⁹

The circumstantial evidence Troupe submitted in response to the motion for summary judgment was the suspicious timing of her termination and various documents, including her doctor's notes to her supervisor asking to excuse Troupe for her lateness due to morning sickness and her supervisor's notes in response that Troupe had been late with "no excuses."¹³⁰ This evidence suggests two possible evidentiary constructs: the

language in *Landgraf* and *Rivers* focuses heavily on the time when the conduct occurs as the key date in determining whether the statute should apply; both seem to assume that if the conduct occurs before enactment, the Act will not apply. See *Rivers*, 114 S. Ct. at 1514-14; *Landgraf*, 114 S. Ct. at 1489. Although we may disagree with the result in *Landgraf* and *Rivers*, if Posner reached the conclusion implicitly in *Troupe* that the 1991 Act should not apply retroactively, we cannot fault his result given the lack of clarity with which Congress addressed the issue. In fact, given the political compromises that had to be reached to pass the Civil Rights Act of 1991, it appears that Congress decided to leave the clause concerning retroactivity ambiguous, allowing the courts to determine the question. See *Rivers*, 114 S. Ct. at 1516-17 (discussing effect of President Bush's veto of a 1990 version of the Act on language concerning retroactivity). If the 1991 Act did not apply retroactively to *Troupe*, see *supra* note 126, the court would apply the existing antidiscrimination provisions of the Civil Rights Act of 1964 as amended. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 2000e-2 (1988)); *supra* note 126. It is unclear from the record whether the defendant expressly raised the retroactivity issue. The district judge's opinion states that the plaintiff brought suit pursuant to the Civil Rights Act of 1964. *Troupe*, 1993 U.S. Dist. LEXIS 7751, at *3. Posner's opinion does not state whether the court was applying the Civil Rights Act of 1964 or the new amendments to the Act passed in 1991. Rather, it focuses on the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988). See *Troupe*, 20 F.3d at 735. Because it appears that the district court applied the earlier act, *Troupe*, 1993 U.S. Dist. LEXIS 7751, at *3, and subsequent cases strongly suggest that the 1991 Act would not apply to *Troupe*, see *supra* note 126, we analyze Posner's opinion initially assuming that the earlier version of the law applied to the case. We also will comment on how the Act would change the analysis concerning the plaintiff's proof and the motion for summary judgment.

127. *Troupe*, 20 F.3d at 736.

128. Aff. of Kimberly Hern Troupe, Mar. 5, 1993, at ¶ 24. This testimony is especially credible because, according to her attorney, Troupe did return to work after her baby was born in a retailing job at a competitor's establishment. Telephone Interview with Ernest Rosiello, Esq., counsel for plaintiff (July 20, 1994).

129. *Troupe*, 1993 U.S. Dist. LEXIS 7751, at *8-*9.

130. See Lord & Taylor, Record of Interview completed by Jennifer Rauch, Feb. 18, 1991 (Pl.'s

“mixed motives” approach¹³¹ and the *McDonnell Douglas* disparate treatment approach.¹³² Posner ignores the possibility of a mixed motives standard and applies a combination of a distorted *McDonnell Douglas* analysis with an overall gestalt approach.

Before the enactment of the 1991 Civil Rights Act, cases involving mixed motives were governed by *Price Waterhouse v. Hopkins*,¹³³ a case that determined the proper allocation of the respective burdens of proof in discrimination cases presenting mixed motives. Although there were various opinions involving issues of mixed motives written by the Supreme Court, in *Price Waterhouse* a majority of the Supreme Court Justices agreed that when the plaintiff can prove by “direct evidence”¹³⁴ that an illegitimate reason—that is, a reason related to race, sex, color, and national origin—was a “substantial”¹³⁵ factor in the employment decision, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even absent the illegitimate motive.¹³⁶ According to *Price Waterhouse*, if the defendant is able to meet its burden of proof, it avoids liability under Title VII.¹³⁷

Ex. G. in Opp’n to Summ. J., *Troupe* app. at A-45).

131. See *Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion) (overruled by 42 U.S.C. § 2000e-2m (Supp. V 1993)).

132. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

133. 490 U.S. 228 (1989).

134. *Id.* at 276 (O’Connor, J., concurring). It remains unclear, however, that the plaintiff must prove discrimination, after *Price Waterhouse*, in order to benefit from the shift in the burden of proof to the defendant, by direct evidence. A plurality of the Supreme Court (Justices Brennan, Marshall, Blackmun, and Stevens) seemingly would not require direct evidence of discriminatory animus, i.e., evidence not requiring an inferential leap to support an initial finding of unlawful discrimination. See Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 158 & n.91 (1993). The concurrence authored by Justice O’Connor, however, would require such direct evidence. *Price Waterhouse*, 490 U.S. at 276 (O’Connor, J., concurring). It is also unclear whether Justice White would require proof by direct evidence, but he states that he adopts Justice O’Connor’s characterization of the plaintiff’s burden. *Id.* at 259 (White, J., concurring). Because either Justice O’Connor or Justice White’s support would have been necessary to form a majority, it appears that direct evidence may be required under *Hopkins*. McGinley, *supra*, at 158 n.91. The 1991 Act does not require direct evidence. It merely requires that a plaintiff demonstrate that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

135. The plurality would require the plaintiff to prove that illegal discrimination was merely a “motivating” factor. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion). The concurrences used the term “substantial” factor. *Id.* at 259 (White, J., concurring); *id.* at 265 (O’Connor, J., concurring). The difference between these two standards is unclear, but arguably the concurring Justices saw the substantial factor test as at least slightly more rigorous. Congress adopted the plurality’s “motivating” factor test, see *id.* at 258, when it passed the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

136. *Price Waterhouse*, 490 U.S. at 244-45, 258 (plurality opinion); *id.* at 259-60 (White, J., concurring); *id.* at 261 (O’Connor, J., concurring).

137. This portion of the Supreme Court opinion was overruled legislatively. See 42 U.S.C. §

In Troupe's case, the submission of her superintendent's statement combined with the timing of her discharge was sufficient evidence from which a reasonable factfinder could conclude that the plaintiff's pregnancy was a substantial factor in the decision to fire her. A reasonable factfinder could conclude that the defendant fired Troupe, at least in part, because it did not want to pay her maternity benefits or to hold her job open because it believed that Troupe did not intend to return to the job after the birth of her baby.

This finding, under *Price Waterhouse*, would shift the burden to Lord & Taylor to prove that it would have fired Troupe even if she had not been pregnant and about to take maternity leave.¹³⁸ At this point, Lord & Taylor could submit evidence of Troupe's tardiness in order to try to convince the factfinder that it would have fired her for lateness in spite of its illegitimate motivation in firing her.¹³⁹ If the defendant could convince the factfinder that it would have fired Troupe anyway, it would be relieved of all liability.¹⁴⁰ If the defendant could not prove that it would have fired Troupe absent the discriminatory reason, it would be subject to the remedies provided by the 1964 Act.¹⁴¹

In *Troupe*, the federal district court concluded that the plaintiff had no direct evidence of discrimination, and therefore, could not employ the mixed motives approach to prove her case.¹⁴² Defining direct evidence as evidence tending "to establish the fact without the need for inference or presumption,"¹⁴³ the district court stated that the "plaintiff's allegations regarding supervisor Rauch's comment do not directly speak to the issue of discrimination."¹⁴⁴ Therefore, the court addressed the case under the *McDonnell Douglas* analysis—the indirect method of proof described below.¹⁴⁵

2000e-2(m) (Supp. V 1993).

138. See *supra* notes 135-36 and accompanying text. Under the 1991 Act, the burden would shift to the defendant to prove the same thing. 42 U.S.C. § 2000e-5(g) (Supp. V 1993). The difference is the effect that this proof would have. Under *Price Waterhouse*, if a defendant employer meets this burden, it is relieved of all liability. *Price Waterhouse*, 490 U.S. at 258. Under the 1991 Act, if the defendant meets this burden, it is relieved of backpay, and reinstatement, compensatory and punitive damages. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. V 1993). The defendant still would be liable, however, for attorneys fees and costs that are directly attributable to the claim of an impermissible employment practice, as well as declaratory and injunctive relief other than reinstatement. *Id.*

139. *Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion); *id.* at 259-60 (White, J., concurring).

140. *Id.* at 258 (plurality opinion); see *id.* at 259-60 (White, J., concurring).

141. See 42 U.S.C. § 2000e-5(g), (k) (1988); *Price Waterhouse*, 490 U.S. at 244-45.

142. *Troupe v. May Dep't Stores*, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751, at *7 (N.D. Ill. June 3, 1993).

143. *Id.*

144. *Id.*

145. *Id.* at *8; see *infra* notes 202-49 and accompanying text.

The trial court did not explain why it reached the conclusion that Troupe's supervisor's statement was not direct evidence of pregnancy discrimination.¹⁴⁶ In *Randle v. LaSalle Telecommunications*,¹⁴⁷ the Seventh Circuit explained that in order to shift the burden in a mixed motives case, the evidence need only: (1) "speak directly to the issue of discriminatory intent" and (2) "relate to the specific employment decision in question."¹⁴⁸

Troupe's evidence met this test of direct evidence.¹⁴⁹ First, there is no question that it related to the specific employment decision in question. Her supervisor, immediately before her firing, told her that she would be fired because the supervisor did not believe that Troupe would be returning from her pregnancy leave.¹⁵⁰ Although the supervisor claimed not to have the authority to discharge Troupe, this lack of authority is inconsequential. The supervisor evidently had knowledge that Troupe was about to be terminated and she gave Troupe the information she possessed.¹⁵¹

Second, although the supervisor did not say that Troupe would be fired because of her pregnancy, this statement comes very close to making a damning admission. Certainly, because Title VII forbids making adverse employment decisions on the basis of sexual stereotyping,¹⁵² the admission that the defendant intended to fire Troupe because of a stereotype provides direct evidence of pregnancy discrimination.¹⁵³ This evidence is a far cry from the "stray remarks" that Justice O'Connor explains are insufficient to prove that gender played a part in the employment decision.¹⁵⁴

On appeal, Judge Posner refused to analyze the case in terms of direct and indirect evidence or in terms of single or mixed motives. Instead, he concluded that a plaintiff can survive summary judgment by presenting different kinds and combinations of evidence from which a rational factfinder could conclude that the defendant had discriminated against her because she was a member of a protected group.¹⁵⁵ Although this approach may appear correct, its deployment in this case ignored the method

146. See *Troupe*, 1993 U.S. Dist. LEXIS 7751, at *7.

147. 876 F.2d 563 (7th Cir. 1989).

148. *Id.* at 569.

149. See *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 744 n.3 (N.D. Ill. 1993) (stating judge's opinion that, under *Price Waterhouse*, the defendant's statement that if the plaintiff had not taken pregnancy leave, she would not have been demoted is direct evidence that shifts the burden of persuasion to the defendant).

150. *Troupe*, 20 F.3d at 735-36.

151. See *id.*

152. See *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116-20 (D.D.C. 1985).

153. See *supra* text accompanying notes 147-48.

154. See *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

155. *Troupe*, 20 F.3d at 736.

of proof necessary in a mixed motives case.¹⁵⁶

In spite of the Supreme Court's holding in *Price Waterhouse* that courts must shift the burden of proof to the defendant once the plaintiff proves that discrimination was a substantial factor in the employment decision,¹⁵⁷ Posner neither discussed nor applied the "mixed motives" approach.¹⁵⁸ He avoided its application by relying on a cramped, improper reading of Title VII law in general, and the Pregnancy Discrimination Act in particular.

Posner concluded as a matter of law that Troupe could not prove illegal discrimination even assuming Troupe proved that Lord & Taylor fired her in order to avoid paying maternity benefits or because it believed that she would not return after her leave.¹⁵⁹ According to Posner, Troupe could not prove a violation of the Pregnancy Discrimination Act unless she produced evidence of a similarly situated nonpregnant employee who was not fired before taking disability leave.¹⁶⁰ In the absence of such

156. The question is who should bear the risk of uncertainty at the pretrial stage of the litigation. Because the defendant has admitted that it was going to fire the plaintiff because of its fears that she would not return, *id.* at 735-36, a reason that is so closely linked to the plaintiff's pregnancy and that it, in itself, amounts to illegal sexual stereotyping of the pregnant woman's future work intentions, the burden should rest on the defendant to prove that it treated similarly situated nonpregnant employees the same as it treated Troupe.

This is not a new or radical idea. Even where there is no evidence of mixed motives, courts faced with direct evidence of discrimination or a facially discriminatory policy have shifted the burden of proof to the defendant to prove that either it treated nonpregnant employees similarly, or that nonpregnancy was a bona fide occupational qualification for the job, *see* 42 U.S.C. § 2000e-2(e) (1988), thereby relieving the defendant of liability. *See* *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (placing onus of proof on employer to establish bona fide occupational qualification defense, under 42 U.S.C. § 2000e-2(e) (1988), where employer prohibited women of child-bearing age from working in a battery manufacturing division because of potential lead danger to unborn fetuses); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648-49, 648 n.5 (8th Cir. 1987) (noting that the defendant made no attempt to prove that it treated nonpregnant individuals who had similar physical or medical restrictions on the weight they could lift the same as plaintiff, and holding that the defendant could escape liability only if it proved that nonpregnancy was a bona fide occupational qualification for the job); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1548-49 (11th Cir. 1984) (holding that where x-ray technician is removed from her position during pregnancy to protect the fetus, employer must demonstrate that nonpregnancy is a bona fide occupational qualification for the job).

157. *See supra* notes 133-37 and accompanying text.

158. *See Troupe*, 20 F.3d at 736-37.

159. *Id.* at 737-38.

160. *Id.* at 738-39. Posner's approach requires the plaintiffs to present at the summary judgment stage comparative evidence of a similarly situated nonpregnant employee in order to survive the defendant's motion for summary judgment. *See id.* Intuitively, this requirement is burdensome for the plaintiffs because it may be difficult, if not impossible, to find a comparable situation, especially where the employer is a small business. By chance or misfortune, there may not be another employee to whom a pregnant employee can compare herself even in the face of egregious intentional discrimination. Compounding the problem is the likely reluctance of employer defendants to produce this type of evidence during discovery if it is damaging to their case. As a result, under Posner's comparative evidence mandate, many pregnant employees who are fired precisely because they are pregnant will

proof in response to the defendant's motion for summary judgment, he concluded that the plaintiff must lose the case because she has the burden of proving discrimination at trial.¹⁶¹

Posner supports his decision by claiming that firing Troupe would be perfectly permissible under the discrimination laws if the company would fire a similarly situated male who is about to take medical leave.¹⁶² The Pregnancy Discrimination Act, according to Posner, does not require the employer to grant special treatment to the pregnant employee; it guarantees only that the pregnant employee be treated the same as other employees.¹⁶³

In reaching this conclusion, however, Posner disregards the evidentiary construct of *Price Waterhouse*, a procedure that would shift to the employer the burden to prove that it treated similarly situated nonpregnant employees the same.¹⁶⁴ By disregarding the mixed motives construct, Posner alters substantive Title VII law, grafting onto substantive discrimi-

lose their substantive rights based on the sheer difficulty of meeting Posner's new procedural requirement. The mixed motives approach, in contrast, would more effectively protect the plaintiffs from illegal pregnancy discrimination. To Posner's credit, he suggests that a remedy might be available to plaintiffs such as Troupe even in the absence of such comparative evidence. *See id.* at 738-39. Troupe, however, was not entitled to such consideration because she did not argue for it. *See id.* at 739 ("What to do in such a case is an issue for a case in which the issue is raised.")

161. *Id.* at 738; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (discussing plaintiff's burden of proof).

162. *Troupe*, 20 F.3d at 737-39.

163. *Id.* at 738-39. There has been much commentary on what "equal" treatment means in this context. *See* Melissa Feinberg, Note, *After California Federal Savings & Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 141, 144-46 (1989). Some feminists believe women should be treated exactly the same as men in order to achieve true equality. *Id.* at 144-45. This view holds that even though women may be different from men, the only way to true equality is through assimilation into the male workplace. *See id.* The notion is that to grant women any special privileges based on their pregnancies or other differing characteristics would open the door to protective legislation that perpetuates inaccurate stereotypes about women. *Id.* at 145. Posner's reading of the Pregnancy Discrimination Act appears to adopt this view. *See Troupe*, 20 F.3d at 738.

The "differences" or pluralist approach argues, on the other hand, that the law must take into account the biological differences (and perhaps the social and psychological differences) of women in order to achieve true equality for women. Feinberg, *supra*, at 145-46. *See generally* Nancy E. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORD. L. REV. 699 (1986) (discussing the feasibility and legality of legislation requiring employers to grant maternity leave); Herma H. Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (discussing ways to accommodate pregnancy in the workplace in spite of past use of biological differences between men and women to justify exclusion of women from the male-dominated world).

For a recent example of insensitivity to the impact of pregnancy and consequent job reassignment by an employer, and a court's quick acceptance of the employer's perspective, see *Elie v. K-Mart Corp.*, 64 Fair Empl. Prac. Cas. (BNA) 957, 959-60 (E.D. La. 1994). Unfortunately, *Elie*, like *Troupe*, has the potential to create influential precedent. *See* Stephanie B. Goldberg, *Pregnancy Discrimination—Plaintiffs Face Disparate Impact Hurdle*, A.B.A. J., June 1994, at 66, 66 (discussing *Elie* and *Troupe*).

164. *See Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion).

nation law the procedural requirement of demonstrating that nonpregnant employees were treated differently.¹⁶⁵ His error looms even larger in the summary judgment context.¹⁶⁶ His improper placement of the burdens of production and persuasion on a plaintiff who is defending against a motion for summary judgment wrongfully denied her the right to have a neutral factfinder decide her discrimination claim against her employer.¹⁶⁷

165. See *supra* note 160 and accompanying text.

166. In cases whose facts are very similar to those in *Troupe*, other courts have concluded that summary judgment is inappropriate. See, e.g., *Thompson v. La Petite Academy, Inc.*, 838 F. Supp. 1474, 1477-78 (D. Kan. 1993) (denying the defendant's motion for summary judgment based on employer's comment that the plaintiff's attitude had changed since she became pregnant); *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 742-43 (N.D. Ill. 1993) (denying the defendant's motion for summary judgment because a genuine issue of material fact existed as to whether the defendant replaced the plaintiff while she was on maternity leave due to hostility toward her pregnancy); *Estrada v. Donnelly Corp.*, 708 F. Supp. 834, 837 (W.D. Mich. 1988) (denying the defendant's motion for summary judgment where the plaintiff was allegedly fired for her absenteeism rather than as a result of her pregnancy).

167. Posner relies on two analogies to justify the panel's conclusion. First, he employs an inapt analogy to a hypothetical race discrimination claim. *Troupe*, 20 F.3d at 738. Posner compares *Troupe's* situation to that of a black employee who, just before he goes on leave for a kidney operation, is fired so that the employer can save the cost of the leave. *Id.* Concluding that the black employee could not prevail against his employer in a race discrimination claim, Posner states that this would not make out a case of race discrimination unless the employer were not just as heartless in dealing with white employees. *Id.*

The analogy between the black kidney transplant patient and *Troupe* is so inappropriate that it raises questions as to the objectivity with which Posner approaches the subject matter of the suit. The black kidney patient does not undergo transplant surgery because he is black. Rather, he happens to be a man of color who also needs a kidney transplant. A working woman like *Troupe*, on the other hand, must take a maternity leave precisely for the reason that the law protects her from discrimination: her pregnancy.

But Posner also advances a second hypothetical that at first appearance is more difficult to refute. He compares *Troupe* to an imaginary Mr. *Troupe* who, because of illness, arrives at work late and takes a planned medical leave. *Id.* Posner concludes that if the employer would have also fired Mr. *Troupe* before his medical leave in order to save itself the cost of the medical benefits or because it did not believe that Mr. *Troupe* would return from his leave, then Ms. *Troupe* cannot claim that she was discriminated against because of her pregnancy. *Id.*

This second analogy, although more convincing than the first, does not save the day for Lord & Taylor. It is infirm for a number of reasons: the failure to employ the mixed motives approach and the difficulty many employees will have obtaining suitable comparative evidence, see *supra* note 160 and accompanying text; the discriminatory stereotype associated with the pregnant employee that she will not return after her maternity leave, see *supra* text accompanying notes 152-53; and the evidence of congressional intent and purpose in passing the Pregnancy Discrimination Act which should be read to prohibit firing a pregnant employee in order to avoid paying maternity benefits. Cf. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-92 (1987) (reading the Pregnancy Discrimination Act expansively and finding it permits states to require maternity leave benefits, given the Pregnancy Discrimination Act's original purpose of protecting pregnant women from employment discrimination).

Troupe's misleading hypotheticals are vulnerable to counter-hypotheticals. For example, one might wonder if an employer sued under the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. V 1993) and scattered sections of 47 U.S.C.), could benefit from summary judgment if it fired an otherwise capable worker who was frequently tardy due to the side effects of chemotherapy. See 42 U.S.C. § 12112(a) (Supp. V

2. Sexual Stereotyping as a Matter of Law

Posner would likely respond that the comments made by the defendant are not sufficient as a matter of law to prove that pregnancy was a substantial factor in the decision to terminate Troupe.¹⁶⁸ Apparently, he would argue that firing Troupe based on her predicted failure to return to work is not pregnancy discrimination, but rather an employer's decision based on her absence from work.¹⁶⁹ The basis for this argument is *Hazen Paper Co. v. Biggins*¹⁷⁰ where the Supreme Court held that firing an older employee solely because his pension was about to vest did not constitute age discrimination under the Age Discrimination in Employment Act (ADEA).¹⁷¹ But this reasoning ignores precedent holding that an employer who makes an adverse employment decision as a result of sexual stereotyping is guilty of sex discrimination under Title VII.¹⁷² It distorts the holding in *Hazen Paper* and it flouts the legislative purpose of Title VII generally and, more specifically, that of the Pregnancy Discrimination Act.¹⁷³

In *Price Waterhouse*, the district court found that the partnership of a large accounting firm had denied a female accountant's bid for partnership, in part, because it had engaged in illegal sexual stereotyping.¹⁷⁴ For example, one partner had described Hopkins as "macho,"¹⁷⁵ while another said that she should "take a course in charm school."¹⁷⁶ Others advised Hopkins to "walk more femininely, talk more femininely, wear

1993) (prohibiting discrimination against a "qualified individual with a disability," as defined in 42 U.S.C. § 12111(8)-(10) (Supp. V 1993)). Where the source of the problem is so closely linked to the reason for discharge, pinpointing the employer's real reasons would seemingly require a trial on its merits.

168. See *supra* note 135 and accompanying text.

169. *Troupe*, 20 F.3d at 738. But see *Crnokrak*, 819 F. Supp. at 739, 743-44 (rumors that a woman on pregnancy leave is not going to return, among other factors, do not absolve the employer from liability for replacing her if the employer had discriminatory animus).

170. 113 S. Ct. 1701 (1993).

171. *Id.* at 1705-08 (interpreting Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993))). The ADEA prohibits employment discrimination on the basis of age, see 29 U.S.C. § 623(a) (1988), or against persons 40 years of age or older, 29 U.S.C. § 631(a) (Supp. V 1993).

172. See *Price Waterhouse*, 490 U.S. at 250-51.

173. The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)) was "intended . . . to end discrimination against pregnant workers." *Guerra*, 479 U.S. at 286. The Supreme Court has determined that the Act will be construed to effect its purposes, and not necessarily according to its language alone. *Id.* at 284. The legislative history of the Act cited by the Court suggests that women, after the passage of the Act, should no longer have to choose between a career and a family. *Id.* at 286 n.19 (quoting 124 CONG. REC. 21,442 (1978) (remarks of Rep. Tsongas)).

174. 490 U.S. at 236-37 (plurality opinion).

175. *Id.* at 235 (plurality opinion) (internal quotation marks omitted).

176. *Id.* (plurality opinion) (internal quotation marks omitted).

make-up, have her hair styled, and wear jewelry."¹⁷⁷ The Supreme Court plurality and concurring opinions agreed that adverse employment decisions resulting from sex stereotyping violate Title VII.¹⁷⁸

Like Ann Hopkins, Kimberly Troupe appears to have fallen victim to sex stereotyping. Drawing all reasonable inferences in Troupe's favor, as is the court's obligation on a motion for summary judgment,¹⁷⁹ the panel should have reversed the lower court's summary judgment. It should have concluded that a reasonable factfinder could conclude that the defendant fired Troupe, at least in part, because it decided, without factual basis to support its belief, that Troupe would not return to work after her baby was born.¹⁸⁰ Lord & Taylor would most likely not have reached this conclusion for a similarly situated nonpregnant employee who was about to take disability leave.¹⁸¹ Posner approved the use of a stereotype when he permitted the defendant to assume that Troupe would not return to work after the birth of her baby.¹⁸² It is the prevalence of exactly this type of stereotype that the Pregnancy Discrimination Act was enacted to overcome.¹⁸³

Posner characterizes the defendant's actions as distinct from discrimination based on pregnancy.¹⁸⁴ Rather, he concludes, even if one were to accept the veracity of the supervisor's admission, one could conclude only that the defendant discriminated against the plaintiff on the basis of her absence from work.¹⁸⁵ This is not pregnancy discrimination, he concludes, unless the defendant treated other workers who went on disability leave differently.¹⁸⁶ In support of this argument, Posner relies on *Hazen*

177. *Id.* (plurality opinion) (internal quotation marks omitted).

178. *Id.* at 250-51 (plurality opinion); *id.* at 272 (O'Connor, J., concurring); *see id.* at 260 (White, J., concurring) (referring to defendant's "unlawful motive").

179. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

180. *See Troupe*, 20 F.3d at 736.

181. A nonpregnant employee could truly be similarly situated only if the leave he was about to take would cure him of the disability for which the leave was designed, just as maternity leave will "cure" a new mother of her physical disability.

182. *See Troupe*, 20 F.3d at 737-38.

183. *See supra* note 173; *accord supra* notes 37-38.

184. *Troupe*, 20 F.3d at 737-39.

185. *Id.* at 738-39.

186. *Id.* Even if this is true, the defendant's intent is relevant to the question of whether the plaintiff was dismissed as a result of discriminatory animus. *See Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 743 (N.D. Ill. 1993). This intent is difficult to ascertain absent a trial. *See id.* Troupe presented evidence to the court from which a reasonable factfinder could conclude that her supervisor harbored hostilities toward her because of her pregnancy. This evidence includes the fact of Troupe's morning sickness, *see Troupe*, 20 F.3d at 735, 737, and an internal report of her supervisor stating that Troupe had "No Excuses" for her lateness, *Troupe v. May Dep't Stores*, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751, at *6-*7 (N.D. Ill. June 3, 1993). From these two bits of evidence, which make it obvious that the supervisor knew at the time she wrote her "No Excuses" comment that

Paper.¹⁸⁷ This reliance, however, is misplaced. In *Hazen Paper*, the defendant had a pension plan that required its employees to work for the company for ten years before vesting.¹⁸⁸ The plaintiff, a 62-year-old man, was fired only a few weeks before his pension vested, and sued pursuant to the ADEA.¹⁸⁹ The Court held unanimously that discrimination against an older employee on the eve of pension vesting does not in and of itself violate the ADEA.¹⁹⁰

The Court reasoned that although there is often a correlation between age and years required for a pension to vest, a decision to fire an employee solely to avoid pension vesting is distinct from the decision to fire someone because he is too old for the job.¹⁹¹ In reaching this decision, the Court invoked prior caselaw on the legislative history of the ADEA.¹⁹² According to the Court, Congress passed the ADEA because it was concerned that employers were making employment decisions regarding elderly persons based on "inaccurate and stigmatizing stereotypes" that an employee's productivity and competence decline with age.¹⁹³ Deciding to fire an employee solely because he has more than nine years of service and his pension will vest when he reaches ten years of service does not constitute age discrimination because the stigmatizing stereotype "would not have figured in" the decision.¹⁹⁴ This lack of stigmatizing stereotype is the basis for the Court's decision in *Hazen Paper*.

Moreover, the Supreme Court noted that although there often may be a correlation between age and the vesting of one's pension,¹⁹⁵ the two factors are not the same.¹⁹⁶ An employee at defendant's workplace could have his pension vest before reaching age forty, the age at which the ADEA protects plaintiffs from discrimination.¹⁹⁷ Thus, the vesting of the pension and the worker's age, according to the Court, are analytically distinct.¹⁹⁸ Not so for pregnancy leave and pregnancy. A woman's preg-

it was untrue, a reasonable factfinder could conclude that her supervisor harbored hostility toward the plaintiff based on her pregnancy.

187. *Troupe*, 20 F.3d at 738 (citing *Hazen Paper*, 113 S. Ct. at 1707); see *supra* notes 170-71 and accompanying text.

188. *Hazen Paper*, 113 S. Ct. at 1704.

189. *Id.*

190. *Id.* at 1705-08.

191. *Id.* at 1706-08.

192. *Id.* at 1706 (citing *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)).

193. *Id.*

194. *Id.* at 1707.

195. The Court has not addressed whether "disparate impact" theory, however, applies to ADEA cases. *Id.* at 1706. The United States Court of Appeals for the Second Circuit has held that it does. *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

196. See *Hazen Paper*, 113 S. Ct. at 1707.

197. 29 U.S.C. § 623(a) (1988); 29 U.S.C. § 631(a) (Supp. V 1993).

198. We do not intend to imply that we agree with the *Hazen Paper* decision. But that analysis is

nancy leave is inextricably linked to her pregnancy. It is obviously impossible to give birth without being pregnant; it is practically impossible to give birth and recover from the birth experience without a period of disability.¹⁹⁹

Moreover, Posner ignores that the Pregnancy Discrimination Act was passed in part to overcome the damaging stereotypes about women and motherhood that often caused employers to make adverse employment decisions about pregnant women.²⁰⁰ The purpose of the Act, like the purpose of the ADEA, was to make it illegal for the employer to act in response to these stigmatizing, inaccurate stereotypes.²⁰¹

3. Distorting the *McDonnell Douglas* Approach

Where there is no evidence of mixed motives, and the parties rely on circumstantial evidence, courts should employ the approach set forth in *McDonnell Douglas Corp. v. Green*,²⁰² *Furnco Construction Corp. v. Waters*,²⁰³ and *Texas Department of Community Affairs v. Burdine*.²⁰⁴ Under this methodology, courts analyze a disparate treatment case under Title VII by resorting to a three-part method of allocating the burdens of persuasion and production.²⁰⁵ In disparate treatment cases, the plaintiff must prove that the defendant intentionally discriminated against her.²⁰⁶ Because intent is difficult to prove, the Supreme Court departed from the traditional order of proof in order "to ease the evidentiary burdens on employment discrimination plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination."²⁰⁷ Under the *McDonnell Douglas* construct, in order to prove a prima facie case, the plaintiff must prove: (1) she is a member of the protected class; (2) she is qualified²⁰⁸ for the position; (3) she was fired from the position; and (4)

beyond the scope of this article. We recognize that Posner was bound by the *Hazen Paper* case, and, therefore, we would not expect him to challenge the Court's reasoning. We merely intend to show that, assuming *Hazen Paper* is the law, it does not require, nor even endorse, the reasoning and result of *Troupe*.

199. See Kay, *supra* note 163, at 25 & n.137.

200. See *infra* notes 306-28 and accompanying text.

201. See *infra* text and notes 306-28; *supra* text accompanying note 193.

202. 411 U.S. 792, 802-05 (1973).

203. 438 U.S. 567, 575-78 (1978).

204. 450 U.S. 248, 252-56 (1981).

205. See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 214-21 (1993) for a detailed explanation of the *McDonnell Douglas* approach.

206. See *Burdine*, 450 U.S. at 252-56.

207. *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987).

208. Unfortunately, a number of courts have transferred the traditional *McDonnell Douglas* test into a much greater hurdle than it was originally. For example, a number of circuits require a plaintiff

other employees who were not members of the protected class were retained²⁰⁹ in their positions.²¹⁰ Once the plaintiff proves a prima facie

to prove that she was meeting her employer's legitimate expectations in order to prove that she was qualified for the position. See cases cited in McGinley, *supra* note 205, at 231 n.125. Originally, the "qualified" requirement meant merely that the employee possessed the requisite education and training for the position. *Id.* at 230-31. The conversion of the objective "qualified" standard into a more subjective employer expectations standard is unfortunate, because the employer's expectations should be dealt with in the final, or pretext portion of the three-stage approach. At the second stage, the employer attempts to offer a permissible reason for its employment decision. See *Burdine*, 450 U.S. at 254-56. Finally, the plaintiff has the opportunity to prove that the articulated reason is merely a pretext for intentional impermissible discrimination. *Id.* at 256. Here, it should be more difficult to get summary judgment because there are frequently factual questions and issues of intent. Given that the purpose of the *McDonnell Douglas* approach was to aid plaintiffs in proving their cases, see *supra* text accompanying note 207, this collapse of the three stages is harmful to the substantive rights of civil rights plaintiffs. See McGinley, *supra* note 205, at 230-31 & n.125. The Supreme Court probably agrees. In *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), the Court cited the district court's use of *McDonnell Douglas*, and its "qualified" prong, see *McDonnell Douglas*, 411 U.S. at 802, with approval. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2747 (citing *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991) ("[stating that plaintiff] met applicable job qualifications")). This was not the issue before the Supreme Court, however. See *St. Mary's Honor Ctr.*, 113 S. Ct. at 2747.

209. *Cf., e.g., Guerin v. AT & T Co.*, No. C-93-1522, 1994 U.S. Dist. LEXIS 7501, at *9 (N.D. Cal. June 1, 1994) (using Title VII framework in state racial discrimination case). Some courts, when pregnancy discrimination is alleged, may require the plaintiff to prove that she received treatment that was different from that received by similarly situated nonpregnant employees in order to make out the fourth prong of the prima facie case. See *Troupe*, 20 F.3d at 738-39; *cf. White v. Dial Corp.*, No. 91-C6058, 1994 U.S. Dist. LEXIS 6481, at *8 (N.D. Ill. May 16, 1994) (examining treatment of similarly situated male employees in pure sex discrimination); *Guerin*, 1994 U.S. Dist. LEXIS 7501, at *9 (examining treatment of similarly situated white employees in race discrimination case). For the same reason that a higher standard of proof of the plaintiff's qualifications contravenes the purpose of the *McDonnell Douglas* approach, see *supra* note 208, requiring a plaintiff to prove that she received treatment different from nonpregnant employees who faced disabilities of comparable nature and duration, to make out a prima facie case, also imposes a very heavy burden on a pregnancy discrimination plaintiff. See *supra* note 160. As we argue in this article, we believe that the question of differential treatment is one that should be raised in the defendant's articulation and pretext stages of the suit, not at the outset. Another court specifically has found that in pregnancy discrimination cases it is unnecessary to show that a fired pregnant employee was replaced by a nonpregnant person. See *Hargett v. Delta Automotive, Inc.*, 765 F. Supp. 1487, 1493-94 (N.D. Ala. 1991).

210. See *McDonnell Douglas*, 411 U.S. at 802. Some courts have imposed much more rigid requirements to make out a prima facie case than others. See, e.g., *White*, 1994 U.S. Dist. LEXIS 6481, at *8. (requiring sex discrimination plaintiff to prove that she is a member of a "protected class"; that "she performed her job satisfactorily"; that "she suffered an adverse employment action"; and that "she was treated less favorably" than her male counterparts, in order to make out a prima facie case); *Estrada v. Donnelly Corp.*, 708 F. Supp. 834, 836 (W.D. Mich. 1988) (requiring a pregnancy discrimination plaintiff to prove that "she was a member of a protected class, that she was qualified for and performing the job which she held, and that she was terminated based on her pregnant condition"). But see *Randle*, 876 F.2d at 568 (stating that "[t]he initial elements of the prima facie case are relatively simple to prove"). The imposition of more rigid requirements at this stage of the *McDonnell Douglas* analysis defeats the very purpose of this burden shifting approach, which is "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (alteration in original)).

case, a rebuttable presumption of discrimination arises.²¹¹ The burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment decision.²¹² If the defendant does nothing, the plaintiff wins the case.²¹³ Once the defendant articulates its reason, the burden of production shifts back to the plaintiff to prove that the defendant's articulated reason is pretextual.²¹⁴ Upon a finding of pretext, the factfinder is entitled to, but need not, conclude that defendant illegally discriminated.²¹⁵ A conclusion that the defendant discriminated would, of course, make the defendant liable.²¹⁶

In *Troupe*, the trial judge concluded that there was no direct evidence of discrimination that would permit the court to employ a mixed motives analysis.²¹⁷ Therefore, he concluded, the plaintiff must prove her case by the indirect method set forth in *McDonnell Douglas*.²¹⁸ He then quickly dispensed with the case by concluding that the plaintiff had not satisfied the qualification requirement of a prima facie case²¹⁹ because Troupe did not dispute the defendant's evidence that she had a record of tardiness.²²⁰

If the *McDonnell Douglas* test rather than the mixed motives approach applies, Troupe should have survived summary judgment. She easily established a prima facie case. She proved that she was a member of the protected class by virtue of her pregnancy;²²¹ she was qualified for the job because she had been working in the job satisfactorily for almost three years;²²² and she was discharged from the position while other nonpregnant salespersons remained in their positions.²²³ Once Troupe made out this prima facie case, the burden of production should have shifted to the defendant to produce evidence of a nondiscriminatory reason for the dis-

211. See *McDonnell Douglas*, 411 U.S. at 802-03.

212. *Burdine*, 450 U.S. at 254-55; *McDonnell Douglas*, 411 U.S. at 802.

213. See *McDonnell Douglas*, 411 U.S. at 802-03.

214. *Burdine*, 450 U.S. at 255-56. For a detailed explanation of the *McDonnell Douglas* approach before *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), see McGinley, *supra* note 205, at part IB. The *St. Mary's Honor Ctr.* case changed the approach to the extent that it concluded that the factfinder could infer discrimination upon a conclusion that the defendant's articulated reason for its employment decision was pretextual, but was not required to do so. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2749. Liability does not result unless the factfinder concludes that unlawful discrimination indeed occurred. *Id.* at 2751-52 (quoting *Burdine*, 450 U.S. at 253).

215. See *St. Mary's Honor Ctr.*, 113 S. Ct. at 2749.

216. See *id.* at 2749 & n.4.

217. *Troupe v. May Dep't Stores*, No. 92-C2605, 1993 U.S. Dist. LEXIS 7751, at *4-*8 (N.D. Ill. June 4, 1993).

218. *Id.* at *8.

219. See *supra* note 208.

220. *Troupe*, 1993 U.S. Dist. LEXIS 7751, at *8.

221. *Troupe*, 20 F.3d at 736-37.

222. *Id.*

223. *Id.* Presumably, defendant Lord & Taylor did not simultaneously discharge its nonpregnant salespersons along with plaintiff Troupe.

charge.²²⁴ The defendant satisfied this burden by producing evidence of Troupe's frequent tardiness.²²⁵

At this point, Troupe produced evidence that the defendant's nondiscriminatory reason was a pretext for discrimination. She submitted evidence that her supervisor's statement that Troupe was fired because the defendant believed that she did not intend to return to work.²²⁶ Under *St. Mary's Honor Center v. Hicks*, the factfinder is entitled to conclude based on this evidence of pretext that the defendant fired the plaintiff as a result of illegal discrimination and not because of lateness.²²⁷ Even without a showing of any comparative evidence, therefore, the plaintiff would at least be able to present her case to a factfinder because the factfinder could infer from the supervisor's statement that the defendant was not honest in claiming that it fired the plaintiff because of tardiness. Posner appears to apply a distorted version of this traditional approach.²²⁸ By refusing to analyze the case under the *McDonnell Douglas* construct while at the same time using some, but not all, of the *McDonnell Douglas* analysis,²²⁹ Posner twists the case.

Although Posner's conclusion that Troupe was unable to create a genuine issue of material fact is clear, his reasoning is not. He stresses that because of Troupe's tardiness, "she could not show that she met the employer's requirements for her job"²³⁰ and, given her admitted tardiness, she could not prove that the employer's stated reason for firing her was pretextual.²³¹ By virtue of this reasoning, Posner erred in logic, Title VII, and summary judgment law. By concluding that Troupe is unable to prove pretext because she did not deny the defendant's charges that she was frequently late,²³² Posner assumes, on a motion for summary judgment, in light of very strong evidence to the contrary, that Troupe's tardiness is the real (and only) reason for Troupe's dismissal.²³³

But evidence to the contrary is provided by the admission of the

224. See *Burdine*, 450 U.S. at 254-55; *McDonnell Douglas*, 411 U.S. at 802; *supra* text accompanying note 212.

225. *Troupe*, 20 F.3d at 735.

226. *Id.* at 735-36.

227. See 113 S. Ct. 2742, 2749 (1993); *supra* text accompanying notes 215-16.

228. See *Troupe*, 20 F.3d at 736-37. In *Mason v. Continental Ill. Nat'l Bank*, 704 F.2d 361 (7th Cir. 1983), Posner explained his aversion to the *McDonnell Douglas* approach where the person suing is a managerial employee. See *id.* at 365. Evidently, he now dislikes the approach for retail sales personnel as well.

229. See *Troupe*, 20 F.3d at 736-37.

230. *Id.* at 737.

231. *Id.*

232. See *id.*

233. *Id.* For other examples of courts' crediting the defendant's reason for the discharge on a motion for summary judgment, see McGinley, *supra* note 205, at 231-33.

defendant's employee, Troupe's immediate supervisor, that Lord & Taylor fired Troupe because her supervisor believed that Troupe would not return after her maternity leave.²³⁴ In addition, there is the suspicious timing of Troupe's discharge.²³⁵ Clearly, this evidence is sufficient to raise an issue of material fact as to the real reason for the plaintiff's discharge.²³⁶ There can be no stronger evidence of the pretextual nature of the defendant's articulated reason for its actions (plaintiff's tardiness), than an admission by the defendant itself that its alleged non-discriminatory reason was not the real reason for the discharge.²³⁷ Furthermore, according to *St. Mary's Honor Center*, it is up to the factfinder, not a panel of judges reviewing a grant of summary judgment, to decide whether defendant committed illegal discrimination once the plaintiff has presented evidence that the defendant's non-discriminatory reason for the discharge is a pretext.²³⁸

234. *Troupe*, 20 F.3d at 736.

235. *See id.* at 735-36, 737.

236. Posner seems to admit this. *See id.* at 737 ("[t]his is only an interpretation; and it might appear to be an issue for trial").

237. Posner's avoidance of the facts regarding the true reason for the discharge reminds us of the arguments made in favor of permitting the use of after-acquired evidence of an employee's wrongdoing as a complete defense to a discrimination suit. *See, e.g., Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. dismissed*, 114 S. Ct. 22 (1993). In the after-acquired evidence cases, the defendant is basically saying that its real reason for firing the plaintiff does not matter. *See id.* at 305 (stating discrimination "becomes irrelevant"). Rather, defendant's argue that at the time of the firing, there existed a legitimate reason to fire the plaintiff even if it were not the real reason. *See id.* at 304-05. Similarly, Posner seems to assume that the real reason for firing Troupe is irrelevant because there existed at the time of her dismissal some other legitimate reason for firing her.

The Supreme Court recently spoke to this issue in the context of an ADEA case. *See McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995). "For purposes of summary judgment, [the employer] conceded its discrimination. . . ." *Id.* at 883. Plaintiff, however, had admitted during discovery that in her last year on the job, she copied and removed confidential documents. *Id.* The issue for the Supreme Court was whether the discovery of plaintiff's misconduct after the case was filed acted as a bar to her recovery, assuming that the employer would have fired the plaintiff for such misconduct had it been aware of it. *Id.*

Justice Kennedy, writing for the Court, first paid lip service to the antidiscrimination provisions and policies underlying both the ADEA and Title VII. *See id.* at 884-86. Nevertheless, because of the employee's wrongdoing, the plaintiff was not entitled to reinstatement nor "front pay" which might otherwise be available under 29 U.S.C. § 626(b) (1988). *McKennon*, 115 S. Ct. at 886. She was entitled, however, to calculation by the trial court of her "backpay from the date of the unlawful discharge to the date the new information was discovered." *Id.* This calculation, however, could be modified by any "extraordinary equitable circumstances that affect the legitimate interests of either party." *Id.* Cryptically, the Court resolved, "An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective." *Id.*

McKennon, then, is vague at best in its guidance to lower courts on the specific issue it addresses. Worse, while making repeated references to Title VII, *see, e.g., id.* at 884, *McKennon* is not a Title VII case. Therefore, it does not address the availability of compensatory and punitive damages in after-acquired evidence cases which fall under Title VII or the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. V 1993). *See* 42 U.S.C. § 1981a(b) (Supp. V 1993).

238. *See St. Mary's Honor Ctr.*, 113 S. Ct. at 2749. The question is whether any one of us who drew the discrimination inference and supported Troupe's claim could really be labeled unreasonable.

Posner went even further. While admitting that the timing of Troupe's discharge could create a question as to the real motivations of the defendant,²³⁹ he forged ahead, intruding upon the factfinding function of trial, to justify a discharge whose timing made no sense.²⁴⁰ Posner recognizes that it seems nonsensical for Lord & Taylor to fire a pregnant employee for her past tardiness the day before her maternity leave where the reason for her tardiness would exist no longer after the leave.²⁴¹ Posner deals with this troubling discrepancy in Lord & Taylor's story, without referring to any evidence in the record, by creating out of whole cloth a justification for Lord & Taylor's odd timing. Of course, Posner opines, Lord & Taylor had to fire Troupe for violating her probationary period in order to deter other employees from violating probation and flouting company rules.²⁴² Said Posner, in dealing with Troupe's case for pretext:

[Troupe's] morning sickness could not interfere with her work when she was not working because she was on maternity leave, and it could not interfere with her work when she returned to work after her maternity leave because her morning sickness would end at the latest with the birth of her child. Thus her employer fired her one day before the problem that the employer says caused her to be fired was certain to end. If the discharge of an unsatisfactory worker were a purely remedial measure rather than also, or instead, a deterrent one, the inference that Troupe wasn't really fired because of her tardiness would therefore be a powerful one. But that is a big "if." We must remember that after two warnings Troupe had been placed on probation for sixty days and that she had violated the implicit terms of probation by being

After all, the defendant had kept Troupe on the payroll for about four years, including the six months prior to her dismissal when she was frequently tardy. *Troupe*, 20 F.3d at 735. But the defendant did not fire Troupe after the first time she was late—or the second, or the third. *Id.* According to Posner's opinion, the defendant suffered Troupe's tardiness at least 20 times without discharging her. *Id.* Although Troupe's schedule was changed and she was placed on the 60-day probation, the case report lacks any other evidence of anything resembling punishment of Troupe. *Id.* at 735-36. She was accommodated, warned, and nothing more until she was about to claim the fruits of maternity leave. *See id.* Then she was fired. *Id.*

It is of course plausible that the defendant became fed up with Troupe's lateness and simply did not get around to firing her until the time of the maternity leave. But weighing the competing scenarios is a task for trial, *see St. Mary's Honor Ctr.*, 113 S. Ct. at 2749, and not that of Posner and his colleagues, who have enjoyed tenured employment as federal judges and formerly as professors. *See supra* note 4. Posner, Easterbrook, and Ripple can be fired essentially only for committing crimes. *See* U.S. CONST. art. III, § 1. It rings a little hollow for this trio to treat pregnancy-related tardiness as though it were embezzlement.

239. *Troupe*, 20 F.3d at 737.

240. *See id.*

241. *Id.*

242. *Id.*

as tardy during the probationary period as she had been before. If the company did not fire her, its warnings and threats would seem empty. Employees would be encouraged to flout work rules knowing that the only sanction would be a toothless warning or a meaningless period of probation.²⁴³

In his academic writings, Posner has advanced arguments for forceful rules of liability or punishment in order to advance deterrence of undesired conduct.²⁴⁴ But considering the facts in *Troupe*, deterrence seems an odd justification for Lord & Taylor's actions. *Troupe* had for more than three years been an "entirely satisfactory" employee.²⁴⁵ It was only when *Troupe* suffered from a particularly bad case of morning sickness that she began to arrive late at work, ultimately resulting in her probationary period.²⁴⁶ It is difficult to imagine how an employer's ruthlessness could deter morning sickness and its consequent vomiting, mad dashes to the rest room, dizziness, and exhaustion.²⁴⁷

The deterrence theory Posner posits can only work if Lord & Taylor can successfully deter other employees from becoming pregnant based on its treatment of *Troupe*. Although, according to Posner, such deterrence would be more efficient,²⁴⁸ we think it inconsistent with federal anti-discrimination policy and the Pregnancy Discrimination Act itself.

Of course, Posner's supplementation of the record with his reading of Lord & Taylor's bizarre conduct disregards summary judgment law. In contravention of the law, Posner does not view the facts in the light most favorable to *Troupe*, drawing all reasonable inferences in her behalf. Instead, he supplies a strained rationale that would support the defendant's version of the facts, hinting that no reasonable factfinder could conclude otherwise.²⁴⁹ In the next section we explain how Posner artfully uses lan-

243. *Id.*

244. See, e.g., POSNER, *ECONOMIC ANALYSIS*, 3d, *supra* note 7, §§ 7.1-.2; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1209-14 (1985). Posner has been particularly fond of arguments for high penalties for illegality in order to deter violations with a minimum investment of enforcement resources. POSNER, *ECONOMIC ANALYSIS*, 3d, *supra* note 7, § 7.2. The argument posits that even if the odds of getting caught are low (because of the thin detection and enforcement mechanisms), potential violators will refrain when faced with high penalties because the penalties are frightening even when discounted for the low possibility of their occurrence. *Id.*

245. *Troupe*, 20 F.3d at 735.

246. *Id.*

247. See Kay, *supra* note 163, at 25 & n.137 (outlining likely nonpathological problems in pregnancy).

248. See Posner, *Sex Discrimination*, *supra* note 19, at 1332-33 (arguing that a ban on pregnancy discrimination, or on any other sex-based differentiation in the workplace, is not efficient).

249. See *Troupe*, 20 F.3d at 737. At trial, facts frequently are more fully developed, even where the case was well-discovered during pretrial. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Pro-*

guage to justify the outcome in *Troupe*.

B. *Troupe's* Condescension

The label attached to a person or event often shapes perception of the thing labeled. For example, the terms "terrorist" and "freedom fighter" convey wildly different connotations but can be used by political opponents to describe the same people. In a more academic and less partisan vein, law and literature scholarship has demonstrated how clever writing can paint protagonists and antagonists in a subtle but powerful light prompting either favor or disdain in the reader.²⁵⁰ Like a hypnotized sub-

cess, 49 OHIO ST. L.J. 95, 172-78 (1988).

Perhaps Posner's activism in response to the defendant's motion for summary judgment reflects his previously admitted skepticism about the efficiency of the Pregnancy Discrimination Act, as expressed in *EEOC v. Vucitech*, 842 F.2d 936, 940-41 (7th Cir. 1988). There Posner noted his skepticism about the utility of the Pregnancy Discrimination Act, at least in the context of benefits that are bargained for by a union:

It is possible that no one was really hurt by the baby bonus plan. The union may have been trading maternity benefits . . . for some other form of benefit . . . worth more to the employees . . . ; in that event there may have been no net discrimination in favor of the female employees, who, as we have just noted, received maternity benefits more generous than the baby bonuses. But this is not an equitable argument; it is an argument that the Pregnancy Discrimination Act, at least in the context of explicitly bargained-for wages and fringe benefits, is a gratuitous and perhaps idle interference with labor markets—which it may be, but that is not our business.

Id.

Posner's activism in *Troupe* is insidious for another reason. As all Pregnancy Discrimination Act cases eventually are brought under the Civil Rights Act of 1991, entitling the parties to a jury trial, *see* 42 U.S.C. § 1981a(c) (Supp. V 1993), the holding in *Troupe* will be a precedent for granting summary judgment and denying the statutory right to a jury trial. It appears that this result would not displease Posner. In *Pieczynski v. Duffy*, 875 F.2d 1331, 1334 (7th Cir. 1989), Posner expressed his lack of faith in juries:

It would be nice to be able to filter out the phony cases but we have been unable to think of a good filter beyond what is already provided by pretrial discovery and summary judgment and Rule 11 and directed verdict and remittitur and the other checks on groundless cases and runaway juries. In the end much will depend on the good sense of juries, and our faith in the jury is not so great that we can regard this prospect with equanimity.

Id.

250. *See* Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1027-29 (1994); Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1082-90 (1994) [hereinafter Delgado & Stefancic, *Scorn*]. *See generally* JAMES B. WHITE, *HERACLES' BOW—ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) (discussing rhetorical component of society's perception of the law); *Symposium, Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (discussing the role of narrative in legal scholarship); Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 42-58 (1982). Posner has criticized certain law and literature writings at length, particularly Weisberg's interpretation of *Billy Budd*, but would largely agree with our statement in text. *See* POSNER, *LAW AND LITERATURE*, *supra* note 7, at 155-66, 269-99 (criticizing Weisberg and then discussing judicial opinions as literature); POSNER, *supra* note 1, at 33-57 (discussing the prose of Cardozo himself as some-

ject or a population swooning to propaganda, the reader of a judicial opinion can be induced to form subconscious views about the case and the litigants that make the result seem just or inevitable notwithstanding the doctrine enunciated in the case.²⁵¹

Seen in this light, Posner's *Troupe* opinion is part of the American judicial tradition,²⁵² though hardly a tradition worth perpetuating. Posner has practiced this genre before, but with less subtlety. For example, he has disparaged prisoner complaints based on his speculation that "[i]nmates love turning the tables on the prison's staff by hauling it into court. They like the occasional vacation from prison to testify in court."²⁵³ Similarly, Posner has stated that "[i]nstead of reflecting on the wrongs they have done to society our convicts . . . prosecute an endless series of mostly imaginary grievances against society."²⁵⁴

Sometimes, as in these prisoners' rights decisions, derision of the losing litigant is too vitriolic and becomes a lightning rod for criticism. On other occasions, Posner's choice of language effectively demonizes the loser and solidifies the legal result. Posner's *Troupe* opinion, in its subtle and artful undermining of the credibility of the plaintiff, is a far cry from his previous putdowns of prisoners,²⁵⁵ but remains an effective attempt to paint *Troupe* as an unworthy plaintiff. At the outset of the opinion, Posner notes that *Troupe* was a part-time employee for three years (1987-90), converted to full-time status in 1990, and began having her pregnancy-related problems of illness and tardiness within months after attaining full-time employment.²⁵⁶ Already, the reader may begin to think of *Troupe* as something short of a Horatio Alger character since she is content with

what result-oriented).

251. See Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1874-75 (1990) (describing a specific use of metaphor and its effect on the reader). See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing role of a narrative based on personal experience, particularly feminist narrative, in scholarship).

252. See, e.g., POSNER, *supra* note 1, at 33-57; Delgado & Stefancic, *Scorn*, *supra* note 250, at 1063 (judicial rhetoric typically is unduly solicitous of society's powerful litigants and unreasonably disparaging of litigants with lower socioeconomic status).

253. *Merritt v. Faulkner*, 823 F.2d 1150, 1157 (7th Cir. 1987).

254. *McKeever v. Israel*, 689 F.2d 1315, 1323 (7th Cir. 1982) (Posner, J., dissenting).

255. By this, we mean that Posner's *Troupe* rhetoric does not raise a red flag as to his result-oriented disposition of the case, whereas every intelligent reader could see that Posner disliked prisoners and their litigation immensely. See *supra* text accompanying notes 253-54. This is not to say that Posner's prisoner rhetoric made him unpopular with anyone other than perhaps a few civil libertarians and academics, since most of society and the legal establishment probably wish prisoners would simply go away. During the Reagan and Bush Administrations, Posner's anti-prisoner rhetoric may have even helped his prospects for the Supreme Court, see Ranii, *supra* note 3, at 1, 26, just as Warren Burger's speeches against criminal defendants' rights helped him become Chief Justice. See WOODWARD & ARMSTRONG, *supra* note 4, at 12.

256. *Troupe*, 20 F.3d at 735.

protracted part-time employment. When affected by pregnancy, she quickly reverts to part-time status,²⁵⁷ signaling perhaps that she does not have the requisite commitment to full-time work, certainly not when faced with any adversity.

In case we had any doubt, Posner makes Troupe's unworthiness more apparent in the next few sentences when he notes that Troupe continued to be bothered by morning sickness despite working a noon to 5 p.m. shift "[p]artly it seems because she slept later under the new schedule, so that noon was 'morning' for her."²⁵⁸ Thus, Posner, who has obviously never been pregnant and is not a medical doctor,²⁵⁹ simply presumes that anyone troubled by morning sickness at noon must have been slothfully sleeping the morning away, enjoying the fruits of her conversion to part-time status.²⁶⁰ The reader begins to see Troupe as lazy and, although perhaps adequate to the task prior to pregnancy,²⁶¹ as the sort of employee who could not handle adversity sufficiently to remain "qualified" for the job when pregnant,²⁶² at least not within Posner's construction of Title VII.

In the same sentence, Posner questions Troupe's candor and that of her lawyer by noting that he has described Troupe's job problems "with understatement as 'slight' or 'occasional' tardiness."²⁶³ The rest of the opinion and the record in the case fail to establish that Troupe's tardiness was really a serious impediment to her work.²⁶⁴ Posner paints the lateness problem as quite severe, noting with delphic authority that for a one-month period, Troupe "reported late to work, or left early, on nine out of the 21 working days"²⁶⁵ and that she was "tardy three days in a row late in March"²⁶⁶ and "late eleven more days" during her probationary

257. *Id.*

258. *Id.*

259. SEARCH OF WESTLAW, WLD-JUDGE database (Jan. 15, 1995).

260. To be fair to Posner, we note that there is some support in the record for a portion of what he implies. Troupe's physician recommended that, in addition to adopting a different diet regime, she rise earlier as part of an effort to minimize the morning sickness. *See* Aff. of Mary K. Palmore, M.D., Mar. 5, 1993 (Pl.'s Ex. B in Opp'n to Summ. J., *Troupe* app. at A-41). Troupe's doctor did not, however, suggest that simply making "morning" earlier would eliminate Troupe's illness. *See id.*

261. *See* Posner, *Sex Discrimination*, *supra* note 19, at 1328 n.38. Posner states:

Rarely will an employer fire, or otherwise treat badly, a perfect worker, of whatever race or sex. Discrimination is more apt to be directed against workers who are not, or not much, better than average, and whose complaint is that the employer took a dimmer view of their failings than he would have of a white male's failings.

Id.

262. *See supra* note 208 and text accompanying notes 217-20, 230.

263. *Troupe*, 20 F.3d at 735.

264. *See supra* notes 230-38 and accompanying text.

265. *Troupe*, 20 F.3d at 735.

266. *Id.*

period.²⁶⁷ Posner invites the reader to follow him in putting the worst spin on Troupe's lateness.

Posner also notes Troupe's supervisor by name, thus indicating that the supervisor is a woman.²⁶⁸ This introduction of an unnecessary fact suggests to the reader that Troupe was not being judged (at least not at close range) by some cigar-chomping white male retailing tycoon but by another woman. The implication is that Troupe was probably treated with some sensitivity and given a chance to make good.²⁶⁹ Posner further paints the picture of a benevolent Lord & Taylor in his overall description.²⁷⁰ Having failed such a reasonable employer, Troupe is implicitly characterized as unworthy. Although Posner later hitches the case decision primarily to his legal view of Title VII that employers have something of a license to be mean,²⁷¹ his earlier spin on the facts invites the reader to relax and not be too greatly troubled by the harshness of his broad immunity for employers. The subliminal message posits that Troupe was given a fair shake by a decent employer. If only she had stopped sleeping until noon and gotten herself to work on time she would have had her maternity leave and a job when she returned from leave. Posner invites readers to blame Troupe for the problem.

Posner's repeated references to the paucity of the record and the thin reed upon which Troupe's lawyer has hung the case²⁷² are more justifiable content for a judicial opinion. We operate, after all, in an adversary system, and to a large extent litigants suffer for the mistakes of their lawyers.²⁷³ Consequently, a court is to some extent led to its conclusions by

267. *Id.*

268. *Id.*

269. The record in the case suggests quite the opposite. In a "verbal counseling" record form dated Feb. 18, 1991, supervisor Jennifer Rauch states that she warned Troupe about tardiness but that, in her view, Troupe had "no excuses." Lord & Taylor Record of Interview completed by Jennifer Rauch, Feb. 18, 1991 (Pl.'s Ex. G in Opp'n to Summ. J., *Troupe* app. at A-45). Rauch records Troupe as late "9 out of 21 days" but states that "2 of those days she was ill." *Id.* Rauch's presentation of the "facts" thus differs dramatically from those of Troupe (and her physician) and suggests more than a little insensitivity or hostility toward Troupe's pregnancy in that Rauch apparently did not consider morning sickness a legitimate illness, nor an excuse for lateness. *See id.*

270. *See Troupe*, 20 F.3d at 735-36. Posner notes that the defendant permitted Troupe to switch from full-time to part-time to meet her needs. *Id.* at 735. He cited the store's tolerance for her tardiness, *see supra* notes 265-67 and accompanying text, and its generous maternity leave policy, *Troupe*, 20 F.3d at 736.

271. *See Troupe*, 20 F.3d at 738-39 (holding that Lord & Taylor could indeed dismiss Troupe for her pregnancy absence as long as a male employee would be fired for a comparable absence).

272. *See id.* at 737 (stating Troupe has only "two facts to offer" against the inference that tardiness led to her dismissal). Furthermore, she did not meet the evidentiary burden announced by Posner in this opinion. *Id.* at 738-39; *see supra* notes 160-61 and accompanying text.

273. *See, e.g., Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410, 413 (1st Cir. 1981) (stating adversary system necessarily implies that clients will be bound by their attorneys' errors), *cert. denied*, 459 U.S. 826 (1982). *See generally* BAILEY KUKLIN & JEFFREY W. STEMPEL,

the work of the lawyers. If Troupe's lawyer led her case to defeat, as the case suggests, this is not the fault of the courts. But, of course, even in the adversary system, courts are not rigidly bound to characterize the case in the manner presented by counsel, particularly where counsel may have miscalculated.²⁷⁴ Indeed, Posner himself has frequently recast attorneys' arguments into the form he believes is most conducive to rendering an optimal ruling on the case and discussion of the legal issue in question.²⁷⁵ In *Troupe*, however, Posner implies failings of her counsel to facilitate the grant of summary judgment.²⁷⁶ Consequently, Posner in *Troupe* embraces "bare bones" adversarialism and inaccurately suggests that he is constrained to decide *Troupe* as he did because of the way *her* lawyer served up the case.

This presentation serves both to make Posner look less result oriented²⁷⁷ and also buttresses the earlier rhetoric suggesting that Troupe is unworthy of the legal system's aid. Because her lawyer has bungled, she has bungled. Perhaps a better lawyer was unwilling to take the case. Posner the academic has suggested quite bluntly (and probably erroneously)²⁷⁸ that the market for legal services screens the quality of cases according to an attorney's willingness to take them.²⁷⁹ If a case cannot attract a good attorney, he reasons, it must not be a very good case.²⁸⁰ By tarring her

FOUNDATIONS OF THE LAW—AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 103-28 (1994) (describing the adversary system of dispute resolution that prevails in the United States court system).

274. See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 524-26 (1975) (arguing, in the criminal context, that American judges have control over the manner in which a case is presented and the result, despite not being the ostensible developers of facts and legal arguments in the case).

275. See, e.g., *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 362-65 (7th Cir. 1990) (Posner, J.) (explaining a doctrine which attorneys themselves could not explain); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 726 (7th Cir. 1986) (Posner, J.) (redefining "willful" for plaintiff). Indeed, attorneys and judges have criticized Posner for interpreting and evaluating arguments in his own terms. See, e.g., Warren, *supra* note 2, at 76-77.

276. See *supra* note 263 and text accompanying notes 263, 272.

277. By our definition, not Posner's. See *infra* notes 463-71 and accompanying text.

278. See Russell G. Pearce et al., Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 143-44 (1980) (suggesting that factors other than merit of claims are critical in determining whether attorneys participate).

279. See, e.g., *McKeever v. Israel*, 689 F.2d 1315, 1324-25 (7th Cir. 1982) (Posner, J., dissenting) (making this argument in the context of prisoners' rights suits).

280. See, e.g., *Hughes v. Joliet Correctional Ctr.*, 931 F.2d 425, 429-30 (7th Cir. 1991) (Posner, J.); *McKeever*, 689 F.2d at 1324-25 (Posner, J., dissenting). This argument ignores the obvious market glitches involving delivery of legal services. See Brown, *supra* note 15, at 1138-53.

These market imperfections are not peculiar to prisoner's cases. See *id.* at 1145-46. Because an inexperienced or unsophisticated consumer, perhaps like Troupe, could have difficulty differentiating lawyers according to quality, there is little likelihood that she ever attempted to attract a star lawyer to her case. Further, even an outstanding case of liability may involve a low amount of damages, making star lawyers unlikely to be interested or unlikely to expend significant effort on a typical worker's discrimination claim. See *id.* at 1145. Posner himself admits that the "stakes are small" for the typical

lawyer, Posner implicitly tars Troupe.

C. *Disregarding the Purpose of the Pregnancy Discrimination Act*

Perhaps the most damning criticism of Posner's *Troupe* opinion is that it ignored the history and purpose of the Pregnancy Discrimination Act, contradicting Posner's own philosophy of the judicial role in statutory interpretation.²⁸¹ Posner's opinion in *Troupe* is particularly troubling given his awareness of the peculiar history of the Pregnancy Discrimination Act.²⁸² As mentioned earlier, the Act was passed in 1978 for the express purpose of overruling *General Electric Co. v. Gilbert*,²⁸³ which, in an opinion by Chief Justice William Rehnquist, held that discrimination against women based on pregnancy was not gender discrimination under Title VII.²⁸⁴

The *Gilbert* plaintiffs were hourly employees of a General Electric plant in Salem, Virginia.²⁸⁵ As such, they were entitled to coverage under the company's disability insurance plan, which provided that totally disabled employees could collect up to sixty percent of their average weekly wages for up to twenty-six weeks.²⁸⁶ However, disability resulting from pregnancy—childbirth, miscarriage, morning sickness, or other pregnancy-related illness—was not covered.²⁸⁷ The plaintiffs alleged gender discrimination in violation of Title VII and prevailed in the district court²⁸⁸ and before a divided Fourth Circuit panel.²⁸⁹ By a 6-3 vote,²⁹⁰ the Supreme Court reversed²⁹¹ in a majority opinion authored by Justice Rehnquist.²⁹²

plaintiff in a disparate treatment gender discrimination case. See Posner, *Sex Discrimination*, *supra* note 19, at 1328. Consequently, even cases of clear discrimination may not attract lawyers.

Posner seems to hint that these cases should not be brought, *see id.* at 1328-29, 1334-35, but we differ: these are exactly the sorts of cases that need to be brought to prevent employers from engaging in routine discrimination against women, minorities, and older workers in low-paying jobs.

281. See *supra* text and notes 68-90.

282. See *Troupe*, 20 F.3d at 735.

283. 429 U.S. 125 (1976).

284. *Id.* at 136-46.

285. *Id.* at 128-29.

286. *Id.* at 128.

287. *Id.* at 129. The named plaintiffs in this class action case tested the concreteness of the company's interpretation of the policy by filing disability claims for the periods in which they were absent from work because of pregnancy. *Id.* at 128-29. GE denied the claims. *Id.* at 129.

288. *Id.* at 130.

289. *Id.* at 132.

290. Justices Brennan, Marshall, and Stevens dissented. *Id.* at 146 (Brennan, J., dissenting); *id.* at 160 (Stevens, J., dissenting).

291. *Id.* at 146.

292. *Id.* at 127. Joining Justice Rehnquist in the majority vote to absolve the defendant of Title

Justice Rehnquist's rationale for finding no gender discrimination is troubling. Justice Rehnquist concluded that an employee benefit plan excluding pregnancy benefits was not discriminatory because the exclusion deprived both men and some women of pregnancy disability benefits and thus treated male and female employees alike in its exclusion.²⁹³ Justice Rehnquist was forced to acknowledge, of course, that men do not get pregnant, but found this biological truth irrelevant to the legal inquiry.²⁹⁴ Because the exclusion was facially neutral (i.e., a male employee could apply for pregnancy disability and also be denied), Justice Rehnquist found no per se gender discrimination.²⁹⁵ His review of the record and the plaintiff's theory of the case also suggested that the exclusion in the policy was not the result of intentional discrimination directed at female employees.²⁹⁶

Although acknowledging that Title VII barred discriminatory effects as well as intentional discrimination,²⁹⁷ Justice Rehnquist found dismissal of the plaintiffs' claim appropriate because "there is no proof that the [employees' disability leave] package is in fact worth more to men than to women," making it "impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits."²⁹⁸ Justice Rehnquist reproduced some data on disability payments under the plan to suggest that women workers on average received more benefits under the disability plan than did their male co-workers.²⁹⁹

Justice Brennan dissented, with Justice Marshall joining.³⁰⁰ Justice

VII liability were Chief Justice Warren Burger and Justices Stewart, White, Blackmun, and Powell. Justices Stewart and Blackmun concurred specially to note that the limited scope of the majority opinion should not be read to undermine *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact theory of Title VII liability). *Gilbert*, 429 U.S. at 146 (Stewart, J., concurring); *id.* (Blackmun, J., concurring in part). However, neither of the concurring Justices questioned the reasoning of the *Gilbert* majority. *Id.* (Stewart, J., concurring); *id.* (Blackmun, J., concurring in part).

293. *Gilbert*, 429 U.S. at 134-35.

294. *Id.* at 135 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

295. *Id.* at 134-35 (citing *Geduldig*, 417 U.S. at 496-97).

296. *See id.* at 136-37. It also appears that the plaintiffs made no serious effort to suggest that GE chose its particular disability insurance plan with the intent of targeting women for exclusion. Of course, an employer, particularly one with a significant female workforce of childbearing age, might be quite conscious of the opportunity to reduce benefits claimed and collected by women by procuring disability insurance that excludes pregnancy coverage. Proving this sort of intentional discrimination would likely be quite difficult, however, since this illegal goal, if ever discussed, would likely be raised in undocumented conversations between (male) executives and insurance brokers.

297. *See id.* at 136-38; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32 (1971) (creating the Title VII disparate impact cause of action).

298. *Gilbert*, 429 U.S. at 138.

299. *Id.* at 130 n.9.

300. *Id.* at 146 (Brennan, J., dissenting).

Stevens filed a separate dissent.³⁰¹ Justice Brennan refuted the Court's conclusion that the General Electric Disability Plan was sex-neutral.³⁰² He argued that the policy's coverage of all disabilities that were mutual to both sexes was not enough.³⁰³ He noted that the disability policy favored men by covering all male reproductive procedures such as prostatectomies, vasectomies, and circumcisions, whereas it covered only some of the female reproductive disabilities and singularly excluded the most prevalent cause of reproductive disabilities for females: pregnancy.³⁰⁴

Justice Stevens's dissent argued that denying disability coverage related to pregnancy violated Title VII because it "places the risk of absence caused by pregnancy in a class by itself."³⁰⁵

By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan. Accordingly . . . I conclude that the language of the statute plainly requires the result which the Courts of Appeals have reached unanimously.³⁰⁶

In a rapid response to *Gilbert*, Congress amended Title VII, passing the Pregnancy Discrimination Act.³⁰⁷ Title VII had already made it unlawful for an employer to discharge or discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment" because of the individual's sex.³⁰⁸ The Pregnancy Discrimination Act amended the "Definitions" section of Title VII to make it clear that discrimination based on pregnancy was discrimination based on sex in violation of Title VII.³⁰⁹ The amendment states in relevant part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the

301. *Id.* at 160 (Stevens, J., dissenting).

302. *Id.* at 152-53 (Brennan, J., dissenting).

303. *Id.* at 152 (Brennan, J., dissenting).

304. *Id.* (Brennan, J., dissenting).

305. *Id.* at 161 (Stevens, J., dissenting).

306. *Id.* at 161-62 (Stevens, J., dissenting).

307. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076-77 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

308. *See* 42 U.S.C. § 2000e-2(a)(1) (1988).

309. Pregnancy Discrimination Act, 92 Stat. at 2076.

same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .³¹⁰

The legislative history of the Pregnancy Discrimination Act makes clear that Congress believed that the original Civil Rights Act of 1964 prohibited discrimination based on pregnancy, childbirth, and related medical conditions.³¹¹ The House Report of the Education and Labor Committee specifically notes that the Equal Employment Opportunity Commission (EEOC) had, years before *Gilbert*, issued guidelines requiring employers to treat disabilities caused by pregnancy as they do any other disability.³¹² The House Report further states that before the *Gilbert* decision, eighteen federal district courts and all seven United States Courts of Appeals that had dealt with the issue had prohibited discrimination based on pregnancy, in accordance with the EEOC guidelines.³¹³ The House Report concludes that Congress, in enacting Title VII, had mandated "equal access to employment and its concomitant benefits for female and male workers."³¹⁴ The House Report criticized the "Supreme Court's narrow interpretations of Title VII [as] tend[ing] to erode our national policy of nondiscrimination in employment [leaving us] in a state of national confusion and with inconsistent practices from State to State."³¹⁵ Rather, the House Report explicitly adopts the arguments made by Justices Brennan and Stevens in their dissents.³¹⁶

This explicit adoption of the Brennan and Stevens dissents demonstrates that the Act not only overturned *Gilbert*, but also had a broader purpose, as was acknowledged by the Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,³¹⁷ a 7-2 opinion which left Justice Rehnquist continuing his defense of *Gilbert*.³¹⁸ *Newport News*, authored

310. 42 U.S.C. § 2000e(k) (1988).

311. See H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-4 (1978), reprinted in 1978 U.S.C.A.N. 4749, 4750-52.

312. *Id.* at 4750.

313. *Id.*

314. *Id.* at 4751.

315. *Id.*

316. *Id.* at 4750.

317. 462 U.S. 669 (1983). *Newport News* held that an insurance plan that gave less generous pregnancy coverage to the wives of male employees than it gave to women employees violated the 1978 Act. *Id.* at 682-84.

318. See *id.* at 685 (Rehnquist, J., dissenting). As is so frequently the case, a Justice Rehnquist opinion can read persuasively but perhaps takes undue liberties in the presentation of the facts and law. See *id.* at 680 n.20 (majority opinion implying that Justice Rehnquist has presented a distorted picture of a colloquy between Senators Williams (D-N.J.) and Hatch (R-Utah) in order to unfairly buttress his claim that majority has extended 1978 Act beyond legislative intent); WOODWARD & ARMSTRONG, *supra* note 4, at 383-84 (describing how Justice Brennan concluded that Justice

by Justice Stevens, read the 1978 Act as not only overruling *Gilbert* and expanding the reach of Title VII's prohibition of pregnancy discrimination,³¹⁹ but also approving the statutory interpretation approach of the *Gilbert* dissenters.³²⁰

This interpretation would require the courts to examine the broad purposes of Title VII law in eliminating sex discrimination in interpreting the Pregnancy Discrimination Act.³²¹ According to the House Report, the stereotypical assumption that women who become pregnant will leave the labor force has caused the view that women are "marginal" workers.³²² This view "is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."³²³ The Report stated:

Although recent attention has been focused on the coverage of disability benefits programs, the consequences of other discriminatory employment policies on pregnant women and women in general has historically had a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.³²⁴

To correct this problem, the legislation applies broadly to all aspects of employment, including hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and other conditions of employment covered by Title VII.³²⁵

The Report from the Senate Committee on Human Resources³²⁶ echoes the House Report, stating that the *Gilbert* decision "threatens to under-

Rehnquist misquoted precedent deceptively to try to alter the substantive law in a way not contemplated by the Justices in conference).

319. *Newport News*, 462 U.S. at 676-81.

320. *Id.* at 679 & n.17.

321. See Feinberg, *supra* note 163, at 143-44; accord *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-92 (1987) (reading Pregnancy Discrimination Act expansively, finding it permits states to require maternity leave benefits, given the Pregnancy Discrimination Act's original purpose of protecting pregnant women from employment discrimination).

322. H.R. REP. NO. 948, 95th Cong., 2d Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751.

323. *Id.*

324. *Id.* at 4754-55.

325. *Id.* at 4755.

326. S. REP. NO. 331, 95th Cong., 1st Sess. (1977).

mine the central purpose of the sex discrimination prohibitions of [T]itle VII.³²⁷ It goes on to report that the testimony before the Senate Committee demonstrated that

the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace. A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment.³²⁸

Contrary to the explicit purpose of the Pregnancy Discrimination Act—to protect women of child-bearing age from marginalization in the workplace by expanding the employment rights of women and by defeating stigmatizing stereotypes—Posner contracts the substantive rights of women in *Troupe*, relying on the very same stereotypes the legislature sought to condemn.³²⁹ In so doing, Posner authors a decision that demonstrates an eerie similarity to Justice Rehnquist's opinion in *Gilbert*. It is far less excusable, however, given Posner's awareness of the history of *Gilbert* and of the Pregnancy Discrimination Act.³³⁰

In deciding that discharge of a pregnant employee on the verge of maternity leave in order to save a few dollars does not violate the modern, post-*Gilbert*, amended Title VII,³³¹ Posner in *Troupe* resurrects then-Justice Rehnquist's narrow methods of statutory interpretation. In effect, Posner has chosen Justice Rehnquist's *Gilbert* formalism over the functionalism of *Newport News*.³³² By a functional interpretative approach, we mean one that seeks to give effect to the intended function of the statute so long as that application is not clearly precluded by the law's text or specific congressional intent and would not unfairly upset or penalize the settled expectations of the parties. What we describe as a functional approach is, ironically, similar to what Posner has termed a pragmatic or practical reason approach to statutory interpretation, an approach to which he claims to subscribe.³³³ It is clear from the legislative history of

327. *Id.* at 3.

328. *Id.*

329. *See Troupe*, 20 F.3d at 737-39 (holding that a termination motivated by the employer's expectation that a pregnant employee will not return to work is not illegal discrimination).

330. *See id.* at 735.

331. *See id.* at 737-39.

332. Compare *supra* notes 317-21 and accompanying text (discussing *Newport News*) with *supra* notes 283-99 and accompanying text (discussing *Gilbert*).

333. *See* Posner, *A Primer*, *supra* note 6, at 448, 449-50. For additional reading, see also Eskridge & Frickey, *supra* note 67, at 345-62, describing an essentially functional approach to statutory application, but labeling it as "practical reasoning." This contradiction between theorist Posner and jurist

the Pregnancy Discrimination Act that the obvious functional goal of Congress in enacting Title VII's ban on gender (and pregnancy) discrimination was to equalize employment opportunities for women by creating civil liability when employers discriminate against women based on illegitimate stereotypes of the role women play.³³⁴

Posner's opinion in *Troupe* fails to achieve this functional goal. In fact, it belittles this goal by appearing to give full force to the plain meaning and intent of the Act, while at the same time avoiding the use of established evidentiary constructs,³³⁵ finding facts in favor of the defendant on a motion for summary judgment and permitting the illegal use of stigmatizing stereotypes to justify the defendant's actions.³³⁶

Gilbert stands as an embarrassment to the Supreme Court and Justice Rehnquist because it so badly misconstrued a relatively recent statute with a broad, seemingly applicable text backed by other indicia of congressional intent, circuit court decisions, and the views of the administrative agency charged with enforcing the statute.³³⁷ In retrospect, it is thus not surprising that Congress reversed *Gilbert* in relatively short order.³³⁸ The Court erred so badly in large part because it spurned a functional approach to Title VII. In *Gilbert*, Justice Rehnquist cannot claim to have merely adopted a textual approach³³⁹ to interpreting the law, which he frequently

Posner is explored later. See *infra* notes 429-73 and accompanying text. Although Posner distinguishes pragmatism and practical reason (arriving at an acceptable resolution of a case or problem based on an eclectic mix of inquiry), see POSNER, JURISPRUDENCE, *supra* note 7, at 26-27 & n.41, we commingle the two concepts as we believe Posner does as well (in both cases and scholarly writing). When applied fairly and intelligently, the two approaches are nearly synonymous in that they both counsel a functional approach to statutory interpretation and case adjudication. Accord Van Zandt, *supra* note 89, at 788-89, 791-831 (mingling the terms, finding that common sense is an important part of judicial decisionmaking, but finding that judges and scholars promoting pragmatic practical reason overstate the objectivity and correctness of their views as to what constitutes common sense).

334. See *supra* notes 311-16 and accompanying text; accord *supra* note 133 and accompanying text (discussing *Price Waterhouse*, 490 U.S. at 228).

335. See *supra* parts III.A.1, III.A.3.

336. See *supra* part III.A.2.

337. See *supra* notes 311-16 and accompanying text.

338. See *supra* note 307 and accompanying text. Notwithstanding this rebuke by the popularly elected legislative branch, Justice Rehnquist and his conservative allies continued to fight against a functional approach to interpreting civil rights laws, prompting further corrective legislation. See Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 673-74 (1991).

339. By textualism, we mean the method of statutory construction that seeks to discern the law's meaning according to the text of the statute alone, minimizing resort to extrinsic sources of information such as congressional proceedings, the circumstances prompting the enactment, or the purpose of the statute. See generally Redish & Chung, *supra* note 51 (reviewing major approaches to statutory interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing modern plain meaning school of thought, most associated with Justice Scalia, as contrasted to earlier versions of textualist approach that were more admitting of extrinsic material as aids to interpretation).

endorses,³⁴⁰ but instead adopted a hyper-literal view of Title VII's text that an employer may not "discriminate against any individual with respect to . . . employment, because of . . . sex."³⁴¹ To be sure, disability benefits are part of employment compensation and privileges. However, the *Gilbert* Court saw no discrimination because the employer's denial of benefits was ostensibly based on the condition of pregnancy rather than gender³⁴² even though the two are inextricably linked. As Justice Stevens' dissent demonstrates, the text of Title VII does not compel this simultaneously narrow yet strained reading adopted by the Court majority.³⁴³ It is simply the Rehnquist faction's favored way to read the text.

Posner acknowledges awareness of this historical background,³⁴⁴ which makes the *Troupe* opinion all the more puzzling and indefensible. In fact, five years earlier in *UAW v. Johnson Controls, Inc.*,³⁴⁵ Posner interpreted the "Bona Fide Occupational Qualification" (BFOQ),³⁴⁶ defense narrowly, an interpretation that is inconsistent with his free market views, but consistent with the purpose of the Pregnancy Discrimination Act. In *Johnson Controls*, the plaintiffs, fertile women, were excluded from jobs relating to the production of batteries for the purpose of protecting their potential fetuses from lead poisoning should they become pregnant.³⁴⁷ The Seventh Circuit concluded that the restriction was justified by the defendant's business necessity.³⁴⁸

Posner dissented, arguing first that "business necessity" was not the proper defense because the case presented a question of intentional, overt discrimination against fertile women, a class that is protected by the Pregnancy Discrimination Act.³⁴⁹ Second, Posner argued that the BFOQ defense cannot be interpreted to permit employers to treat fertile women differently based on the employer's cost of accommodating fertile (and pregnant) women.³⁵⁰ Posner concluded that an employers' accommoda-

340. See, e.g., *Demarest v. Manspeaker*, 498 U.S. 184, 187-88 (1991) (holding for unanimous Court that the prisoner subpoenaed as a witness is entitled to compensation under the federal witness fee statute), *overruled by* Incarcerated Witness Fees Act of 1991, Pub. L. No. 102-417, § 2, 106 Stat. 2138 (1992), 28 U.S.C. § 1821(f) (Supp. V 1993); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575-77 (1982) (holding for 7-2 majority that damages provisions of 46 U.S.C. § 596 (1982) require an unsuccessful defendant to pay double daily wages to the prevailing seaman plaintiff for each day unpaid, no matter what length of litigation precedes the fixing of liability).

341. *Gilbert*, 429 U.S. at 133 (quoting 42 U.S.C. § 2000e-2(a) (1976)).

342. *Id.* at 134-35 (citing *Geduldig v. Aiello*, 417 U.S. 484, 494, 496-97 (1974)).

343. See *id.* at 160-62 (Stevens, J., dissenting).

344. See *Troupe*, 20 F.3d at 735.

345. 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991).

346. See 42 U.S.C. § 2000e-2(e)(1) (1988).

347. *Johnson Controls*, 886 F.2d at 875-76.

348. *Id.* at 898.

349. *Id.* at 904 (Posner, J., dissenting).

350. *Id.* (Posner, J., dissenting).

tion of pregnant employees is not a rational choice because it will always cost an employer more to accommodate a pregnant employee. Therefore, Posner concluded, the Pregnancy Discrimination Act would be meaningless if it were to permit a broad cost justification defense.³⁵¹

Thus, in *Johnson Controls*, Posner the judge did not accede to his personal preference for market theory in interpreting the Act. Instead, he interpreted the statute in light of its purpose—to protect pregnant women (and those who could become pregnant) from—job discrimination. It is unclear why Posner roamed from this position in *Troupe*.

Although one would assume that the lessons of *Johnson Controls*, *Gilbert*, and the 1978 Pregnancy Discrimination Act would prompt him to avoid a hyper-literal reading of Title VII, in *Troupe* Posner repeats and expands upon Justice Rehnquist's errors. To be fair, Posner would distinguish *Gilbert* by arguing that the law requires only that employers treat pregnant and nonpregnant employees alike.³⁵² In *Gilbert*, GE treated its female employees differently from the men by not granting disability benefits to all of the women's reproductive disabilities while simultaneously granting disability benefits to men for all of their reproductive disabilities.³⁵³ In *Troupe*, Posner would say, the plaintiff did not prove that the defendant would have treated differently a male employee about to embark on a medical leave.³⁵⁴ But the basic assumption alone that it is not a violation of the Pregnancy Discrimination Act to fire an employee because she is about to go on maternity leave is questionable considering the legislative purpose of the Act and the history of its enactment. Pregnancy and maternity leave are so inextricably linked that they may be impossible to separate for purposes of discrimination law, just as pregnancy and gender are so inextricably linked, as Justice Rehnquist discovered.

We are not criticizing Posner's view that the Act demands only equal, and not preferential treatment for pregnant women. There is a substantial basis in the legislative history for this conclusion.³⁵⁵ Moreover, the text of the Act is not crystal clear. And the Supreme Court has not yet decided the issue of whether the Act requires preferential or merely equal treatment of pregnant employees. *California Federal Savings & Loan Ass'n v.*

351. *Id.* (Posner, J., dissenting).

352. *See id.* at 738-39.

353. *Gilbert*, 429 U.S. at 152-53 (Brennan, J., dissenting).

354. *See Troupe*, 20 F.3d at 738-39.

355. *See, e.g.*, H.R. REP. NO. 948, at 4752. Many of the courts interpreting the Act have interpreted it to require equal, and not preferential, treatment. A pregnant teacher, for example, could not prevail in a Pregnancy Discrimination suit if she "did not lack any benefit available to other teachers." *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 296 (7th Cir. 1994). There is a good argument, however, that providing an equal employment opportunity to women may require some preferential treatment. *See Kay, supra* note 163, at 30-31; *Feinberg, supra* note 163, at 145-46.

Guerra,³⁵⁶ which held that the Pregnancy Discrimination Act did not preempt a California law that gave preferential treatment to pregnant employees taking disability leave,³⁵⁷ left open the question whether the Act *requires* preferential treatment of pregnant employees.

The confusion as to whether the Act requires preferential treatment of pregnant employees stems from two clauses of the Act that are apparently contradictory.³⁵⁸ The first clause in question states: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . ."³⁵⁹ Standing alone, this clause appears to be an absolute prohibition against all adverse actions taken against employees because of pregnancy, potentially requiring an employer to grant a pregnant employee preferential treatment. For example, it would likely prevent employers from discharging employees who are too disabled to work due to their pregnancies, even though employers would discharge similarly situated, nonpregnant employees.³⁶⁰

The second clause in question states:

[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2h of this title shall be interpreted to permit otherwise.³⁶¹

This clause has a number of potential interpretations. One could read it as simply overruling *Gilbert*, limiting the first clause to the specific examples given. This interpretation is an unduly narrow reading of the Act, which *Newport News* subsequently rejected.³⁶² Or, the second clause could conceivably limit the first clause by prohibiting preferential treatment of pregnant employees. The Court rejected this interpretation in *Guerra*,³⁶³ rightfully so in light of the legislative history and purpose of the Act. Another possible interpretation is that the second clause limits the first clause, requiring that pregnant employees shall be treated equally to, and not necessarily better than, other similarly situated nonpregnant employ-

356. 479 U.S. 272 (1987).

357. *Id.* at 292.

358. See Feinberg, *supra* note 163, at 143-46.

359. 42 U.S.C. § 2000e(k) (1988).

360. See Feinberg, *supra* note 163, at 143-46.

361. 42 U.S.C. § 2000e(k) (1988).

362. See *supra* notes 317-20 and accompanying text.

363. *Guerra*, 479 U.S. at 285.

ees.³⁶⁴ Or, finally, the second clause could be read independently of the first clause, simply overruling the result in *Gilbert*, but not limiting, illustrating, or interpreting the first clause. Under this interpretation, the Act would likely require preferential treatment of pregnant employees.

Given these possible interpretations, we would not condemn Posner for selecting the more conservative interpretation. We do criticize, however, the formalistic conclusion that firing a woman based on a stereotypical assumption that she will not return to work after pregnancy leave is not a violation of the Act.³⁶⁵ We also criticize the manner in which Posner approached the subject, a manner that suggests insufficient regard for Congress and the Act.³⁶⁶ This disregard is inconsistent with Posner's professed views on statutory interpretation.

IV. SITING *TROUPE* ON THE POSNERIAN LEGAL LANDSCAPE

A. *Posner on Gender Discrimination*

Close examination of *Troupe* and Posner's statements regarding employment discrimination suggests that Title VII litigation remains an area where despite ostensible commitment to neutral judging, Posner remains a prisoner of personal preferences. As noted before, Posner has orally belittled job discrimination claims³⁶⁷ and in his written opinions and articles made similar criticisms of this genre of cases and the body politic's allegedly misplaced concern for them.³⁶⁸ His criticism is not that discrimination laws were not legitimately passed by Congress or that they do not enjoy a philosophical, moral, political, and social base. Rather, Posner attacks gender discrimination laws (indeed, all discrimination laws, but gender more than others), because they are inefficient.³⁶⁹

Posner's most recent scholarly assault on gender discrimination laws appears in the current edition of *Economic Analysis of Law*³⁷⁰ and essentially restates arguments he has made primarily in law review articles

364. This is the interpretation that Posner gives the law, an interpretation that, although inconsistent with our own views of what the Pregnancy Discrimination Act should be, is probably the most accepted interpretation of the Act. Thus, we do not criticize Posner for this interpretation.

365. See *supra* notes 168-201 and accompanying text.

366. See *supra* notes 311-34.

367. See *supra* note 20 and accompanying text.

368. See, e.g., Posner, *supra* note 20, at 2216 (referring to age discrimination laws as "sacred cows"); *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 930 (7th Cir. 1993) (criticizing the plaintiff's lateness and absences), *cert. denied*, 114 S. Ct. 1648 (1994); *Harrington v. Aetna-Bearing Co.*, 921 F.2d 717, 721 (7th Cir.) (stating that the ADEA does not "provide older employees with job security"), *cert. denied*, 500 U.S. 906 (1991).

369. See, e.g., POSNER, *ECONOMIC ANALYSIS*, 4th, *supra* note 7, § 11.7.

370. *Id.*

published in 1987³⁷¹ and 1989.³⁷² The 1989 article³⁷³ presents Posner's most extensive discussion of gender discrimination and employment. Although in his other writings during this period, Posner was, according to his own account, moving away from narrow economic analysis of legal questions,³⁷⁴ wealth-maximization continues to be Posner's mantra for meditating on discrimination law.

In making this assessment, we are perhaps less than generous. Posner's 1989 article was expressly labeled an economic analysis³⁷⁵ so it is unsurprising that his discussion of gender discrimination is economic. However, in that article, his treatise, and other writings, Posner not only focuses on economic analysis but also tends to disregard or minimize other issues one would expect to find in a reasonably comprehensive discussion of gender discrimination law.³⁷⁶ In his other economically oriented writings reaching controversial conclusions, Posner frequently acknowledges noneconomic aspects of the topic that might justify a different conclusion.³⁷⁷ Although Posner is aware of these issues and at least alludes to them when discussing race discrimination law,³⁷⁸ when addressing gender discrimination law, he seems to delight in keeping his analytic focus narrow.³⁷⁹ As Posner assigns weights to the variables of his economic model of gender discrimination, economic analysis suggests to him that such laws are unwise, unnecessary, and perhaps counterproductive.³⁸⁰

371. See Posner, *Efficiency and Efficacy*, *supra* note 19, at 514.

372. See Posner, *Sex Discrimination*, *supra* note 19, at 1334-35.

373. Technically, the piece is an "exchange" with Northwestern University Law Professor John J. Donohue, III. See Donohue, *Prohibiting Sex Discrimination*, *supra* note 19, at 1340 (refuting Posner in economic terms). Posner's earlier article attacking Title VII as generally inefficient also was spurred by Donohue. See Posner, *Efficiency and Efficacy*, *supra* note 19, at 513 (responding to Donohue, *Title VII*, *supra* note 19). Although Posner's 1989 Chicago piece is comparatively short, it provides his most sustained examination of the law and policy of gender discrimination in employment and has been ratified by his more recent writings, particularly the Fourth Edition of *Economic Analysis of Law*. See POSNER, *ECONOMIC ANALYSIS*, 4th, *supra* note 7, § 11.7. Consequently, our discussion will focus on the 1989 article. See Posner, *Sex Discrimination*, *supra* note 19.

374. See *supra* part II.

375. See Posner, *Sex Discrimination*, *supra* note 19, at 1311.

376. See, e.g., POSNER, *ECONOMIC ANALYSIS*, 3d, *supra* note 7, §11.7, at 313-14 (acknowledging with seven words that "exploitative discrimination" is one explanation for wage discrimination against females); Posner, *Sex Discrimination*, *supra* note 19, at 1311-12 (failing to acknowledge intentional sex discrimination as anything but a product of economic forces in his introduction).

377. See, e.g., POSNER, *ECONOMIC ANALYSIS*, 3d, *supra* note 7, § 5.4, at 141 (discussing adoption as an economic matter and noting that some may recoil at his suggestion of selling babies as a means of improving child placement).

378. See, e.g., Posner, *Efficiency and Efficacy*, *supra* note 19, at 521 (acknowledging morality of racial equality as a justification for Title VII). When addressing gender discrimination, Posner notes only in passing the presence of "—it goes without saying—an enormous legal literature on sex discrimination law, again focused on employment." Posner, *Sex Discrimination*, *supra* note 19, at 1311.

379. See *supra* note 376.

380. See, e.g., Posner, *Sex Discrimination*, *supra* note 19, at 1334-35 (arguing that the "overall

For example, Posner finds it a "plausible hypothesis [that] sex discrimination law has not increased, and it may even have reduced, the aggregate welfare of women."³⁸¹ He posits that women are on average rational economic actors who "invest less than men in human capital" (and therefore reap lower returns on human capital) because a woman "expects to take more time out of the work force than the average man to raise children."³⁸² Posner grudgingly admits that it "is possible that the greater propensity of women than men to take time out of the labor force is itself a product of sex discrimination," but is "skeptical of that proposition" and thinks that "child-rearing is an area where nature dominates culture,"³⁸³ although he provides no evidence to support this sweeping assessment.³⁸⁴ Consequently, Posner excludes historical, social, and political factors from his analysis.

Talking about gender discrimination without at least taking a peek at these noneconomic considerations is a bit like Hamlet without the Prince. Indeed, most discussion of discrimination addresses the noneconomic aspects of the problem and most of it concludes that women's status and wealth in society result from a variety of factors other than a hypothetical free or rational decision to be undereducated, undertrained, unemployed, and dependent on men.³⁸⁵ By repeatedly adhering to his famous "tunnel vision" in economic analysis of a problem,³⁸⁶ Posner gives the impression that he is not very concerned about these other potential causes for women's lower status. Although Posner the academic has the right to a narrow and even arid perspective on discrimination, Posner the jurist should not be afforded this luxury, especially if other parts of the body politic, such as Congress, have enacted legislation premised on noneconomic concerns. Decisions like *Troupe* raise the troubling possibility that Posner cannot resist making his particular brand of economic

effect of the law [may be] to reduce aggregate social welfare because of the allocative and administrative costs").

381. Posner, *Sex Discrimination*, *supra* note 19, at 1312.

382. Posner, *Sex Discrimination*, *supra* note 19, at 1315. Of course, this opinion contradicts the congressional view that it is precisely these stereotypical views of women that marginalize them in the workforce and deny them equal opportunity. See H.R. REP. NO. 948, 95th Cong., 1st Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751.

383. Posner, *Sex Discrimination*, *supra* note 19, at 1315.

384. *See id.*

385. *See, e.g.*, Hadfield, *supra* note 17, at 480-82, 496-99 (providing economic critique of *Sex and Reason* and invoking historical, political, sociological, and anthropological factors); Donohue, *Prohibiting Sex Discrimination*, *supra* note 19, at 1338-41 (discussing societal attitudes about women in the workplace). Even examinations of the issue that are primarily economic must acknowledge the presence of historical, social, and psychological factors in determining worker status.

386. *See* Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974) (describing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973), as "four hundred pages of tunnel vision").

assessment *the* method for deciding gender discrimination claims, at least the ones he perceives to be close or unmeritorious, notwithstanding the sentiment of Congress.

Posner's scholarly writings also revisit an aspect of his work often seen as troubling by commentators: the uncritical acceptance of empirical myths, even where countervailing evidence suggests the myths are incorrect. This tendency marred *Sex and Reason* and was effectively criticized in several reviews of the work. Particularly good illustrations are the reviews of Gillian Hadfield, which show Posner's analysis of gender roles to be bound by an antiquated and erroneous sociobiological view of men and women,³⁸⁷ and William Eskridge, who notes that Posner, despite a professed objective rigor, falls prey to traditional stereotypes about gays.³⁸⁸ More recently, Eskridge and Brian Weimer, in reviewing Posner's assessment of the economics of the spread of AIDS, demonstrate beyond argument that Posner's perspective on AIDS ignores a number of real world factors (e.g., immaturity of the sexually active, rape, fraud, diminished capacity, miscalculation of costs and benefits) relevant to a truly thorough analysis (economic or otherwise) of the problem.³⁸⁹

In short, where the topic is sex (role, status, or activity), Posner seems not to have completely disengaged from the ivory tower academic. Even where Posner faces ugly social facts related to discrimination, he gives them a sanitized air. "Misogyny . . . is a morally unattractive trait, but from an economic standpoint it *may* be no different in character from having an aversion to cabbage or rutabaga. . . ."³⁹⁰

Once in the economic groove, Posner concludes that "there is no strong theoretical reason to believe that sex discrimination, even if not prohibited by law, would be a substantial source of inefficiency in American labor markets today."³⁹¹ Consequently, "the costs of administering that law will be largely a deadweight [economic] loss."³⁹² Posner ever so charitably allows that this "does not make the law immoral or unjust" but argues that this posited loss must be considered in "deciding whether a particular law or set of laws furthers the public interest."³⁹³ Although Posner's provocative views always make interesting reading, it is a little disconcerting to hear a federal judge, sworn to uphold a statute, damn the law (which most observers view as public-regarding) with the faint praise

387. Hadfield, *supra* note 17, at 480-82, 487-91.

388. Eskridge, *supra* note 5, at 359-60.

389. William N. Eskridge, Jr. & Brian D. Weimer, *The Economics Epidemic in an AIDS Perspective*, 61 U. CHI. L. REV. 733, 734-36, 739-49 (1994) (reviewing PHILIPSON & POSNER, *supra* note 7).

390. Posner, *Sex Discrimination*, *supra* note 19, at 1321.

391. *Id.*

392. *Id.*

393. *Id.*

that perhaps it is not "immoral or unjust."³⁹⁴ Posner further concludes, with perhaps unrealistic optimism, that sex discrimination is likely to go away gradually due to market factors.³⁹⁵

In his academic writing, Posner's discussion of the black-letter adjudication methodology of Title VII³⁹⁶ also suggests infirmities in his approach to the *Troupe* opinion. For example, Posner makes the broad assertion that "[d]isparate impact litigation has been important in eliminating personnel practices that tended to exclude blacks (i.e., requiring a high school diploma), but has not been very important in the area of sex discrimination."³⁹⁷ This is probably true, but one reason for the inefficacy of disparate impact suits is decisions like *Gilbert*, which refused to see their applicability to gender issues like pregnancy.³⁹⁸ Similarly, a facially neutral de facto employment practice such as firing workers on the verge of a leave might have a disparate impact on women workers who become temporarily disabled through pregnancy or childbirth.³⁹⁹ Of course, *Troupe's* case was never presented as a disparate impact case.⁴⁰⁰ She had something better: some direct and circumstantial evidence of pregnancy bias.⁴⁰¹

As to disparate treatment Title VII claims like *Troupe's*, Posner acknowledges that the "practical difficulties in such litigation are great"⁴⁰² and that "it often does not pay the plaintiff to invest in the necessary proof—which involves looking at similarly situated males to show that the plaintiff's inadequacies were not responsible for her being fired or otherwise mistreated."⁴⁰³ Despite his awareness of the practical difficulties of these cases, Posner in *Troupe* cuts every close inference, and even some that are not that close, against the plaintiff with the uphill battle.⁴⁰⁴ If

394. *Id.*

395. *See id.* at 1321-25.

396. *See, e.g., id.* at 1328-29.

397. *Id.* at 1328.

398. *See Gilbert*, 429 U.S. at 137-38 (entertaining the idea that plaintiffs could prevail under a disparate impact theory, but then dismissing this idea, despite the fact that plaintiffs did not attempt to make out a disparate impact case).

399. *Accord Troupe*, 20 F.3d at 738 (conceding that disparate impact theory could hypothetically benefit plaintiff, citing *Maganuco v. Leyden Community High Sch.* Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991)).

400. *Accord id.* (hypothesizing on *Troupe's* possible disparate impact claim, but failing to rule on the issue).

401. *See supra* notes 226-38 and accompanying text. Although, in a revealing glimpse of the hostility of many federal judges to discrimination claims, District Judge Grady refused to even regard Rauch's comments to *Troupe* as direct evidence of pregnancy discrimination. *See supra* notes 142-46 and accompanying text.

402. Posner, *Sex Discrimination*, *supra* note 19, at 1328.

403. *Id.*

404. *See, e.g., supra* notes 239-49 (fact issue of pretext).

Posner were seriously concerned about error costs, one might expect him to take a more charitable view toward plaintiffs because, given Posner's own analysis of the practicalities of litigation⁴⁰⁵ it will be relatively easy for clever defendants with good lawyers to avoid liability even when discrimination in fact occurred.

Posner finds the Pregnancy Discrimination Act's ban on disparate treatment of pregnant employees inefficient because it compels employers to ignore "a real difference in the average cost of male and female employees."⁴⁰⁶ Glancing toward the possibility of unintended consequences, Posner notes that the employer "cannot recoup [the costs of mandated pregnancy benefits] by reducing women's wages . . . but he can minimize his costs by employing fewer women."⁴⁰⁷ After *Troupe*, the employer also can recover his losses by firing women about to take pregnancy leave.⁴⁰⁸ Even though Posner's general economic approach predicts employer efforts to evade the law, in *Troupe*, Posner paradoxically gives greater deference to the employer by siding with Lord & Taylor. Although obviously consistent with his personal views about the inefficiency of sex discrimination laws, Posner's analysis in *Troupe* nonetheless contradicts his professed beliefs about statutory interpretation. We will demonstrate this conflict in the next section.

B. *Potential Pitfalls of Posnerian Pragmatism: Troupe as an Example*

In the main, we object to *Troupe* because it fails to follow the basic groundrules of statutory interpretation Posner has espoused since the mid-1980s. Although Posner's methodology of statutory construction has become more eclectic and complex, he has, throughout the past decade, argued for fidelity to legislative intent and purpose, with judges seeking to attain case outcomes consistent with the intended effect of the statute.⁴⁰⁹ He implies this is objectively feasible in the great majority of cases.⁴¹⁰

If Posner were loyal to the pragmatic approach proposed in *The Problems of Jurisprudence*, his methodology in *Troupe* would be consistent with his approach to statutory interpretation that has prevailed since the

405. See Posner, *Sex Discrimination*, *supra* note 19, at 1328 (discussing uphill battle for disparate treatment plaintiff).

406. *Id.* at 1332.

407. *Id.* at 1333.

408. See *Troupe*, 20 F.3d at 738-39 (holding, as a matter of law, that plaintiff fired for taking a pregnancy leave cannot prevail in disparate treatment suit without proof that similarly situated male employee would not be fired for taking a leave of comparable length).

409. See *supra* notes 68-86 and accompanying text.

410. See *supra* note 85 and accompanying text.

mid-1980s. Although in *The Problems of Jurisprudence*, Posner suggests granting greater leeway to courts interpreting statutes,⁴¹¹ he limits this judicial discretion to situations where the statutes do not convey a clear message.⁴¹² Posner employs the military “command analogy” to explain his theory.⁴¹³ He posits that a court faced with interpretation of an unclear statute is like a lieutenant commanding the lead platoon in an attack who finds the way blocked by an enemy pillbox.⁴¹⁴ The lieutenant has three choices: discontinue the attack; go straight at the pillbox; or try to bypass it.⁴¹⁵ The lieutenant radios to the company’s commander for instructions.⁴¹⁶ He receives the message, “go” and his radio goes dead.⁴¹⁷ Posner concludes that if the lieutenant decides to halt due to the incomplete instructions, he has erred because the portion of the instructions received clearly suggests intent that the lieutenant take action of some type.⁴¹⁸ The difficult question, of course, is what action should be taken.⁴¹⁹

Judges, according to Posner, are often in the position of the lieutenant: Congress has sent an incomplete or unclear message, but the court cannot communicate with Congress to find out its intent.⁴²⁰ Under these circumstances, the “subordinate” (lieutenant or judge) must use creativity and imagination to solve the problem.⁴²¹ Instead of interpreting the message, as in the analogy, the judge needs to complete it.⁴²² This approach differs from the more traditional statutory interpretation approaches, according to Posner, because it is forward-looking.⁴²³ It requires the judge to adapt to the future, rather than search only in the past for answers.⁴²⁴

Posner argues, however, that this approach should not be interpreted as granting judges *carte blanche* to interpret statutes and constitutional provisions in order to reach pleasing results.⁴²⁵ Rather, statutory inter-

411. POSNER, JURISPRUDENCE, *supra* note 7, at 269. As previously noted, Posner in *Overcoming Law* does not address statutory construction extensively, but his most recent views are consistent with *The Problems of Jurisprudence*.

412. *See supra* notes 87-90 and accompanying text.

413. *See* POSNER, JURISPRUDENCE, *supra* note 7, at 269-73.

414. *Id.* at 269.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *See id.*

420. *Id.* at 270.

421. *Id.* at 271.

422. *Id.*

423. *Id.* at 269-70.

424. *Id.* at 270.

425. *Id.* at 272-73.

pretation should be creative, rather than mechanical.⁴²⁶ This creative process of “imaginative reconstruction,”⁴²⁷ permits the judges to “summon all their powers of imagination and empathy, in an effort . . . to place themselves in the position of the legislators who enacted the statute that they are being asked to interpret.”⁴²⁸ In so doing, judges may not rely on the plain meaning of the statute only because such analysis is incomplete; they also need to try to understand the problem faced by the legislators.⁴²⁹ This characterization of the judge’s role does not seem particularly radical or even forward-looking as Posner claims.

But Posner acknowledges that imaginative reconstruction can fail: studying the purpose of the statute often does not help the court reach a result true to the legislature’s intent.⁴³⁰ Furthermore, because gaps or lack of clarity in a statute often reflect a political deal struck by members of Congress in order to assure its passage, searching for the purpose or intent of the legislature in order to answer particular questions raised by the statute may be futile.⁴³¹

Where imaginative reconstruction fails, Posner advocates studying the statute to determine whether Congress intended the courts to fill the gap.⁴³² If courts decide to fill the gap, they must address the question by “exercising the kind of discretion that a common law court uses to decide a question not ruled by precedent.”⁴³³ Judges approaching common law questions without sufficient precedent necessarily resort to a “grab bag”⁴³⁴ of judicial tools in order to reach the proper result.⁴³⁵ Those tools include “anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction (the expectation of regularities, a disposition related both to intuition and to analogy).”⁴³⁶

If Posner had followed his own theoretical construct, *Troupe* probably would have reached a different result. The message from Congress regarding the Pregnancy Discrimination Act was not incomplete nor was its purpose indeterminate.⁴³⁷ The Act specifically reversed a Supreme Court

426. See *id.* at 270-71.

427. *Id.* at 273.

428. *Id.*

429. See *id.* at 267-74.

430. See *id.* at 273-76.

431. *Id.* at 276-77.

432. See *id.* at 278.

433. *Id.* at 279.

434. See *id.* at 273 (practical reason resorts to “grab bag” of ways of deciding an issue).

435. See *id.* at 279.

436. *Id.* at 73.

437. See *supra* notes 307-28 and accompanying text.

case that Congress regarded as erroneous to expressly forbid *any* job discrimination based on pregnancy just as the law forbade race, religion, and national origin discrimination.⁴³⁸ In making this declaration, Congress did not sluff a controversial political issue onto a less visible administrative or judicial arm of government. Instead, Congress made a stirring declaration in favor of the rights of women workers.

Viewed in fair totality,⁴³⁹ the Act comes very close to Posner's model of the type of statute that gives quite explicit interpretative commands to judges.⁴⁴⁰ A command of this sort from Congress suggests that a judge truly giving appropriate deference to legislative intent and purpose would make all reasonable inferences of legal and factual interpretation in favor of the woman alleging pregnancy discrimination. Likewise, he seems oblivious to the thrust of the statute. Rather than willingly carrying forward the congressional mandate, Posner acts in *Troupe* as if he were construing a narrow statute intended by Congress to have only the most limited application.⁴⁴¹

Moreover, there was binding precedent from the Supreme Court establishing summary judgment law and the methods and burdens of proof in Title VII cases that Posner and his colleagues ignored.⁴⁴² Given these strong directives from Congress and caselaw, Posner need not resort to any "imaginative reconstruction" of how legislatures might want *Troupe*'s case adjudicated nor need he sample from the judicial grab bag of intuitive, policy-soaked reflections that can so easily lead to substituting personal preference for settled law.

One consequently wonders why Posner in *Troupe* did not simply

438. See *supra* notes 307-28 and accompanying text. Both Posner and the Supreme Court have acknowledged that the Pregnancy Discrimination Act did more than overrule *Gilbert*. See *Troupe*, 20 F.3d at 735 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983)).

439. See *supra* notes 285-328 and accompanying text (discussing legislative background of the Pregnancy Discrimination Act).

440. See *supra* text accompanying note 81.

441. On the issue of summary judgment, Posner also tends to display favoritism for the common law views of judges (at least the more conservative judges of the Seventh Circuit) rather than the policy views of the legislature. The overly aggressive use of summary judgment, particularly in discrimination cases, grows out of some rhetoric in the Supreme Court's 1986 summary judgment trilogy and its misuse in many circuit and district courts. See McGinley, *supra* note 205, at 206-42. These judicial misperceptions and misapplications of summary judgment conflict with the actual text of Rule 56 as tacitly approved by Congress in adopting the rule pursuant to federal statute, 28 U.S.C. §§ 2071-2077 (1988 & Supp. V 1993). See Stempel, *supra* note 249, at 129-56. Finally, it is inconsistent with the solicitude Congress has shown toward job discrimination and civil rights claims in enacting the Civil Rights Act of 1991 and other legislation overturning crabbed judicial interpretations of civil rights statutes. See Stempel, *supra* note 338, at 657-59 (summarizing congressional efforts at overruling of Supreme Court decisions adverse to civil rights claimants during 1976-1990 period).

442. See *supra* part III.A.

follow the teachings of his command analogy and give appropriate deference to congressional purpose and the practical epistemological difficulties of assessing the "true" facts of the case (i.e., was Troupe discharged because she was tardy, about to take a medical leave, or because she was pregnant?). Was *Troupe* the result of isolated error, political partisanship, or a more systematic failing of Posner's professed pragmatism? We think the tragedy of *Troupe*⁴⁴³ stems both from Posner's falling short of his own theoretical aspirations of the judicial function⁴⁴⁴ and from inherent flaws in his pragmatist construct.⁴⁴⁵

Once a case is classified as sufficiently indeterminate according to the standard indices of statutory meaning, Posner's pragmatism vests the judge with a great deal of interpretative authority to seek the "best result."⁴⁴⁶ It permits judges substantial freedom to invoke intuition and personal assessment when deciding cases. Although Posner has criticized such grants of judicial authority as the trick of political liberals seeking to obtain substantive policy victories from courts that they could not obtain in the electoral process,⁴⁴⁷ conservative judges armed with his pragmatist arsenal are just as capable of using the judicial power to defeat the policy gains attained by liberals in the legislature.⁴⁴⁸

443. "Tragedy" is, of course, a melodramatic word. However, one need not be overly emotive in resisting law's call for sterilized prose and analysis to rightly regard the decision as tragic. An individual litigant was at least treated unfairly and perhaps discriminated against by an employer. See *Troupe*, 20 F.3d at 735-36; *supra* notes 107-17 and accompanying text. She was then accorded unsympathetic, unfavorable treatment by the federal judiciary at both the trial and appellate level. See *supra* notes 120-21 and accompanying text. The decision sets a precedent designed to make it more difficult for disempowered victims of discrimination, particularly those with low dollar-value claims, to attain corrective justice. But Posner wrongfully characterizes discrimination legislation as an attempt to achieve distributive justice. See Posner, *A Primer*, *supra* note 6, at 439. Finally, the judiciary pruned back hard-won rights conferred by the legislative branch authorized to determine statutory rights. "Tragedy" is the right word.

444. See *supra* notes 68-90 and accompanying text (summarizing Posner's recent jurisprudential writings).

445. If, however, one takes the cynical view that Posner is engaged in a covert enterprise to advance his personal political preferences through decisions cast in the language of reasonable, objective, and principled legal discourse, then *Troupe* is a brilliant opinion in that it does significant damage to pregnancy discrimination law but will be convincing to many readers. We have conducted our review of Posner's writings and the *Troupe* opinion on the assumption that Posner is not engaged in cynical manipulation and actually believes what he says.

446. Accord *supra* notes 411-12 and accompanying text (discussing POSNER, JURISPRUDENCE, *supra* note 7, on the leeway of courts to interpret statutes).

447. POSNER, JURISPRUDENCE, *supra* note 7, at 269-73.

448. See Redish & Chung, *supra* note 51, at 857-58. The Supreme Court of the Burger-Rehnquist era has been criticized for this sort of partisanship. E.g., Stempel, *supra* note 338, at 645-62; see also Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 59 (1989) (suggesting that the conservative Court in the 1988 term used whatever justification was necessary to achieve preferred outcomes); D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U. SAN FRAN. L. REV. 1, 10-16 (1990) (criticizing the Rehnquist

Indeed, in *Troupe*, Posner may have used his pragmatism as a smokescreen, either conscious or subconscious, for his antipathy toward discrimination suits.⁴⁴⁹ In so doing, he violates his own tenets. When pragmatism is used to liberate the judge from the constraints of more conventional indicia of statutory interpretation such as text, intent, and purpose, the judge can draw from the pragmatist's grab bag the tools with which she is most conversant or comfortable (in both an experiential and a political sense). Not surprisingly, when adjudicating, Posner, the entrepreneur of the law and economics movement,⁴⁵⁰ tends to prefer economic analysis to the application of other factors that might help illuminate the correct, most reasonable, fairest, or most socially useful result. Although Posner employs no graphs and avoids the buzz words characteristic of economics scholarship, his *Troupe* opinion is evidently a product of reverence for the free market of at-will employment, employer prerogatives, wealth-maximization and of economics-based distaste for antidiscrimination law.

Another potential flaw in Posner's theory of adjudication may stem from his concept of principled decisionmaking and judicial restraint. His views on the subject, although invariably interesting, are oddly on the border of the mainstream and, in our view, wrong. In a 1983 article⁴⁵¹ reprinted in a chapter of *The Federal Courts*,⁴⁵² Posner purports to define the frequently invoked terms "principled," "result-oriented," "judicial activism," and "judicial self-restraint."⁴⁵³ To Posner, a result-oriented decision is one made "according to personal or partisan considerations generally agreed to be illegitimate."⁴⁵⁴ But Posner's notion of illegitimacy is not particularly Victorian. To Posner, a decision is "principled" rather than result-oriented if "the ground of decision can be stated truthfully in a form the judge could avow without inviting universal condemnation by profes-

Court for abandoning notions of judicial restraint to rewrite the law with a conservative slant). Nevertheless, the Court's Reagan conservatives have usually pursued policy preferences through a formalist textualism, invoking favorable linguistic interpretation under the guise of plain meaning and submerging value choices. See Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 422-28, 428-33. Posner's pragmatism, to its credit, is more open about the policymaking inherent in adjudication. See *supra* notes 87-90 and accompanying text. However, like the other preferred methodologies of liberals and conservatives, Posner's pragmatism presents plenty of opportunity for subterfuge.

449. See *supra* notes 17-24 and accompanying text (discussing Posner's distaste for such suits).

450. Posner is, after all, the sole author of *Economic Analysis of Law*, now in its fourth edition. See POSNER, *ECONOMIC ANALYSIS*, 4th, *supra* note 7.

451. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

452. See POSNER, *FEDERAL COURTS*, *supra* note 7, at 198-221 (discussing judicial restraint in chapter 7).

453. Posner, *supra* note 451, at 1-2.

454. *Id.* at 8.

sional opinion.”⁴⁵⁵ Unprincipled or result-oriented decisions are those whose real basis is “so generally rejected that they would never be announced as the true grounds of decision.”⁴⁵⁶ As part of these definitions, Posner assumes that in acceptable opinions, even if predictably adverse to some litigants and helpful to others, the judge can base the decision on a principle (e.g., wealth maximization or wealth redistribution) rather than on an attitude (e.g., dislike of unions, friendship with corporate CEOs), the decision is “principled” and not “result-oriented.”⁴⁵⁷

In other words, as long as a candid judge would not be ridiculed while discussing a case, the decision is legitimate. By implication, however, Posner’s lexicon grants judges a license to legislate. As Posner emphasizes in *The Problems of Jurisprudence*⁴⁵⁸ and appreciated at the time of *The Federal Courts*,⁴⁵⁹ law is a diverse discipline with a wide range of legitimate viewpoints. As Posner pithily notes, the consensus of the Harvard Legal Process school “forged by the end of the 1950s now lies in ruins.”⁴⁶⁰ Today, Posner observes, the degree of indeterminacy in law is so great that no one is even mildly shocked when losing litigants or professors label a Supreme Court decision as incorrect.⁴⁶¹ Legal doctrines and viewpoints are highly contingent, capable of varying in rapid phases.⁴⁶²

Under these circumstances, defining principle and nonpartisanship as the absence of universal opprobrium by the legal profession is a bit like saying a decision is correct so long as the citizenry does not riot in the streets. By Posner’s reckoning, decisions are principled and nonpartisan even when greeted with overwhelming criticism (which is, by definition, something less than universal condemnation). Conversely, decisions endorsed or accepted by the legal establishment would seem not to be capable of being unprincipled or result-oriented. Imagine applying this yardstick to the Nazi laws.

As Posner acknowledges, by his definition calling a decision “‘principled’ is at best a tepid compliment.”⁴⁶³ Posner rightly notes that being principled is not enough—the judge must be employing the right principles, or at least acceptable principles. “The terms of the statute he is applying, or precedent, or other sources of authoritative guidance to judicial decision-making may dictate that a particular principle be applied in a

455. *Id.*

456. *Id.*

457. *See id.* at 8-9.

458. *See* POSNER, *JURISPRUDENCE*, *supra* note 7, at 128-29.

459. *See* POSNER, *FEDERAL COURTS*, *supra* note 7, at 262.

460. Posner, *A Primer*, *supra* note 6, at 434.

461. *See* POSNER, *JURISPRUDENCE*, *supra* note 7, at 80.

462. *Id.*

463. Posner, *supra* note 451, at 9.

particular case.⁴⁶⁴ Yet, reading Posner's scholarly work and *Troupe*, one gets the uneasy feeling that judges have more freedom to pick and choose principles than one might prefer. *Troupe* is just one example where Posner has opted for wealth maximization and the prerogatives of employers even in the face of powerful evidence that these are not the principles Congress sought to promote.

Posner's political conservatism also is reflected in his definition of what constitutes judicial self-restraint. According to Posner, the term can reasonably have any one of five different meanings.⁴⁶⁵ He states that his and the legal system's principal connotation of the term is a judicial desire "to reduce the power of [the] court system relative to that of other branches of government."⁴⁶⁶ He also suggests, however, that one connotation of the term which interests him is judicial decision "influenced by a concern lest promiscuous judicial creation of rights result in so swamping the courts in litigation that they cannot function effectively."⁴⁶⁷

As discussed in Part II, Posner's *Troupe* decision does just the opposite of reducing judicial power in deference to legislative and executive power. Rather, it enhances judicial power by limiting the reach of a congressional enactment. At a minimum, Posner is being unfaithful to his professed fidelity to at least this definition of restraintist judging.

Similarly, Posner in *Troupe* appears to be at odds with other definitions of restraint.⁴⁶⁸ But without doubt, Posner in *Troupe* has remained true to the definition of judicial restraint that reflects a desire to limit the business of the federal courts. Although this concept of restraint may be apt in the common law context, we find it jarringly inapt for statutory interpretation. The point of the statute may in fact be a legislative command that courts become more involved in some aspect of American life. *Troupe* was not asking the court to create a right, promiscuously or other-

464. *Id.*

465. *Id.* at 10.

466. *Id.*

467. *Id.*; *see id.* at 11. In another discrimination case, Posner candidly acknowledged that pressure to trim the docket might well work against claimants. *See Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). According to Posner, appellate judges are extremely reluctant to overrule grants of summary judgment by trial courts "merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter." *Id.* at 403. This approach is logically faulty and unfair to claimants of all types, but may weigh particularly heavily on discrimination plaintiffs. *See McGinley*, *supra* note 205, at 206-09.

The other Posnerian definitions of judicial restraint are:

- (1) Keeping the judge's own policy preferences from influencing his decisions;
- (2) Being cautious about intruding policy views [in the adjudication process];
- (3) Being aware of "practical political constraints on the exercise of judicial power."

Posner, *supra* note 451, at 10.

468. *See supra* note 467.

wise. She simply wanted a trial determination about a right she already possessed by virtue of congressional enactment and signature by the President. When the bench thwarts such a claim, this can hardly be justified in the name of judicial restraint.

Posner thus emerges as a theorist whose concept of judicial restraint may not involve the traditional concept of the term (i.e., deference to the other branches or detached decisionmaking) so much as it seeks limitations on claims and court authority, at least court authority in the service of individual rights, particularly rights of recent vintage.⁴⁶⁹ In short, *Troupe* suggests that Posner's pragmatism is indeed vulnerable to becoming simply a fluid jurisprudential philosophy enabling the judge to exercise "power without guilt"⁴⁷⁰ in the service of personal preferences. As one reviewer put it, "Posner springs into his antifoundationalism without any of the sense of humility that comes from understanding why foundations are attractive."⁴⁷¹ Indeed, foundations serve to regulate the personal agendas of a legal profession and American body politic with frequently conflicting views. Although pragmatism can and should be more regarded as constrained by the social and legal landscape (even in hard cases), *Troupe* suggests Posner's pragmatism may lack sufficient boundaries.

V. CONCLUSION: JUDGING THE JUDGE BY HIS WORK

In *Troupe*, a badly treated claimant⁴⁷² was not only turned away from vindication of a statutory legal right but also was used as a human pawn in a clever judge's larger game of shaping the law to fit his personal views regarding the merit of pregnancy discrimination claims—even though this personal aversion to these claims occasionally belies his frequent public pronouncements of fidelity to the legislature and the essentially neutral and constrained role of the judge. In the process, the claimant was subtly ridiculed and labeled as unworthy of legal assistance. Furthermore, future litigants face a precedent that makes it likely that they,

469. See *supra* note 467.

470. See Jonathan Simon, *Power Without Guilt*, 56 REV. POL. 465, 467 (1991) ("While some pragmatists, Richard Rorty in particular, find in epistemological and ontological skepticism an imperative to develop a sense of contingency in one's thought and solidarity with others, Richard Posner finds a license to exercise power without guilt. Of course Posner would encourage judges to adhere to constraining practices, and above all reasonableness, and his descriptions of the world are apt to seem reasonable to the other white, male, and affluent denizens of our high courts and academies.").

471. *Id.* at 466-67; accord Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1324 (1991) (resolving that Posner "does not give the argument from ordinary meaning [of statutes] its just due"). Summers feels that generally Posner understates the value of formal rules. See *id.* at 1312-25.

472. *Troupe* was badly treated by any reasonable definition despite the digs taken at her by Posner. Whatever her problems of tardiness, the Lord & Taylor store management could have done better than working her up to the point of pregnancy leave and then firing her as the leave arrived.

too, will not realize congressionally and constitutionally conferred rights unless a federal judge (often of different race and gender) finds them sufficiently worthy to plead their case before their peers.

To be sure, *Troupe* is not *Plessy v. Ferguson*.⁴⁷³ It is not even *Gilbert v. General Electric*.⁴⁷⁴ But *Troupe* shares the same undistinguished lineage and works the same pernicious sort of mischief. Even the most prominent and respected judges of our system deserve criticism when they produce opinions like *Troupe*.

In addition, *Troupe* serves as a gauge for assessing the intellectual travels of its famous author. One could read Posner's recent works, *The Problems of Jurisprudence*,⁴⁷⁵ and *Cardozo: A Study in Reputation*,⁴⁷⁶ as placing him in the illustrious mainstream of reflective jurists within a few degrees left or right of moderation. Posner has sought to claim the mantle of the eclectic centrist tradition of Holmes,⁴⁷⁷ Brandeis, Cardozo, and Hand. *Troupe* is a figurative splash of cold water, a reality check of the evolving Posnerian philosophy. The Posner of *Troupe* bears closer resemblance to the Justice Rehnquist of *Gilbert* than to these historical titans of the law. According to the standard Posner himself articulated in his examination of Cardozo (quoted at the outset of this article), Posner's work in *Troupe* fell short of his aspirations.

473. 163 U.S. 537 (1896). *Plessy* held, of course, that state statutes mandating segregated, "separate but equal" traveling accommodations are consistent with the Fourteenth Amendment. *Id.* at 544-52.

474. 429 U.S. at 125; see *supra* notes 283-306 and accompanying text.

475. POSNER, *JURISPRUDENCE*, *supra* note 7.

476. POSNER, *supra* note 1.

477. Posner wraps this cloak about himself in his introduction to his recent book on Holmes. See POSNER, ed., *ESSENTIAL HOLMES*, *supra* note 7, at xv-xvii. He has been quite successful in persuading much of the legal community of the resemblance. See, e.g., Donohue, *Prohibiting Sex Discrimination*, *supra* note 19, at 1367-68 (despite his skepticism about discrimination laws, Posner has "evident solicitude for the rights of plaintiffs in sex discrimination cases [that] is evocative of Justice Oliver Wendell Holmes's desire to faithfully interpret the Sherman Antitrust Act, of which he was always highly dubious").

Although perhaps gushing a bit, Donohue is not incorrect. Our review of Posner's other discrimination opinions suggests that he generally keeps his opposition to Title VII in check. See *id.* at 1367-68 & n.83. *Troupe* thus stands in even starker contrast as a substandard Posner opinion. We also note in passing that in the case cited by Donohue as evidence of the Holmesian Posner, see *id.* at 1367 (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987)), Posner is again overstressing the importance of worker comparison data in discrimination claims. See *Riordan*, 831 F.2d at 700. Donohue also may be excessive in his praise of Holmes's antitrust jurisprudence. See Spencer W. Waller, *The Antitrust Philosophy of Justice Holmes*, 18 SO. ILL. U. L.J. 283, 327 (1994) (concluding that personal biases indeed affected Holmes's antitrust opinions).

